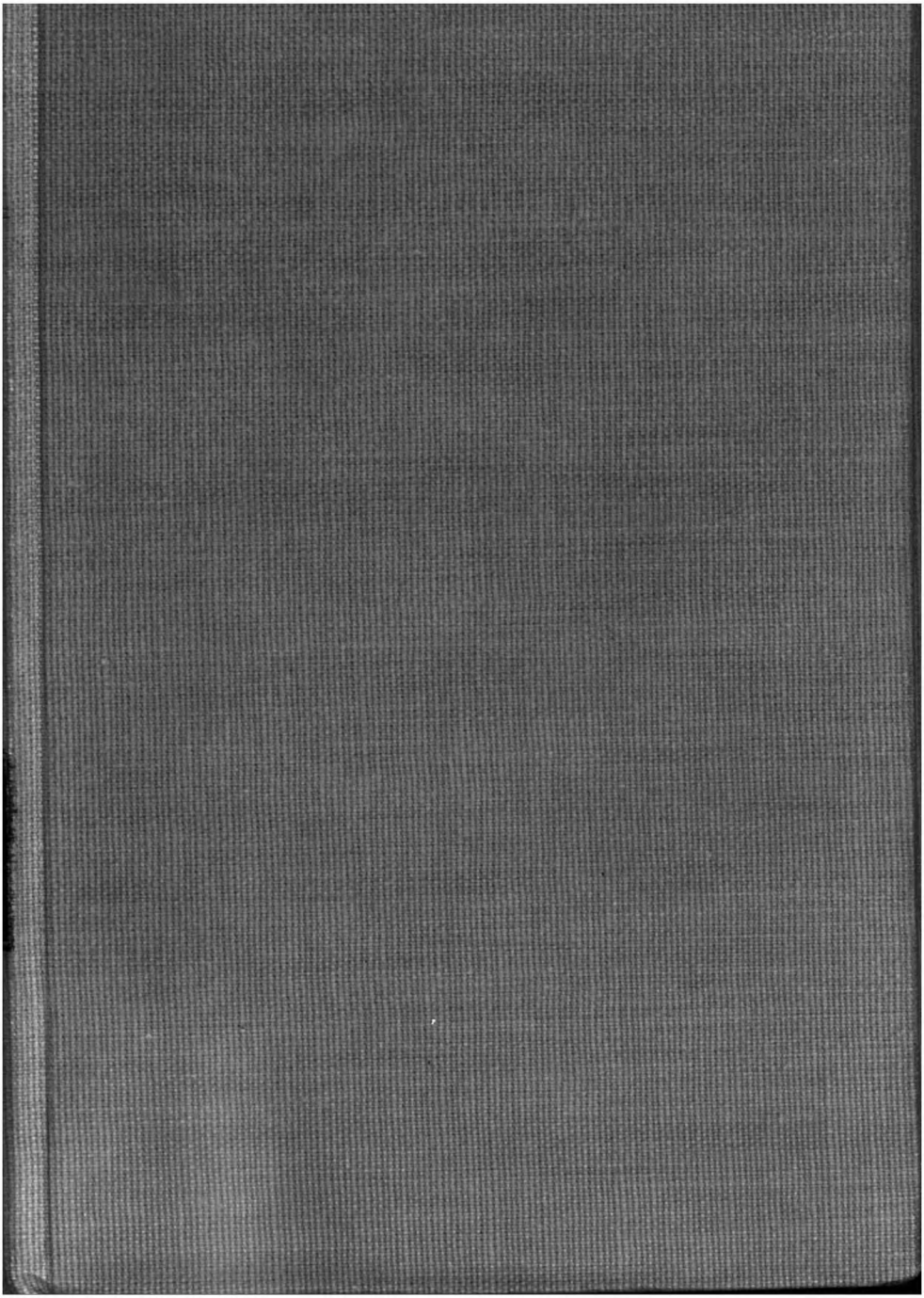
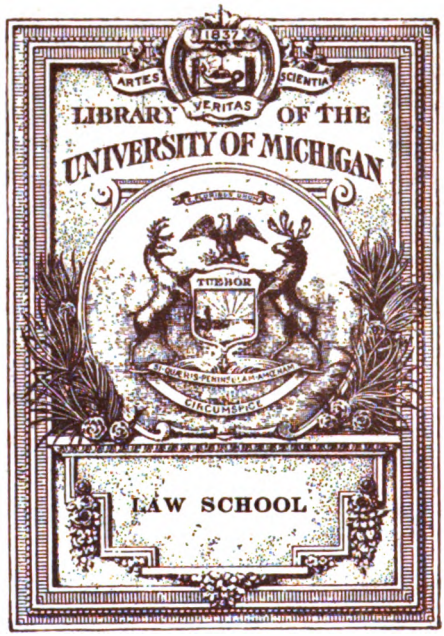




REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

JUNE 1896 TO OCTOBER 1897

ALSO

Rules of Practice of the Supreme and District Courts

JOHN M. COCHRANE, Reporter

VOLUME 6

GRAND FORKS, N. D.:
HERALD, STATE PRINTERS AND BINDERS
1898.

OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

HON. GUY C. H. CORLISS, Chief Justice.*

HON. J. M. BARTHOLOMEW and

HON. ALFRED WALLIN, Judges.

R. D. HOSKINS, Clerk.

JOHN M. COCHRANE, Reporter.

---

* JUDGE CORLISS became Chief Justice on the first Monday in December, 1896.

CONSTITUTION OF NORTH DAKOTA.

SEC. 101. When a judgment or decree is reversed or confirmed by the Supreme Court, every point fairly arising upon the record of the case shall be considered and decided, and the reasons therefor shall be concisely stated in writing, signed by the judges concurring, filed in the office of the Clerk of the Supreme Court and preserved with a record of the case. Any judge dissenting therefrom, may give the reasons of his dissent in writing over his signature.

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

CASES REPORTED IN THIS VOLUME.

A

	PAGE
Anderson v. First Nat. Bank of Grand Forks	497
Anderson, McCanna v.	482
Angell v. Egger	391
Arnestad, Standard Oil Company v.	255
Ashe v. Beasley & Co.	191
Atlantic Elevator Co. v. Underwood	274

B

Barnes County, Iowa & Dakota Land Co. v.	601
Beasley & Co., Ashe v.	191
Benjamin v. Northwestern Elevator Co.	254
Bigelow v. Draper	152
Birkholz v. Dinnie	511
Bismarck Water Co., McKenzie v.	361
Bladow, Guaranty Savings Bank v.	108
Booker, Bray v.	526
Bray v. Booker	526
Brynjolfson v. Northwestern Elevator Co.	450
Burton, Vickery v.	245

C

Cargill Elevator Co., Seymour v.	444
Cetnor, Fryer v.	518
Colby v. McDermont	495
Conrad, Kuhnert v.	215
Conrad v. Smith	337
Coop, Nearing v.	345
Cornwell v. Fraternal Acc'd't Ass'n.	201
Cummings State Bank, Hanson v.	212
Cunningham, Thompson v.	426

D

Dahl, State v.	81
Daisy Roller Mills v. Ward	317
Daley, Plano Mfg. Co. v.	330
Denoyer, State v.	586
Dickinson Company, Swedish American Nat. Bank v.	222
Dinnie, Birkholz v.	511
Dinnie, McDermont v.	278
Doherty, Van Dyke v.	263
Draper, Bigelow v.	152
Dryden, McArthur v.	438

E

Egger, Angell v.	391
Ellestad v. Northwestern Elevator Co.	88
Elton v. O'Connor	1

F

	PAGE
Field v. Great Western Elevator Co.	424
First National Bank, Anderson v.	497
First National Bank, Nichols & Shepard Co. v.	404
Fletcher Bros. v. Nelson	94
Flugel v. Henschel	205
Fraternal Acc'd't. Assn., Cornwell v.	201
Fryer v. Cetnor	518

G

Garr, Scott & Co. v. Green	48
Giese, Severn v.	523
Gordon v. Vermont Loan & Trust Co.	454
Great Western Elevator Company, Field v.	424
Great Western Elevator Co., New England Mtge. Sec'y. Co. v.	407
Green, Garr Scott & Co. v.	48
Greenberg, Towle v.	37
Guaranty Savings Bank, Bladow v.	108
Gull River Lumber Co. v. Osborne McMillan Elev. Co.	276

H

Hanson v. Cummings State Bank	212
Hartzell v. Vigen	117
Henry v. Maher	413
Henschel, Flugel v.	205
Hillsboro National Bank, McRae v.	353
Howe & Co. v. Smith	432

I

Iowa & Dakota Land Co. v. Barnes County	601

J

Jacobson, Sobolisk v.	175
Johnson, National Bank of Commerce v.	180
Jones, Kolka v.	461

K

Knowlton v. Schultz	417
Kolka v. Jones	461
Kreuger v. Schultz	310
Kuhnert v. Conrad	215

L

Larson, McCormick Machine Company v.	533
Lloyds Bankers, Peabody v.	27
Luger Furniture Co., Martin v.	351

PAGE

M

Maher, Henry v. 413
Martin v. Luger Furniture Co. 351
McArthur v. Dryden 438
McCanna v. Anderson 482
McCormick Machine Co. v. Larson 533
McDermont, Colby v. 495
McDermont v. Dinnie 278
McGill, Stanford v. 536
McKenzie v. Bismarck Water Co. 361
McRae v. Hillsboro National Bank 353
Minneapolis & Northern Elevator Co., State v. 41

N

National Bank of Commerce v. Johnson 180
Nearing v. Coop 345
Nelson, Fletcher Brothers v. 94
New England Mtge. Sec'ty. Co. v. Great Western Elev. Co. 407
Nichols & Shepard Co. v. Paulson & Brother 400
Nichols & Shepard Co. v. First National Bank 404
Northwestern Elevator Co., Brynjolfson v. 450
Northwestern Elevator Co., Benjamin v. 254
Northwestern Elevator Co., Ellestad v. 88

O

O'Connor, Elton v. 1
O'Connor, State v. 285
Osborne McMillan Elev. Co., Gull River Lumber Co. v. 276

P

Patterson v. Ward 359
Patterson v. Ward 609
Paulson & Brother, Nichols & Shepard Co. v. 400
Peabody v. Lloyds Bankers 27
Plano Manufacturing Co. v. Daley 330

R

Rankin, Tullis v. 44
Root v. Rose 575
Rose, Root v. 575

PAGE

S

School District No. 21, State v. 488
Schultz, Kreuger v. 310
Schultz, Knowlton v. 417
Severn v. Giese 523
Seymour v. Cargill Elevator Co. 444
Shattuck v. Smith 56
Skauge, Walcott Township v. 382
Smith, Shattuck v. 56
Smith, Conrad v. 537
Smith, Howe & Co. v. 432
Sobolisk v. Jacobson 175
Standard Oil Company v. Arnestad 255
Stanford v. McGill 536
State v. Minneapolis & Northern Elevator Co. 41
State v. Dahl 81
State v. O'Connor 285
State v. School District No. 21 488
State v. Denoyer 586
Stinson, Warren v. 293
Swedish American Nat. Bank v. Dickinson Company 222

T

Thompson v. Cunningham 426
Towle v. Greenberg 37
Tullis v. Rankin 44

U

Underwood v. Atlantic Elevator Co. 274

V

Van Dyke v. Doherty 263
Vermont Loan & Trust Co., Gordon v. 454
Vickery v. Burton 245
Vigen, Hartzell v. 117

W

Walcott Township v. Skauge 382
Ward, Daisy Roller Mill v. 317
Ward, Patterson v. 359
Ward, Patterson v. 609
Warren v. Stinson 293
Williams v. Williams 269

TABLE OF DAKOTA CASES CITED IN OPINIONS.

		PAGE
Anderson v. Bank	5 N. D. 80	507, 99
Anderson v. Bank	5 N. D. 451	509
Andrews v. Wynn	4 S. D. 40	253
Bowman v. Eppinger	1 N. D. 21	496
Bright v. Ecker	69 N. W. Rep. 824	480
Budge v. City of Grand Forks	1 N. D. 309	604
Buttz v. Railroad Company	119 U. S. 55	312
Caledonia Gold Mining Co. v. Noonan	3 Dak. 189	481
Conrad v. Smith	2 N. D. 408	339
Clement v. Barnes	6 S. D. 483	210
Cutter v. Pollock	4 N. D. 205	613
Davis v. Bronson	2 N. D. 300	567
Dunham v. Peterson	5 N. D. 414	251
Enderlin State Bank v. Jennings	4 N. D. 228	177
Fahey v. Machine Company	3 N. D. 220	54
Farrington v. Investment Company	1 N. D. 102	61
Field v. Great Western Elevator Co	5 N. D. 400	425
First National Bank v. Lamont	5 N. D. 393	39
First National Bank v. Laughlin	4 N. D. 391	100, 481
First National Bank v. Merchants' National Bank	5 N. D. 161	430
Finney v. Railroad	3 Dak. 270	253
Fore v. Fore	2 N. D. 267	484
French v. Lancaster	2 Dak. 346	315
Gale v. Shillock	4 Dak. 196	533
Gould v. Elevator Company	2 N. D. 216	99
Grandin v. LaBar	3 N. D. 446	315
Hall v. Harris	1 S. D. 279	177
Hazelton Boiler Co. v. Fargo Gas Co.	4 N. D. 365	358
Henry v. Maher	6 N. D. 413	430
Hesnard v. Plunkett	6 S. D. 73	487
Hostetter v. Minneapolis & Northern Elev. Co.	4 N. D. 357	415, 430
Holt v. Van Eps	1 Dak. 208	502
Iowa State Bank v. Jacobson	66 N. W. Rep. 453	132
Johnson v. N. P. Ry. Co	1 N. D. 354	99
Laird v. Hopkins	6 S. D. 217	437
Lavin v. Bradley	1 N. D. 291	437
Lloyd v. Powers	4 Dak. 62	398
Lovejoy v. Bank	5 N. D. 623	398
Luke v. Griggs	4 Dak. 287	105
Madison National Bank v. Farmer	5 Dak. 282	100
Martin v. Tyler	4 N. D. 278	284
McClurg v. Bindery Co.	3 S. D. 362	533

		PAGE
McGlynn v. Scott	4 N. D. 18	522
McLauren v. City of Grand Forks	6 Dak. 397	604
Moore v. Booker	4 N. D. 543	443
New England M. S. Co. v. G. W. Elev. Co.	6 N. D. 407	445
Nichols & Shepard Co. v. Bank	6 N. D. 404	400
O'Brien v. Miller	4 N. D. 308	430
Patterson v. Ward	6 N. D. 359	609
Parker v. Bank	3 N. D. 87	93
Parsons v. Venzke	4 N. D. 452	112
Paulson v. Ward	4 N. D. 100	320
Pirie v. Gillitt	2 N. D. 255	253
Power v. Larabee	3 N. D. 502	298, 302, 305
Power v. Larabee	2 N. D. 141	603
Power v Bowdle	3 N. D. 107	603-607
Russell & Co. v. Amundson	4 N. D. 112	268
Sanford v. Elevator Co.	2 N. D. 6	93
Security Bank v. Kingsland	5 N. D. 263	251
Schmitz v. Heger	5 N. D. 165	430
Slattery v. Donnelly	1 N. D. 264	253, 358
State v. O'Connor	5 N. D. 629	284
State v. Gitchell	3 N. D. 243	284
Sundback v. Griffith	63 N. W. Rep. 544	178
Taylor v. Rice	1 N. D. 72	178
Tyler v. Cass County	1 N. D. 369	604-62
Tyler v. Shea	4 N. D. 337	274
Union National Bank v. Oium	3 N. D. 193	30, 344
United States v. Beebe	2 Dak. 292	315
Vickery v. Burton	6 N. D. 245	420, 358
Wells v. Pennington County	2 S. D. 1	388
Yetzer v. Young	3 S. D. 263	533

SUPREME COURT RULES.

RULE I.

CLERK'S OFFICE, WHERE.] Until otherwise directed by a rule of court, the Clerk of the Supreme Court shall keep his office at the capital of the state. When absent from the capital, the office shall be kept open, and the duties of the Clerk shall be performed by a deputy. The Clerk shall not practice as an attorney or counselor.

RULE II.

CLERK, DUTIES OF.] He shall keep a complete record of the proceedings of the court, and shall perform all the duties pertaining to his office. He must not allow any written opinion of the court, or any original record or paper pertaining to his office, to be taken therefrom without an order from the court, or one of the judges thereof. He shall promptly announce, by letter, any decision rendered or order entered in any cause or matter, to one of the attorneys of each side, when such attorneys are not in attendance upon the court.

RULE III.

CLERK'S FEES, DEPOSIT OF.] The appellant, on bringing a cause to this court, shall, at or before the filing of the record, deposit with the Clerk of said court the sum of eight dollars, to apply on his fees, and in all cases (except habeas corpus) originally brought in this court, the plaintiff or petitioner, at or before the filing of the first papers in the case, shall deposit with the Clerk the same amount for the same purpose.

RULE IV.

APPEAL HEARD, WHEN.] The notice of appeal in civil causes shall be served in the manner indicated in Section 5606, Revised Codes; and if not served at least sixty days before the first day of

the next succeeding term of the Supreme Court the cause shall not be heard at such term unless an abstract and brief shall have been served and filed by one party or the other at least twenty-five days prior to the first day of such term.

RULE V.

ORIGINAL PAPERS TRANSMITTED—JUDGE'S CERTIFICATE APPENDED.] When an appeal is taken either from a judgment or an order (except in cases where by special order of the District Court copies are sent to the Supreme Court in lieu of original papers) the clerk shall transmit the original judgment roll, or in case of an order, the original order and the original papers used by each party on the application for the order as required by Section 5607, Revised Codes. For purposes of a complete identification of each and all the papers constituting the record on appeal,—and whether original papers or copies are transmitted,—the judge's certificate (or copy thereof as the case may be) as prescribed by Rule IX, must be appended to the record. In framing appealable orders the attention of trial courts and of counsel is particularly called to the terms of Section 5719 of the Revised Codes. The following or equivalent forms of certificate may be used:

[Form of Clerk's Certificate when the Appeal is from a Judgment in Civil Cases.]

STATE OF NORTH DAKOTA, } ss. ---------- -----Judicial District.
County of---------- }

I, A. B., Clerk of the District Court within and for the said County of----------, in the----------Judicial District of the State of North Dakota, do hereby certify that the above and foregoing papers are the original notice of appeal, with proof of service thereof, and the undertaking given thereon, and also the original judgment roll and certificate of the judge thereto appended (or full, true, and complete copies of said judgment roll and certificate, as the case may be) in the above entitled action, wherein----------is plaintiff and----------is defendant, as the same now remain of record in said Court, and the same are transmitted to the Supreme Court pursuant to said appeal.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this--------day of----------, A. D. 189--

[SEAL.] ----------
Clerk.

[Form of Clerk's Certificate when the Appeal is from an Order.]

STATE OF NORTH DAKOTA, County of _____ } ss. _____Judicial District.

I, A. B., Clerk of the District Court within and for said County of_____, in the_____Judicial District of the State of North Dakota, do hereby certify that the above and foregoing is the original notice of appeal, with proof of service thereof, and the original undertaking given thereon, also the original order from which an appeal is taken, with all the papers used by each party on the application for such order, with the certificate of the judge attached thereto (or full, true and complete copies of such order, papers and certificate, as the case may be) in the above entitled action, wherein_____is plaintiff and_____is defendant, as the same now remain of record in said Court, and the same are transmitted to the Supreme Court persuant to said appeal.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this_____day of_____, A. D. 189__

[SEAL.] _____

Clerk.

[Form of Clerk's Certificate in a Criminal Case.]

STATE OF NORTH DAKOTA, County of _____ } ss. _____Judicial District.

I, A. B., Clerk of the District Court within and for said County of_____, in the_____Judicial District of the State of North Dakota, do, pursuant to the notice of appeal filed herein, hereby certify and return that the above and foregoing is a true and complete transcript of the record in this case, to-wit: the information, (or indictment) the minutes of the Clerk of the District Court; the instructions to the jury, given and refused, with the endorsements thereon; all exceptions, statement of the case, and also the certificate of the Judge of the District Court, in an action wherein the State of North Dakota is plaintiff and_____is defendant, as the same now remains of record in the said court, and the same are transmitted to the Supreme Court pursuant to said appeal.

In witness whereof, I have hereunto set my hand and affixed the seal of said court this_____day of_____, A. D. 189__

[SEAL.] _____

Clerk.

RULE VI.

RESPONDENT MAY REQUIRE RETURN TO BE FILED, WHEN.] The appellant shall cause the proper return to be made and filed with the Clerk of this court within sixty days after the appeal is perfected. If he fails to do so, the respondent may, by notice in writing, require such return to be filed within twenty days after the service of such notice, and if the return is not filed in pursuance of such notice, the appellant shall be deemed to have abandoned the appeal, and on an affidavit proving when the appeal was perfected and the service of such notice, and a cer-

tificate of the Clerk of this court that no return has been filed, the respondent may apply to any Judge of this court for an order dismissing the appeal for want of prosecution, with costs, and the court below may thereupon proceed as though there had been no appeal; provided, nevertheless, that this rule shall have no application to cases where the respondent has elected to cause the record to be transmitted to the Supreme Court as regulated by the proviso contained in Section 5607, Revised Codes.

Woods H. Co. *v.* Heidel, 4. N. D. 427.

Rule VII.

Criminal causes first on calendar.] All criminal causes shall be placed first on the calendar in the order of filing the transcript with the Clerk of the Supreme Court, and shall have precedence of other causes. Such cases, unless continued for cause, shall stand for argument at the first term after the transcript is filed. The presence of the defendant in the Supreme Court shall in no case be necessary unless specially ordered by the court.

Rule VIII.

Order of civil causes on calendar.] All civil causes shall be placed on the calendar by the Clerk in the order of the filing of the transcript, and shall (with the criminal causes) be numbered consecutively from term to term in one continued series; and no civil cause shall be placed on the calendar after the day preceding the opening of the court, unless ordered by the court.

Rule IX.

Judge's certificate required.] In all civil actions and special proceedings which are brought into the Supreme Court by appeal the Judge of the District Court shall append to the original judgment roll or record, filed in the court below, a certificate, signed by him, as follows: In civil actions and special proceedings the certificate shall state in substance that the above and foregoing papers—naming each separately—are contained in

and constitute the judgment roll (or other record as the case may be) and the whole thereof. The original certificate (or copy thereof in cases where a copy is transmitted) must be embraced in the record sent to this court.

First Nat. Bank *v.* Merchants' Nat. Bank, 5 N. D. 161.

Rule X.

Judgment roll, contains what.] The judgment roll must only contain the pleadings, the judgment, the verdict of the jury, or decision of the judge, the report of the referee, if any; the offer of the defendant, if any; the bill of exceptions or statement of the case, as settled and certified by the court or judge, and such orders and papers as have been, by direction of the Court or Judge incorporated into and made a part of the judgment roll; also all orders and papers which necessarily involve the merits and affect the judgment. Bills of exception and statements of the case, whether to be used on a motion for new trial or on appeal without such motion, must, when brought into this court, be framed in substantial conformity to the requirements of the statute; and if such bill or statement fails to contain the specifications of errors of law complained of, or, where the finding of fact is attacked, fails to specify the particulars in which the evidence is claimed to be insufficient, such bill or statement will be disregarded. When a bill or statement contains superfluous matter, or fails to contain the certificate of the trial judge, as specified in Rule 9 hereof, it will be liable to be stricken out on motion. The specifications required by statute to be embraced in bills of exception and statements are vital parts thereof; and such specifications shall be either prefixed or appended to all bills of exception and statements, and shall be settled and allowed by the District Courts as essential parts thereof. Attention is directed to Sections 5464, 5465, 5466, 5467, 5468, 5630, (as amended in 1897) 8268, Revised Codes.

Thompson *v.* Cunningham, 6 N. D. 426; Henry *v.* Maher, 6 N. D. 415; Hostetter *v.* Brooks Elev. Co., 4 N. D. 357; First Nat. Bank *v.* Bank, 5 N. D. 161; Schmitz *v.* Heger, 5 N. D. 165; Illstad *v.* Anderson, 2 N. D. 167.

RULE XI.

ORDER OF PAPERS IN JUDGMENT ROLL.] In making up the judgment roll or records in all cases to be brought to this court, the parties and the Clerks of the District Courts must arrange the pleadings, orders and proceedings in the chronological order provided in Rule 13 for the preparation of an abstract; and when a transcript is prepared for this court it must be plainly written, carefully paged, and the lines on each page carefully numbered.

RULE XII.

ASSIGNMENT OF ERRORS.] In civil actions and proceedings the appellant shall subjoin to his brief an assignment of errors, which need follow no stated form, but must, in a way as specific as the case will allow, point out the errors objected to, and only such as he expects to rely on and ask this court to examine. Among several points in a demurrer, in a motion, in the instructions, or in other rulings excepted to, it must designate which is relied on as error, and the court will, in its discretion, only regard errors which are assigned with the requisite exactness. And in criminal causes the counsel for the appellant may also file a new assignment of errors in this court, specifically setting forth the errors he desires to have reviewed, as in this rule provided. The assignments of error need not quote or duplicate the specifications of error as set out in the bill or statement, but shall refer to the page of the abstract where the particular specification of error is found and also to the page or pages of the abstract in which the matter is found upon which the error is assigned.

Henry *v.* Maher, 6 N. D. 415; Hostetter *v.* Brooks Elev. Co., 4 N. D. 357; First Nat. Bank *v.* Bank, 5 N. D. 161; Schmitz *v.* Heger, 5 N. D. 165; Illstad *v.* Anderson, 2 N. D. 167; First Nat. Bank *v.* Laughlin, 4 N. D. 392; O'Brien *v.* Miller, 4 N. D. 308; Globe In. Co. *v.* Boyum, 3 N. D. 538; Thompson *v.* Cunningham, 6 N. D. 426.

RULE XIII.

ABSTRACT—NUMBER OF COPIES AND SERVICE.] In all civil causes the appellant shall deliver or mail to the Clerk of this Court, twenty-five days before the first day of the term of the court at

which the cause may be heard, seven printed copies of an abridgment or abstract of the record in the cause, setting forth so much thereof only as is necessary to a full understanding of all the questions presented to this court for decision. He shall at the same time also deliver a copy of the same to the counsel for the respondent, and if there be more than one respondent, to the counsel of each. The abstract shall be prepared and printed in substantially the following form:

IN THE SUPREME COURT.

STATE OF NORTH DAKOTA.

.....Term, 189..

JOHN DOE, Plaintiff and { Appellant or Respondent, as case may be.

vs.

RICHARD ROE, Defendant and { Apppellant or Respondent, as case may be.

COMPLAINT.

The plaintiff in his complaint states his cause of action as follows:

(Set out all the complaint necessary to an understanding of the questions to be presented to this court, and no more. In setting out exhibits omit all merely formal irrelevant parts; as, for example, if the exhibit be a deed or mortgage and no question is raised as to the acknowledgment, omit the acknowledgment. When the defendant has appeared, it is useless to encumber the record with the summons or the return of the officer.)

DEMURRER.

To which complaint the defendant demurred, setting up the following grounds:

(State only the grounds of the demurrer, omitting all formal parts. If a pleading was attacked by motion below, and the ruling thereon is one of the questions to be reviewed, set out the motion, omitting all formal parts,)

And on the.....of.....189.. the same was submitted to the court, and the court made the following ruling thereon:

(Here set out the ruling. In every instance let the abstract be made in the chronological order of the events in the case—letting each ruling appear in the proper

connection. If the defendant pleaded over, and thereby waived his right to appeal from these rulings, no mention of them should be made in the abstract; but it should continue.)

ANSWER.

Which complaint the defendant answered, setting up the following defenses.

(Here set out the defenses, omitting all formal parts. If motions or demurrers were interposed to the pleading, proceed as directed with reference to the complaint.

Frame the record so that it will properly present all questions to be reviewed and raised before issue is joined. When the transcript shows issue joined, proceed.)

On the.....day of.....189.., said cause was tried by a jury (or the court, as the case may be), and on the trial the following proceedings were had:

(Set out so much of the bill of exceptions, or statement containing exceptions, as is necessary to show the rulings of the court to which exceptions were taken during progress of the trial; and if the evidence or any part thereof be embraced in the bill of exceptions, or statement containing exceptions, epitomize the same by excluding all superfluous matter and unnecessary verbiage. Where a review of the verdict or findings of fact is sought upon the ground that the evidence is insufficient to justify the same, the evidence shall be reduced to a narrative form, except in those particulars where a rescript of the stenographer's report becomes necessary to preserve the sense or present the particular points of error. In statements, not less than in bills of exception, all superfluous matter, including all evidence not bearing upon specifications, is required to be rigorously excluded. A stenographic report of the trial, if settled and allowed, does not constitute a bill of exceptions or a statement of a case within the meaning of the law, and will not be so regarded by this court. Questions propounded upon which no rulings are made, and objections followed by rulings against the successful party, should be eliminated from the record, unless their preservation is necessary to the sense.)

INSTRUCTIONS.

At the proper time the plaintiff (or the defendant, as the case may be), asked the court to give each of the following instructions to the jury:

(Set out the instructions referred to, and continue:)

which the court refused as to each instruction, to which several rulings the plaintiff (or defendant) at the proper time excepted, and thereupon the court gave the following instructions to the jury:

(Set out the instructions.)

To the giving of those numbered (give the numbers, if numbered), or (if not numbered) to the giving of the following por-

tions thereof (setting out the portions), and to the giving of each thereof, plaintiff (or defendant) at the proper time specifically excepted.

VERDICT.

On the.....day of....., 189.., the jury returned the following verdict into court:

(Set out the verdict.)

(If the cause be tried by the court, instead of the instructions and verdict of the jury, set out so much of the findings of fact and conclusions of law, and requests for findings, if any, together with the exceptions relating thereto, as may be necessary to present the errors complained of.)

MOTION FOR NEW TRIAL.

On the.....day of....., 189.., the plaintiff (or defendant) served notice of intention to move for a new trial, as follows:

(Here insert notice of intention, omitting all formal parts.)

On the.....day of....., 189.., the plaintiff (or defendant) moved for a new trial upon the grounds therein specified.

On the.....day of....., 189.., the court made the following rulings upon said motion:

(Set out the record of the ruling to which the plaintiff (or defendant) at the proper time excepted.)

JUDGMENT.

On the.....day of....., 189.., the following judgment was entered:

(Set out the judgment entry (or order) appealed from.)

On the.....day of....., 189.., the plaintiff (or defendant) perfected an appeal to the Supreme Court of the State of North Dakota by serving upon the defendant (or plaintiff, as the case may be), and the Clerk of the District Court of .....county, a notice of appeal.

(If supersedeas bond was filed, state the fact.)

(This outline is presented for the purpose of indicating the character of the abstract or abridgment of the record contemplated by the rule, which, like all rules, is to be substantially complied with. Of course, no formula can be laid down applicable to all cases. The rule to be observed in abstracting a case is: *Preserve everything material to the question to be decided, and omit everything else.*

This rule, with some additions, has been borrowed from the rules of the late Supreme Court of the Territory, and we have continued it in force as a rule governing the preparation of abstracts of the record proper. But in this court we adopt it chiefly for still another purpose for which it is well adapted, viz: *as a guide and rule to be observed in framing statements and bills of exception to be settled in the District Courts.* Bills of exceptions and statements must be framed substantially in accordance with the requirements of the statute and this rule of court. When so framed, the work of abstracting the record for use in this court will be reduced to the minimum, and will generally relate only to matters of form.)

The abstract, when it consists of more than five printed pages, must be followed by an index of its contents. In exceptional cases, where a reference to the record proper is desired, the appellant must, by apt words, refer the court to such parts of the record as he desires to have examined. All material parts of the record should be embodied in the abstract or amended abstract, and this court will, as a rule, decline to explore the record coming up from the District Court.

RULE XIV.

RESPONDENT'S ABSTRACT AND SERVICE OF.] If the respondent shall deem the abstract of the appellant imperfect or unfair, he may within fifteen days after receiving the same deliver to the counsel of the adverse party one printed copy, and deliver or mail to the Clerk of this Court seven printed copies of such further or additional abstracts as he shall deem necessary to a full understanding of the questions presented to this court for decision.

RULE XV.

BRIEFS—SERVICE OF, ETC.] Not less than twenty-five days before the first day of the term at which any civil cause may be heard, the counsel for the appellant shall serve upon the counsel of the adverse party one copy, and shall deliver or mail to the Clerk of this court seven copies of his brief; and not less than five days before the first day of such term the respondent shall serve upon the counsel of the adverse party one copy, and deliver or mail to the Clerk of this Court seven copies of his brief, which brief shall be printed, and shall contain a statement of the points relied on, and the authorities to be cited in support of the same.

RULE XVI.

RULES AS TO BRIEFS AND ABSTRACTS APPLICABLE TO CRIMINAL CASES.] The rules of this court regulating the preparation, service and filing of abstracts and briefs in civil cases are, with the modifications stated below, hereby made applicable to criminal cases unless the same are found to be repugnant to some statute. When because of the poverty of the defendant, counsel has been assigned to his defense, and such defendant makes and files with the Clerk of this Court an affidavit stating in substance that he is financially unable to pay the expense thereof, the printing of such abstracts and briefs may be dispensed with, and only five copies each of the united abstract and brief need be filed with the Clerk. Provided, that no criminal case can be brought to a hearing without the consent of both parties unless the appellant's abstract and brief have been served and filed at least ten days before the case is heard and the respondent's brief has been served and filed at least two days before the case is heard. Where a criminal case has been appealed to the Supreme Court sixty days prior to the first day of the term the rule in civil cases will be enforced.

RULE XVII.

WHEN STATE IS A PARTY, ATTORNEY GENERAL SERVED.] In all appeal cases in which the State is respondent, and in which the Attorney General is required by law to represent the State, the notice of appeal and the abstracts and briefs as prescribed by statute or the rules of this court shall be served upon the Attorney General, and in criminal cases or where a county is a party the notice of appeal, abstracts and briefs shall also be served upon the State's Attorney of the proper county.

RULE XVIII.

ABSTRACTS AND BRIEFS PRINTED, HOW.] All abstracts and briefs furnished the court in calendar causes,—except where typewritten abstracts and briefs are especially allowed by statute or rule of court,—shall be printed on white paper with a margin on the outer edge of the leaf one and a half inches wide. The

printed page, exclusive of any marginal note or reference shall be seven inches long and three and a half inches wide. The folios, numbering from the commencement to the end of the case, shall be printed on the outer margin of the page. Small pica, solid, is the smallest letter and most compact mode of composition which is allowed. No charge for printing the papers mentioned in this rule shall be allowed as a disbursement in a cause unless the requirements of this rule shall appear to have been complied with in all papers printed.

RULE XIX.

NUMBER OF COUNSEL TO ARGUE CAUSE, SUBMISSION OF CAUSE ON BRIEFS.] Only two counsel shall be permitted to argue for each party in a cause, except in capital cases, and the court may limit the time to be occupied by counsel for each side, before the argument shall commence; and any cause may be submitted on printed arguments or briefs.

RULE XX.

PREPARATION OF BRIEFS.] In the preparation of briefs in causes to be argued in this court, counsel for appellant shall prefix to their brief or argument a concise and true statement of the facts in the case which are material to the points of law to be argued, with proper reference to the folios of the abstract which sustain them, which statement may be read or its substance stated orally to the court. No further reading of the abstract will be allowed without permission of the court. In the argument of a cause, not more than one hour shall be occupied by counsel upon each side, exclusive of the time necessarily occupied in reading the record, unless additional time is allowed by the express permission of the court, obtained before commencement of the argument.

RULE XXI.

COURT WILL CONTINUE CASES, WHEN.] In cases where counsel arrange as between themselves to disregard the rules of court governing the time of the filing and service of briefs and

abstracts and where counsel do not by motion or otherwise raise objections thereto, this court will on its own motion continue such cases over the term unless the disregard of the rules is excused by a showing which is satisfactory to the court.

RULE XXII.

CALL OF CALENDAR—CASES LIABLE FOR ARGUMENT.] The court on the first day of each term shall call the entire calendar of cases for that term. On such call cases may be finally submitted on briefs, or either party may submit on briefs. All cases wherein abstracts and briefs have been filed, as provided by statute and the rules of this court, which are not fully submitted on briefs, shall be set for argument in the order in which they appear on the calendar, unless for good cause the court deems it advisable to change such order. Cases wherein the time for filing briefs and abstracts has been extended by consent, and cases brought upon the calendar by stipulation will not be heard until all cases regularly prepared have been disposed of, and then only subject to the provisions of Rule 21 of these rules. Not more than three cases so set for hearing shall be liable to call on any one day.

RULE XXIII.

TYPE-WRITTEN ABSTRACTS AND BRIEFS—NUMBER TO BE FILED.] The rules of this court regulating the preparation, service and filing of printed abstracts and briefs are hereby made applicable to all cases, whether civil or criminal, in which type-written abstracts and briefs are permitted to be served and filed; provided, that the appellant in cases where type-written abstracts and briefs are allowed, shall file with the Clerk five copies of his abstract and brief and the respondent shall file five copies of his brief. The Clerk shall, when the case is called, deliver one copy of each to each of the Judges, and one copy of each shall be for the use of the reporter. The remaining copy shall be ratained with the papers in the case.

RULE XXIV.

MOTIONS, HOW NOTICED.] Motions, except for orders of course

shall be brought upon notice; and when not made upon the records or files of the court, the notice of motion shall be accompanied by the papers on which the motion is founded, copies of which shall be served with the notice of motion. Motions shall not be taken up until the day following the service thereof, unless the case is sooner reached for hearing. Upon the hearing of a motion, or order to show cause, the moving party shall be entitled to open and close; provided, that the papers on both sides shall be read in the opening.

XXV.

MOTIONS, WHEN HEARD.] All motions for continuance and dismissal, and all motions affecting the place of causes upon the calendar shall be noticed for the first day of the term, and will be for hearing previous to the calling of causes for argument.

XXVI.

REHEARINGS, GRANTED WHEN—HOW OBTAINED.] Whether a decision is handed down in term time or in vacation, a petition for a rehearing will be entertained if five copies of the same be filed with the Clerk within twenty days after the decision is filed and the remittitur will be stayed during the twenty days and no longer, unless for good cause shown the court or a Judge thereof shall, by an order delivered to the Clerk of this court, extend such time for a period not exceeding ten days. Provided, nevertheless, that the court in any case, at its discretion, may direct that the remittitur be sent forthwith to the court below. The petition must be printed or type-written, and shall briefly and distinctly state the grounds upon which the rehearing is requested. It need not be served upon opposite counsel. Where a rehearing is granted in term time, the case will not (unless by special order of the court) be reargued at the same term except by consent. When the rehearing is granted in vacation, and less than six days prior to the first day of the next regular term, the case shall not, except by consent or by special order of the court, be argued at such term. Reargumentsof cases shall ordin-

arily take precedence on the calendar of all other matters before the court except motions and criminal business.

RULE XXVII.

OPINIONS OF COURT.] The opinion of the court in all cases decided by it, whether originating in the Supreme Court, or reaching it by appeal or writ of error, will be reduced to writing and filed with the Clerk either in open court or in vacation. The court will also file written opinions upon all motions, collateral questions or points of practice when the same are deemed exceptionally important.

RULE XXVIII.

COSTS, HOW TAXED.] In all cases originating in this court the costs and disbursements will be taxed by the Clerk of this Court. In other cases the costs and disbursements of both courts (except the fees of the Clerk of this Court, which shall be taxed by him without notice,) shall be taxed in the District Court after the remittitur is sent down, and the amount thereof shall be inserted in the judgment of the court below. In civil cases the remittitur will not be transmitted until the fees of the Clerk of this Court shall first have been paid. In all cases where parties are dissatisfied with any bill of costs as taxed by the Clerk of this Court the matter complained of will be reviewed informally and readjusted by this court at any regular session thereof.

RULE XXIX.

CAUSE MAY BE DISMISSED—FAILURE TO COMPLY WITH RULES.] A failure to comply with any of the requirements contained in these rules within the times therein provided will, in the discretion of the court, be cause for dismissal of the appeal, or affirmance of the judgment, as the case may demand.

RULE XXX.

DISMISSAL OF APPEAL AFFIRMS JUDGMENT.] The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal be expressly made without prejudice to another appeal.

RULE XXXI.

EXECUTIONS.] Executions signed by the Clerk, sealed with the seal of this court, attested of the day when the same issued, may issue out of this court to enforce any judgment for costs made and entered in cases which originate in this court. Such executions may issue and be directed to any Marshal of the Supreme Court of North Dakota, and may be enforced in any county in the state in which a transcript of such judgment for costs is filed and docketed.

RULE XXXII.

WRITS, HOW ISSUED AND RETURNED.] All writs and process issued from and out of this court shall be signed by the Clerk, sealed with the seal of the court, attested of the day when the same issued, and made returnable at any day in the next term, or in the same term when issued in term time; and a Judge may by endorsement thereon, order process to be made returnable on any day in vacation, when, in his opinion, the exigency of the case requires it. When process is made returnable in vacation, the court or judge directing the same to issue shall state in the order allowing the same the time and place when and where the writ shall be returnable.

RULE XXXIII.

DEFECTIVE RETURN, HOW CURED.] If the return made by the Clerk of the Court below is defective, either party may, on an affidavit specifying the defect or omission, apply to the Chief Justice or one of the Judges of this court for an order that such Clerk make a further return and supply the omission or defect without delay. And in a proper case on such application the record may be returned for the use of the District Court when that court desires to amend the record of the proceedings had below.

RULE XXXIV.

STATEMENT MAY BE SETTLED AND SIGNED BY OTHER THAN PRESIDING JUDGE, WHEN AND HOW.] Where a Judge of the District Court who may be authorized by law to settle and sign a

statement of the case in any action, dies or becomes disqualified by illness, is absent from the state or is removed from office before the statement is settled and signed, any other Judge of the District Court of any district in this state adjoining that in which such action is pending, shall, upon a satisfactory showing of the facts, be authorized to settle and sign such statement, and when so settled and signed, the same shall when filed in the proper office be in all respects a valid and binding statement of the case in such action. Provided, that this rule shall have no application to cases where a Judge of the District Court whose duty it is to settle and sign a statement wholly refuses to settle and sign any statement in the case or who refuses to allow an exception in accordance with the facts.

Rule XXXV.

Attorneys, how admitted.] Applications for admission to practice at the bar of this state, when made upon a certificate issued by the courts of any other state, may be made at any regular or special term of this court. Such application shall be upon a written motion made by a member of the bar of this court and filed with the Clerk, and with such motion shall be filed an affidavit, or the certificate of an attorney of this court, showing that the said applicant is at least twenty-one years of age, of good moral character, and an inhabitant of this state, and that such applicant practiced law regularly in the state where he was admitted for at least one year after such admission. All other applications shall be made on the first day of any regular or special term of this court, and shall be upon like motion, and with such motion shall be filed affidavits, or the certificate of an attorney of this court, showing that the applicant possesses the qualifications, and has devoted to the study of law the time specified in Section 421, Revised Codes. If satisfied with such affidavits or certificate the court shall,—unless the Judges prefer to conduct the examination personally in open court,—appoint a committee of not less than three members of the bar of this court to exam

ine such applicant touching his qualifications to practice as an attorney in the courts of this state. But any party who has been admitted to practice in the District Courts of this state prior to July 1, 1891, in accordance with the law in force at the time of such admission, may hereafter be admitted to practice in this court under the rules heretofore existing.

ORDERED: That the above and foregoing rules (thirty-five in number) be and the same are hereby adopted as the "Amended Rules of Practice of the Supreme Court of North Dakota." Until abrogated or modified, said Amended Rules shall govern the practice of this court and shall be supplemental to other provisions of law regulating the practice. The Clerk of this court is directed to spread these Amended Rules upon the minutes of this court and also to cause the same to be published in pamphlet form, for at least thirty days prior to August 1, 1897.

ORDERED, FURTHER, That these Amended Rules shall take effect and be in force from and after August 1, 1897.

Adopted at Bismarck, May 29, 1897.

CLERK'S CERTIFICATE.

SUPREME COURT, } ss.
STATE OF NORTH DAKOTA. }

I, R. D. HOSKINS, Clerk of the Supreme Court of North Dakota, do hereby certify that the above and foregoing Amended Rules of Practice of the Supreme Court of North Dakota are true and correct copies of such rules as adopted by the court at a regular term thereof.

Witness my hand and the seal of this court this 29th day of May, A. D. 1897.

[SEAL.] R. D. HOSKINS,
Clerk.

DISTRICT COURT RULES.

RULE I.

PAPERS TO BE SERVED—INDORSING ATTORNEY'S RESIDENCE.] On process or papers served, the attorney, besides subscribing or indorsing his name, shall add thereto or indorse thereon, his place of residence, and if he shall neglect to do so, papers may be served on him through the mail, by directing them according to the best information that can conveniently be obtained, concerning his residence. This rule shall apply to a party who prosecutes or defends in person, whether he be an attorney or not.

RULE II.

SERVICE BY OTHER THAN SHERIFF—WHAT AFFIDAVIT MUST CONTAIN.] If any person other than the sheriff shall make the service of the summons, pleading, notice, writ, process or any order of court, such person shall state in his affidavit of service that he is more than eighteen years of age, and when and at what particular place he served the same, specifying the manner of service, and that he knew the person served to be the person named in the summons, pleading, notice, writ, process or order, as the case may be, as the person intended to be served.

RULE III.

NUMBERING DEFENSES OR CAUSES OF ACTION.] In all cases of more than one cause of action, defense, counter-claim or reply, the same shall not only be separately stated, but plainly numbered; and all pleadings, not in conformity with this rule, may be stricken out on motion.

RULE IV.

PAGING AND NUMBERING LINES.] Every pleading, affidavit, statement of case, report, order, or judgment exceeding three

folios in length, shall be folioed in folios of one hundred words, and distinctly marked and numbered in the margin thereof; or the pages and lines thereof shall be numbered, and all copies either for the parties, or Court, shall be numbered so as to conform with the original, and if not so marked and numbered, any such paper may within one day be returned to the party who served the same, with objections stated; and if not corrected to conform with this rule and returned within one day, then such service shall be deemed a nullity.

Rule V.

Motions, notices—what notice shall contain.] Except as otherwise provided by statute, notices of motions shall be accompanied with copies of the affidavits and other papers on which the motions are made, except papers in the action of which copies shall have been served, and papers on file at the time of service of the notice which shall be referred to in the notice. When the notice is for irregularity, it shall set forth particularly the irregularity complained of. In other cases it shall not be necessary to make a specification of points, but it shall be sufficient if the notice state generally, the grounds of the motion.

Rule VI.

Default on motions and orders to show cause.] Whenever the notice of a motion shall be given, or an order to show cause served, and no one shall appear to oppose the notice or application, the moving party shall be entitled, on filing proof of service, to the relief or order sought, unless the Court shall otherwise direct.

If the moving party shall not appear, or shall decline to proceed, the opposite party, on filing like proof of service, shall be entitled to an order of dismissal.

Rule VII.

Hearing motions and orders to show cause—order of proof and argument.] On motion the moving party, and on

order to show cause, the party citing shall have the opening and closing of the argument. Before the argument shall commence, the moving party in the motion or order shall introduce his evidence to support the application. The adverse party shall then introduce his evidence in opposition, and the moving party may then introduce evidence strictly in rebuttal or avoidance of the new matter offered by the adverse party. On the hearing of such motion or order to show cause, no oral testimony shall be received unless the court shall direct otherwise.

RULE VIII.

MOTIONS TO CORRECT OR STRIKE OUT PLEADINGS.] Motions to correct or strike out pleadings under Section 5284, Revised Codes, must be noticed before demurring or answering to the pleading, and within thirty days from the service thereof.

RULE IX.

FILING OF PAPERS ON MOTION.] All papers to be used in support of any motion or order to show cause, except rebuttal evidence, must be filed with the Clerk of court of the county in which the action is pending, or left with the Judge to be so filed, before the hearing of the motion or order; and rebuttal affidavits must be filed, or left with such Judge to be filed, and copies served upon the opposing party, before the same are read.

RULE X.

FILING PAPERS BY PARTY OPPOSING MOTION.] Parties opposing motion or order to show cause shall, before the hearing of such motion or order begins, file with the Clerk of court of the county in which such action is pending, or deliver to the Judge to be so filed, the originals of all papers to be used by him on such hearing, and shall at the same time serve on the moving party a copy of all such papers. When rebuttal affidavits are permissable, such service shall be made two days before such hearing.

RULE XI.

EXTENDING TIME TO ANSWER. AFFIDAVIT OF MERITS.] No order extending the time to answer a complaint shall be granted,

unless the party applying for such order shall present to the Judge to whom the application is made, an affidavit of merits or an affidavit of the attorney or counsel retained to defend the action, that from a statement of the case made to him by the defendant he verily believes the defendant has a good and substantial defense upon the merits to the cause of action set forth in the complaint, or to some part thereof, and the affidavit shall state whether any and what extension or extensions of time to answer or demur have been granted by stipulation or order, and where extensions have been had, the date of issue shall be thirty days after the service of the complaint.

Rule XII.

Affidavit of merits—what it must contain.] In an affidavit of merits, the affiant shall state that he has fully and fairly stated the case, and all the facts relating to the case of which he has knowledge to his counsel, and that the defendant has a good and substantial defense to the action on the merits, as he is advised by his counsel, after such statement, and verily believes true; and shall also give the name and place of residence of such counsel.

Rule XIII.

Time to plead when demurrer overruled.] When a demurrer is overruled with leave to answer or reply, the party demurring shall have thirty days after notice of the order, if no time be specified therein, to file and serve an answer or reply, as the case may be.

Rule XIV.

Taking papers from files.] No papers on file in a cause shall be taken from the custody of the Clerk, except by the Judge for his own use, or referee appointed to try the action, or by an attorney in the case, on the order of the Judge.

If a referee or attorney shall take any papers filed in such action, the Clerk shall require a receipt therefor, signed by such referee or attorney, specifying each paper so taken; and all such

papers so taken shall be returned within twenty days; and at least one day before any term of court.

RULE XV.

TRIAL BY REFEREE—FILING REPORT.] Upon a trial of issues by a referee, such referee shall file his report in the Clerk's office upon his fees being paid or tendered by either party.

RULE XVI.

FILING UNDERTAKINGS AND AFFIDAVITS—PENALTY FOR NOT FILING.] It shall be the duty of the plaintiff's attorney forthwith to file with the Clerk of the court, all undertakings given upon procuring an order of arrest or injunction, with the approval thereon, and in case such undertaking shall not be so filed, the defendant shall be at liberty to move the court to vacate the proceedings for irregularity as if no undertaking had been given; but such attorney may file such undertaking on terms to be fixed by the court, at any time. It shall be the duty of the attorney to file, at the same time and under like penalty, the affidavits upon which an injunction has been granted.

RULE XVII.

SHERIFF TO FILE PAPERS.] The sheriff shall file with the Clerk, the order or process and original affidavits on which an arrest has been made, forthwith, after the arrest is made.

RULE XVIII.

NEGLECT OF SHERIFF—ORDER TO SHOW CAUSE.] At any time after the date when it is the duty of the sheriff or other officer to return, deliver or file any process or other paper, by the provisions of the Code of Civil Procedure, or these rules, any party entitled to have such act done, may serve on the officer a notice to return, deliver or file such process or other paper, as the case may be, forthwith, or show cause at a time to be designated by said notice, why an attachment should not be issued against him.

RULE XIX.

ORDERS—SERVICE OF.] An order made upon notice must be served, together with notice thereof, by the prevailing, upon the adverse party, within ten days after the notice of the decision upon which the order is based, and all orders must be filed with the Clerk within five days after the same are granted. If any time be by said order given for the performance of an act, it shall not commence to run until such service.

RULE XX.

RECEIVERS—ORDER TO SHOW CAUSE.] Whenever a receiver shall be appointed exparte, the order appointing such receiver shall contain an order to show cause, returnable within ten days, why such order should not be continued in force.

RULE XXI.

ATTORNEY'S STIPULATION—MUST BE MADE IN WRITING.] No private agreement or consent between parties or their attorneys, in respect to the proceedings in a cause shall be binding unless the same shall have been reduced to the form of an order of consent and entered, or unless the evidence thereof shall be in writing, subscribed by the party against whom the same shall be alleged, or by his attorney or counsel, where one shall have appeared for him in the action.

RULE XXII.

FILING PLEADINGS—COPIES. Each party must, at the time of filing a note of issue, and at least eight days before the commencement of the term at which the case is noticed for trial, file with the Clerk of the court in which the cause is pending, originals of all his pleadings, and shall, when the cause is called for trial, furnish to the court, for its use, correct copies of all such pleadings. In case the pleadings are not filed as herein provided for, the court may issue an order requiring the filing of the same forthwith, with costs of the motion.

RULE XXIII.

CALL OF CALENDAR.] At regular terms there shall be two calls of the calendar. The first shall be preliminary and the second shall be peremptory. The preliminary call shall be had at the opening of the court on the first day of the term, and all motions for continuance or postponement, and all applications in any way affecting the trial of any cause in its regular order upon the calendar, and all applications to place causes upon, or strike them from the calendar, shall be then noted, and the court shall thereupon fix a time for the hearing of such motions, which shall be heard at the earliest practicable time. Such applications may, however, in the discretion of the court, be made at any time after the preliminary call of the calendar. On the second or the peremptory call of the calendar, causes will be finally disposed of in their order upon the calendar, unless the court, for good cause shown, shall otherwise direct.

RULE XXIV.

SET CAUSES FOR TRIAL.] All applications to have causes set for trial for a particular time, must be made upon the preliminary call of the calendar, and the court may set any cause for trial for a day certain, for good cause shown.

RULE XXV.

CRIMINAL CASES—PLACING ON CALENDAR.] The States Attorney shall place upon the calendar all criminal cases which he expects to try at any term, and shall so arrange the trial thereof, if possible, as to occupy the time of the court continuously until the trial of all such cases is finished; and shall, on the preliminary call of the calendar, announce when he will be ready to commence criminal trials, and the probable length of time necessary to complete the same; and no criminal trial shall be taken up before the time announced by the States Attorney, unless otherwise ordered.

RULE XXVI.

CONTINUANCE—MOTIONS FOR—AFFIDAVITS.] All motions for

continuance shall be made within the first three days of the term, unless cause for such continuance shall have arisen or come to the knowledge of the party subsequent to that day, and all affidavits for a continuance on account of the absence of a material witness or material evidence shall show to the satisfaction of the court, by the facts therein stated, that the applicant has used due diligence to prepare for the trial, and the nature and kind of diligence used, and the name and residence of the absent witness or witnesses, and what he expects or believes such witness or witnesses would testify to were he or they present and orally examined in court, or the nature of any document wanted and where the same may be found, and that the same facts cannot be satisfactorily shown by other verbal evidence. No counter affidavits shall be received on motions for continuance, unless otherwise ordered. No continuance shall be granted for the term except upon such terms and costs as the court may impose, and if terms and costs shall be imposed the same shall be complied with and paid within such time as may be fixed by the court after the making of the order, or such continuance shall not be had.

Rule XXVII.

Trial, examining witnesses — argument.] On the trial of actions before the court, but one counsel on each side shall examine or cross-examine a witness, and one counsel only on each side shall sum up to the jury, except with the permission of the court. Upon interlocutory questions, the party moving the court or objecting to the testimony shall be heard first. The respondent may then reply by one counsel, confining his remarks to the points first stated and a pertinent answer to the moving party. The moving party may then reply. Discussion on the question shall then be closed, unless the court requests further argument.

Rule XXVIII.

Offers of proof—arguments on evidence.] In the trial of causes before a jury, offers of proof desired to be made of record must be dictated to the stenographer, and stated to the court, so

as not to be heard or understood by the jury; and no argument on questions of the admissibility of evidence will be permitted in the presence of the jury, unless requested by the court. So far as possible such arguments will be heard after the jury is excused and during recess.

RULE XXIX.

VERDICT—PRESENCE OF PARTIES NOT NECESSARY.] It shall not be necessary to call either party, or that either party be represented, when the jury return to the bar to deliver their verdict in a civil action.

RULE XXX.

JUDGMENTS—HOW ATTESTED—COPIES.] Judgments shall in all cases be attested by the Clerk with his signature; and copies to annex to the judgment roll shall have appended thereto his certificate of their correctness, under the seal of the court.

RULE XXXI.

JUDGMENT—ENTRY OF BY ADVERSE PARTY.] Where a party is entitled to have judgment entered in his favor by the Clerk upon the verdict of the jury, report of referee, or decision or finding of the court, and neglects to enter the same for the space of ten days after the rendition of the verdict or notice of filing of the report, decision or finding (or in case the same has been stayed, for the space of ten days after the expiration of the stay) the opposite party may cause the same to be entered by the Clerk upon five days' notice to the adverse party of the application therefor.

RULE XXXII.

FILING DECISION—CLERK TO NOTIFY.] Upon the filing of any decision by the court or Judge, the Clerk shall forthwith give notice of such filing to the attorneys for the respective parties.

RULE XXXIII.

CHANGE OF ATTORNEYS.] An attorney may be changed by consent or upon application of the client upon cause shown and

upon such terms as shall be just, by order of the court and not otherwise.

RULE XXXIV.

IRREGULARITY—HOW WAIVED.] A party upon whom a paper is served shall be deemed to have waived any objection of irregularity thereto, unless within two days after the receipt thereof he returns such paper to the party serving the same, with a statement of each particular objection to its receipt.

RULE XXXV.

ORDERS—WHAT TO CONTAIN.] No order made upon notice or upon an order to show cause will be signed or entered unless it shall upon its face by apt words briefly describe the affidavits, documents, papers and evidence upon which it is made, in compliance with Section 5719 Revised Codes.

RULE XXXVI.

MOTION COSTS—WHEN PAID.] Costs shall be allowed to the prevailing party on all contested motions made on notice and orders to show cause, the amount thereof and time of payment to be in the discretion of the court.

RULE XXXVII.

GENERAL TERM—MORNING HOUR.] At the opening of the court on the morning of each day, so much time as shall be necessary, not exceeding one hour, shall be devoted to the hearing of such motions as relate to the actions on the calendar for trial by jury, and to exparte business.

RULE XXXVIII.

DAY CALENDAR.] The first five causes shall constitute the day calendar for the first day of each general term. Prior to the adjournment of court on the first day of the term, the Clerk, under the direction of the court, shall prepare a list of ten cases in the order in which the same shall appear upon the general calendar, which list shall constitute the day calendar for the second day of the term, and for each subsequent day until at least

eight of such causes shall have been disposed of, when a new list of ten causes to be made in the same manner, including causes undisposed of upon such preceding day calendar, shall be made for the succeeding day, and lists in the like manner shall be made until all the causes on the general calendar are disposed of, or the term shall be finally adjourned. Provided, that the Judge may in his discretion, assign a different number of causes than is herein provided.

RULE XXXIX.

CAUSES FIXED FOR A DAY CERTAIN.] No cause shall go to the foot of the general calendar nor be set for a particular day unless the court, upon application, so orders, and when a cause is so set by order of the court it shall have precedence of all other causes not on trial.

RULE XL.

JUDGMENT—ENTRY OF.] , Whenever a judgment is entered on a promissory note, or other instrument for the payment of money only, against all the parties liable thereon, and the note or other such instrument is in the possession or under the control of the party entering the judgment, the same shall be filed with the judgment roll.

RULE XLI.

PAPERS SERVED TO BE INDORSED.] All papers or copies thereof served upon a party or attorney in an action must be plainly indorsed with the name of the court, the title of the action, and the name of the paper, or the paper may be returned and the service treated as a nullity.

RULE XLII.

APPEAL FROM COUNTY COMMISSIONERS—ISSUE, HOW FORMED.] In all cases where an appeal is taken from a decision of the Board of County Commissioners, pursuant to Sections 1927 and 1928 of the Revised Codes, the party taking the appeal shall, immediately after perfecting the same, and not later than ten days from the date of said appeal, file in the office of the Clerk of the District

Court a complaint stating in ordinary and concise language, without repetition, the facts upon which the appellant relies for a reversal of the decision of said Board of County Commissioners. Said complaint shall be governed by the rules of pleading in civil actions, and the party appealing shall, upon the filing of the complaint with the Clerk, give notice thereof to the attorney for the County, and the respondent or person adversely interested shall, within thirty days after the filing of said complaint, file his answer to said complaint in the office of said Clerk. That upon the issue thus joined, said case shall stand for trial at the next term of the District Court to be holden in said county without the necessity of notice of trial or note of issue.

Rule XLIII.

But one notice of trial.] Where the Supreme Court shall order a new trial of any cause, upon the coming down of the remittitur the same shall go on the trial calendar without further notice from either party, and the date of issue shall be the date of service of the last pleading, and the cause shall be placed upon the calendar accordingly.

Rule XLIV.

Transcripts of stenographer's minutes.] Transcripts of the stenographic reporter's minutes shall be made in the exact words and in the form of the original minutes. The party procuring the transcript of the testimony in any case shall, at or before the time of serving his proposed case or bill of exceptions, file the same with the Clerk for the use of the parties to the action and of the court.

It is hereby ordered that the foregoing Rules be and the same are hereby adopted to govern the practice of the several District Courts of the First, Second, Third, Fourth, and Seventh districts of the State of North Dakota, and shall take effect and be in force on and after September 18, 1897.

CHAS. J. FISK,
Judge District Court, First District.
D. E. MORGAN,
Judge District Court, Second District.
CHAS. A. POLLOCK,
Judge District Court, Third District.
W. S. LAUDER,
Judge District Court, Fourth District.
O. E. SAUTER,
Judge District Court, Seventh District.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH DAKOTA

JAMES ELTON *vs.* M. J. O'CONNOR.

Opinion filed May 15th, 1896.

Insolvency Law—Discharge Feature Void as to Existing Creditors.

A creditor of an insolvent debtor, whose claim accrued before the enactment of the insolvency law under which such debtor is seeking discharge from his debts, may prove his claim and receive his dividends without waiving his right to insist that the discharge feature of such statute is, as to his claim, a law impairing the obligation of his contract in so far as it assumes to discharge his claim without full payment. That such feature of an insolvency law is unconstitutional as to creditors whose claims existed at the time the law was enacted, is well settled.

Title by Assignment Vests in Assignee as of Date Proceedings Instituted.

But the entire body of such a law is not unconstitutional as to such creditors. So far as such law provides for the transfer of the debtor's property to an assignee, to be distributed among his creditors, it is valid as to all creditors, and therefore no creditor, even though his debt was in existence when the insolvency law was passed, can levy upon such property after the title thereto has vested in the assignee under the terms of the statute. The fact that the levy was made intermediate, the commencement of the insolvency proceedings and the execution of the formal assignment, is immaterial where the statute, as in this state, declares that when the assignment is executed it vests the title in the assignee as of the time when the proceedings were commenced, and annuls all levies between these two dates.

Appeal from District Court, Grand Forks County; *Templeton*, J. Edwin T. Spafford was adjudged an insolvent and James Elton

became his assignee in insolvency. From an order denying a motion to have certain levies made by M. J. O'Connor, as sheriff, set aside, the assignee appeals.

Reversed.

Cochrane & Feetham, for appellant.

At the time of the levy in this case, the title to the property was not in the execution debtor but in the assignee. *Perry Mfg. Co.* v. *Brown*, 2 Woodb. and M. 449, 19 Fed. Cases, 11,015; *Geilinger* v. *Phillippi*, 133 U. S. 246, 10 S. C. Rep. 268. Before the execution levy an adjudication of insolvency had been entered upon the petition of the debtor. The deed of assignment was executed two days after the levy and this deed related back to the commencement of the proceedings. Sections 6036, Rev. Codes. The creditor was not in time to gain the advantage given by the trial court. *Perry Mfg. Co.* v. *Brown*, 19 Fed. Cases, 11,015, *Perry* v. *Smith*, 1 Woodb. and M. 115, Fed Cases, No. 14,115; *Farrens* v. *Hammond*, 10 Fed. Rep. 900; *Judd* v. *Ives*, 4 Metc. 401; *Gallup* v. *Robinson*, 11 Gray 20; *Williams* v. *Merritt*, 103 Mass. 147. The reason that non-residents of the state are not barred by its insolvency discharge is that these laws are local, they are made for the relief of citizens residing within the limits of the state which enacts them and cannot be made to effect the rights of citizens of other states. *Ogden* v. *Saunders*, 6 L. Ed. 659; *Collins* v. *Randolph*, 3 Green, (Ia.) 303, 29 Alb. L. Jr. 188; *Hawley* v. *Hunt*, 27 Ia. 307; *Bedell* v. *Scruton*, 54 Vt. 494. But where the non-resident creditor submits his controversy and contracts to the arbitration of our law and courts by becoming a party to the proceeding he is bound by the decree entered therein. *Gillman* v. *Lockman*, 4 Wall. 409, 18 L. Ed. 432; *Clay* v. *Smith*, 7 L. Ed. 723; *Baldwin* v. *Hall*, 1 Wall. 223, 17 L. Ed. 531; *Baldwin* v. *Bank*, 1 Wall. 234, 17 L. Ed. 534. The contract upon which the execution creditor in this case obtained his judgment was entered into before the passage of the insolvency law, therefore the provisions of our insolvency law as to the discharge of the debt is

void as to this creditor. *Denny* v. *Bennett*, 32 L. Ed. 401, 9 S. C. Rep. 134; *Baldwin* v. *Buswell*, 52 Vt. 65. And because to enforce the discharge feature of this law against prior contracts would be to violate the obligation of such contract, regardless of the residence of the creditor. *Ogden* v. *Saunders*, 6 L. Ed. 606, 12 Wheat. 213; *Roosevelt* v. *Cebra*, 17 Johns. 108; *Matter of Wendell*, 19 Johns. 153; Reno on Non-residents, § 268. The non-resident creditor can come into court and prove his claim, obtain his *pro rata* of assetts, at the same time call the courts attention to the fact that his debt was contracted prior to the passage of the insolvent law and claim and obtain his constitutional privilege of not having his contract discharged. *Talcott* v. *Harris*, 93 N. Y. 567; *Chapman* v. *Forsythe*, 11 L. Ed. 238; Reno on Non-residents, § 268; *Kimberly* v. *Ely*, 6 Pick. 440; *Allen* v. *Roosevelt*, 14 Wend. 100; *Woodbridge* v. *Wright*, 3 Conn. 523; *Embry* v. *Palmer*, 107 U. S. 3; *Montague* v. *Massey*, 76 Va. 397; *Reynolds* v. *Adden*, 136 U. S. 348.

F. H. McDermont, for respondent.

The state insolvency law impairs the obligation of a pre-existing contract in that it takes away the remedy for its enforcement. The remedy at the time a contract is made enters into and forms a part of it. *Green* v. *Biddell*, 8 Wheat. 1; *Sturgis* v. *Crowninshield*, 4 Wheat. 122; *Ogden* v. *Saunders*, 12 Wheat. 213; *Bronson* v. *Kinsie*, 1 How. 311: *Von Hoffman* v. *Quincy*, 4 Wall. 535; *Walker* v. *Whitehead*, 16 Wall. 314; *Edwards* v. *Kearsey*, 96; U. S. 595; *Pinney* v. *Pinney*, 4 L. R. A., 348. Section 6085 Rev. Codes provides that all debts *proved* against the estate shall be wholly and absolutely discharged, not all debts contracted subsequent to the taking effect of the law, and proved. *Therefore*, if a claim is *proved* against the estate, it will be discharged as a whole however small a distributive share it may draw. To stay out and not prove, is to be deprived of all remedy or indefinitely stay process. *Deering* v. *Boyle*, 12 Am. Rep. 480; *Aycock* v. *Martin*, 92 Am. Dec. 56; *Coffman* v. *Bank*, 90 Am. Dec. 311. If an

existing creditor participates in insolvency proceedings under a law subsequently enacted, he is bound by its provisions and if he accepts its benefits he must submit to its burdens. *Baldwin* v. *Hale*, 1 Wall. 223; *Gillman* v. *Lockwood*, 4 Wall. 409; *Brown* v. *Smart*, 145 U. S. 454; *Berpee* v. *Sparhacok*, 108 Mass. 111; *Hawley* v. *Hunt*, 1 Am. Rep. 273; *Pratt* v. *Chase*, 44 N. Y. 597; *Sloan* v. *Chiniquy*, 22 Fed. Rep. 213; *Conway* v. *Seamons*, 45 Am. Rep. 579; *Clay* v. *Smith*, 3 Pet. 411; 11 Am. and Eng. Enc. L. 226; *Eustis* v. *Bolles*, 146 Mass. 413; overruling *Kimberly* v. *Ely*, 6 Pick. 440; *Beal* v. *Burchstead*, 10 Cush. 523; *Fisher* v. *Currier*, 7 Metc. 424; *Van Hook* v. *Whitlock*, 7 Paige, Ch. 373.

CORLISS, J. The appeal in this case is from an order sustaining certain levies of execution upon the property of a judgment debtor after the institution of insolvency proceedings. The judgment debtor filed his petition to be adjudged an insolvent under the provisions of Ch. 38 of the Rev. Codes on the 14th day of January, 1896. On the same day he was adjudged an insolvent. Subsequently the necessary steps were taken to carry forward the insolvency proceedings to the point where an assignment could be executed; and on the 5th day of March, 1896, the clerk of the District Court, under the provisions of § 6036, executed to the assignee chosen by the creditors an assignment in due form according to the requirements of that section. Intermediate the inception of the insolvency proceedings and the time of the execution of this assignment, certain creditors, whose claims accrued before the insolvency law went into effect, and who seem to have been non-residents, levied upon the insolvent's property several writs of execution. A motion having been made by the assignee to have these levies set aside on the ground that the property was no longer subject to seizure as the property of the debtor, but had passed to the assignee under the insolvency proceedings, the District Court held that such levies were valid; and therefore denied such motion. From the order denying this motion an appeal has been perfected, and the case is now before

us for review. The position taken by the counsel for the respondent is that the insolvency law is unconstitutional as to claims of the creditors for whom the levies were made, for the reason that they accrued before the law went into effect, and that they are now compelled either to refrain from sharing in the distribution of the assigned estate, or to lose their demands as a result of accepting dividends, and that in this way their situation has been so radically altered to their detriment, as compared with their rights when these contracts were entered into, as to make the statute vulnerable so far as their claims are concerned to the constitutional objection that it impairs the obligation of their contracts. The levies in this case must be treated as having been made after the title to the property had vested in the assignee if the insolvency law is valid as to the creditors in question with respect to all its features save the discharge feature. The statute in terms declares that the assignment, when finally made, "shall relate back to the commencement of the proceedings in insolvency, and by operation of law shall vest the title to all such property, both real and personal, in the assignee, although the same is then held under any process as the property of the debtor." Revised Codes, § 6036. If the creditors in this case secured a valid lien upon the property, they could have secured such lien, as well after the formal execucution of the assignment, as before. The date of the transfer of the title is the commencement of the insolvency proceedings, provided they are prosecuted, and not abandoned. The decision in this case necessarily proceeds upon the theory of the invalidity as to the creditors in question of the entire body of the insolvency law. While the writer of this opinion has long regarded as unanswerable the argument of Mr. Webster in *Ogden* v. *Saunders*, against the power of a state to enact insolvency laws authorizing the discharge of debtors from personal liability, yet the law must be deemed to be settled against this view. *Butler* v. *Gorely*, 146 U. S. 303, 13 Sup. Ct. 84, and cases cited. It is true that as to contracts entered into before the enactment of such a statute it is

ineffectual in so far as it attempts to release the debtor without full payment. *Sturges* v. *Crowninshield*, 4 Wheat. 122; *Bank* v. *Smith*, 6 Wheat 131. But with respect to contracts made subsequently to the adoption of the statute in the state in which such insolvency law exists, or which are entered into with reference to such law, the rule now firmly established is that such legislation is valid. *Ogden* v. *Saunders*, 12 Wheat. 213; *Boyle* v. *Zacharie*, 6 Pet. 348; *Butler* v. *Goreley*, 146 U. S. 303, 13 Sup. Ct. 84 and cases cited; *Denny* v. *Bennett*, 128 U. S. 489, 9 Sup. Ct. 134. A creditor who cannot be affected by the discharge in insolvency proceedings, either because his contract was made before the insolvency law was passed, or for the reason that his contract was entered into with reference to the laws of another state, has no right, on that account, to ignore the whole law. He cannot treat the entire act as unconstitutional, and levy upon the property of his debtor after the title has passed to the assignee or trustee in the insolvency proceedings. So far as the law authorizes the creation of a trust, and provides for the transfer of the debtor's title to the trustee, it is a perfectly valid enactment. Indeed it is constitutional even as to the discharge feature it embodies when the rights of creditors whose claims accrued subsequently to the enactment of the law are concerned, provided they were entered into with reference to such law. The utmost scope of the doctrine against the constitutionality of such statutes does not go beyond the limitation of the effect of such discharge to a certain class of creditors. It merely declares that certain other creditors are not affected by it. The law itself, so far as it provides for the transfer of the debtor's property for the benefit of his creditors, is a valid law. The transfer under it divests the title of the debtor to his property, leaving nothing in him subject to seizure under judicial process. The fallacy of the reasoning which leads up to the conclusion that the debtor's property, despite the insolvency proceedings, is still liable to levy on behalf of a particular class of creditors, lies in the postulate that as to such creditors the whole law is void. This proposition is not sound. It is not

supported by either reason or authority. Because the federal constitution has thrown around every citizen the protection of his contract rights against impairment by state action, the courts have built up the doctrine that insolvency proceedings are not operative to discharge the debt where the effect of such discharge would be the impairment of the obligation of the contract. But with the possible exception of cases to be hereafter referred to there is no hint in any of the cases that the entire body of the insolvency law is, as to such creditors, utterly void. It is the discharge feature alone which the federal constitution in such cases strikes down. The insolvency proceedings go on, as to such creditors, as though the law contained no provision for a discharge of the debtor from his debts. As to them, it is as no provision at all. The supreme law of the land renders it inapplicable to such creditors. What right, then, have they to complain of the statute? On what principle can they treat the whole law as void, and the transfer founded thereon as a nullity? As to their debts, the law is no more than an ordinary assignment law, embodying no discharge element whatever. They may appear and secure a dividend without risk. Creditors are not required in this state, under our statute, to file releases as a condition precedent to the right to prove their claims or receive a dividend. Revised Codes, § 6053. And when, after a discharge has been granted the debtor, he relies on it under § 6085 as a defense, such creditors may always assert against such a plea that the discharge feature of the statute is inapplicable to their claims. That such creditors do not, by proving their claims and receiving dividends, waive their right to insist that the discharge does not embrace their contracts, must be the law. All creditors are permitted to receive dividends; and later in the statute is found the section which declares what effect the discharge shall have. So far as it can be inferred from this section that a certain class of creditors are within its purview, it is inoperative. How can it, then, be said that such creditors have waived their right to insist that the discharge feature of the law is void as to them, when it is a nullity at the time they accept

their dividend, and they are not required, as a condition of securing such dividend, to release or agree to release their claim, or be bound by this provision, void as to them? The case of *Kimberly* v. *Ely*, 6 Pick. 440; is in point on this question, and sustains our view. The decision in *Talcott* v. *Harris*, 93 N. Y. 567, strongly supports it. See, also, Reno Non-res. § 268 *et seq.* Proceeding from the untenable premise that by receiving a dividend the creditor validates that portion of the act which is a nullity as to him, and then assuming that to exclude him from a share of the assets except on condition of releasing his claim is to impair the obligation of his contract, the argument moves serenely to its conclusion that the whole law is void. This is the inevitable result of the position of the learned District Judge. The court, in *Manufacturing Co.* v. *Brown*, Fed. Cas. No. 11,015, saw this consequence, and predicated on it an argument against the soundness of the view which would thus leave the assigned estate, after the title had vested in the assignee, still subject to seizure by creditors whose claims accrued before the law was passed, or whose contracts were entered into with reference to laws of a jurisdiction other than that in which the insolvency proceedings were pending. Said the court in that case: "If the security is not to be lessened in any way, the principle must be that nothing can be done with an insolvent estate,—no title to it passed within the statute until all non-resident creditors are fully paid. This would be both novel and extraordinary." The court might have placed in this list of creditors who could ignore the insolvency proceedings on this theory those whose claims arose before the law was passed. We are not sure that the proposition that a creditor whose claim accrued before the insolvency law was passed may not be allowed to receive a dividend without losing the balance of his claim (assuming that proposition to be sound) is decisive on the question of the validity of the whole law. It certainly is not clear that a legislature may not provide that creditors whose claims accrued before the law took effect shall not be permitted to receive any portion of the assigned assets.

The debt would not be affected. As to subsequently acquired assets, it could be enforced. It appears to be true, as a general proposition, that the legislature may even, with respect to existing contracts, alter the law touching priority of payment in cases of insolvency proceedings or assignments for the benefit of creditors. Those entitled, at the time their contracts were entered into, to preference in cases of such proceedings or such assignments, may, by subsequent legislative enactment, lawfully be deprived of such preferential right. This doctrine is clearly stated in *Baldwin* v. *Buswell*, 52 Vt. 57-64. "Where by the law of the place of contract certain species of contracts have prior and superior claims to satisfaction, such as contracts between landlord and tenant, contracts for mechanics' labor, or labor upon public works, or debts evidenced by bonds and specialties, it has been held that such priority and privilege is subject always to modification or repeal, at the pleasure of the legislature, without touching upon this provision of the federal constitution. *Stocking* v. *Hunt*, 3 Denio, 274; *Morse* v. *Goold*, 11 N. Y. 281, 288; *Edwards* v. *Kearzey*, 96 U. S. 595, 610." See, also, *Bigelow* v. *Pritchard*, 21 Pick. 169. And it is possible that an insolvency law which in terms prohibits a creditor whose claim arose before the law was passed from receiving a dividend unless he would release his debt might be regarded as not impairing the obligation of his contract. It would seem that the lawmaking power can place a class of creditors at the bottom of a list of preferences notwithstanding the fact that when their claims accrued there was no such provision in the law. The practical effect of such legislation is to leave such creditors without remedy as to the assigned assets unless they are more than sufficient to pay the claims which are preferred. If there is more than sufficient to pay such preferred claims, these creditors, whose rights, as to this particular property, are subordinate to the rights of the other creditors, can secure the balance of the assets, whether they take them from the assignee in the insolvency proceedings, or, being turned back to the debtor, for the reason that such creditors can

claim nothing under the assignment, they take such assets by seizing them as the property of such debtor. It is therefore possible (but we do not decide the point) that we would hold that the fact that creditors whose claims are in existence when an insolvency law is passed are prohibited from sharing at all in the particular property assigned, or can share only on condition of voluntarily releasing their claims, would not necessarily lead to the conclusion that the obligation of their contracts had been impaired.

But, assuming, this to be the law, then we discover a strong, and to our minds a conclusive reason for holding that the effect of receiving a dividend should not operate to discharge the claims of such creditors. If the effect of receiving a dividend is to bar the claim, and if it is repugnant to the federal constitution for the state laws to place the creditor in this situation, where he must either lose all right to resort to the assigned assets or lose his claim, then the inevitable conclusion is that the whole body of every insolvency law, and not merely its discharge feature, is absolutely void as to all such creditors. Nay, it is void as to all creditors whose contracts were entered into subsequently to the passage of the law, but with reference to the laws of another state. Such creditors can no more be bound by the insolvency law than creditors whose claims arose before the law was passed. Such law does not enter into their contracts, they being made with no reference to such law, but solely with a view to the laws of some other state. The result of this doctrine would be that no insolvency proceedings in any state would cut off the right of creditors whose debts were contracted under the laws of another state utterly to disregard the insolvency proceedings, and sweep away from the assignee and the other creditors all of the assigned estate. The consequence would be that one of the primary purposes of such a law—equality of distribution—would seldom, if ever, be attained. Insolvency proceedings would be merely a notice to creditors so situated that they could overthrow the proceedings,—that they could levy upon and absorb all the assets,

leaving the proceedings without value to the other creditors. In fact the result would be that the debtor, by the mere form of filing the petition in insolvency, would secure in many cases a discharge from those debts on which not a dollar of dividend would be paid, although in effect the case would be in no way different from what it would have been had the creditors who levied upon the assets after the insolvency proceedings seized the property without any such proceedings whatever. If it is now the law that the whole body of every insolvency statute is void as to creditors whose claims accrued before it was passed, then this has been the law for more than three-quarters of a century. Is it not singular, if this is the case, that, although thousands of opportunities must, during this time, have presented themselves for creditors so situated to seize the assigned property, and assert the unconstitutionality as to them of the whole of such laws, and the consequent invalidity of the insolvency proceedings founded thereon, yet no such attempt has ever been made? In the whole range of judicial decisions on this subject,—and the adjudications are by meams few,—it has never been suggested by court or counsel that such creditors could ignore the proceedings as void as to them, and seize the assigned property as the property of the debtor. We can see no occasion for a doctrine so extreme. It is not necessary for the protection of the existing creditor, for the reason that the exemption of his claim from the effect of the discharge saves the obligation of his contract from impairment. Is it not called for by any sound principle, for every reason favors the view that the mere receipt of dividends by one whose claim is not within the scope of the discharge feature of the statute, because the federal constitution will not permit it to have such scope, cannot possibly be construed as barring the right of the creditor to enforce the balance of his debt. He does not in terms agree to release his claim, nor is there any valid statute under which it can be discharged. When it is insisted against him that he is presumed to have accepted a dividend in view of the language of the law that his debt will

thereby be discharged, he may well answer that a higher law assured him, when he received such dividend, that it was not in the power of the state to enact such a provision with respect to his claim. It is impossible to spell from the decisions on this subject any other doctrine than this; that existing creditors are not bound by the discharge feature of subsequently enacted insolvency laws. In practically all the cases in which the question has arisen the debtor was seeking to interpose the discharge as a defense. In not one of them has it ever been held that the existing creditor could assail the whole law, and overthrow the insolvency proceedings based on it. In *Baldwin* v. *Buswell*, 52 Vt. 57, the creditor, whose claim accrued before the insolvency law was passed, was in a still more favorable position than the creditors in the case at bar. He had levied on the property before the inception of the insolvency proceedings, and yet the court gave effect, as to him, to the retroactive clause of the insolvency statute vacating levies made within a specified time before the commencement of such proceedings. If an existing creditor who secures a lien before proceedings of that character are begun is yet so much bound by them that they are effective to annul his previous lien, certainly the same rule applies to such a creditor who fails to secure his lien until after the title of the debtor to the property has been divested. It is true that the decision in this Vermont case might have been rested on the single ground that the state insolvency law did not place the creditor in any worse position than the national bankruptcy law which was in force when his contract was made. But the court expressly puts its ruling on that ground also which supports our view of the law, and gives that ground the more prominence in the opinion.

We have thus far proceeded on the theory that the levies sustained by the learned District Judge were made after the inception of the insolvency proceedings. But we would reach no different conclusion if we should assume that the creditors who are claiming the right to enforce their debts out of the assigned

property seized and secured a lien on the property prior to the vesting of the title in the assignee, but within a period of 60 days before such insolvency proceedings were instituted. By the express terms of the statute all levies made under any process are dissolved by insolvency proceedings commenced within 60 days of such levy. Revised Codes, § 6036. No creditor who seizes property of his debtor with such a law on the statute book of the state to whose tribunals he resorts for redress can insist that he has such a vested right in retaining such levy, as against its destruction by subsequent insolvency proceedings, that the annullment of his lien by such proceedings will impair the obligation of his contract. His levy is contingent as to its continued life. The possibilities of its speedy death are before him on the face of the statute when he secures his lien. Such enactments have been universally sustained. Their validity rests upon the control of each sovereignty over all the property within its limits. They relate to the remedy merely, and, while it is true that laws affecting the remedy sometimes work such radical and injurious changes in the rights of creditors as to bring such legislation within the spirit of the article of the federal constitution prohibiting the impairment by the states of the obligation of contracts, yet provisions giving a subsequent assignment for the benefit of creditors, or subsequent insolvency proceedings, a destructive retroactive effect as to liens obtained by judicial process or preferences secured by the voluntary act of the debtor, have never been held to be obnoxious to the mandate of this, the highest law in the nation. Such statutes do not impair the obligation of contract. *Baldwin* v. *Buswell*, 52 Vt. 57; *Bigelow* v. *Pritchard*, 21 Pick. 169. The Federal Supreme Court in a recent case treats the point as settled that such legislation is within competency of the state where the property is situated. In *Brown* v. *Smart*, 145 U. S. 454, 12 Sup. Ct. 959, the court said: "A provision of the insolvency law of a state that all conveyances, by way of preference, of any property within its borders, made by a citizen of the state, being insolvent, and within four months before the

commencement of proceedings in insolvency, shall be void, is a usual and a valid exercise of the power of the state over property within its jurisdiction, as to all such conveyances made after the passage of the law, whether to its own citizens or to citizens of other states." In *Denny* v. *Bennett*, 128 U. S. 489, 9 Sup. Ct. 134, the court sustained a recovery by the assignee for the benefit of creditors against a United States marshal, who, under a warrant of attachment, had seized the debtor's property, for the conversion of the property so seized, although it appeared that the attachment antedated the assignment. The Minnesota statute made the subsequent assignment operative to set aside the attachment. The creditors under whose process the levy was made were non-residents, and by the setting aside of their prior levies they were placed in a position where they were compelled to release their claims as a condition of receiving any portion of the assigned property. Unless they should file such releases, they could not receive any dividend. Said the court in that case: "The act in question in the present case does not exceed many of the class to which we have alluded in its effect in enabling the debtor to dispose of his property without regard to the ordinary judicial proceedings to subject it to forced sale. The power is conceded, when not forbidden by the statutes of a state, to a failing debtor to make a general assignment of his property for the benefit of his creditors, as this one does. It is further admitted that in such an assignment, if there be nothing fraudulent otherwise, he can prefer some creditors over others, and that he can secure to some payment in full while he leaves others who will certainly get nothing out of his estate. When this is done, the creditors who are not provided for in the assignment are left in a worse condition than they are where it is done under the present law, because, in the first instance, they would certainly get nothing out of the debtor's property, though they would retain a right to proceed against him by a judgment and execution, while in the present case they have the option of pursuing that course, or of coming in with the other creditors, executing releases, and

obtaining their share of the property assigned. Here, instead of naming the preferred creditors, the assignor gives his property to all who will execute a release of their claim against him. Nobody is required by the statute to do so unless he thinks it is to his interest. The creditor who executes such a release gets his share of the property assigned, while the one who does not, receives nothing, unless there may be a surplus left after the payment of the releasors, but he is not hindered or delayed in obtaining a judgment against the debtor, or in levying upon any other property, if such can be found, not conveyed by the instrument, or upon any afterwards acquired by the debtor. The latter remains liable, notwithstanding this statute, and this assignment, as he always was, for the debt of the non-assenting creditor. It is not easy, then, to see how this statute can be more complained of as impairing the obligation of contracts than the statutes of exemption which we have already mentioned, and the principles which lie at the foundation of all voluntary assignments for the benefit of creditors with preferences that exhaust the fund assigned." This case is in point, except as to the feature of the existence of the contract at the time of the enacting of the statute. The insolvency law appears to have been enacted before the contract was entered into on which the suit was brought. But in our opinion, this difference between the cases is of no importance. If the fact that at the time a debt is incurred there is no law in force authorizing a creditor to assign with preference, or assign so as to prevent the creditor from sharing in the assigned estate as a condition of securing any portion of the assets to apply on his claim, vests in him a right to overthrow such law, when subsequently passed, as a law impairing the obligation of his contract, this doctrine must rest upon the ground that the contract was not made with reference to the new statute, but with reference to the existing law, and that to change this law is to impair the obligation of the creditor's contract. Such a doctrine proves too much. It would put it beyond the power of every state to pass such statutes, even as to future contracts made and to be preferred

in another state. Such contracts are never entered into with reference to the assignment or insolvency laws of some other states. So far as we can discover from the case of *Denny* v. *Bennett*, the inference that the contract was made in another state is stronger than the inference that it was made in Minnesota, the creditors being non-residents. This decision may, therefore, be fairly regarded as opposed to any distinction based on the fact that the creditor did not contract with reference to the insolvency law under which his prior levy is set aside. The court, however, did not pass upon the point as to the right of a state, in this case, to enact such a provision with respect to existing contracts. But on that point we have no doubt. Such enactments are in the interest of equality of payment, and no citizen can insist that he has a constitutional right by superior diligence to absorb perhaps all the assets of his debtor the prejudice of other creditors whose demands are equally meritorious, merely because the law was in this condition when his debt was contracted. Aside from the obvious justice of legislation preventing the securing of priority by the first seizure of property, it has a still deeper foundation in public policy. It removes the temptation to spring upon the debtor with judicial process at the first scent of danger by taking away the advantage of priority. A creditor whose claim accrues before the passage of an insolvency law cannot complain of such a feature in it. He must pursue his remedy subject to the laws of the state in which he sues. Nor does he suffer any great detriment—if, indeed, it can be called a detriment at all—than that which other creditors suffer in common with him. And his vantage ground, from which he may treat as void the discharge provision of the law, remains, despite his receipt of dividends, firm under his feet. Nor can it with reason be urged that the fact of the non-residence of the creditors in this case in any manner affect the decision which should be rendered. It is true that if, as to such creditors, a prior levy is set aside by subsequent insolvency proceedings, and thereafter, to secure a portion of the assigned estate, they accept dividends, they will, by the receipt

of such dividends, submit themselves to the jurisdiction of the court in which the insolvency proceedings are pending, so that the discharge will bind them if their contracts are subject to the provisions of the law; and it is also true that if they do not appear they will not receive any portion of the assigned estate. But the sole right enjoyed by a non-resident creditor, if his claim is one which the insolvency proceedings would, but for such non-residence, discharge, is to be exempt from the effect of such proceedings so long as he does not appear therein. It cannot be that he is injured by reason of the setting aside of his prior levy by the insolvency proceedings, for such legislation is within the conceded power of the state. Nor can he complain that the obligation of his contract has been impaired by the fact that he cannot receive a dividend without vesting jurisdiction over his person and his demand in the court in which the insolvency proceedings are carried on, and so make operative against his claim the discharge therein granted. The argument seems to be that, while the legislature may, as to non-resident as well as to resident creditors, declare that insolvency proceedings instituted within a specified period after prior levies or preferences shall set aside such prior levies or preferences; and while a non-resident creditor cannot, if his claim was legally within the discharge feature of the law, receive a dividend without releasing his debt, yet that lawfully to take away his prior levy, and lawfully to present to him the alternative of accepting a dividend on condition of losing the balance of his demand, or of preserving his debt at the cost of receiving no dividend at all, is in some mysterious way the impairment of the obligation of his contract. How it can be said that to apply to his case well settled legal doctrines works a a destruction of his constitutional rights, is beyond our comprehension.

Counsel insists that the case of *Kimberly* v. *Ely*, 6 Pick. 440, has been overruled by the decision in *Eustis* v. *Bolles*, 146 Mass. 413, 16 N. E. Rep. 286. The language of the court in the Eustis

case does not warrant this broad statement. The court merely declared that the Kimberly case was in conflict with the later decisions so far as it upheld the doctrine that a foreign creditor who voluntarily proves his debt and receives a dividend in insolvency proceedings is not barred by the discharge. But in the Kimberly case there was the additional element that the claim accrued before the passage of the insolvency law. To that extent the Kimberly case is not overruled, and an examination of the Kimberly case will disclose the fact that the court in deciding it ignored the element of non-residence, and placed the determination solely on the ground that the claim was in existence when the statute was enacted. The court in the Eustis case uttered some *dicta* which seemed to favor the respondent. But it is obvious that the court in that case proceeds on a theory which cannot be supported. It assimilates the case of an existing claim to that of a claim held by a non-resident. It asserts that "a similar question was decided in *Clay* v. *Smith*, 3 Pet. 411, where it was held that the plaintiff, by proving his debt, and taking a dividend under the bankrupt laws of Louisiana, waived his right to object that the law did not apply to his debt, he being a creditor residing in another state." But in such a case the discharge feature is not unconstitutional, and hence void as to the creditor, if his debt is one which would be discharged, if he were a resident. The exemption from the effect of the discharge feature of the law rests, in such a case, upon the want of jurisdiction of the court in which the insolvency proceedings are pending over the creditor and his claim. If he appears in the proceedings, and accepts a dividend, of course he confers jurisdiction on the court, and renders binding upon him the decree of discharge subsequently rendered. It is indispensable in these cases to keep in mind a fundamental distinction between cases of mere non-residence of the creditor and those which belong to that class as to which the discharge feature of an insolvency law is void. Where the creditor is a non-resident, the courts can have no jurisdiction over his claim unless he voluntarily submits it to the

jurisdiction of the court. For the purpose of testing the power of the court over it in such proceedings, it is deemed to have its *situs* at the domicile of the creditor. This is, indeed, the general rule, and only gives way to the contrary doctrine in exceptional cases, such as cases in which the *situs* of a debt is fixed at the debtor's domicile for the purposes of founding administration of decedent's estates, or for purposes of seizure under judicial process. But, as against insolvency proceedings, the creditor has the right to insist that his claim has its *situs*, not where the insolvency proceedings were carried on,—the state of the debtor's domicile,—but in the jurisdiction where he (the creditor) lives. For this reason it has been repeatedly held by the Federal Supreme Court that as to non-resident creditors who do not appear in the proceedings the discharge is of no affect. *Gilman* v. *Lockwood*, 4 Wall. 409; *Suydam* v. *Broadnax*, 14 Pet. 67; *Cook* v. *Moffat*, 5 How. 295; *Baldwin* v. *Hale*, 1 Wall. 223. The reasoning of the Federal Supreme Court shows that that court has always placed the exemption of non-residents solely on the ground of want of jurisdiction, and jurisdiction of course, can always be conferred by the voluntary appearance of the creditor. That he does so appear when he proves his claim and receives a dividend cannot admit of doubt. In *Suydam* v. *Broadnax*, 14 Pet. 67, the court say, at page 75: "Every bankrupt or insolvent system in the world must partake of the character of a judicial investigation. Parties whose rights are affected are entitled to a hearing. Hence any bankrupt or insolvent system professes to summon the creditors before some tribunal, to show cause against granting a discharge to the bankrupt. But on what principle can a citizen of another state be forced into the courts of a state for this investigation? The judgment to be passed is to postrate his rights, and on the subject of those rights the constitution exempts him from the jurisdiction of the state tribunals, without regard to the place where the contract may originate. In *Ogden* v. *Saunders*, 12 Wheat. 213: 'A bankrupt or insolvent law of any state, which discharges both the person of the debtor and his future acquisi-

tions of property is not a law impairing the obligation of contracts, so far as respects debts contracted subsequently to the passage of the law. But a certificate of discharge cannot be pleaded in bar of an action brought by a citizen of another state in the courts of the United States, or of any other state than that where the discharge was obtained.' Though this is a statute intended to act upon the distribution of insolvent estates, and not a statute of bankruptcy, whatever exemption it may give from suit to an executor or administrator of an insolvent estate against the citizens of Alabama, a citizen of another state, being a creditor of the testator or intestate, cannot be acted upon by any proceedings under the statute, unless he shall have voluntarily made himself a party in them, so as to impair his constitutional and legal right to sue an executor or administrator in the Circuit Court of the United States." But those creditors whose contracts are not made with presumed reference to an insolvency law stand without its purview, and occupy the same position with respect to it that they would have occupied had they in terms been exempted from the operation of its discharge feature. The dictum in the Eustis Case, 146 Mass. 413, 16 N. E. Rep. 286, is therefore without weight, because of the fact that the court bases it upon the conceded effect of the receipt of a dividend by a non-resident creditor. No logical deduction can be made from the premise that such a creditor, by receiving a dividend, becomes bound by the discharge thereafter granted, that therefore a creditor as to whose claim the discharge feature is a mere nullity is also bound by the discharge when he likewise accepts a dividend. But the court in that case bases its dictum on just such a deduction. To us it is unsound. The same mistake lies at the foundation of the decision in *Van Hook* v. *Whitlock*, 7 Paige, 373. The court builds up its decision on the same case of *Clay* v. *Smith*, 3 Pet. 411. The true ground for the decision in the Eustis case is that it appeared that the creditor who was seeking to recover was not merely essaying to avoid the force of a discharge decree in insolvency proceedings, but the legal effect, under settled principles of law,

of his own release of his claim by becoming a party to a composition agreement under the very terms of which he agreed to discharge the obligation of his debtor on receipt of one-half of his debt. It is obvious that it is on this ground that the decision of the court in that case rests. Said the court: "He proved his debt in insolvency, and voted for assignee; but this he had a right to do, as the proceedings were commenced under the Public Statutes, and, if they had been pursued according to these statutes, his debt would have been discharged, and he would have been entitled to his share of the debtor's property. After the composition was proposed, at a hearing thereon on March 10, 1887, he objected to it, on the ground that the composition statutes were unconstitutional and void as to his debts. So far it is clear that there was no waiver of his rights. But it further appears that on May 14, 1887, the plaintiff received the sum of $8,020, being fifty cents on the dollar of his claim, and gave a receipt reciting that it was 'according to the composition confirmed by the court in the case,' being like the receipts signed by all the other creditors. He thus voluntarily received all the benefits and fruits of the composition. We think that when the composition was confirmed he was put to his election whether he would avail himself of the composition offer, or would reject it, and rely upon his right to enforce his debt against the debtors notwithstanding their discharge. The offer was to pay him fifty per cent., not in part payment of his debt, but in full discharge of it. The offer may be an amount larger than could be realized from the debtor's assets if administered in insolvency. The statute contemplates that the money offered may be, and it often is, in fact, paid into court by the debtor's friends, and in such case it is paid over to the person who deposited it, if not called for within a year by any of the creditors. It is clearly a violation of the whole purpose and spirit of the composition for any creditor of the insolvent to draw out his share of the money, and apply it in part payment of his debt, holding the insolvent liable for the balance. It is unjust to the person who deposited the money.

As the plaintiff saw fit to accept the offer, he thus made himself a party to the composition, and such acceptance was inconsistent with the right to enforce the balance of his debt, in violation of the terms of the composition. We are of opinion that he has waived his right to object that the discharge is invalid as to him."

The facts before the court in the Eustis case did not call for any decision on the question on which the court incidentally touched in the case. While the claim sued on accrued before the new feature of the insolvency law under which the composition proceedings were held went into effect, yet there was an insolvency law in force when such debt was created; and the new law did not alter the position of the creditor to his detriment. Under the old law the debtor had the absolute right to a discharge on paying a dividend of fifty per cent. without the consent of a single one of his creditors, or on paying less than fifty per cent. provided a majority in number and value of his creditors would assent in writing to his discharge. Under the new provision of the law, which was merely a composition feature incorporated in the old act, and of which the debtor might or might not, at his own pleasure, avail himself, he, the debtor, could file a written proposal for composition with his creditors, setting forth the amount he offered. But under this proceeding the discharge could not be obtained so easily by the debtor as under the old act, for he could not secure discharge merely on paying a dividend of fifty per cent., but only in the event of his securing the written consent of a majority in number and value of his creditors, and in the event of his offering less than fifty per cent. he must obtain the written assent of three-fourths in number and value of such creditors. The court in that case did not decide, but merely assumed, that the new feature of the law should, as to creditors whose claims accrued under the old law, but before the adoption of such new feature, be treated as a law impairing the obligation of their contracts. Said the court: "We assume, in favor of the plaintiff, that the composition statutes above cited, as they undertake to discharge debts due to creditors

upon conditions materially different from those existing prior to the time of their passage, are as to such prior creditors unconstitutional, as impairing the obligation of their contracts. But they are not wholly unconstitutional and void. They are clearly valid as to all debts between citizens of the state which accrue after the statutes went into effect; and a prior creditor, if he elects to avail himself of the composition proceedings, and to accept their benefits, may waive his right to object that they are invalid as to his debt. The principal question in this case is whether the plaintiff has thus waived his rights."

The decisions relating to fiduciary debts under the federal bankruptcy law are not in point. See, as recognizing the doctrine that by accepting a dividend a creditor holding a fiduciary claim waives his privilege. *Morse* v. *City of Lowell*, 7 Metc. (Mass.) 152; *Fisher* v. *Currier*, *Id.* 424; *Gilbert* v. *Hebard*, 8 Metc. (Mass.) 129-132; *Chapman* v. *Forsyth*, 2 How. 202. It is apparent from the decision in the case of *Chapman* v. *Forsyth* that these debts were not within the bankruptcy law at all, and were not provable under it, except on condition of waiving the claim that they were privileged. The court construed the statute as exempting creditors holding such claims from the effect of a discharge in bankruptcy proceedings only on condition that they did not participate in such proceedings. They were given the privilege of not being bound by the proceedings, but this was conditional on their not participating therein by the proof of their claims and the receipt of dividends. When one who holds a claim that is not provable, if he intends to insist that it cannot be discharged by the proceedings, does in fact prove it, and accept a dividend on it, he has by that act placed his claim in the list of provable claims as to which the discharge is a bar, and is estopped from showing the contrary. But there is no provision in our statute which declares that antecedent claims are not provable. On the contrary, such debts are provable. When it is subsequently urged that by making such proof the creditor has assented to the statute which declares that the discharge shall operate upon all

claims actually proved, he can logically reply that such a proviso is unconstitutional as to his demand, and therefore, with respect thereto, is no law at all for any purpose; that he has not assented to the terms of the statute because as to him there is no such statute. The language of Justice Miller in *Denny* v. *Bennett*, 128 U. S. 489, 9 Sup. Ct. Rep. 134, on which the learned District Judge rested in part his decision, is only obiter, and does not even express the individual views of that distinguished jurist. He merely says that it may be conceded that, so far as an attempt might be made to apply the insolvency statute in question to contracts in existence before it was enacted, it would be liable to the objection that it impaired the obligation of such contracts. But he does not assert that this is his opinion, or the opinion of the court. Nor does he, in terms, state that even this concession embraces the invalidity of the whole law. In *Sloane* v. *Chiniquy*, 22 Fed. 213, it is claimed that the same justice sitting at circuit used language which supports the decision herein. Whatever is said in that case was purely obiter, and, moreover, it is apparent that the court did not carefully consider the question, but merely assumed that possibly the whole law might be invalid. Indeed, it is by no means clear that that eminent jurist intended to go further than assert the invalidity of that portion of the law requiring creditors to file releases as a condition of securing dividends, so far as it related to creditors whose claims arose before the law was passed. In *Manufacturing Co.* v. *Brown*, Fed. Cas. No. 11,015, it appeared that the attaching creditor held a claim arising out of a contract governed by the laws of a state other than that of the insolvency proceedings, it being a contract to be performed in another state, and yet, so far from holding that the insolvency proceedings were a nullity as to him, they were adjudged to be valid; and it was held that he secured no lien on the assigned assets by his levy after the inception of the insolvency proceedings. We hold that the court erred in ruling that the levies were valid as against the insolvency proceedings. The court should have granted the order applied for requiring

the sheriff to turn over the property levied on to the assignee. The order is therefore reversed, and the District Court will enter an order in conformity with this opinion. All concur.

(68 N. W. Rep. 84)

NOTE—Where an insolvent made an assignment for creditors, but failed to file with the inventory an affidavit that the same was in all respects just and true as required by § 4668, Comp. Laws, no title vested in the assignee. *Farmer* v. *Cobban*, 4 Dak. 425. Words of similar import with those in the statute may be used. *Landauer* v. *Conklin*, 3 S. D. 462. Sections 4667-46-68, Comp. Laws, requiring an inventory and affidavit to be attached and filed are mandatory, and the doing of such acts are essential to the validity of the assignment. *Landauer* v. *Conklin*, 3 S. D. 462. An assignment must be acknowledged and recorded, else it is void as to non-assenting creditors. *Cannon* v. *Deming*, 3 S. D. 421. Contract construed as ordinary contracts with same presumptions of good faith. *Landauer* v. *Conklin*, 3 S. D. 462. An attachment of property in the hands of an assignee, prior to the filing of the inventory and affidavit required by statute is not premature, but may be defeated by a compliance with the provisions of the statute within the 20 days limited. *Farmer* v. *Cobban*, 4 Dak. 425. Where an insolvent firm gave some of its creditors mortgages upon its entire stock in trade, all the mortgages being executed within a few minutes of each other and their amount far in excess of the value of the goods, and permitted the mortgagors to take immediate possession of the property; *held*, that the transaction constituted an assignment with preferences and was prohibited by § 4660, Comp. Laws. *Straw* v. *Jenks*, 6 Dak. 414, (43 N. W. Rep. 941.) But this case has been overruled. *Cutter* v. *Pollock*, 4 N. D. 205, (59 N. W. Rep. 1062;) *Sandwich Mfg. Co.* v. *Max*, 5 S. D. 125, (58 N. W. Rep. 14.) An insolvent debtor may pay or secure one creditor in preference to another except in cases where he executes an assignment for the benefit of his creditors. *Cutter* v. *Pollock*, 4 N. D. 205. A debtor may use his property to pay preferred creditors or he may make a general assigment as he chooses. *Sandwich Mfg. Co.* v. *Max*, 5 S. D. 125. If he attempts to assign under the statute he can make no preferences, 5 S. D. 125. An assignment under the provisions of § 4660, Comp. Laws, does not place the property in *custodia legis*. *Enderlin Bank* v. *Rose*, 4 N. D. 319. Question not decided in South Dakota. *Wright* v. *Lee*, 5 S. D. 237. A general assignment of all the debtors property "except such property only as is exempt by law from attachment and execution" is not fraudulent in law. *Red River Valley Bank* v. *Freeman*, 1 N. D. 196; *Bangs* v. *Fadden*, 5 N. D. 92. In the absence of actual fraud attachment will not lie against an assignor for the reason that in making an assignment he reserves all property exempt from execution. *Bank* v. *Freeman*, 1 N. D. 196. District Courts have inherent jurisdiction over the subject matter of trusts and will on proper application put forth their equity powers to aid the administration of the trust. *Bank* v. *Freeman*, 1 N. D. 196. Deed of assignment construed and *held* not to require creditors to file releases as a condition to securing benefits thereunder. *Bangs* v. *Fadden*, 5 N. D. 92. A conveyance made by a husband to his wife cannot be regarded as a general assignment for creditors when the record fails to show insolvency of the husband and the property conveyed did not constitute substantially all the grantors property. *Williams* v. *Harris*, 4 S. D. 22. In assignment by a corporation the secretary may verify the inventory. *Wright* v. *Lee*, 4 S. D. 237, or the

president, *Wright* v. *Lee*, 2 S. D. 597. An assignment must be in good faith and it is subject to the code provisions relative to trusts and fraudulent transfers. 4 S. D. 237; 2 S. D. 597. It is not necessary that the inventory required by § 4668, Comp. Laws, recite upon its face that it is a full and true inventory, if the fact is otherwise made to appear. 3 S. D. 462. An instrument that does not purport to be made by an insolvent debtor and to convey all the debtors property not by law exempt does not constitute an assignment. *Sandmeyer* v. *Dak. F. & M. Ins. Co.*, 2 S. D. 346. An assignment which conveys to the assignee the absolute legal and equitable title to the assigned property charged with a trust for the payment of all or certain designated debts of the debtor constitutes the assignee the trustee of an express trust who is authorized to bring suit in his own name by § 4872, Comp. Laws. *Sandmeyer* v. *Dak. F. & M. Ins. Co.*, 2 S. D. 346. A creditor can contest the validity of an assignment on the ground that it never was authorized by a duly elected board of directors. *Wright* v. *Lee*, 2 S. D. 596. A foreign corporation may make a valid assignment for creditors and the directors are qualified to make the assignment without first obtaining the sanction of the stockholders, *Wright* v. *Lee*, 2 S. D. 597. Where the assignees report and admisssions show gross irregularities, his removal by the court without notice was not reversed. *King* v. *McClurg*, 63 N. W. Rep. 219. An assignor for creditors may move to vacate an attachment issued before the assignment. *Tobertson* v. *Casperson*, 63 N. W. Rep. 908. The insolvent law discussed in the courts opinion, *Elton* v. *O'Connor*, *supra*, became a law January 2nd, 1896.

KEMPER PEABODY *vs.* LLOYDS BANKERS.

Opinion filed June 5th, 1896.

Estoppel in Pais.

Where A., who furnished the money to buy a stock of goods, bought them in the name of B., and thereafter carried on the business in B.'s name as manager, ordering and paying for goods in his name, signing his name to checks, making credit statements in his name, having his name printed on the paper on which letters were written to merchants who sold goods to the business and in every way created the false appearance that B. was the owner of the stock and the business; and where it appeared that certain attaching creditors, who seized the property as B's property, had sold the goods for the unpaid portion of the purchase price of which they attached, relying upon the appearance of B's ownership of the stock and of the business so created by A., a portion of the goods being the identical goods so sold by them to B.,—*held*, that A. was estopped, as against such creditors, from setting up ownership of the goods.

Estoppel Against Pledgee Chargeable with Knowledge.

Held, further, that the same estoppel was operative against a receiver of a creditor of A's who accepted a pledge of the goods from A. as his property before the attachments were levied, no value having been parted with by the pledgee at the time of accepting the pledge, and it appearing that he knew at that time that A. had created this false appearance of B's ownership of the property, so that he, the pledgee, was chargeable with knowledge of the fact that, owing to A.'s conduct, estoppels might have arisen in favor of B.'s creditors.

Estoppels Bind Privies.

As a general rule, estoppels bind privies as well as those who create them.

Appeal from District Court, LaMoure County; *Rose*, J.

Action by Kemper Peabody, as state examiner, plaintiff, and Winston, Farrington & Company and Duluth Dry Goods Company, each intervenors and appellants, against Lloyds Bankers and F. M. Kinter as receiver of Lloyds Bankers, defendants and respondents.

This action was originally commenced by Kemper Peabody as state examiner against Lloyds Bankers a banking corporation under the state laws, to wind up the affairs of the corporation, defendant, and to forfeit its charter. The defendant F. M.

Kinter, was appointed in said action as receiver of said Lloyds Bankers, and thereafter as receiver took possession of a certain stock of general merchandise in the City of LaMoure claimed to belong to Myron R. Isham. About this time Winston, Farrington & Co., and the Duluth Dry Goods Co., creditors of Isham who had sold him some of the goods in question, each commenced an action against Isham and attached the property in question in the hands of the receiver, having first obtained an order permitting said attachment from the Judge of the Fourth Judicial District, acting in the place of the Judge of the Fifth Judicial District, who was at that time absent from the state. Upon the return of the Judge of Fifth Judicial District, he made an *ex parte* order without notice, directing the sheriff to forthwith turn over said stock of merchandise attached to the receiver. Thereafter an order was made by the court permitting these interveners to file their complaints in intervention and directing that the receiver hold the property or its proceeds until the final determination of this action and that the lien of interveners thereon be preserved in the hands of the receiver and that the receiver be brought in as a party defendant. In the actions against Isham, judgments were obtained and executions upon said judgments returned unsatisfied. In this action there was judgment that the defendant Kinter as receiver of the Lloyds Bankers had a first lien, preferred and paramount to any claim of interveners upon all the property in controversy. From the judgment the interveners appeal.

Reversed.

Newman, Spalding & Phelps, for appellants.

The rights of Kinter as receiver are no greater than would have been the rights of Lloyds Bankers, had no receiver been appointed. High. on Rec. § § 204, 205. Defendants are estopped to claim the goods as to intervener by the representations of Lloyds Bankers. *Stevens* v. *Ludlow*, 24 Am. St. Rep. 210 and note 2 Herman on Estoppel, 795. Wilson is also estopped.

Wellend Canal Co. v. *Hathaway*, 24 Am. Dec. 51; 2 Herman on Estoppel, 752-767, Kinter claimed under Wilson upon a contract which had no new consideration and with full knowledge of the facts, did not stand in the relation of a purchaser of the property in good faith and is estopped. 2 Herman on Estoppel, 587-793; *McCrary* v. *Remsen*, 54 Am. Dec. 194; *Parker* v. *Crittenden*, 37 Conn. 148; Bigelow on Estoppel, 493; *Strachen* v. *Foss*, 42 N. H. 47; *Crane* v. *Turner*, 67 N. Y. 467; *Westbrook* v. *Gleason*, 79 N. Y. 23; *Viele* v. *Judson*, 82 N. Y. 32.

C. W. Davis, for respondents.

CORLISS, J. The strife in this cause is between the pledgee of a stock of goods and certain attaching creditors. As we view the case, it presents neither complicated questions of fact nor perplexing legal problems. Prior to January, 1889, E. H. Wilson was engaged in the mercantile business with a Mr. Dewey under the firm name of Wilson & Dewey. Becoming financially embarrassed, in January, 1889, they made a general assignment for the benefit of their creditors. In August, 1890, the assignee sold this stock of goods at public auction. On the sale the stock was purchased by Wilson in the name of M. R. Isham. As a matter of fact the goods were purchased by Wilson for his own benefit, and the business was thereafter conducted in his own interest, Isham being only the nominal proprietor of the business. The motive for this is obvious. Wilson was so involved that he feared that his creditors would break up his business at any moment by seizure of the property to obtain payment of their demands, if it was supposed that he himself was carrying it on as proprietor. Therefore to the world he deliberately created the appearance that Isham was the owner of the stock of goods and the proprietor of the business, and that he was only a manager of the store. This appearance was false, and the motive which prompted Wilson to create it was fraudulent. For several years the business was conducted by him under this cover. He had exclusive charge of it, and from the beginning to the moment

he turned over the stock of goods to the receiver of one of his creditors as pledgee he was responsible for every act which would naturally induce, and which did in fact induce, wholesale dealers to assume that Isham was the owner of the stock and the proprietor of the business. Wilson had Isham's name printed on the paper on which letters were written to wholesale merchants. The account in the bank was kept in Isham's name. All checks were signed in his name. His name was subscribed to all letters written to those who sold goods to be used in the business. The goods were ordered in his name. In fact every thing possible was done by Wilson to cause the public to believe that his connection with the store was simply that of manager, and that the stock and business belonged to and were being managed in the interest of Isham. Relying upon these appearances, created by Wilson, certain wholesale dealers sold Isham goods from time to time on credit, and some of these goods constitute a portion of the stock, on which they claim a lien by attachment superior to the lien of the pledgee. When Wilson purchased in the name of Isham the old stock of Wilson & Dewey at the assignee's sale, he borrowed of Lloyds Bankers, a firm engaged in the banking business in this state, the necessary sum of money to pay the purchase price, and gave his notes therefor. This banking business was subsequently transferred to a banking corporation of the same name. As part of this same transaction Isham executed to one of the Lloyds brothers an instrument which was obviously intended as a chattel mortgage to secure the amount of this loan. As such instrument was not placed on record until just before the attachment was levied, and as the attaching creditors extended credit to Isham between the time of the execution thereof, and the date of filing it, it is obvious that no rights can be claimed by the receiver of Lloyds Bankers under it as against such attaching creditors. *Bank* v. *Oium*, 3 N. D. 193, 54 N. W. 1034. The action in which these rights are being contested was originally brought by the state examiner against the Lloyds Bankers, a state banking corporation, to wind up its affairs, and annul its

charter under the statutes of this state. In this action F. M. Kinter was appointed receiver. Finding among the assets of the corporation the notes given by Wilson and the chattel mortgage executed by Isham, Mr. Kinter made efforts to secure possession of the stock of goods, and finally succeeded in obtaining such possession. It is a controverted question of fact whether he took possession under this chattel mortgage, void as to creditors of Isham, or as pledgee. We will assume the theory of the case most favorable to the receiver, and, in our judgment it is the one which the evidence requires us to accept. After he had obtained possession as pledgee to secure the notes held by him as receiver for the bank against Wilson, the creditors who claim a lien on this stock of goods as against him (the receiver) attached the property, permission to attach it having been granted by the court. When the receiver accepted the stock as pledgee it was delivered to him as the property of Wilson, and not as the property of Isham. Mr. Wilson at that time informed him, the receiver, that Isham had not then, and had never had, any interest in the stock or the business, but that he (Wilson) was the real owner and proprietor. By an amicable arrangement between the parties, the stock was sold, and the proceeds were placed in the hands of the receiver to abide the decision of this case. The attaching creditors intervened in the action, and the receiver was made a party. No questions of practice are raised, and we are asked to settle these conflicting claims in this action, all the parties interested being before the court. The case is here for a trial *de novo*. It is obvious that the only theory on which the attaching creditors can sustain their claim that their levies take precedence of the receiver's rights as pledgee is that Wilson has, by his conduct, estopped himself from claiming as against such attaching creditors that he was the owner of this stock; and the business carried on with it; and that the receiver, being a mere pledgee for an old debt owing by Wilson, stands exactly in his position, and is, therefore, likewise bound by the same estoppel. That Wilson himself would be estopped as against such creditors from claim-

ing the property, we are clear. Inspired by a fraudulent motive, he exhausted his ingenuity in efforts to make it appear that Isham owned this business and this stock of goods, his very purpose being to deceive the public as to the ownership of the stock and the business. These creditors sold Isham the goods for the purchase price of a portion of which the attachments were made, relying on the belief that he was the owner of such stock. Some of their very goods were among the property attached. To allow Wilson himself to claim the property as against them under these circumstances would be to permit him, actuated by a motive which cannot be approved, to entrap innocent traders by creating a false appearance, and then straightway deny for his own benefit the truth of the appearance by which others had been deceived, when the consequence of such a denial would be an injury to those who had relied on, and who were justified in relying upon, the appearance so created, and who, as Wilson was bound to know and did know, would rely upon such appearance. The facts of the case bring it within the doctrine of estoppel as that doctrine has been formulated by the courts. Even if the case fall within no statement of the doctrine to be found in the books, it is clearly within the essential spirit of that doctrine. And no principle of law should be more jealously guarded against all attempts to fritter it away than the principal of estoppel. In the whole range of jurisprudence there is no principal more ethical in character, or more beneficient in its application. We deem unnecessary to cite more than a few decisions to support our ruling on this point. *Rogers* v. *Robinson*, (Mich.) 62 N. W. Rep. 402; *Anderson* v. *Armstead*, 69 Ill. 452; *McDermott* v. *Barnum*, 19 Mo. 204; 2 Herm. Estop. § § 764, 765, 978. As Wilson himself would have been estopped from claiming title as against the attaching creditors, his pledgee stands in no better position. He is a privy, and as such is as fully bound by the estoppel as Wilson would be were he himself claiming the property. The pledgee was not a purchaser for value of the stock; nor did he loan any money on the strength of the security. Moreover, it expressly

appears that he knew that Wilson had been holding out Isham to the public as the owner of the property and the business. He therefore took the property as pledgee, chargeable with knowledge that Wilson might have estopped himself from claiming the goods as against those who had dealt with Isham believing him to be such owner. Indeed, we regard it as a fair inference from the evidence that Lloyds Bankers were well aware of the fact that Wilson was the real proprietor of the business, and yet was holding out Isham to the world as the proprietor. We do not say that the pledgee would occupy any better position, even though it appeared that he had bought the property from Wilson for cash, without any knowledge of the facts on which the estoppel rests. The general rule is that a privy is as fully bound by the estoppel as the person between whom and himself the relation of privity exists. 2 Herm. Estop. pp. 921, 922, 978, 1231; *Parker* v. *Crittenden*, 37 Conn. 148; *White* v. *Patten*, 24 Pick. 324; *McCravey* v. *Remson*, 19 Ala. 430; *Crane* v. *Turner*, 67 N. Y. 437; *Shaw* v. *Beebe*, 35 Vt. 205; *Corbett* v. *Norcross*, 35 N. H. 99; *Snodgrass* v. *Ricketts*, 13 Cal. 359: *Thistle* v. *Buford*, 50 Mo. 278; *Couchman's Adm'r* v. *Maupin*, 78 Ky. 33. It is unnecessary to state the limitations of this doctrine, for this case falls within no known exception to the general rule that estoppels bind privies. The District Court will enter a judgment directing the receiver to pay over to the attaching creditors, in the order of their respective levies, the proceeds of the property in question in his hands, first to the Duluth Dry Goods Company until its judgment is paid, and, second, to Winston, Farrington & Co. If there is any balance, it will be retained by him as such receiver.

WALLIN, C. J., concurs. Bartholomew, J., having been of counsel, did not sit at the hearing of the case.

On Application to Modify Judgment.
(July 20, 1896.)

The Receiver asks us to modify the judgment herein. The

ground of his application is that, before the interveners had appealed and given a stay bond, he had distributed among the creditors of Lloyds brothers the proceeds of the stock of goods, less the sum of $338.48, paid to the sheriff of La Moure County on account of the judgments of the interveners. It does not appear that this was done under order of the court. But, assuming that it was, we are unable to see why this should operate to the prejudice of the interveners. The orders which were made assuming that they authorized the receiver to make such distribution were made on the application of the receiver, and without notice to the interveners. The failure of the interveners to appeal or obtain a stay before this money was paid out by the receiver is immaterial. The only effect of a stay would be to prevent the receiver from receiving the money from the interveners in case it was in their possession. There was a contest over the right to the proceeds of this stock of goods between the receiver and the interveners. The receiver was successful in the District Court, but the interveners had a right to appeal, and, so long as this right existed, the question of title to such proceeds was in controversy; and the receiver could not safely distribute such proceeds during this time. There was the danger during all this period that the interveners would appeal, and be successful. While the question whether he could hold such proceeds as against the interveners was unsettled, he should have refrained from paying out this money, which might, in a later stage of the litigation, be adjudged to belong to the interveners. The interveners were under no obligation to appeal and give a stay bond to prevent his distributing this fund among the creditors. In fact a stay bond would have had no such effect. Such a bond merely prevents the successful suitor from enforcing his judgment against the defeated litigant. There was no occasion for a stay bond in this case. The fund was in the hands of the receiver, and the decision was in his favor. The interveners were under no obligation to give a bond to stay those proceedings on the part of the receiver which the judgment in no way authorized. The judgment did

not direct him to pay out this money to creditors. Nor would such a provision in the judgment have been proper. There was no such question before the court. It was merely a question whether the receiver or the interveners had the superior lien on the property. When the court decided that the receiver had the prior lien, it had disposed of the litigation. The receiver, then, as a prudent man, should have refused to pay out this money until the question of right to this fund was settled in such a way as to preclude further litigation of it by the interveners. It would be a novel doctrine that a trustee, for the benefit of creditors, who in suit for the conversion of property, has been successful, can, when defeated on appeal, defend himself from liability by showing that he has paid out to creditors, either voluntarily or under an *ex parte* order of the court, the proceeds of the property, which the court finally adjudges to belong to the plaintiff. It is his business to retain the fund until the question whether he has any right to pay it out is finally settled; and that question can be finally settled only in the suit to which those who claim to be entitled to the fund are parties. When it is finally established that the fund belongs to the claimant, and is not a part of the trust estate, the trustee cannot justify his payment of the fund to creditors, for it is only trust property that he has any authority to distribute among them. So far as the receiver has paid moneys to the sheriff on account of interveners' judgment, he will be entitled to credit therefor on the final judgment which we have directed to be entered by the District Court. We regret that Mr. Kinter finds himself placed in this embarrassing position, but it is our duty to protect the rights of the interveners under the law.

The application for a modification of the judgment is denied.

(68 N. W. Rep. 92.)

NOTE—A lessee is not estopped to deny his landlords title in an action upon a contract of lease void as contrary to the policy of express law. *Uhlig* v. *Garrison*, 2 Dak. 71. Where evidence of an estoppel in *pais* is introduced without objection and a verdict rendered upon the evidence, the point that the estoppel has not been pleaded is waived. *Parliman* v. *Young*, 2 Dak. 175; *Davis* v. *Davis*, 26 Cal. 38. To establish an estoppel in *pais* it must be shown. First. 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 would influence his conduct, inconsistent with the evidence he proposed to give, or the title he proposes to set up. Second. That the other party has acted upon or has been influenced by such act. Third. That the party will be prejudiced by allowing the truth of the admission to be disproved. *Parliman* v. *Young*, 2 Dak. 185; *Brown* v. *Brown*, 30 N. Y. 519; *Lux* v. *Haggin*, 69 Cal. 266, 10 Pac. Rep. 676. One who expressly admits or avers by his pleading that which establishes his adversary's rights cannot thereafter be permitted to deny the existence of such facts or to prove inconsistent circumstances. *Myrick* v. *Bill*, 3 Dak. 284; *Paige* v. *Willet*, 38 N. Y. 28. A party is not estopped from attacking a judgment as void for want of service of process, because an attorney appeared for him, without his authority, knowledge or consent. *Williams* v. *Neth*, 4 Dak. 360. A cause of action once litigated as a counterclaim is extinguished and cannot be thereafter litigated as an independent cause of action. *Thompson* v. *Shuster*, 4 Dak. 163. Purchaser of property when estopped to avail himself of action for breach of warranty. *J. I. Case T. M. Co.* v. *Vennum*, 4 Dak. 92; *Minnesota Th. Mfg. Co.* v. *Hanson*, 3 N. D. 81. Wife joining in mortgage of husbands real estate is estopped from claiming a subsequently acquired adverse title. *Yerkes* v. *Hadley*, 5 Dak. 324. One who participates in and assents to the carrying out of a contract in a certain manner is estopped to say that it was not properly done. *Hennessy* v. *Griggs*, 1 N. D. 52. Estoppel against insured by silence after notice of errors made by agent of insurer in writing application. *Johnson* v. *Ins. Co.*, 1 N. D. 167. School officers cannot estop the township by representations express or implied, that the facts to authorize the issue of a lawful warrant exist. *Bank* v. *School Township*, 1 N. D. 26. County not estopped to show illegality of expenditure by acts of its commissioners in accepting the benefits of their *ultra vires* acts. *State* v. *Getchell*, 3 N. D. 243. Municipal corporations are estopped as against *bona fide* holders of its bonds from setting up that the preliminary steps necessary to authorize the issue of the bonds were taken—when bonds recite that conditions precedent have been complied with. *Coler* v. *Dwight School Tp.*, 3 N. D. 249. People dealing with a foreign corporation are estopped from pleading against it, noncompliance with the statute. *Washburn Mill Co.* v. *Bartlett*, 3 N. D. 138. Estoppel by ambiguous instructions to agent. *Anderson* v. *Bank*, 4 N. D. 182, 5 N. D. 451. By representations. *Fargo Gas & Coke Co.* v. *Fargo G. & E. Co.*, 4 N. D. 219. A party on whose objection evidence was excluded cannot complain on appeal that it is not before the appellate court. *Taylor* v. *Taylor*, 5 N. D. 58.

GEORGE E. TOWLE *vs.* N. GREENBERG, *et al.*

Opinion filed July 2nd, 1896.

Claim and Delivery—Review of Evidence.

This case involves only questions of fact. Evidence examined, and *held* to sustain the findings of the trial court.

Appeal from District Court, Grand Forks County; *Templeton*, J.

Action by George E. Towle against N. Greenberg and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Cochrane & Feetham, for appellant.

J. H. Bosard, *Tracy R. Bangs*, and *Bangs & Fisk*, for respondents.

BARTHOLOMEW, J. This action was in claim and delivery for certain personal property which it is conceded was owned by and in possession of respondents, and to which appellant claimed a right of possession under and by virtue of a chattel mortgage executed by said respondents to him. In general outline the facts surrounding the transaction were as follows: The respondents were indebted to the Union National Bank of Grand Forks in the sum of about $3,700, a portion of which was overdue, and the bank was pressing for payment, and respondents were unable to pay. A new note was given for the amount of the indebtedness. It was dated October 3, 1893, and became due October 16, 1893, and was secured by a chattel mortgage upon the property in dispute. But the note and mortgage were executed in favor of appellant, and not in favor of the bank. That fact gives rise to this contention. Appellant claims, and his claim is supported by the testimony of Mr. Beecher, an officer of the bank, who was also an agent for appellant, that it was proposed to respondents that they should borrow from appellant an amount sufficient to pay their indebtedness to the bank. Respondents were represented in the matter by N. Greenberg. It is claimed that the

proposition was accepted, and the papers drawn up accordingly, and signed by N. Greenberg and Anna Greenberg, his wife, and Mrs. B. Fishman. Mr. M. Fishman who was absent, did not sign until later. On the other hand, Mr. Greenberg testifies that the appellant, Towle was not known in the transaction, and his name was not mentioned; that only a small portion of the indebtedness of Greenberg and Fishman to the bank was overdue when the new note was given; and that the bank officer, Mr. Beecher, represented that there was soon to be a meeting of the directors of the bank, and that it would look better on the books, and be a great accommodation to him, if a new note, with security, could be given for the whole amount, and that it was for that reason that the new note was given. Mr. Fishman testifies that when he signed the note the same representations were made to him, and the same reasons assigned, to induce him to sign the papers. It appears from their testimony that neither Greenberg nor Fishman can read written English with any proficiency, and that they signed the papers in the full belief that they ran to the bank, and never knew appellant in the transaction until this action was begun. It is also undisputed that very soon after the execution of the note it was indorsed to the bank by Mr. Beecher as agent for Mr. Towle; that it was entered among the bills receivable of the bank, and not on the register of notes held for collection; and that on the visit of the national bank examiner to the bank, the note was reckoned as a part of the assets of the bank; and that some three months after the note was given a renewal note was given for the amount remaining due, which note ran directly to the bank. There is nothing in the evidence to show that the bank paid Towle anything for the note when it was indorsed. From these facts and circumstances the trial court found that respondents never borrowed any money from appellant; that there was no consideration passing between appellant and respondents to sustain the note; and that appellant was not, and never was, the beneficial owner thereof, or entitled to any beneficial interest therein. We think this finding is supported by a

preponderance of the evidence, direct and circumstantial. It is claimed, however, as we understand from the brief of the learned counsel for appellant, that the note never was legally indorsed to the bank; that no authority is shown on the part of Mr. Beecher to indorse the paper of his principal; and that in fact the note always remained the property of Towle, and that consequently he is the legal holder thereof, and may maintain an action thereon; and that, since respondents owe the debt to some one, they cannot be heard to question appellant's right to recover. We think, for several reasons, that this position is not sound. We have already held that there was no consideration for the note, as between the parties thereto; that appellant loaned respondents no money at that time; hence the old notes were not paid, neither were they extended. Had the new note run to the bank, as the reapondents supposed, and had such new note been taken as collateral to the old notes, the effect might have been to suspend any right of action on the old notes until the new note matured, and thus furnish a consideration for the new note. *Bank* v. *Lamont*, (decided at this term) 67 N. W. 145. Had the appellant actually advanced money with which the old notes were paid and discharged, there would be much more reason in saying that it could make no difference to respondents to whom they paid the note. But we have held that the old notes were not paid. Mr. Beecher admits that they were not paid when he says that the bank still holds them, and holds them on the theory that they represent a liability on the part of respondents. True, he explains it by saying that subsequent to the execution of the note to appellant the bank guarantied the note, and that it holds the old notes as collateral to its liability on such guaranty. But the respondents never requested the bank to guaranty such note, and never knew that it was done. The bank had no right to make that voluntary guaranty, and then seek to force respondents to indemnify it thereon. Moreover, if the old notes were paid,—as they must have been if there was any consideration for the new note,—then they became mere waste paper, and could be of no

value as collateral or otherwise. But, as the old notes were not paid, and are still held by the bank, it becomes vitally important to respondents whether or not they shall be compelled to pay a note which, if it represents anything, represents the same indebtedness, to a third person, while their old notes shall remain in the hands of their original creditor. The bank is not a party to this action, is not before the court, and cannot be bound by any judgment in this case. Nor would we like to say, under the evidence in this case, that appellant has the legal title to the note. The trial court expressly found as follows: "That the plaintiff has no interest in the note or mortgage set forth in the complaint, the note having been indorsed and transferred before the commencement of this action, and the same is now owned by the Union National Bank." This is undisputed, but it is said that it is not shown that the agent, Beecher, had authority to indorse the note. The agent, as a witness for his principal, testifies that he so indorsed the note, and the principal has never questioned his authority so to do, and does not question it now. He simply claims through his counsel that this fact has not been brought upon the record. But it is clear from the testimony that Towle knew of the indorsement at the time, or very soon thereafter. It does not appear that he made any objections. He left the bank to deal with the note as with its own property. The whole evidence leads us irresistibly to the conclusion that the bank used the name of appellant simply for its own purposes, and in its own interests, and that, if appellant ever held any legal title to the note, such title has been transferred to and is held by the bank.

The findings of the trial court were right on the evidence, and the judgment must be affirmed. All concur.

(68 N. W. Rep. 82.)

THE STATE OF NORTH DAKOTA *vs.* MINNEAPOLIS & NORTHERN ELEVATOR COMPANY.

Opinion filed July 2nd, 1896.

Taxation—Assessment—Ownership.

Under the revenue law of this state, which requires personal property to be listed and assessed as of May 1st in each year, when prior to that date an elevator compnny had sold the wheat in a certain elevator, in good faith, and for full value, paid in cash by the purchaser at the time, it was error to assess such wheat to and against the elevator company, although it was not shipped out of the elevator until after May 1st next succeeding.

Appeal from District Court, Grand Forks County; *Templeton*, J.

Action by the State of North Dakota against the Minneapolis & Northern Elevator Company. Judgment for plaintiff, and defendant appeals.

Reversed.

Cochrane & Feetham, for appellant.

J. G. Hamilton, States Attorney, for respondent.

BARTHOLOMEW, J. This case arises under the revenue law. The facts are stipulated, and found by the court as stipulated. The case turns entirely upon this question of law: Was the appellant, the Minneapolis and Northern Elevator Company, on the 1st day of May, 1895, under the conceded facts, the owner of 34,000 bushels of wheat in its elevator at Inkster, in Grand Forks County? That this amount of wheat was in such elevator on such date is admitted. The taxing officers of Grand Forks County assessed the same to and against the appellant, and, the same becoming delinquent, a citation was issued requiring appellant to show cause why judgment should not be entered against it for the amount of such tax. No question is made upon the regularity of the proceedings at any stage. On the return day the appellant appeared and answered. The facts were then stipulated, and upon the facts as stipulated and found the court made conclusions of law in favor of respondent, and entered judgment against appellant for the amount of the tax. This

appeal is from the judgment. The statute then in force —Subd. 9, § 7, Ch. 132, Laws 1890—provides that: "Personal property shall be listed and assessed annually with reference to its value on the first day of May." Counsel for the state concedes that appellant is not liable in any capacity other than as owner. The sixth finding of fact is as follows: "That on the 1st of May, 1895, and during the entire months of May and June, 1895, there was in store in the elevator of this defendant at Inkster, aforesaid, 34,000 bushels of number one Northern wheat, all of which had been purchased by this defendant from farmers prior to the 14th day of February in said year. That on the 14th day of February, 1895, in the due and usual course of business, this defendant sold to A. D. Thompson & Company, of Duluth, Minnesota, 150,000 bushels of wheat, of which the 34,000 bushels in the elevator at Inkster formed a part, and at said time, and in fulfillment of said sale, did execute and deliver to said A. D. Thompson & Company its warehouse receipts for said wheat so sold, and, among others, its warehouse receipt No. 530, calling for 34,000 bushels of number one Northern wheat in its elevator at Inkster, aforesaid, being all the wheat in said elevator, and said warehouse receipt was in the words and figures following to-wit: 'Charles A. Pillsbury, President. C. M. Amsden, General Manager and Treasurer. Minneapolis & Northern Elevator Company. No. 530. Minneapolis, Minn., Feb. 14th, 1895. Received in store at Inkster, N. D., thirty-four thousand bushels of One Northern wheat, subject only to the order of A. D. Thompson & Co., and the surrender of this receipt and payment of charges. The wheat represented by this receipt is fully covered by fire insurance for the benefit of the holder, and all charges are paid to May 1st, 1895. It is hereby agreed by the holder of this receipt that the grain herein mentioned may be stored with other grain of the same quality by inspection. Freight to Duluth or Superior guarantied. 34,000 bushels 1c grade. Minneapolis & Northern Elevator Co., by C. M. Amsden, Treasurer.' And that said wheat was, on the delivery of said warehouse receipt, paid

for in full, in cash, by said A. D. Thompson & Co. That said sale was made in good faith, in the due course of business, and for full value, as above set forth." In its conclusions of law the court declared that the sale to A. D. Thompson & Co., not being accompanied or followed by an actual and continued change of possession, was illegal, fraudulent, and void as against the state, while valid as between the parties, and hence the wheat was properly assessed against the appellant. Under § 4657, Comp. Laws, a sale of personal property by a vendor in possession, not followed by an actual change of possession, was conclusively presumed to be fraudulent as against creditors and subsequent purchasers from the vendor while he so remained in possession. But § 5053, Rev. Codes, in force when this action was tried, changes the law in that respect, and declares that such a transfer shall be presumed to be fraudulent as against such creditors and purchasers, "unless those claiming under such sale or assignment make it appear that the same was made in good faith, and without any intent to hinder, delay, or defraud such creditors, purchasers, or incumbrancers." Was the state a creditor within the meaning of this statute? Certainly not on February 14, 1895, when the sale was made to A. D. Thompson & Co., and certainly not on May 1, 1895. The record does not show when the wheat was shipped out. But in respondent's favor we may assume, although the record does not warrant it, that the wheat remained in the elevator at Inkster until the tax if valid, became a debt. Would the state then become a creditor? Certainly not, unless we assume the very point in controversy. There could be no debt due the state unless the appellant was the owner of the wheat on May 1st; and if there was another party who, as against appellant, was the absolute owner of the grain, with the unqualified right to immediate possession, it is difficult to perceive how appellant could have any taxable interest therein. But assume that the state was a creditor within the statute, and assume that there had been no transfer of possession, still the transfer was only presumably fraudulent. The court expressly finds that upon the

delivery of the warehouse receipt the wheat was paid for in cash by the purchaser, and that the sale was made in good faith, in due course of business, and for full value. This is an express finding that there was a sale on February 14, 1895, as that was the date of the delivery of the warehouse receipt; and it would be difficult to use stronger language to show that the sale was in good faith, and passed an absolute title. It is therefore entirely immaterial whether the warehouse receipt was effective to pass actual possession or not. The sale, as found by the court, was a good and valid sale as against all the world. The District Court will set aside its judgment in this case, and enter a judgment discharging the citation and canceling the tax on the 34,000 bushels of wheat, and giving appellant the costs of both courts.

Reversed. All concur.

(68 N. W. Rep. 81.)

AMOS E. TULLIS *vs.* JAMES A. RANKIN.

Opinion filed July 2nd, 1896.

Expert Evidence.

Where a surgeon, shown to be duly qualified in this profession, testifies fully before the jury as to the condition in which he found a limb that had previously been amputated, he may properly be asked what, in his opinion, was the cause of the condition in which he found the limb.

Appeal from District Court, Stutsman County; *Rose*, J.

Action by Amos E. Tullis against James A. Rankin. Judgment for defendant. Plaintiff appeals.

Reversed.

M. A. Hildreth and *J. A. Knauf*, for appellant.

E. W. Camp, for respondent.

BARTHOLOMEW, J. This was an action for damages for malpractice in the amputation of a leg. There is but one question in

the case, although presented in a variety of forms, and it is this: Is is legally competent, in order to show malpractice, for a surgical expert, with the results of a surgical operation performed nearly two years prior before him, either through his own personal examination and investigation of that result, or through an hypothetical question placing the results properly before him, to give an opinion as to the cause or causes that produced the results? The trial court held that it was not. We reach the opposite conclusion, while admitting that the question is close, and that authorities can be found that give support to the ruling of the trial court. The authorities are not uniform. Each case seems to have been ruled to some extent by its own attendant circumstances. Courts, as a rule, entertain an aversion to expert testimony, particularly medical and surgical expert testimony, and experience no doubt warrants the aversion, yet it is well understood that expert testimony is often indispensable; cases must be decided upon that class of testimony. Its weight or lack of weight may often be matter of embarrassment for a jury, but courts ought not to exclude it for that reason. There are cases where a given result might be produced by so many different causes, and of so nearly equal probability, that it might be very difficult to assign the true cause. Yet where it is a matter that must be determined from scientific investigation and information, and from that only, it is difficult to see why a witness who has shown himself possessed of the requisite scientific knowledge should not be allowed to state what, in his opinion, was the cause of the effect. Of course, the weight to be given to the opinion might be but little, but a party ought to be permitted to present it. Other cases may arise where, from a scientific standpoint, a certain effect could be produced only from one cause. In such a case no one would question but that the scientist might be asked what, in his opinion, was the cause of the effect; and yet the inherent nature of the testimony is not different in the two cases. It differs only in the weight to be given to it. This view of the law would seem to be somewhat opposed to the views expressed

in *Spear* v. *Hiles*, 67 Wis. 361, 30 N. W. 511. But that case does not purport to announce any general rule. Its facts were exceptional. It was an action for malacious prosecution, brought by a woman who had been arrested and imprisoned. By the expert testimony the plaintiff sought to establish a fact to augment her damages. The court held that it was not a proper element of damage, but also held that the expert could not give his opinion that a certain condition was the result of a certain cause, because it was common knowledge that so many other causes might have produced the same result. *Noonan* v. *State*, 55 Wis. 258, 12 N. W. 379, is also, perhaps, an authority in respondent's favor. *Hanselman* v. *Carstens*, 60 Mich. 187, 27 N. W. 18, cited by respondent, is not in point, as the court was then discussing a different question; and *Brant* v. *City of Lyons*, 60 Iowa, 172, 14 N. W. 227, also cited, is, we think, in appellant's favor. Rogers on Expert Testimony, at page 353, thus states the rule: "But an expert, speaking on a question of science, can be asked, in the presence of a given effect, of what causes it either was or might be the resultant. Such an inquiry is not regarded as speculative in any objectionable sense, but is a common and proper mode of examination." And in Lawson, Exp. Ev. 144, it is stated that the opinion of a medical expert may be based upon his acquaintance with the party under investigation, on a medical examination of him which he has made, or upon an hypothetical case stated. And see, also, *Railway Co.* v. *Brady*, (Neb.) 57 N. W. 767; *Railway Co.* v. *Holsapple*, (Ind. App.) 38 N. E. 1107; *Moyer* v. *Railway Co.*, 98 N. Y. 645. These cases and many others show that when the facts are known, and have been testified to by the expert, it is not necessary to put an hypothetical question. See Rog. Exp. Test. 75, and cases cited. In this case plaintiff, who was in the employ of the Northern Pacific Railway Company, had his foot run over and crushed by the cars on May 5, 1893. On that same day his leg was amputated by defendant, and he was sent to the hospital at Brainard, Minn., where he remained for about two months. At that time the wound was not, and

never was, entirely healed, until after the second amputation. The pain never left it, and at times was intense. Finally, in March, 1895, a second amputation was performed, and the limb healed, and all pain ceased. This second amputation was performed by Drs. Vidal, De Puy, and Morse. These gentlemen were severally sworn as expert witnesses for plaintiff. They testified in detail as to the condition of the limb and the patient at the time of the second amputation. After having so testified, each expert witness was asked: "What in your opinion, was the cause of the condition in which you found the limb at the time you made the examination and amputation?" And to Dr. De Puy, an hypothetical question was put incorporating the facts to which plaintiff had testified as to his injury. The witnesses were not permitted to answer. It will be noticed that they were not asked whether or not some specified fact was not the cause. They were left free to assign whatever cause their judgment dictated. It may be conceded, however, that the ultimate object was to show that an improper or unskillful amputation was the cause of the condition. Certainly that was a probable cause. Other circumstances or events might have intervened, and produced the results. But the question did not ask for a mere possibility. We go no further than the facts of this case require. But these opinions, if given as anticipated, would have concluded nothing. They would have gone to the jury for what they were worth. It was still open to the defendant to show that the original amputation was skillfully and properly performed; still open to him to show that other circumstances and events influenced or produced the results; still open to him to show by other expert testimony, if he could, that the opinions of plaintiff's experts were unwarranted in scientific surgery. But the questions as asked should have been answered.

Reversed, and a new trial ordered. All concur.

(68 N. W. Rep. 187.)

GAAR SCOTT & CO. *vs.* J. K. GREEN AND E. E. GREEN.

Opinion filed July 27th, 1896.

Contract—Consideration.

Where a party is legally bound by contract to execute certain papers, but refuses to do so unless the other party to the contract will enter further agreements and promises, such further agreements and promises are without consideration, and impose no liabilities.

Enforcement of Payment.

Principle applied: A. purchased machinery of B. by written contract in which he agreed to execute certain notes therefor. After receiving the machinery, he refused to execute the notes unless the vendor would agree to do certain things about the machinery not embraced in the original contract. This the vendor promised to do. *Held*, that such promise was without consideration, and that collection of the notes could be enforced without showing compliance therewith.

Appeal from District Court, Cass County; *McConnell*, J.

Action by Gaar, Scott & Co., against J. K. Green and E. E. Green. Judgment for defendants, and plaintiff appeals.

Reversed.

Ball, Watson & Maclay, for appellant.

The execution of the notes and mortgage by the defendants could furnish no consideration for the alleged new agreement to put the machine in repair. Whart. on Contracts, 500; *Conover* v. *Stilwell*, 34 N. J. L. 54; *Vanderbilt* v. *Schreyer*, 91 N. Y. 392. Defendants allege an oral warranty, but there was a written warranty to the same effect. In such case proof of the oral warranty was inadmissible. *Zimmerman* v. *Dolph*, 62 N. W. Rep. 339; *Bucy* v. *Pitts*, 56 N. W. Rep. 541. Evidence of the condition subsequent, viz: That the notes were not to be paid if the promise to put the machine in order was not fulfilled was inadmissible. Sections 3888-3889, Rev. Codes; *Brown* v. *Hall*, 1 Denio. 400; *Ely* v. *Kilborn*, 5 Denio. 514; *Payne* v. *Ladue*, 1 Hill. 116; *Erwin* v. *Saunders*, 1 Cow. 249; *Van Brunt* v. *Day*, 81 N. Y. 251; *Underwood* v. *Simonds*, 12 Metc. 275; *Adams* v. *Wilson*, 12

Metc. 138; *Wakefield* v. *Stedman*, 12 Pick. 562; *Spring* v. *Lovett*, 11 Pick. 417; *Sears* v. *Wright*, 24 Me. 278; *McClintock* v. *Cory*, 22 Ind. 175; *Harlow* v. *Boswell*, 15 Ill. 56; *University* v. *Boorman*, 14 N. W. Rep. 819; *Washabaugh* v. *Hall*, 56 N. W. Rep. 82; *Dean* v. *Bank*, 6 Dak. 222; *Moseley* v. *Hanford*, 10 B. and C. 729; The agent had no authority to alter or vary the terms of the contract. *Minnesota Thresher Co.* v. *Lincoln*, 4 N. D. 410; *Reeves* v. *Corrigan*, 3 N. D. 415; *Fahey* v. *Esterly Machine Co.*, 3 N. D. 220; *Walter A. Wood, etc. Co.* v. *Crow*, 30 N. W. Rep. 609.

D. A. Lindsey, for respondents.

The notes were delivered upon condition which could lawfully be imposed. *Benton* v. *Martin*, 52 N. Y. 570. Parole evidence is admissible to show that a written contract was not to become binding until the performance of some condition precedent resting in parole. *Reynolds* v. *Robinson*, 110 N. Y. 654, 18 N. E. Rep. 127; *Merchants Exc. Bank* v. *Luckow*, 37 Minn. 542, 35 N. W. Rep. 434; *Westman* v. *Krumweide*, 30 Minn. 313, 15 N. W. Rep. 255; *McFarland* v. *Sikes*, 54 Conn. 250, 7 At. Rep. 408; *Belleville Sav. Bank* v. *Bornman*, 124 Ill. 205, 16 N. E. Rep. 211; *Ware* v. *Allen*, 128 U. S. 591, 9 S. C. Rep. 174; *Burke* v. *Dulaney*, 153 U. S. 228.

BARTHOLOMEW, J. There is no conflict in the evidence in this case. There was a directed verdict for defendants. Motion for a new trial denied. Judgment upon the verdict, and plaintiff appeals. The action is upon certain promissory notes executed by respondents to appellant. The notes had been secured by a chattel mortgage. The mortgaged property had been seized and sold, and the amount realized credited upon the notes, and this action is for the balance. The notes were given for the purchase price of a grain separator. The issues arise upon the allegations in the answer that the notes were delivered conditionally only. The answer also alleges that time of payment was extended. It appears that on August 21, 1893, the respondent J. K. Green

entered into a written contract with appellant, through its agents at Fargo, for the purchase of a separator. The usual printed and written form of contract was used, which recites:

Fargo, August 21, 1893.

"The undersigned, residing in Cass County, State of North Dakota, this day order of Gaar, Scott & Co., Richmond, Indiana, through Magill & Co., agent at Fargo, N. D., one 40 inch cylinder, 58 inch separator, flax and timothy riddles, threeway crank thresher, with truck wagon and folding stacker, and all small belts, and one Fargo weigher and wagon loader. In consideration whereof, the undersigned agrees to receive the same on its arrival, subject to all the conditions of the warranty printed below, pay freight and charges thereon from your factory, and also agrees to pay to your order, at the time and place of delivery, the sum of six hundred and thirty ($630.00) dollars, as follows: Cash on or before delivery, $———; note due October 1st, 1893, for $140.00, with interest at eight per cent; note due October 1st, 1894, for $210.00, with interest at eight per cent; note due October 1st, 1895, for $200.00, with interest at eight per cent; note due October 1st, 1893, for $80.00, with interest at eight per cent. Said notes to be made payable to Gaar, Scott & Co. And I further agree, at the time and place of delivery, to give in security of said notes, a first mortgage on the above named machinery, and on the following other property or further approved security, viz.: 14 horse Buffalo Pitts plain engine; one grain tank. * * *

"Warranty: The machinery furnished on this order is warranted to be made of good materials, well constructed, and, with proper use and management, to do as good work as any other of the same size and rated capacity made for the same purpose. If, inside of six days from the day of its first use, it shall fail in any respect to fill this warranty, written notice shall be given immediately by the purchaser to Gaar, Scott & Co., at their home office, Richmond, Ind., and written notice also to the local agent through whom the same was received, stating particularly what parts and wherein it fails to fill the warranty, and a reasonable

time allowed the company to get to the machine with skilled workmen, and remedy the defects, if any there be (if it be of such nature that a remedy cannot be suggested by letter;) the purchaser to render all necessary and friendly assistance and co-operation in making the machinery a practical success. If any part of the machinery cannot be made to fill the warranty, that part which falls shall be returned immediately by the undersigned to the place where it was received, with the option in the company either to furnish another machine or part in place of the machine or part so returned, which shall perform the work, or return the money and notes which shall have been given for the same, and thereby rescind the contract *pro tanto* or in whole, as the case may be, and be released from any further liability whatever herein. * * * It is further mutually understood and agreed that use of said machinery, after the expiration of the time named in the above warranty, shall be evidence of the fulfillment of the warranty, and full satisfaction to the undersigned, who agrees hereafter to make no other claim on Gaar, Scott & Co.; and, further, that if the above machinery, or any part thereof, is delivered to the undersigned before settlement is made for same, as herein agreed, or any alterations or erasures are made in the above warranty or in this special understanding and agreement, the undersigned waives all claims under warranty."

This contract was signed by J. K. Green, and accepted by appellant. We gather from the record, although not expressly so stated, that the machine was in Fargo when the order was given; that it was at once delivered to J. K. Green, who took it to his farm, without executing the notes and mortgage. The machine was tried for about two weeks, and found to fail to work as warranted. Magill & Co., the agents, sent several men out to try and make it work properly, but without success. J. K. Green testifies: That he told the agent that he "would not take the machine, because it was no good." That the agent proposed that they would "put the machine in good order the next year, to do as good work as any other machine, and just as much of it; that, if

it didn't, why the notes should not be paid." That he then delivered the notes to the agent, who accepted them on that condition. All this testimony was objected to, on the ground that it tended to vary the written contract evidenced by the notes. E. E. Green, the other respondent, testified upon this point, over the same objection, as follows: "Kerr, the plaintiff's agent, came for me, and we went to Mapleton, and he asked J. K. Green to sign the notes. The latter stated he would not sign them until the machine gave satisfaction; if he would make the machine give satisfaction, that he would close the deal, and sign the notes, and give him security, as much as he wanted. So, on the condition that he would put the machine in good running order another year, and make it do as much work and as good work as any other machine of that kind, he signed the notes, and he asked me if I would sign them with him, and I told him I would if he would carry him over another year in case he didn't pay anything that fall. Kerr told me he would; so I signed the notes with him." There was also other evidence as to the inferior character of the machine, and that in the spring of 1894 plaintiff seized and sold the machine under the chattel mortgage. It was also proved that Magill & Co. were the agents of the plaintiff, and that Kerr was a subordinate employed by them, and that neither Magill & Co. nor Kerr had any authority to take any other or different notes than those called for by the contract of sale, or to vary the terms of the notes themselves. But it was further shown that respondents had no knowledge as to any limitations on Kerr's authority as agent for plaintiff.

On this testimony, each party moved for a directed verdict. Appellant's motion was denied, and respondent's granted. We think this was error. It is perhaps true, as urged by respondents, that the maker of a note may place the same in the hands of the payee, and such delivery be so far conditional that no liability upon the notes in the hands of the payee will arise until the specified conditions are performed. *Benton* v. *Martin*, 52 N. Y. 570; *Reynolds* v. *Robinson*, 110 N. Y. 654, 18 N. E. 127; *Bank* v.

Luckow, 37 Minn. 542, 35 N. W. 434; *McFarland* v. *Sikes*, 54 Conn. 250, 7 Atl. 408; *Bank* v. *Bornman*, 124 Ill. 205, 16 N. E. 210. And this conditional delivery may be shown by parol. Such evidence has no tendency to vary or contradict the terms of the written instrument. It only shows that the terms of the instrument never became obligatory. *Ware* v. *Allen*, 128 U. S. 591, 9 Sup. Ct. 174; *Burke* v. *Dulaney*, 153 U. S. 228, 14 Sup. Ct. 816. It may also be true (but we do not decide the point) that if the subsequent contract to which J. K. Green testifies was based upon a sufficient consideration, and if the notes in suit were given by reason of such subsequent promise, and would not have been given otherwise, plaintiff, in seeking to enforce such notes, ratifies such subsequent promise, and cannot be heard to say that it was unauthorized. On this point, see *Churchill* v. *Palmer*, 115 Mass. 310; *Melby* v. *Osborne*, 33 Minn. 492, 24 N. W. 253; *Culver* v. *Ashley*, 19 Pick. 300; *Ellwell* v. *Chamberlin*, 31 N. Y. 611-619; *Meehan* v. *Forrester*, 52 N. Y. 277; *Mundorff* v. *Wickersham*, 63 Pa. St. 87; *Saving Fund Ass'n* v. *Fire Ins. Co.*, 16 Iowa, 74; *Eadie* v. *Ashbaugh*, 44 Iowa, 519.

But respondents are not in a position on this record to avail themselves of these principles. J. K. Green bought the machine under a written contract, which included a warranty on the part of the vendor. By the terms of that warranty, he agreed that, in case said machine, or any of its parts, failed to operate as warranted within six days after its first use, he would give written notice of the defect to the home office of the vendor, and also written notice to the agent from whom the machime was purchased, to the end that efforts might be made to remedy the defects, and, if not remedied, the defective machine or part must be returned to the place where received. He further agreed that use of said machine after the expiration of the six days should be evidence of the fulfillment of the warranty, and that he would thereafter make no other claim upon the vendors. The improvidence of such a contract as applied to threshing machinery is most glaring. It cannot be tested until the crop is ready for

threshing and, once that time arrives, delays are so dangerous and expensive, time is of such importance, that the farmer will take great risks on the machinery, rather than cease work. The practical result is that in case of defective machinery the vendors can generally avoid liability on the warranty by reason of some default on the part of the vendee. But, while parties continue to make such contracts, courts must continue to enforce them. It does not appear in this case that any written notice of defects was ever given to the home office or the local office. We have held that this was absolutely necessary. See *Fahey* v. *Machine Co.*, 3 N. D. 220, 55 N. W. 580. It does not appear that the machine, or any part thereof, was ever returned, or any offer made to return the same. It does conclusively appear that the machine had been used for 12 days at the time the notes were given. Under these circumstances, the respondents were in no condition to claim defects in the machine. It stood as to them as completely fulfilling the warranty. J. K. Green had agreed to give the identical notes and mortgage that he did give. The consideration for that promise was the sale of the machine which he had in his possession when he gave the notes. That consideration was exhausted, and he had no legal right to insist upon any other terms or contract upon the part of the vendors; and any such further contract, if given, was without consideration, and imposed no obligation. True, he might have refused to execute the notes, but he could only have done so on condition of incurring liability for all damages resulting from such refusal, and this the law regards as the equivalent of performance. As fully sustaining these views, we cite, without quoting therefrom, the following well considered cases. *Conover* v. *Stillwell*, 34 N. J. Law, 54; *Geer* v. *Archer*, 2 Barb. 420; *Ayres* v. *Railroad Co.*, 52 Iowa, 478, 3 N. W. 522; *Reynolds* v. *Nugent*, 25 Ind. 328; *Furnace Co.* v. *French*, 34 How. Prac. 94; *Vanderbilt* v. *Schreyer*, 91 N. Y. 392; *Festerman* v. *Parker*, 10 Ired. 474.

One other point: E. E. Green signed the notes, and is sued jointly with J. K. Green, and they answer jointly. E. E. Green

did not sign the original contract of purchase, nor does such contract in terms provide that E. E. Green should sign the notes. He testifies that he signed in consideration of the promise to extend time. But this is at variance with his answer. In that he declares that the chattel mortgage was given in consideration of the promise to extend the time. But the original contract called for the chattel mortgage. The sale of the machine furnished the consideration for that. There was no extension of time in fact, but we do not discuss the question whether or not an executory promise to extend time on the contingency mentioned would furnish a sufficient consideration for the signature of E. E. Green to the notes. We think the answer conclusively shows that E. E. Green was in fact interested in the purchase of the machine. The respondents declare in their answer that they "are united in interest;" and, in the third division of their answer, they set up a counterclaim, and allege a purchase of the separator by both defendants, and set up a warranty to both defendants, and unite in asking a judgment against plaintiff for damages for the breach of such warranty. Being in fact a joint purchase, there was, of course, sufficient consideration for the promise of E. E. Green.

The judgment of the District Court is reversed, and a new trial ordered. All concur.

(58 N. W. Rep. 318.)

RICHARD A. SHUTTUCK, *et al vs.* O. P. SMITH, *et al.*

Opinion filed September 5th, 1896.

Assessment—Under Valuation.

When an assessor, acting within his jurisdiction, and in good faith, and in the exercise of his honest judgment, assesses certain property for taxtion at less than its actual value, such under valuation will not invalidate the entire assessment.

Omission of Taxable Property.

Nor will the omission of taxable property from the assessment roll by the assessor, while so acting, invalidate the entire assessment, whether such omission be through inadvertence or design, through a mistake of facts or a misapprehension of the law.

Railroad Property—Assessed at Less Than True Value.

When by statute the duty of assessing railroad property is devolved upon the state board of equalization, it is not sufficient to invalidate such assessment to show that the value fixed by such board was less than the actual value in the judgment of the said board, when the record also shows that there are grave doubts as to the liability of the property for taxation, and is silent as to whether or not the board regarded it as taxable.

Curative Legislation.

It is competent for the legislature, by curative act, to validate a defect levy which it might originally have authorized to be made in the manner in which it was done.

County Tax Levy—Itemized Statement.

The statute required that the county tax levy should be based upon an itemized statement of county expenses for the ensuing year, and that such statement should be included in the published proceedings of the board of county commisioners, but did not further indicate the form or nature of such statement. The records of such board showed a levy of a specific amount for each item of county expenses. *Held*, that this was a sufficient compliance with the law as to such itemized statement.

Levy of General City Tax—Yeas and Nays.

The statute relating to proceedings by city councils declared, "The yeas and nays shall be taken upon the passage of all ordinances, and on all propositions to create any liability against the city or for the expenditure or appropriation of its money." Comp. Laws, § 880. *Held* that this did not require that the yeas and nays be taken upon the passage of a resolution levying a general city tax.

Sale for More Than Amount Due.

Under the revenue law of 1890, a tax sale is not rendered invalid by reason of the auditors selling for an amount in excess of the amount due.

Tax Law Consitutional.

A state law which directs that the entire tract of land be sold to the highest bidder, for the taxes delinquent thereon, violates no constitutional provision.

Appeal from District Court, Cass County; *McConnell*, J.

Action by Richard A. Shattuck as administrator of the estate of Annie N. Trelease and others against O. P. Smith and John C. Miller, as county auditor. Judgment for plaintiffs and defendants appeal.

Reversed.

Charles A. Pollock and *R. M. Pollock*, for appellants.

When provision is made for an application to a board of equalization or review for the correction of errors in an assessment, such remedy is exclusive. Cooley on Taxation 748; *N. P. Ry. Co.* v. *Patterson*, 10 Mont. 90, 24 Pac. Rep. 704; *Bath* v. *Whitmore*, 79 Me. 182; *Comstock* v. *Grand Rapids*, 54 Mich. 641; *Randle* v. *Williams*, 18 Ark. 380; *San Jose* v. *January*, 57 Cal. 614; *Jeffersonville* v. *McQueen*, 49 Ind. 64; *Norcross* v. *Milford*, 150 Mass. 237; *State* v. *Tyler*, 48 Conn. 145; *State* v. *Danser*, 23 N. J. L. 552; *Vose* v. *Willard*, 47 Barb. 320; *Tripp* v. *Merchants Mut. F. Ins. Co.*, 12 R. I. 435; *Stanley* v. *Albany Co.*, 121 U. S. 535. And a failure to apply for relief to this board will not avail against collection of the tax. *Chambers* v. *Satterlee*, 40 Cal. 519; *Windson* v. *Field*, 1 Conn. 279; *Deane* v. *Todd*, 22 Mo. 90; *Peo.* v. *Tax Commissioners*, 99 N. Y. 254; *Meade* v. *Haines*, 81 Mich. 261; *First Nat. Bank* v. *St. Joseph Twp.*, 46 Mich. 530; Van Norts' Appeal, 121 Pa. St. 118; *Paulson* v. *Mathews*, 40 N. J. L. 268; *State* v. *Wright*, 4 Nev. 251; *Price* v. *Kramer*, 4 Colo. 546; *New Orleans* v. *Canal etc. Co.*, 32 La. Ann. 160; *Kittle* v *Shervin*, 11 Neb. 65. A party has the right to complain to the board of equalization that the property of others has been assessed too low. *Dundee Mortgage Co.* v. *Charlton*, 32 Fed. Rep. 192. The remedy for over valuation, as the assessment to a party of property he does not own, is by appeal to the commissioners. *City of Bath* v. *Whitmore*, 9 At. Rep. 119; *Stickney* v. *Bangor*, 30 Me. 404; *Heminway* v. *Machias*, 33 Me. 445; *Gilpatrick*

v. *Saco*, 57 Me. 277; *Waite* v. *Princeton*, 66 Me. 225. Inequality of assessment must be adjusted before the board of review. *Williams* v. *City*, 51 Mich 120, 16 N. W. Rep. 260; *Porter* v. *Ry. Co.*, 76 Ill. 598; *Humphreys* v. *Nelson*, 4 N. E. Rep. 737; *Peninsular I. & L. Co.* v. *Crystal Falls Twp.*, 27 N. W. Rep. 668; *Harris* v. *Freemont Co.*, 19 N. W. Rep. 826; *Macklot* v. *City*, 17 Ia. 379; *Buell* v. *Schale*, 39 Ia. 293; *Meger* v. *County*, 43 Ia. 592; *Nugent* v. *Bates*, 51 Ia. 77; *New York, etc.* v. *Gleason*, 13 N. E. Rep 204. The court cannot inquire as to the basis adopted by the state board of equalization to ascertain and arrive at the value fixed upon property. *Ins. Co.* v. *Pollock*, 75 Ill. 292; *Felsenthal* v. *Johnson*, 104 Ill. 21.

Miller & Resser and *J. E. Robinson*, for respondents.

Where any material portion of taxable property is intentionally omitted from the assessment roll, it avoids the assessment. *Perry* v. *Mulberry*, 21 Pick. 65; *Henry* v. *Chester*, 15 Vt. 460; *Perkins* v. *Nugent*, 45 Mich. 159; *Hurd* v. *Raymond*, 50 Mich. 369; *Wecks City*, 10 Wis. 186; *Smith* v. *Smith*, 19 Wis. 649; *Hersey* v. *Supervisors*, 37 Wis. 75; *Marsh* v. *Supervisors*, 42 Wis. 502; *Sheetler* v. *City*, 43 Wis. 48; *McTwiggan* v. *Hunter*, 30 At. Rep. 962; *State* v. *Brand*, 23 N. J. L. 509; *Auditor General* v. *Prescott*, 94 Mich. 190, 53 N. W. Rep. 1058; *Merritt* v. *Humphrey*, 24 Mich. 170; *Johnson* v. *Oshkosh*, 65 Wis. 473. The tax sales were each for an excessive amount and void for this reason. *Baker* v. *Supervisors*, 39 Wis. 447; *Mileg* v. *Coleman*, 47 Wis. 184; *Kimball* v. *Ballard*, 19 Wis. 634; *Harper* v. *Rowe*, 53 Cal. 152; *Fredwell* v. *Peterson*, 51 Cal. 637; *Case* v. *Dean*, 16 Mich. 12.

BARTHOLOMEW, J. The object sought to be attained by this action is, in effect, the cancellation of certain tax sale certificates upon realty in the City of Fargo, and to permanently enjoin the issuance of any deeds upon such certificates. The plaintiff is the representative of the fee owners of the realty, and the defendant is the tax sale purchaser. The validity of the taxes in the City of Fargo, for the years 1890 to 1893, inclusive, is attacked. The basis of the attack consists in alleged under valuations by the assessors,

and omissions from the assessment roll. There is no claim that plaintiff's land was assessed in excess of its actual value, or that it was exempt from taxation. But it is claimed that by reason of such under valuation, and omission of other property, plaintiff's taxes were much larger than, in justice and equity, they should have been. It is also claimed that there was no valid levy of taxes for said years either by the county commissioners or city council. There was a trial by the court. Plaintiff prevailed, and the case comes into this court, on defendant's appeal, for hearing on the merits. There is no real conflict of evidence upon any point. It is simply a question of the legal effect of the competent testimony introduced upon trial. On the question of assessment, the testimony shows that the Columbia Hotel in the City of Fargo, was worth, including grounds, building, and furniture, at least $100,000. This property was assessed for less than $20,000. Other property known as the "Bishop Shanley Property," was assessed at less than than 20 per cent of its value. We may dismiss this piece of property, however, with the statement that the board of equalization remitted all taxes thereon upon the grounds that the property was used exclusively for church purposes. No complaint is made of the action of the board; hence the assessment becomes immaterial. There was also in the City of Fargo a tract of land, valued by witnesses at $75,000, belonging to the Northern Pacific Railroad Company, but outside of the right of way, which was entirely omitted from the assessroll. On the right of way of said railroad company, which is 400 feet in width, and extends across the city from east to west, were many valuable warehouses, and a large hotel. The ground upon which the buildings stood was not assessed by the city assessor, although the buildings themselves were properly assessed. Our statutes (Ch. 135, Laws 1890) require the state board of equalization, at its August meeting in each year, to assess at its actual value the franchise, roadway, roadbed, rails, and rolling stock of said railroad company. In each of said years this property was assessed by said board at $2,500 per mile. This,

according to the testimony, is only about one-eighth of its actual value, or of what it would cost to reproduce it. The farm lands of Cass County, in which the City of Fargo is situated, were assessed during said years at about one-half what witnesses swear they are worth. Do these facts render the assessment absolutely void, and the taxes based thereon illegal? It will be at once perceived that these objections urged against the taxes are very far-reaching. If sustained in their entirety, they must invalidate the taxes for the years in question, not only in the city of Fargo and County of Cass, but throughout the entire state. This would result in such a flood of litigation, such disturbance of titles, and such confusion and chaos in the public revenues, that, unless forced thereto by well settled and plain rules of law, we should hesitate long before adopting a ruling that involves such untortunate results. Taxation is, at its best one of the most fruitful sources of litigation known to the law. It is a proceeding in *invitum*, and one which the average taxpayer seems to feel in duty bound to defeat when possible. States, counties, and municipalities can be sustained only by the expenditure of a certain amount of revenue. This revenue can be obtained only through the exercise of the sovereign power of taxation. To obtain this necessary revenue the state delegates to the various counties and municipalities this sovereign power. It necessarily follows that many men participate in the exercise of this power,—men of widely variant minds, and men subject to those frailties of judgment from which no man is entirely exempt. Uniformity of taxation is demanded by that section of our constitution (section 176) which declares that "laws shall be passed taxing by uniform rule all property according to its true value in money." It has ever been the aim of the legislature to realize this universal demand of constitutional law. Nevertheless, absolute uniformity and equality in taxation has ever remained a Utopian project,—accessible in theory, but never reached in practice. Inequalities and injustice in taxation, more or less pronounced, always have existed, and, from the necessities of the cause, it would seem

that they must exist. But this has not generally been supposed sufficient to invalidate a tax. If it were, the collection of revenue would instantly and permanently cease. Long before the courts ruled upon the subject, the common sense of mankind united in declaring that it were better that the individual should suffer the slight injustice, rather than that the wheels of government should stop. But that a tax may be invalidated by reason of matters connected with the assessment and levy is an undisputed proposition. It remains, then, to determine in this case whether the matters complained of do or do not invalidate the tax in this case, for it is conceded that plaintiff must fail in the action unless the taxes for which his lands were sold were void. And, in discussing this question, we repeat what we said in *Farrington* v. *Investment Co.*, 1 N. D. 102, 45 N. W. 193: "Respondent attacks the validity of the tax, and the burden is upon him to establish its invalidity; and it is not enough, for the purposes of this case, that the court cannot be able to say from the evidence that the tax is valid. The presumption is that the tax is valid, and and this presumption necessarily extends to every act upon which the tax in any measure depends. The court must be able, upon the evidence, to pronounce judgment against its validity." See cases cited.

The first attack in this case is directed against the assessment. The assessor is the person who initiates the tax proceedings. An assessment is absolutely necessary to any valid tax. The law requires the assessor to assess all property not by law exempt from taxation, and to assess it at its actual value. Necessarily, in this process, two things are left to the judgment of the assessor: He must say primarily what is the actual value of the property. To do this with any approach to accuracy requires broad knowledge, extended experience, and excellent judgment. He must also say whether or not any given piece of property belongs to any of the classes which are by law exempt. Simple as this may appear, it is often a difficult and delicate task. The law exempts from taxation all property of the United States, of

the state, and of the county and municipal corporations; also all property used exclusively for school, religious, cemetery, or charitable purposes. To fix the title of property, or declare the use to which it is exclusively devoted, requires the highest order of judgment, and often a considerable knowledge of law. But the duty of deciding these matters must be lodged some where, and the legislature has seen proper to lodge it primarily with the assessor. And in deciding these matters the assessor acts as a judicial officer. See *Farrington* v. *Investment Co.*, *supra*, and authorities cited; also *Tyler* v. *Cass Co.*, 1 N. D. 369–383, 48 N. W. Rep. 232, 234. This being true, and the determinations of the assessor being in the nature of judgments, it is fundamental that errors and mistakes of judgment while acting within his jurisdiction do not invalidate the assessment. This very question of under valuation and omission from the assessment roll has frequently been before the courts, and, unless accompanied by fraud either in fact or law, we find no case, save in Wisconsin, where it has ever been held to invalidate the tax. In *Dillingham* v. *Snow*, 5 Mass. 547 (decided in 1809), the court, in an opinion by Chief Justice Parsons, ruled the point squarely. The action was trespass against the assessors by one whose property had been seized for taxes. It was shown that the assessors had purposely omitted the real estate of non-residents from the assessment roll. The court held that there was no authority for so doing, and that it was a violation of a statutory provision. It is then said, "The last question is whether, in consequence of this irregularity, the assessment complained of is void, and the assessors answerable in this action as trespassers with force and arms." It will be noticed that the liability of the assessor is made to turn upon the single point of the validity of the assessment. The learned jurist, among other remarks exceedingly pertinent to this case, says: "It deserves great consideration before we decide that the assessment, through an error in judgment or mistake of the assessors, is void, so that no part of it can be collected." And again: "Now, when judicial officers, deriving their authority from the

law, mistake or err in the execution of their authority, in a case clearly within their jurisdiction, which they have not exceeded, we know of no law declaring them to be trespassors *vi et armis.* If the law were otherwise respecting assessors, who, when chosen are compelled to serve or pay a fine, hard indeed would be their case. But the same law must apply to them as to inferior judicial officers." And in conclusion: "But we are all satisfied that for an error in judgment committed by the assessors, in omitting to assess some taxable estate, they are not answerable as trespassers with force and arms." *Merritt* v. *Farris*, 22 Ill. 303, was a case where taxable property had been omitted from the assessment roll, and it was urged that the tax was void because the assessment was a violation of their constitutional provisions requiring uniformity of taxation. But the court refused to entertain the thought that the constitution makers ever intended that the omission of the taxable property by an assessor should invalidate the entire tax, and thus defeat the collection of all revenues for the year. Indeed, there is an intimation in that case that the only remedy of the taxpayer, even for a corrupt omission by the assessor, would be a personal action against the derelict officer. This case was expressly approved in *Dunham* v. *City of Chicago*, 55 Ill. 357, and *Spencer* v. *People*, 68 Ill. 510. The case of *Albany and West Stockbridge R. Co.* v. *Town of Canaan*, 16 Barb. 244, while a case of over valuation, yet the plenary power of the assessor acting within his jurisdiction is fully recognized. Says the court: "Though it could be demonstrated that the assessors had erred, and that egregiously, in this judgment, no tribunal has been endowed with power to correct such error. Like the verdict of a jury, if founded on correct principles it must stand, however much its conclusions may surprise us." In *Williams* v. *Inhabitants of School District No. 1*, 21 Pick. 75, the assessors intentionally omitted to tax one of the inhabitants of the district; and the court, through Chief Justice Shaw, said: "If this was done through error of judgment, or any error or mistake of the law in this respect, it does not invalidate the whole tax. The

case shows nothing more." From the case of *People* v. *McCreery*, 34 Cal 432, we quote one of the head notes: "The omission of an assessor to assess certain parcels of property subject thereto, whether arising from a misapprehension of the law, or by giving effect to void provisions of statute, or a mistake of fact, will not invalidate his general assessment list." The case of *Van Deventer* v. *Long Island City*, 139 N. Y. 133, 34 N. E. Rep. 775, is very much in point upon the question of the legality of this assessment. That action, like this, was brought to set aside tax sales running through a number of years, and on the ground that in each of said years a large amount of taxable real estate in the city had been intentionally omitted from the assessment roll. But the court said: "The assessors in making the assessments acted judicially, and if they omitted any property from the assessment rolls, either by mistake or design, the entire assessments are not thereby rendered invalid. An assessment roll is in the nature of a judgment, and it was never heard that a judgment rendered by an officer exercising judicial functions was void because, by a mistake or design, he had made it too large or too small, in a case where he had the jurisdiction, and acted within his jurisdiction." See, also, *Henry* v. *Town of Chester*, 15 Vt. 460; *Spear* v. *Town of Braintree*, 24 Vt. 414; *State* v. *Platt*, 24 N. J. L. 108-120; *Insurance Co.* v. *Yard*, 17 Pa. St. 331-339; *Watson* v. *Inhabitants of Princeton*, 4 Metc. (Mass.) 599; *Muscatine* v. *Mississippi & M. R. Co.*, Fed. Cas. No. 9,971.

To our mind, the reasoning of the foregoing cases is unassailable, and they furnish us ample authority for holding that any error of judgment upon the part of an assessor in fixing the value of property for taxation, however great, if not such as to show fraud on his part, will not invalidate his entire assessment; nor will an omission of taxable property from the assessment roll, whether arising from inadvertence or design, through a mistake of fact or law, invalidate such assessment. We are aware that in Wisconsin this doctrine is not admitted to the extent stated. In that state the cases are largeiy based upon the opinion in *Weeks*

v. *City of Milwaukee*, 10 Wis. 242. In that case valuable property (a large hotel) was admitted from the assessment roll, not because there was any pretense that it was exempt under any state law, but because the city council, deeming the hotel an advantage to the city, had directed that it be omitted. This was held to invalidate the entire assessment. But even there we find in the opinion this language, on page 264. "Omissions of this character, arising from mistakes of fact, erroneous computations, or errors of judgment on the part of those to whom the execution of the taxing laws is entrusted, do not necessarily vitiate the whole tax." But in *Kneeland* v. *City of Milwaukee*, 15 Wis. 454, and *Hersey* v. *Supervisors*, 16 Wis. 198, and *Johnson* v. *City of Oshkosh*, 65 Wis. 473, 27 N. W. Rep. 320, the able Supreme Court of that state distinctly held that the assessor, in omitting from the roll property which he believed to be by law exempt, vitiated the entire tax, notwithstanding the good faith of the assessor. These cases are greatly relied upon by respondent. But we think the application of such a doctrine to judicial officers is attended with great danger. We know of no instance of its application to any other judicial officer, and we know of no reason why assessors should be made an exception. The great weight of authority is against it.

We do not, in this opinion, discuss the question of the effect upon the assessment of fraud in law or fraud in fact upon the part of the assessor, because we do not deem such a question involved. There is an allegation of fraud in the pleadings, but it is entirely unsustained by the proof. We will briefly refer to the testimony, in order to show that this case come clearly within the principles we have announced: The same party was assessor in the City of Fargo during all the years in question, and for several years prior thereto. He gave some general testimony as follows: "In these various years, when assessing property in the City of Fargo, and those places over which I had jurisdiction, I assessed the entire property of the city equitably, and on the same basis

of valuation, and according to a true and a fair valuation thereof, as I understood it." And again: "I state that there was never any property intentionally omitted from my assessment roll; that is, property which I regarded as taxable property. The county auditor makes the assessment roll, and, where I have not put values against his descriptions, it is because, to the best of my knowledge, that the property is exempt under the law." Concerning the Columbia Hotel, he testified that he assessed the lots the same as other lots in the neighborhood, and, when it was first completed, assessed the building at $30,000. This the board of equalization, on application of the hotel company reduced. Subsequently, in fixing the value, he took into consideration the fact that it was not paying property. The assessment was probably too low, but it was a clear error of judgment upon the part of the assessor. Concerning the property of the Northern Pacific Railroad Company, outside the limits of the right of way, it appears that in 1888 the assessor assessed this property, and the attorney for the company appeared before the board of equalization, and had the assessment annulled on the ground that it was not liable to taxation, by reason of the law taxing railroad companies on gross earnings. Thereupon the assessor deemed such property exempt for that reason, and did not assess the same. The evidence need not have gone to that length. We quote again from *Van Deventer* v. *Long Island City*, *supra*: "While it was found by the trial judge that the assessors intentionally and purposely omitted to assess the real estate, it was not found that they made the omission knowing that the real estate was liable to assessment and taxation. It was a legitimate inference, under the facts found, that the assessment was omitted by the assessors, in the exercise of their judgment, under the belief that the real estate thus situated was not liable to taxation." This disposes of the attack upon the assessments of the city assessor. But it is alleged that farming lands in Cass County were assessed only at $6 and a fraction per acre, while they were worth $10, and witnesses swear that they were worth the latter sum, or more. The

witnesses differ in their estimate, clearly showing that it is a matter of opinion, and there is nothing whatever in the case indicating in any way that the assessment made by the assessor did not represent his honest judgment as to valuation; and when we remember that his assessment, without material alteration, passed the scrutiny of both the county and state boards of equalization, whose sworn duty it is to raise the property to its true value, if under valued, we find that the judgment of the assessor had fair support, although it needs none for the purposes of this case.

There remains yet to be considered the assessment made by the state board of equalization upon the main line of the Northern Pacific Railroad, and, in considering this question, we must keep constantly in mind the fact that the taxes are presumed to be valid, and the burden rests upon the respondent to establish their invalidity. This he claims he has done, by showing that the valuation, as fixed, does not represent the judgment of the board as to the actual value of the property. This claim is based upon the record of the proceedings of the said board, as introduced in evidence. During the sessions of said board each year, there was introduced and passed a resolution; the wording being the same in each instance, except the year named. We quote the preamble to the resolution: "Whereas, there is a question as to the legal right of the State of North Dakota to assess the right of way of the main line of the Northern Pacific Railroad Company for taxation, and, in order to compromise and secure the collection of taxes upon such right of way for the year 1891 without litigation, it is deemed advisable to assess such main line at less than, in the judgment of this board, should otherwise be assessed, resolved," etc. It may fairly be claimed for this preamble that it shows that the valuation fixed upon the property was less, in the judgment of the board, than the actual value of the property. But there was another question involved—a question which the board of equalization, sitting as a board of assessors, was bound to consider—and that was whether or not

the property could be taxed by the State of North Dakota. It is matter of notorious knowledge in this state that that question arises on the language contained in the original charter of the Northern Pacific Railroad Company, as granted by the United States. That charter was granted in 1864, long before the State of North Dakota was carved out of the Territory of Dakota, and it contains this language: "That the right of way through the public lands be and the same is hereby granted to the said Northern Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed. * * * Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, work shops, depots, machine shops, and switches, side tracks, turn tables, and water stations; and the right of way shall be exempt from taxation within the territories of the United States." 13 Stat. 367. A casual reading of this language shows that the right of the State of North Dakota to tax the right of way of the Northern Pacific Railroad Company is indeed in doubt. It is a question of greatest importance to this state, and in the condition of this record; and, with the parties here before us, it would be highly improper for this court to, in any measure, intimate an opinion on this subject. We do not do so. But we do say that if the preamble quoted, or if this record as a whole, established it as a fact that, in the judgment of the board, the State of North Dakota had the right to tax this property, then, indeed, the validity of this entire tax would be a grave question, and one upon which we find no authority. We must be permitted to doubt the power of any board of assessors to compromise and fritter away public rights which they believe to exist. But the record in this case does not show that such was the judgment of the board, nor have we a right to presume that such was their judgment, because that requires us to presume that they did, or attempted to do, an unlawful thing. Rather, it is our duty, in the support of this tax, to presume that this low

valuation was fixed because, in the judgment of the board, the property was exempt from taxation. Nor is this presumption inconsistent with the fact that the board placed a valuation on the property. They were the agents of the state charged with the duty of providing revenue for the state; anxious to make that revenue as ample as could reasonably be done. If the board knew—and the preamble clearly indicates that it did know—that the railroad company, in the uncertainty, surrounding the question, was willing to pay something rather than litigate, the board might readily conclude that its duty to the state required it to assess the railroad property to the last farthing that could be collected without forcing a litigation that might demonstrate that the railroad company was not required to pay anything. Upon that theory, if thereby it injured anybody, it was the railroad company; and, to the extent that it injured the railroad company, it benefited all the other taxpayers of the state, including respondent, and they could not be heard to object to such action. Respondent failed to prove that the assessment of the railroad company was invalid.

Respondent also pleads that there was no valid levy of taxes for the years included in the tax sales, and in this court he urges that the evidence supports the allegation. The first attack is upon the state levy for the year 1890. Section 48, Ch. 132, Laws 1890, which went into effect March 11, 1890, provided that the state tax should be levied by the legislative assembly. The legislature that passed that act levied no tax whatever for the year 1890. That was our first year of statehood. Prior thereto the territorial tax had been levied by the territorial board of equalization. Comp. Laws, § 1588. When the state board of equalization—which succeeded to the general duties of the territorial board—met in August, 1890, it proceeded to levy a state tax within the limit prescribed by law. The counties were notified of the tax so levied, and it was carried out on the tax lists. When the legislature convened in 1891, it proceeded by chapter 104 of the laws of that session to legalize the tax so

levied by the state board of equalization, and declare it as valid for all intents and purposes as if made by the legislative assembly as provided by law. The state had a right to levy a tax. The levy thus sought to be invalidated was one that the legislature might originally have made, or might have authorized the board of equalization to make. Clearly, under the authorities, the legislature could cure this defective levy. See Desty, Tax'n, 617, 618, and the cases cited; Cooley, Tax'n, 300, note 2. It may be proper to add that Ch. 106, Laws 1891, removed the duty of levying the state tax from the legislature, and placed it again upon the board of equalization.

The validity of the levy made by the county commissioners of Cass County in each of said years is denied. This denial is based upon an alleged failure of the board to comply with the provisions of said section 48 of the revenue law of 1890. That section provides that the county tax shall be levied by the county commissioners at the July meeting in each year, and that "such taxes shall be based upon an itemized statement of the county expenses for the ensuing year, which statement shall be included in the published proceedings of the board," etc. It is claimed that the levy was not based upon the required statement. To establish this claim, the respondent introduced in evidence the record of the levy made by the county commissioners each year. This record shows that in each of said years the county levy was made by resolution duly passed, which embraced a levy of specific amounts for some 17 different and specific purposes, all of which were ordinary and legitimate county expenses. We note some of them:

For interest and sinking fund	$22,000
For roads and bridges	500
For District Court	10,000
For Justice Court	3,000
For county jail	1,500

The entire levy is thus itemized, and a specific amount levied for each item. No part of the proceedings of the county board is offered in evidence, save the offer and adoption of this resolu-

tion; and the auditor certifies that the same is a true copy of the tax levy, as the same appears in the record of the proceedings of the county commissioners. We fully agree with counsel that under the laws it was mandatory upon the commissioners to make an itemized statement of the county expenses for the ensuing year, and that such statement should be made a part of the record of their official proceedings. In the judgment of my associates, the evidence introduced affirmatively establishes the fact that this was done. The law requires no particular form for this statement—no particular manner in which it should be made. The record shows a particular amount designated for each item of county expenses for the ensuing year. This being, in substance, what the law requires, and all that it requires, it is immaterial in what form or connection it may be found in the record, so long as the law is silent upon those points. Said § 48 requires the taxes to be levied in "specific amounts." But such taxes must be "based upon an itemized statement of county expenses for the ensuing year." The specific amounts must correspond with the itemized statement. Hence, it is not necessary that the figures be duplicated in the commissioners' record. Appearing once therein in the form required by law, showing clearly the amount which the commissioners intend shall be expended for each item of county expenses for the ensuing year, it in no manner impairs their identity as an itemized statement that the same figures designate the amount of the levy for such purposes for the ensuing year. For these reasons my associates conclude that the respondent failed in his attack upon the county levy. I fully concur in this conclusion, but prefer to base my judgment, not on the ground that the record affirmatively shows that the levy was good, but upon the ground that the record does not show that the levy was bad. In other words, respondent failed to overcome the legal presumption that the levy was valid. While the levy must be based upon an itemized statement, such statement is no part of the levy. The two things are entirely distinct. They need not be made at the same sitting, or at the same

session. The only part of the commissioners' record here introduced pertains to one sitting, and to the levy proper. I find nothing to negative the idea that a complete and technical itemized statement of county expenses for the ensuing fiscal year may not be found elsewhere in their records.

The next attack on the levy to be found in the record is that made upon the levy of the city taxes during the years in question. The City of Fargo is, and was during said years, acting under the general city incorporation law, being §§ 844 to 1021, inclusive, of the Compiled Laws. Section 880 requires that "the yeas and nays shall be taken upon the passage of all ordinances and upon all propositions to create any liability against the city or for the appropriation and expenditure of its money." It is urged that in making the city levy the yeas and nays were not taken, and the record of the city council is introduced to prove it. The record shows that the yeas and nays were called, but it does not show who voted "Aye," or who voted "Nay." It simply says, "Passed by an aye and nay vote, all voting aye." We will assume that the law requires in the cases specified that the ayes and nays shall be entered at large in the journal. Still we think this attack must fail also. There are three classes of cases where the statute requires that the yeas and nays shall be taken: First, upon the passage of all ordinances; second, upon all propositions to create any liability against the city; and, third, upon all propositions for the appropriation or expenditure of the money of the city. That a tax levy is not a proposition to create any liability against the city, or for the appropriation or expenditure of its money, is too clear for discussion. Is it an ordinance? Black defines an "ordinance" to be: "A rule established by authority; a permanent rule of action; a law or statute." See Black, Law Dict. In Dill. Mun. Corp. § 307, (4th Ed.) it is said that in this county the word is "limited in its application to the acts or regulations, in the nature of local laws, passed by the proper assembly or governing body of the corporation." In *Citizens' Gas & Min. Co.* v. *Town of Elwood*, 114 Ind. 332, 16

N. E. Rep. 626, Judge Elliot says, "It means a local law prescribing a general and permanent rule." A tax levy comes within none of these definitions. It is not a law—not a rule of action. It has no permanency. Once acted upon, it is *functus officio*. It carries no command to the public generally. It is not a thing that can be violated. It has no single element of what is generally understood to be an ordinance. It never properly, and seldom in fact, assumes the form or name of an ordinance. It is generally made by a resolution of the proper body. Such was the case in the levies under consideration. And for the passage of that resolution there was no statute requiring that the yeas and nays be taken. It is true that section 956, Compiled Laws, requires the city council, in each year, to pass an ordinance to be termed the "Annual Appropriation Bill," but the levy was not based on this ordinance. Section 922, Compiled Laws, declares that the city tax levy shall be "based upon estimates furnished by the city auditor or a committee of the city council," and there is no complaint that this basis was lacking. Possibly these remarks may not apply to the levy of 1893, as Ch. 33 of the Session Laws of that year made some changes in the law on this subject; but, as the tax sale certificates relied upon by appellants were based on the taxes for 1890 and 1892, we are not called upon to further notice the levy for 1893. The levies upon which the certificates were based were good, beyond question.

Respondent also urges that the sale was invalid because the interest and penalty charged against the property was 1 per cent. too much. Assuming this to be the case, we are nevertheless clear that, in view of the provisions of §§ 72 and 82 of the revenue law of 1890, (Ch. 132) the sale was not thereby rendered invalid. Section 72, in terms, declares that no tax sale shall be set aside or declared invalid unless for certain reasons therein specified, and a sale for an excessive amount is not one of the cases so specified. Section 82 vests in the owner of the fee the right to obtain from the auditor a warrant on the county treasurer for any amount paid into the treasury on the sale of any piece or parcel

of land for taxes in excess of the amount due upon such piece or parcel at the time of the sale. If, for any reason, whether because the purchaser sees fit to bid more than the amount of the tax, or because the auditor, in settling, makes a mistake in computing the amount due, the purchaser pays more than the amount due at the time of the sale for taxes assessed against the property, the owner can call upon the auditor to give him a warrant upon the treasurer for such excess. Should the auditor fail to comply with that request, in a proper case mandamus would lie to compel him so to do. It follows that no injury can accrue to the owner from the sale of this property for an amount in excess of the taxes due, and it is therefore entirely reasonable that it should be provided in another section (§ 72) that such a sale should not be set aside as invalid.

It is also urged that the law under which such sales were made (§ 70, Ch. 132, laws 1890) is void because it provides for a sale of the entire tract, and there is no provision for the sale of any fractional part thereof. We are not pointed to any constitutional provision that this law violates, but we are cited to two cases in Virginia (*Martin* v. *Snowden*, 18 Grat. 100, and *Downey* v. *Nutt*, 19 Grat. 59) as announcing that doctrine. These cases both arose under the acts of congress for the collection of direct taxes in the "insurrectionary districts" during the war of the Rebellion, and the point is based upon the theory that the federal government is a government of limited powers, having only such powers as are expressly delegated to it, and that while congress has power to lay and collect taxes, and power to pass all laws which shall be necessary and proper to carry that power into execution, yet it was not necessary that the whole tract should be sold in order to collect the tax, and therefore, when congress so directed, it was exercising a power that had not been delegated to it. But, of course, this reasoning has no application to a state legislature. We think the legislature had the power to pass the act. Its propriety is not for us to consider.

The District Court of Cass County will set aside its judgment

herein, and enter judgment dismissing the action, with costs of both courts in favor of appellant.

Reversed. All concur.

ON REHEARING.

An earnest appeal has been made to us to order a reargument of this case. We do not think we would be warranted in so doing, but it is proper that we briefly notice some of the claims put forth by the learned counsel in his petition for a rehearing.

It is urged that this is a statutory action, given by § 72 of the revenue law of 1890, and that under that statute it was only necessary for the plaintiff to set forth his record title, and that thereupon it became incumbent upon defendant to affirmatively plead his title under the tax proceedings, and that the burden rested upon him to establish the validity of such proceedings, at every step, by affirmative proof. In this, counsel is in error. Said § 72 gives no right of action. A careful perusal of the entire section will show that its purpose was to remove the statutes of limitations theretofore existing against the several actions enumerated in the statutes. True it is that under § 5904, Rev. Codes, being § 5449, Comp. Laws, a party may bring an action to determine conflicting claims to real estate, in which he need only set forth his title, and allege that the defendant claims an estate or interest in the land. To this challenge the defendant must respond by setting forth the basis of his estate or interest, and, of course, the burden is upon him to establish his affirmative allegations. But this procedure was never exclusive. A party always had the right to bring an ordinary action in equity to remove a cloud from his title, and in that form of action it was always necessary for him to set forth the matters constituting the cloud, and establish their illegality. In this case plaintiff chose the latter method. He set forth defendant's claim of title, and set forth in detail the facts which, from his standpoint, rendered such claim invalid. The defendant might content himself with a denial of these facts, and upon the trial of such

issue the ordinary rules of evidence would prevail. The burden was upon plaintiff, and the presumptions against him.

Complaint is made of the summary manner in which the opinion disposes of the Island Park property. We think it justified by the record. But, however that may be, we cannot accept the evidence of the assessor as to the value of the property at the time of the trial—years after the assessment—as contradicting his evidence that at the time of the assessment he assessed all property at what he deemed its fair and reasonable value. Nor can we accept his testimony that such property was not used exclusively for church purposes as having any bearing upon the case. If the board of equalization, in remitting the taxes on the property, honestly believed it to be exempt as church property,—and there is not even an intimaton to the contrary,—then clearly, under the authorities cited in the opinion, their mistake would not invalidate the tax.

It is again urged that a statute which authorizes a sale of the entire tract, when not necessary in order to realize a sufficient sum to pay the taxes and charges, is a violation of the constitutional provision against taking property without due process of law. This might be true, if the statute contained no provision that the surplus should go to the land owner. When a statute directs that only so much land shall be sold as is necessary to pay the tax, then the sale of an entire tract without offering a part, or without some evidence that the sale of the whole was necessary, is always void. Some of the cases on this point will be found collated in note 2, Cooley Tax'n p. 496. And the same has been held where the statute was silent as to the amount to be sold. See cases in note 1, same volume and page. But a statute directing the sale of the entire tract, reserving the surplus for the land owner, is expressly recognized by Mr. Cooley as a proper method for saving something to the owner. See page 495. This has long been the exclusive method in many of the states, and no case has been found to question the validity of such a statute, save the two cases in Gratton cited in the opinion, and which are

confined to a federal statute. Upon the point that the sale was for a greater amount than was legally due under the assessment and levy, the opinion was prepared upon the theory that respondent's contention was correct on the facts, and we are not prepared to recede from what we said on that theory. But a close inspection of the tax lists shows that a decision of the point was not necessary. The sale was for the correct amount, and no more.

By inadvertence one point raised in the case was not noticed in the original opinion. In 1890 the state board of equalization, after equalizing the valuations throughout the state, adopted a motion, duly made, to raise the assessed valuation of all real estate 10 per cent. The motion recited that it was "for the purpose of raising revenue for the state." This language was unfortunate, in that it subjected the board to criticism for performing an act which it had a perfect right to perform. All taxation is for the purpose of raising revenue. The statute not only gave the board of equalization the power, but it made it the absolute duty of the board, in case property was assessed below its actual value, to raise the assessment to the actual valuation. There is no suggestion that this power was exceeded. Should we admit that a wrong motive was assigned, still that would not invalidate a proceeding strictly enjoined upon the board as a duty. Neither in the briefs of counsel nor in the oral argument was there any extended discussion touching the validity or effect of the so called curative act of 1891,—being Ch. 104 of the Session Laws of that year,—passed for the purpose of curing the levy for state purposes made by the state board of equalization in the year 1890. It must be conceded that such board had no authority whatever to make such levy at the time it purported to make the same. The legislature of 1890 had clothed itself with the authority, but had adjourned—no doubt inadvertently—without exercising the power. The question arises, then, whether or not it was competent for the legislature, by a subsequent enactment, to validate this levy so made without authority. This question

has received elaborate consideration in the petition for rehearing, and authorities are cited which seem to hold contrary to the view expressed in our opinion. The text in Desty on Taxation is particularly strong. It is there said, at page 620: "The curative power of the legislature can reach things voidable only, not void, —defects of execution only, not of authority or jurisdiction,—and is confined to defective proceedings under previous legislative authority." In note 12 the author cites a large number of cases to support his text, mostly from Wisconsin. We have examined these authorities with care, and we think the language of the author is broader than these authorities warrant. Many of the cases cited relate to efforts to cure, by subsequent legislation, judicial proceedings which were void by reason of want of jurisdiction of the court. It is the universal holding of the courts, as well as the universal understanding of the bar, that this cannot be done. But we believe a far less rigorous rule is applied to the acts of officers and official boards generally. It is true that in *Kimball* v. *Town of Rosendale*, 42 Wis. 412,—a case involving the acts of the town board of supervisors,—the exact language is used which we have quoted from Mr. Desty's valuable work. But the language was not necessary in the case. The town had assessed and levied a special and unauthorized tax, which the legislature subsequently undertook to validate. It was held that this could not be done, because the constitution of Wisconsin deprived the legislature of the power to pass any special law for the assessment and collection of taxes, and, as the legislature could not have originally authorized the tax, of course it could not subsequently validate it. Moreover the learned jurist who wrote the opinion in that case introduced the language quoted in these words: "Perhaps the true limit of the curative power of the legislature, as gathered from all the authorities and sanctioned by principle, is, or ought to be, that it can reach things voidable only, not void," etc. And following the language quoted he says, "It is true that many most respectable authorities do not set so narrow a limit to the power." An examination of

the Wisconsin cases will show that the Supreme Court of that state did not adopt the narrow limit. In *Single* v. *Supervisors*, 38 Wis. 363, Lyon, J., says: "For the purposes of these appeals, it will be assumed that the proceedings of the board of supervisors on the 15th of March and the 4th of September [1873] were without authority of law, and but for the legislation of 1874, that the same are entirely void. We are thus brought at once to consider and determine the validity and effect of that legislation." And a unanimous court, of which Chief Justice Ryan, who wrote the opinion in *Kimball* v. *Town of Rosendale*, was a member, held that the subsequent legislation validated the void proceedings of the supervisors. See, also, opinion of Dickson, C. J., in *Fisk* v. *City of Kenosha*, 26 Wis. 33. These cases are not questioned in the case in 42 Wis. But, conceding that cases may be found which seem to support the doctrine of the text in Desty, we think the better authority is the other way. The case of *Boardman* v. *Beckwith*, 18 Iowa, 292, is very much in point. There a general revenue law had been passed in 1858 repealing all prior laws on the subject, but the statute failed to make any provision whatever for the assessment and levy of any tax for the year 1858. Notwithstanding this omission, the officers and boards charged with those duties under the old statutes proceeded to assess and levy a tax, and the next legislature passed an act validating such unauthorized proceedings; and the court, in sustaining such curative act, said: "The point made upon this legislation is that it was not competent for the general assembly to thus legalize the levy and assessment of 1858; that, as there was no law at the time authorizing such levy and assessment, all proceedings thereunder, notwithstanding the curative act, were illegal and void. Whatever doubt there might be if the act of 1860 had taken effect after the sale and purchase under which plaintiff claims, there can be no room for controversy when it is remembered that it was passed and took effect long prior to that time. [This act took effect May 9, 1860.] That it is competent to thus legislate, we entertain no doubt. The power of the legislature to pass acts of

this character, conducive as they are to the general welfare, and based upon considerations of controlling public necessity, is, in our opinion, undoubted. It does not interfere with vested rights, nor impair the obligation of any contract. This case was approved and followed in *Land Co.* v. *Soper*, 39 Iowa, 112, and again in *Richman* v. *Muscatine Co.*, 77 Iowa, 513, 42 N. W. Rep. 422. The case of *Grim* v. *School Dist.*, 57 Pa. St. 433, goes even further. There a tax had been levied without lawful authority. It was paid under protest, and suit brought to recover the money so paid. After the action was brought the legislature passed a curative act validating the tax. The court, in an exhaustive and well reasoned opinion, among other things says: "It has not been pretended, and could not be, that the legislature had not the power antecedent to authorize it. If so, they could cure any irregularity or want of authority in levying it by a retroactive law, even though thereby a right of action which had been vested in an individual should be divested. It is within the principle of all the decisions of admitted authority." This case is followed, and the above language quoted with approval, in *City of Chester* v. *Black*, 132 Pa. St. 568, 19 Atl. 276, and the principle is reaffirmed in *Donley* v. *City of Pittsburg*, 147 Pa. St. 348, 23 Atl. 394, and is announced by the Supreme Court of Minnesota in *Kunkle* v. *Town of Franklin*, 13 Minn. 127 (Gil. 119.)

In this case, as we said, in effect, in the original opinion, the tax was one which the state was empowered to levy and collect. It was recognized both by the constitution and the statute law, and was within the limits there fixed. It represented the just and equitable amount which respondent ought to pay the state. Its only defect was that it was levied by an unauthorized board. It is undisputed that the legislature might have placed the power to make the levy with the board that did make it. The power had been lodged there previously, and was subsequently placed there again. The curative act was passed, not only before the tax sale, but before the tax became delinquent. No vested right was disturbed. Under the foregoing authorities, which meet our

unqualified approval, the action of the legislature must be upheld. The other points in the case require no further notice.

Petition denied.

(69 N. W. Rep. 5.)

THE STATE EX. REL. J. B. WINEMAN *vs.* C. M. DAHL.

Opinion filed October 8, 1896.

State Legislature—Joint Resolution.

The expression of the sovereign will of the legislature that a particular proposition or question be submitted to the people to be voted upon need not take the form of a law. It is sufficient if it be in the form of a joint resolution.

Constitutional Convention.

Accordingly, *held*, that it is the duty of the secretary of state to certify to the county auditors of the various counties in the state a joint resolution passed by the legislature, that the question whether a constitutional convention should be held should be submitted to the people.

Mandamus, on the relation of J. B. Wineman, to compel C. M. Dahl, secretary of state, to certify to the county auditors of the various counties of the state a joint resolution passed by the legislature, that the question whether a constitutional convention shall be held shall be submitted to the people.

Peremptory writ granted.

J. B. Wineman and *Burke Corbet*, for relator.

John F. Cowan, Atty. Gen'l, for respondent.

CORLISS, J. An alternative writ of mandamus having been issued by this court in the exercise of its original jurisdiction, the defendant appeared and answered the writ. A demurrer having been interposed to such answer, the case presents to us only questions of law. The object of this proceeding is to compel the defendant, as secretary of state, to certify to the county auditor of each county a certain joint resolution adopted at the last session of the legislature. It is in the following words: "Concur-

rent Resolution. Be it resolved by the house of representatives of the State of North Dakota, the senate concurring therein, that, in the opinion of the legislative assembly, the best interests of the state require that a constitutional convention be called at some future date, for the purposing of revising the constitution. Therefore, it is hereby recommended to the electors of the state of North Dakota that at the next general election, to be held on the first Tuesday after the first Monday in November, 1896, that they vote for or against a convention to revise the constitution of the state." Section 83 of the constitution declares that the powers and duties of the secretary of state shall be as prescribed by law. One of these duties is to certify to the county auditors propositions or other questions to be submitted to the people. Rev. Codes, § § 491, 509. It is obvious that the body which is vested with power to designate the question to be submitted to the people is the legislature. This proposition is not controverted; nor is it disputed that that body has expressed its will that there should be submitted to the people the question whether a constitutional convention should be called to revise the constitution. But it is insisted that this expression of sovereign will is not in constitutional form, and is therefore without legal effect. That it did not take the form of an ordinary law is too clear for controversy. The joint resolution has no title. Its enacting clause is not couched in the language prescribed by the constitution to be employed in the enactment of ordinary laws; nor was it ever submitted to the governor for approval. Whenever it is necessary that the expression of sovereign will should take the form of ordinary legislation, these requirements must be strictly observed. But, in declaring its purpose that a specific proposition should be submitted to the people for their approval or disapproval, the legislature is not discharging the ordinary function of enacting laws. In cases of this kind it has been the established usage to employ a joint resolution as the mode of expressing sovereign pleasure. There is nothing in our constitution indicating a purpose to abrogate this settled practice. It is

a simple and very satisfactory form in which to embody the will of sovereign power; and there is nothing in the nature of such an expression of legislative purpose which renders it necessary that the checks and safeguards which surround ordinary legislation should be applicable in cases of this character. No permanent general rule is thereby established. The whole force of the resolution is spent upon those officers whose duties it is to see that the proposition therein specified is submitted to the people. When they have performed their duty, there is nothing left but a mere recommendation to the people to express their views on the particular question submitted, to the end that the verdict of the public upon that proposition may furnish a guide to future legislative action. It is not the resolution in this case which imposes any duty on the secretary of state. The duty he is required by this court to perform is imposed upon him by a law passed with all the formalities and solemnities essential to a valid enactment. That law declares that he must certify to the county auditors such question or proposition as is to be submitted to the people; and the body which has power to designate the proposition or question to be submitted is, as we have already asserted, the body which inheres sovereignty. By the joint resolution, that body has designated the question to be submitted, and the law prescribes what the secretary of state shall do towards carrying out its legally expressed will.

There is eminent authority for the proposition that it is not necessary that the legislative will that the constitution should be amended should assume the form of an ordinary law, and be submitted to the executive for approval. This was held by the Federal Supreme Court in *Hollingsworth* v. *Virginia*, 3 Dall. 378. The argument in support of the proposition that the president must approve a proposed amendment to the federal constitution is much stronger than the argument in this case that the governor must approve the action of the legislature in declaring that a particular question shall be submitted to the people. The federal constitution (Art. 1, § 7) provides that "every order, resolution

or vote to which the concurrence of the senate and house of representatives may be necesssay shall be presented to the president of the United States." etc. Yet, despite this provision of the constitution, the court ruled that the eleventh amendment had been lawfully adopted, although the resolution embodying the amendment had not been submitted to the president for approval. This was in 1794. The amendments which were made in 1789, 1803, and 1866 were carried through without the action of the president. In 1865 the slavery amendments were inadvertently submitted to the executive, and approved by him. On discovering this fact, Senator Trumbull, of Illinois, chairman of the judiciary committee, introduced a resolution declaring its submission to him to have been an inadvertent act, and that his approval was unnecessary and of no effect. The resolution also asserted that that case should not constitute a precedent for the future. It was adopted without division. But it is unnecessary to pursue this line of discussion any further. Under many state constitutions containing provisions with regard to the enactment of statutes similar to those found in the organic law of this state, it has been, and is, customary to express by joint resolution the will of the legislature on matters not falling within the category of ordinary legislation. Such course has not, so far as we have been able to discover, ever been successfully challenged as being repugnant to the supreme law. Our constitution plainly recognizes the legality of the expression of sovereign will by joint resolution. See § 66. This section declares that the presiding officer of each house shall sign all bills and joint resolutions. We do not think that it was the purpose of the people to interfere with this settled and convenient usage of expressing sovereign pleasure by joint resolution in all cases not falling within the domain of ordinary legislation. We cannot bring ourselves to believe that they intended to require all the forms and procedure essential to a valid law, in cases where the legislature merely desires to express its wish that the people would at the polls inform their servants of their sentiment touching some question of public interest.

Whether aught will come of an affirmative vote on this question is immaterial. It is no concern of the secretary of state whether it is wise or unwise to submit to the people the proposition specified in the resolution,—whether it will lead to practical results or be only an idle form. The sovereignty of the people, speaking through its representatives, is the final judge whether the sense of the people on a grave issue shall be taken at the polls. The secretary of state has naught to do but obey the law, and certify such question to the proper officers, that it may be submitted to the people for their approval or disapproval.

Nor can it be said that it is an empty form to leave to popular vote the grave question whether the people shall assemble in convention, and revise their fundamental law. True it is that the power to take the initiative with respect to the calling of a constitutional convention resides in the legislature. In the absence of any provision in the constitution on the subject, that body alone can give legality to such a convention. If its foundation is in the spontaneous action of the people, without permissive legislative authority, the movement is revolutionary, although no blood be spilled or violence accompany the rising of the people to assert their reserve power of revolution. There was a time in the earlier history of this country when in certain quarters the view was entertained that the people could legally assemble in convention, and revise their constitution, without the sanction of legislative action. See James. Const. Conv. pp. 383-387, 663-666. But this opinion no longer prevails. James. Const. Conv. §§ 219, 394-403, 570, 571, 574h. Judge Jameson says: "The making of provision for the assembling of conventions, and the hedging of them about with the restrictions needed, as well for their efficiency as for the safety of the commonwealth, is emphatically a matter of legislation. It is, moreover a matter of legislation not fundamental in character, but of that species which our constitutions apportion exclusively to the legislative departments created by them. The legislation necessary to initiate and to temper the operations of a convention no department of the

government is competent to effect but the legislature. The sovereign itself could not do it, nor the electors,—bodies whose organization is such as to make diliberation upon the details of laws impossible. Nor is it true, as intimated by the judges in the opinion, that the giving to the legislature, in a constitution, express power to recommend specific amendments to that instrument, involves, by implication, the denial to that body of power to call conventions for a general revision of it. We shall see in a subsequent part of this work that such a grant is applicable only to disconnected and unimportant amendments. It is obvious that a grant of power to propose such amendments in a summary manner, and without the formalities ordinarily attending the enactment of fundamental laws, cannot be considered as an implied prohibition to effect a general revision of a constitution in the only appropriate and practicable way,—by a convention. If it be not in the power of a legislature to call a convention, that fact is not to be inferred from the positive authority to affect a different object in a different way." But while the power resides in the legislature, and that body only, to call a constitutional convention, it is obvious that the agents of the people, who have not been selected on that particular issue, should not take upon themselves the responsibility of burdening the people with the expense of such a movement, without first submitting to them the question whether they desire such a convention to be called. The argument against the taking of the initiative by the legislature in such cases, without first ascertaining public sentiment on the question, is so strong, and lies so plainly on the surface, that in many states the constitution, in terms, requires the submission of the proposition to popular vote, and a majority vote in its favor, before the legislature can legally summon the people to meet in convention to revise their organic law. See James. Const. Conv. pp. 669-671. In 1820 the council of the revision of New York returned to the assembly a bill calling a constitutional convention, with objections to its passage. The ground of these objections was the fact that the legislature had not taken the

sense of the people on the subject. In those objections the conclusion of the council was stated in the following language: "The council therefore think it the most wise and safe course, and most accordant with the performance of the great trust committed to the representative powers under the constitution, that the question of a general revision of it should be submitted to the people in the first instance, to determine whether a convention ought to be convened. The declared sense of the American people throughout the United States on this very point cannot but be received with great respect and reverence; and it appears to be the almost universal will, expressed in their constitutional charters, that conventions to alter the constitution shall not be called at the instance of the legislature without the previous sanction of the people, by whom those constitutions were ordained." It was therefore a very proper step for the legislature to take to declare that the people should be allowed to be heard on this question before final legislative action.

It is unnecessary for us to express any opinion on the question whether § 202 of the constitution, prescribing the mode of amending the same, prevents the lawful assembling of a constitutional convention in this state to revise the fundamental law. The decided weight of authority and the more numerous precedents are arrayed on the side of the doctrine which supports the existence of this inherent legislative power to call a constitutional convention, notwithstanding the fact that the instrument itself points out how it may be amended. See James. Const. Conv. § § 570-574d. But see *In re Constitutional Convention*, 14 R. I. 649. Opinion of Justices of Supreme Court, 6 Cush. 573.

The peremptory writ will issue as prayed for. All concur.

(68 N. W. Rep. 418.)

A. J. ELLESTAD *vs.* NORTHWESTERN ELEVATOR COMPANY.

Opinion filed November 10th, 1896.

Owner of Land Presumptive Owner of Crop.

The owner of real estate is presumed, *prima facie*, to own its products, including annual crops. Such presumption, however, is not conclusive and may be rebutted by evidence.

Ownership of Crop—Question of Fact for the Jury.

The evidence showed that B. was the owner of land upon which he did not reside, but lived elsewhere in the vicinity of the land. L., from seed purchased from plaintiff, planted, harvested, threshed, and sold a crop raised on said land in 1894. During seeding time, and for a short time prior thereto, L. resided on the land with his family, but resided elsewhere at all other times in question. Whether B. consented or did not consent to such occupancy by L. does not appear. *Held*, that it was not error in the trial court to submit such evidence to the jury upon the question of L.'s ownership of said crop.

Sale of Crop was Conversion and Entitled Mortgagee to Possession Before Maturity of Debt Secured.

L. gave a chattel mortgage on the crop to the plaintiff, which was duly filed for record. After the mortgage was filed, but before the maturity of the debt secured by it, L. sold the crop to the defendant, and the defendant received possession thereof in one of its elevators. The mortgage embraced the usual stipulations empowering the mortgagee to take possession of the property at once upon a sale or other disposition of the property by the mortgagor. *Held*, that the sale and delivery of the crop to the defendant by the mortgagor operated, *eo instanti*, to vest in the plaintiff the right to take possession of the crop, and to sue for and recover either the crop itself or its value. Defendant acquired title by its purchase of the crop, but such title was incumbered by the mortgage, of which defendant had constructive notice.

Appeal from District Court, Richland County; *Lauder*, J.

Action by A. J. Ellestad against the Northwestern Elevator Company. Jndgment for plaintiff. From the judgment, and an order denying a new trial, defendant appeals.

Affirmed.

Ball, Watson & Maclay, for appellant.

The presumption of ownership in Lee was overthrown by proof that the land was anothers. *Millard* v. *McDonald Lumber Co.*, 25 N. W. Rep. 656. The defendant had no actual notice of the

chattel mortgage and received the wheat before the debt secured by the mortgage matured. Its possession was rightful. *Sanford* v. *D. & D. Elev. Co.*, 2 N. D. Rep. 6. The defendant in trover and conversion may defeat the action by showing title in a third person with whom it is not in privity, where the original taking was not unlawful. *Blakely* v. *Douglas*, 6 At. Rep. 398; *Bibble* v. *Lawrence*, 17 N. W. Rep. 60; *Seymour* v. *Peters*, 35 N. W. Rep. 62; *Railroad* v. *Lewis*, 162 U. S. 366. Plaintiff must show a general or special ownership in the property converted and possession or a legal right to immediate possession at the time of the conversion. *Parker* v. *Bank*, 3 N. D. 87; *Turley* v. *Tucker*, 6 Mo. 583; *Hungerford* v. *Redford*, 29 Wis. 345; *Schulenberg* v. *Harriman*, 21 Wal. 44; *Railroad* v. *Jones*, 27 Ill. 41; *Murphy* v. *Ry. Co.*, 55 Ia. 473, 8 N. W. Rep. 320. Where crops are put upon land without license or authority, trover may be maintained by the owner of the land for their recovery. *Simpkins* v. *Rogers*, 15 Ill. 397; *Crotly* v. *Collins*, 13 Ill. 567; *Hungerford* v. *Redford*, 29 Wis. 345.

McCumber & Bogart, for respondent.

The possession of Lee was *prima facie* evidence of ownership of both the land and the crop. 19 Am. and Eng. Enc. L. 53. The presumption is that Lee's possession was lawful and the burden was on the defendant to repel this presumption. *Gilpin* v. *Sierra Nevada Mining Co.*, 23 Pac. Rep. 547; *Lunn* v. *Parker*, 3 N. H. 50; *Newell* v. *Wheeler*, 7 Mass. 189. Lee as a trespasser was the owner of the crops raised by his own labors, as against any other than the owner of the soil. *Lindsay* v. *Winona & St. P. R. R. Co.*, 29 Minn. 411.

WALLIN, C. J. The facts which we deem necessary to a proper disposition of this case, as we gather them from the record, may be briefly stated as follows: In the month of May, 1894, one Lee executed and delivered to plaintiff his promissory note, payable to the plaintiff, for $61.20, and to secure the payment of such note said Lee made and delivered to the plaintiff his chattel mortgage, describing certain land in Richland County, and

whereby he mortgaged to the plaintiff all crops to be sown, grown, or harvested upon such land in the year 1894. The note was given to plaintiff for the purchase of seed wheat, which Lee sowed upon the land, and from which Lee, in 1894, raised, harvested, and threshed a crop of wheat, which aggregated in value a sum much greater than the amount due on the note at the time of the trial. For a short time prior to seeding the land, and during seeding time, Lee resided upon the land, but at all other times in question he resided elsewhere in the vicinity of the land. A son of Lee testified, in substance, as follows: "My father was in possession of the land in the spring and summer of 1894, and raised wheat on it. I and my father and the hired man did the work. My father worked the land." The crop which he raised upon the land that year was from seed wheat furnished him by the plaintiff. The wheat was threshed in September, 1894. There was about 1,100 bushels threshed. This wheat was hauled to defendant's elevator, and was delivered to the agent in charge of the elevator. The fact of the delivery of the wheat and its value are not controverted, nor is the fact that a proper demand was made for the wheat by the plaintiff before bringing the action. There is no claim that the note or any part of it was ever paid. The action is brought to recover damages for the conversion of the wheat, and the plaintiff demands judgment for the sum due on the note, and for certain items of disbursement made by plaintiff in his efforts to recover the possession of the wheat from the defendant. Defendant offered testimony of a documentary character to show that, at the time in question, and prior thereto, and ever since, one Benson, who resided some eight miles distant from the land, was the owner, and was seized of a fee-simple title thereto. The testimony was admitted against objection, but, in the view we take of the case, it will be necessary to pass upon the technical competency of the evidence, and we shall assume, for the purpose of the case, that Benson was the owner of the land prior to and during all the time in question. Benson is not a party to the action, nor does it appear that he has at any time

asserted a claim to the crop, or to any part of it. At the close of the testimony defendant's counsel requested the trial court to return a verdict in its favor, which request was denied, and this ruling is assigned as error in this court. Error is also assigned upon the following instruction, given to the jury: "Now, I instruct you that, because the title to this land was in Mr. Benson, it does not necessarily follow that he owned the crop, because the owner of the land might have rented it. There is no testimony upon the point as to the right Mr. Lee had to the possession of the land, but you have heard the testimony as to who sowed the crop, and who threshed it, and you will determine who owned the crop—Mr. Lee or Mr. Benson. If Mr. Lee owned the crop, then the lien of the mortgage attached, and the plaintiff had a right to the possession of the wheat." The verdict and judgment were for the plaintiff.

The defendant's counsel present the principal question to be determined in the following language, which we quote from their brief: "It will be perceived that but a single question is presented for decision upon this appeal, viz.: was the mortgagor's possession of the land, and the crop produced thereon by his labor, sufficient evidence of his title to such crop, in the face of the proof that the land at all times belonged to another?" Counsel for defendant contend that Benson's ownership of the land carried with it, as an incident, the ownership of the crop raised upon the land; and, secondly, that in conversion the burden is upon the plaintiff to show ownership and the right of possession, and that to defeat the recovery the defendant will be permitted to show title in a stranger. To show that the owner of the land is entitled to the products thereof, counsel cite § 3316 of the Revised Codes, which reads: "The owner of a thing owns also all its products and accessions." The principles of law contended for by counsel as above stated may be conceded, without, as we think, accepting the conclusions for which counsel are contending. It is an essential rule of the common law, and recognized as such in the provision of the Code above cited, that the

ownership of realty carries with it, as an incident thereto, the *prima facie* presumption of the ownership of both the natural products of the land, such as grass and trees, and the emblements, or annually sown crops. This rule is elementary. Nevertheless, it is quite clear that such presumptions are not conclusive. They may be overcome by competent evidence, in a given case, that the natural products or the annual crops do in fact belong to another than the owner. If this were not the law, then a tenant for years or at will or at sufferance, or a mere licensee, would not be permitted to prove his title to a crop or any part of it. We do not understand that counsel take such an extreme position. Their contention seems to be that, in the case under consideration, the evidence of Lee's ownership of the crop, which was not objected to, is not sufficiently cogent to overcome the legal presumption that the owner of the fee owned the crops. The real question, therefore, is whether the testimony offered by the plaintiff, and admitted without objection, constituted any legal evidence tending to establish Lee's ownership of the crop. Upon this point we are entirely clear. The evidence of the plaintiff tends strongly to show that, when Lee made the note and mortgage, and delivered them to the plaintiff, he was the owner of the crop. The note secured by the mortgage was given to Lee for the seed grain from which the crop was grown upon the land described in the mortgage, and upon which Lee then resided with his family. The work of seeding, harvesting, threshing, and marketing the grain was done either by Lee personally, or by his procurement, and at his expense. As we have seen, a son of Lee testified that his father was "in possession" of the land in the spring and summer of 1894, and raised wheat on it. He also said, "My father worked the land." And it appears that, while the owner of the land resided in its vicinity, there is no evidence that he ever objected to Lee's occupancy of the land, or ever has at any time made claim to the crop, or any part of it. We are aware that all of these facts might exist without absolutely proving Lee's ownership of the crop. It is possible that all that Lee

did in and about the crop might have been done as an employe of Benson. But we are dealing with evidence, and the question presented is whether such evidence has any reasonable tendency to show ownership in Lee. We think it does, and that the jury drew the proper inference of fact from the evidence. Certainly, there can be no presumption, under the evidence, that Lee was a trespasser or a wrongdoer. An act which may be lawful is not presumed to be unlawful. The presumption is exactly the other way. *Lewis* v. *Disher*, 32 Wis. 506; Best, Ev. § § 346, 349; *Gilpin* v. *Mining Co.* (Idaho) 23 Pac. Rep. 547. The burden was on defendant to show that the possession of Lee was not lawful. In the absence of any evidence tending to show that Lee committed a trespass upon the land, we are not called upon to consider whether a trespasser becomes the owner of an annual crop raised by him while a trespasser.

The note matured in November, 1894. The grain was delivered to defendant's elevator by the mortgagor in September of the same year. Upon these facts, counsel make the point that, when the conversion took place, the defendant did not have either actual possession or the right thereto, and hence that the action will not lie, under an established rule of law applicable to cases of conversion; citing *Parker* v. *Bank*, 3 N. D. Rep. 87, 54 N. W. Rep. 313, which announces the familiar general doctrine contended for. But we think the rule does not apply, or, rather, that it cannot be invoked by defendant to defeat this action. A stipulation is contained in the mortgage whereby the mortgagee is empowered to take possession of the grain at once, in the event of a sale or other disposition of the grain being made. The condition upon which this right came into existence happened, and *eo instanti* the mortgagee's right to take possession became operative. The defendant bought the grain with constructive notice of the mortgage, and becomes chargeable with notice of the stipulation to which we have referred. True, defendant acquired title as against the mortgagor (see *Sanford* v. *Elevator Co.*, 2 N. D. Rep. 6, 48 N. W. Rep. 434), but took such title with the burden of the mortgage.

The mortgagee lost no rights under his mortgage by reason of the sale. The sale entitled the mortgagee to demand and sue for the possession, if the property could be had, and where, as in this case, the property had been converted, the holder could sue for its value. The sale gave plaintiff the right to the immediate possession of the property for purposes of foreclosure. Having this, and failing to secure the actual possession, plaintiff is entitled to sue for its value.

Finding no error in the record, we shall affirm the order and judgment appealed from. All concur.

(69 N. W. Rep. 44.)

FLETCHER BROTHERS *vs.* EDWARD M. NELSON.

Opinion filed November 10th, 1896.

Notice of Intention—When Waived.

A notice of motion for new trial, otherwise in proper form, which contains a notice that the motion will be made upon the minutes of the court, and upon a ground specifically stated in the notice, will operate as a notice of intention, as well as a notice of motion. *Held*, further, where the objection is made for the first time in this court that no notice of intention was ever served, that such objection comes too late. The objection is waived by not being made in the trial court.

Delivery of Contract of Sale Passes Title—When.

Where all the terms of a sale of personal property which has been identified are agreed upon, and embodied in a writing signed and delivered, such delivery of the writing operates to pass title to the purchaser. Accordingly, *held*, in the case of a sale of a mare, when the writing so made and delivered contained a stipulation that the sale was made without any warranty, that an oral warranty of quality, made an hour after the delivery of the writing, and made only as an inducement to the purchaser to accept and keep the mare, could not be enforced as a contract, such oral warranty being without consideration.

Authority to Sell Implies Authority to Warrant.

An agent, having authority to sell particular property, has implied power to warrant the goods sold; but, after consummating a sale, the authority of the agent is exhausted. He cannot, by a subsequent agreement, made without the consent of his principal, rescind the sale, and then enter into a new contract of sale to the original purchaser.

Court May Amend Verdict in Claim and Delivery—When.

In claim and delivery, when the value of the plaintiff's interest in the property is not found in the verdict, but such value is not controverted, and may be ascertained by mere computation made upon the pleading, the verdict may be amended by the court, and a judgment may be entered based upon the amended verdict.

Verdict Directed When Facts Not Controverted.

Where facts are not controverted, or are admitted in the pleadings, it is the province of the court to direct a verdict; and this is the rule in claim and delivery cases, as well as other cases of a civil nature.

Error to District Court, Richland County; *Lauder*, J.

Claim and delivery by Fletcher Bros. against Edward M. Nelson. There was a verdict for plaintiffs, and from an order setting the same aside, and granting a new trial, they appeal.

Reversed, with directions.

McCumber & Bogart, for appellants.

W. E. Purcell, for respondent.

WALLIN, C. J. This action was brought to recover the possession of certain personal property, to-wit, two mares, one colt, and a couple of oxen. Plaintiff's claim the right of possession under a chattel mortgage covering the property, which was executed and delivered by the defendant to secure a promissory note for $115. By his answer defendant admits the execution and delivery of the note and mortgage. Further answering, the defendant alleges that the note was given for the purchase price of one of the mares; that said mare was sold with a warranty to the defendant as to her age, soundness, trueness in harness, etc; that said warranty was false, and broken, and that the defendant was damaged thereby; and that the mare was not worth the said purchase price of $115, and was not worth to exceed $25. Upon these issues a jury trial was had. We quote from the abstract: "Both parties having rested, the plaintiff moved the court to instruct the jury to find a verdict for the plaintiffs and against the defendant, that plaintiffs are entitled to the immediate possession of the property described in the complaint, and that

the value of said plaintiffs' special interest in the said property is the amount of the principal and interest due upon the said note, and that the jury find the value of the property described in the complaint." Said motion was overruled, and the plaintiffs excepted. The cause was submitted to the jury with instructions to find a verdict, for the plaintiffs, that the plaintiffs were entitled to the possession of the property described in the complaint; to also find, in their verdict, the value of the property, and also the amount of the plaintiffs' special interest in the property. And the court further instructed the jury, in substance, that the value of the special interest of the plaintiffs in the property would be the amount due upon their note, less the amount of damages the defendant had suffered by reason of the breach of warranty, in case the jury found that there was a warranty made; and that the defendant's damages, in case they found a breach of warranty, would be the difference between what the property purchased would have been worth if it had been as warranted, and what it was actually worth in the condition that it was in at the time of purchase. The jury, after being out, reported that they could not agree upon the matter of damages. The attorney for the plaintiffs then stated to the court: "Before the jury are discharged, I would ask the court, in view of the statement of the juror that the question that they cannot agree on is one of damages, and the court having instructed the jury to return a verdict for the plaintiffs for the possession of the property, that the court withdraw the question from the jury as to the plaintiffs' special interest in the property, and instruct the jury to return a verdict for the plaintiffs for the property described in the complaint, and to find its value. By the Court: Gentlemen of the jury: I instruct you again to bring in a verdict in this case in favor of the plaintiffs, and in addition you will find the value of the property. This question of damages you need not consider further. You will find a verdict for the plaintiffs for the return of the property, and find also the value of the property." Thereupon the jury retired again, and subsequently returned into court

and returned their verdict as follows: "We, the jury in the above entitled action, find for the plaintiffs on all the issues therein; that the plaintiffs are entitled to the immediate possession of the property described in the complaint herein; that the value of the plaintiff's special interest in said property is———dollars; and that the value of the property described in the complaint is two hundred and thirty dollars,"—which verdict was, on the 5th day of January, 1895, duly received by the court and filed in said action.

No further proceedings were taken in said action by either of said parties until the first day of April, 1896, when the attorneys for the plaintiffs served upon the attorneys for defendant a notice of motion for an order directing the entry of judgment, in favor of plaintiffs and against said defendant, upon the verdict rendered in said action, for the recovery of the property described in plaintiffs' complaint or the amount due plaintiffs on the note described therein, in case delivery of the property cannot be had. Thereafter, and before said motion was argued before the court, the attorneys for defendant served notice upon plaintiffs' attorneys for a new trial in said action, returnable on the 21st day of April, 1896. At said last mentioned time both of the aforesaid motions were argued, and after hearing the arguments on said motions, the court made its order as follows: "The above entitled cause having been brought on to be heard on the 22d day of April, 1896, on motion made by plaintiffs for judgment on the verdict, and on motion made by the defendant to vacate and set aside said verdict, and to grant the defendant a new trial in said cause, Messrs. McCumber & Bogart appearing for the plaintiffs and W. E. Purcell, Esq., appearing for the defendant, and the court having heard the arguments for the respective parties on said motions, and being duly advised in the premises, it is hereby ordered that the motion made by the plaintiffs for judgment on the verdict rendered at the January, 1895, term of this court, in said cause, be, and it is hereby, in

all things denied. Further ordered that the motion of the defendant that said verdict be set aside, and a new trial of said action be granted, be, and it is hereby granted, and said verdict is hereby vacated and set aside, and a new trial of said action is granted and hereby ordered." Which said order was served upon the attorneys for the plaintiffs on the 1st day of May, 1896. Upon the coming in of the verdict, the record reads as follows: "The defendant excepts to the verdict, and asks a stay of proceedings of sixty days, in which time to make a motion for a new trial, prepare a bill of exceptions, or statement of the case. The stay is granted." At the same time the clerk made the following entry in the minutes of the court: "Come again the parties, by their counsel, and thereupon the defendant's counsel moved the court to set aside the verdict of the jury, and thereupon the court decided to reserve the decision now." The notice of the motion for a new trial, which was served on plaintiff's counsel, and is referred to above, contained, among other things, the following language: "Said motion will be made upon the minutes of the court, and the pleadings and proceedings herein, and upon the further ground that the court erred in instructing the jury to return a verdict," etc.

In this court plaintiff's counsel makes the preliminary point that the trial court erred in granting the new trial for two reasons: First, that a notice of intention to move for a new trial was never served; second, that the order directing a verdict for plaintiffs was not objected to, and no exception thereto was taken. We think both of these grounds are untenable. The record, as stipulated and completed shows that counsel for defendant did both object and except to the order of the trial court directing a verdict. We quite agree with counsel for the plaintiffs that the stay order and the entry in the minutes are unavailing as a notice of intention to move for a new trial. A notice of intention must be served on the respondent's counsel and must, when the motion is made upon the minutes, as in the case, specify the particular errors or grounds upon which the motion will be made. These

requirements are statutory, and were not met in the record entries above quoted. Rev. Codes, § 5474; *Calderwood* v. *Brooks*, 28 Cal. 153, 154; *Wittenbrock* v. *Bellmer*, 57 Cal. 12. But we find in the record a sufficient notice of intention. It points out, in terms, that the motion for a new trial will be made upon the minutes of the court, and also specifically states the ground of the motion. This notice, it is true, is embodied in the notice of motion, and hence is not, in strictness, a mere notice of intention. But we think the notice sufficient, and this court particularly so rule in *Anderson* v. *Bank*, 5 N. D. 80, 64 N. W. Rep. 114. The record fails to show that plaintiffs objected in the court below, either as to the time or the character of the notice served. If no notice had been served, the objection comes too late when made for the first time in this court. See Haynes, New Trials & App. pp. 61-63. It would seem that a separate notice of intention is less important, in motions for a new trial based on the minutes of the court, than when made on affidavits or upon a statement. On this point see *Id.* p. 54. It is, of course, the correct practice to serve both a notice of intention and a notice of motion in all cases. This is a statutory requirement, and to comply with it is the only safe course to pursue. But the notice may be waived by not objecting in the court below. See, also, *Gould* v. *Elevator Co.*, 2 N. D. 216, 50 N. W. Rep. 969; *Johnson* v. *Railroad Co.*, 1 N. D. 354, 48 N. W. Rep. 227.

Turning to the merits of the controversy, the question presented is whether the order of the trial court directing a verdict for the plaintiffs was a proper order, under the issues and the evidence in the case. If properly made, the order vacating the verdict was necessarily error, and therefore should be reversed; otherwise it should be affirmed. It will be noticed that the final order directing the verdict in terms withdraws from the jury all questions of damages arising upon the defendant's answer, and also ignores the matter of plaintiffs' special interest in the property, and the value of such special interest. The verdict conformed to the final direction of the court. Plaintiffs' special

interest in the property is not found by the jury. Respondent's contention is that the jury should have been directed to consider and pass upon the evidence relating to the counterclaim or defense alleged in the answer, and also directed to find specifically as to the plaintiff's interest in the property. Plaintiffs' counsel argues that the defendant could not legally allege a counterclaim in claim and delivery. But this position is not available to the plaintiffs, because the point has been waived by failure to demur to the answer on that ground. See *Bank* v. *Laughlin*, 4 N. D. Rep. 391, 61 N. W. Rep. 473. Besides, we think it proper, in an action between the mortgagor and the mortgagee, to litigate the value of the plaintiff's interest, in view of the alternative judgment which the statute allows to be entered in cases where the return of the property cannot be had. *Bank* v. *Farmer*, 5 Dak. 282, 40 N. W. Rep. 345. It follows that, whether the damage pleaded in the answer constitutes a counterclaim, or whether it is only defensive matter, is immaterial in this case.

The evidence bearing upon the warranty alleged in the answer may be briefly stated as follows: At the time of the delivery of the note and mortgage, the vendors made a bill of sale of the mare, which was signed, on behalf of the vendors, by their agent, W. J. Smith, and also signed by the defendant. The bill of sale embraced the following stipulation: "And it is hereby distinctly understood and agreed that no representation or warranty respecting said mare is made as an inducement for or in connection with this sale." At the time of the sale, and the delivery of the papers, the mare sold was loose in a herd, but near by where the sale was made, and where she had been seen by the defendant before he purchased her; but he had not caught or handled her before the sale. After the sale, and delivery of the papers, the mare was caught, and the possession of her was tendered to the defendant. At this point we quote from defendant's testimony: "Q. You first signed the note and mortgage and the bill of sale? A. Yes, sir. Q. You remember that, do you? A. Yes, sir. Q. That was before the horse was caught? A. Yes, sir."

After the mare was produced and tendered to the defendant, the defendant testifies: "I refused to take the mare [after the mortgage and note were given,] and a new contract was entered into verbally." Defendant also testified, in substance, that, after the mare was caught, he examined her, and found that she was older than had been previously represented to him, and that he refused at first to accept the mare, whereupon the plaintiff's said agent warranted the mare as sound and reasonably well broken to harness, and that upon such oral warranty defendant waived the matter of the age of the mare, and accepted her, and took her away; and that, as a matter of fact, to mare proved to be unsound and balky, and was worth not to exceed $25, but she would have been worth $130 if she had been as represented in the oral warranty. All evidence of the oral warranty was received against the objection upon the grounds—First, that there was no consideration for such warranty; second, that the agent of the vendor was without authority to make the warranty; and, finally, that such evidence varied and contradicted the written contract of sale. At one point counsel objected to such evidence on the ground that a "new contract and a new warranty would be entirely unavailable." Following this objection the record reads: "By the Court: Q. Had the horse been delivered to you at the time? A. No, sir. (The objection is overruled, to which ruling the plaintiffs except.") From the question propounded by the learned trial court, and the ruling which followed the answer to the question, it is apparent that the evidence was admitted upon the mistaken theory that the sale, evidenced by the writings, was pending and incomplete when the oral warranties were made, and that the sale contract, evidenced by the writings previously delivered, would be consumated only when the animal was actually delivered by the vendor to the defendant, and accepted by him. But, if the evidence were admitted on that theory, the ruling was error. It is elementary that, where personal property has been identified, the price agreed upon and paid, and the terms of the sale, embracing the intention of the parties, are reduced to

writing, and the writing is signed by the proper parties, and delivered, no manual delivery of the personalty is necessary to complete the sale. In such cases, the title passes at once to the purchaser, without delivery of the thing sold. The sale evidenced by the pre-existing writings was an absolute, unconditional sale, which took effect at once, upon the delivery of the writings, and whereby the title passed from the vendor to the purchaser. Authority is not needed to support this proposition, but see 21 Am. and Eng. Enc. Law, p. 482, and cases under note 1; Benj. Sales, § § 322, 324, 327-329. Besides, if the oral warranties alleged were contemporaneous with the sale, or made before the sale, the evidence was inadmissible under an elementary rule of evidence voiced in the code. Rev. Codes, § 3888, reads: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

But, as we have seen, the sale having been completed, and the title having passed by the the delivery of the writings, no duty remained for the seller to perform, except to produce the property sold, and place it at the disposition of the buyer. This was promptly done. The animal was caught, and brought to the buyer, and he examined her, with reference to her age, especially, and then found, as he testifies, that she was older than she had been previously represented to be. According to defendant's testimony, he refused to accept the mare, and did not do so until a new contract of sale was made "verbally." But what the terms of the new contract were, except as to the oral warranties claimed, does not appear from the evidence. Plaintiff's witnesses deny the making of any new contract, or any oral warranties; but, from the very meager testimony of the defendant, we gather that the new contract of sale, so called, consisted wholly in ingrafting upon the terms of the existing written contract of sale the oral warranties we have referred to above. But was this oral warranty, as testified to by the defendant, a valid contract? We think it

was not. No consideration for the warranty is claimed, other than the fact that defendant refused to accept and keep the mare unless on condition that she should be warranted by the vendor. But the trouble with this position is that, under a pre-existing and valid contract of sale, the defendant had purchased the animal, and then owned her absolutely, by virtue of a sale contract made to him without a warranty. After the purchase, the property was brought to the defendant, and placed at his disposal. Under such a state of facts, a legal obligation rested upon the defendant to accept the animal, and keep her, without additional advantages of any kind, and particularly without a stipulation of warranty, which feature has been expressly dealt with in the contract of sale. We therefore hold, that, in asking for an additional stipulation of warranty, the defendant was making an unfair and illegal demand, and that, if the oral warranty was made as claimed, then it was made without consideration, and is, hence, nonenforceable as a contract. In accepting and keeping his own property, nothing valuable passed from the defendant to the vendor. Counsel for respondent tacitly admit that the new contract which they are contending for cannot stand until the original contract of sale is first gotten rid of. Their position before this court is that the original sale was annulled by the subsequent oral assent of the parties. Doubtless it is true, as an abstract legal proposition, that a written agreement may be abrogated by a subsequent oral agreement fully executed. Rev. Codes, § 3936. But we search this record in vain for any evidence that the parties orally agreed to rescind the original contract. The matter of rescission is not mentioned in the evidence, in terms or in legal effect. Defendant testifies that he refused to accept the mare, and that a new contract was made verbally. He testifies fully as to the terms of the new contract. It has been seen that the new contract relates wholly to the one feature of warranty. As to that, defendant testified that an oral warranty was made. If this is true, then there was an oral agreement touching one, and only one, feature embraced in the

original contract. It is conceded that the terms of the original sale, upon which the minds of the parties had met, and which terms had crystallized in the form of a duly executed and delivered written contract, should remain intact. Not one word of evidence can be found tending to show that the parties ever intended to cancel the note and mortgage, or annul the bill of sale as a whole. It is therefore apparent that there was no such idea as recission broached by the parties at the time the alleged warranty was made. There was no tender of a return of the property by the defendant to the seller, nor was there a claim of fraud made, either in the pleadings or the testimony. Under the evidence, there was neither fraud nor mistake in the original contract of sale, and therefore, under established principles of law, the defendant was not in a position to rescind the contract, if he had sought to rescind, which, as we have stated, he did not do. See Rev. Codes, § 3932, as to recission of contracts.

But there is another and independent ground upon which the evidence touching the oral warranty was inadmissable. It is this: The talk was had between the defendant and the vendors' agent, Smith. In the absence of notice to the defendant of any restrictions upon the authority of the agent, the defendant had the right to assume that the agent, having authority to sell, also had an implied authority to warrant. But there the implied authority of a mere agent to sell terminates. In this case the agent had made an advantageous contract for his principal. He had sold the mare with an express stipulation that no warranty was given in connection with the sale. Under this contract the title had passed to the defendant. How is it proposed to get rid of this executed contract? The respondent asks this court to assume that a mere agent to sell personalty possesses the implied authority, not only to warrant, but to rescind an executed sale, and thereby reinvest his principal with title to the property which had vested in the purchaser under a pre-existing contract of sale. It is well settled that a mere agent to sell possesses no such implied authority. The undisputed evidence shows that the

agent, Smith, had authority to sell the particular herd or lot of horses referred to, and had no other or further authority as the vendors' agent. Under these circumstances, the authority ceased, and was exhausted with respect to any particular horse in the herd, after a sale of such horse. *Stillwell* v. *Insurance Co.*, 72 N. Y. 385; *Luke* v. *Griggs*, 4 Dak. 287, 30 N. W. Rep. 170; *Ahern* v. *Baker* (Minn.), 24 N. W. Rep. 341. Agent to sell cannot rescind. *Andrews* v. *Himrod*, 37 Ill. App. 124: *Diversy* v. *Kellogg*, 44 Ill. 114; *Fullerton* v. *McLaughlin*, (Sup.) 24 N. Y. Supp. 280; Mechem, Ag. § 650. It appears, therefore, that the agent, Smith, having exhausted his authority as agent by a previous sale of the property, was entirely without power to bind his principal by any new contracts relating to the animal sold to the defendant. For this reason, as well as the others above stated, it is clear that the defendant cannot, under any circumstances, recover damages for any breach of the so-called oral warranty. There never was any such warranty which could bind the seller. It follows that the order of the trial court withdrawing the question of damages arising on the alleged warranty from the jury was entirely proper.

A single question remains for consideration. The trial court, by its last order, directed the jury to find a verdict for the plaintiffs for a return of the property, and also find the value of the property in question. The jury returned a verdict as directed, and omitted in the verdict any reference to the value of the plaintiffs' interest. This omission is manifestly the result of the inadvertence of the jury. The nature of plaintiffs' interest, and its value, were at no time disputed. The complaint set out the note and the chattel mortgage as the basis of plaintiffs' right to the possession of the property described in the mortgage. No other right was claimed. The answer admitted the execution and delivery of the note and mortgage, and no claim was made that the note was paid, except a payment of $10, which was indorsed on the note, which was in evidence. Before the jury retired the first time for deliberation, they were instructed, especially, with reference to finding the value of the plaintiffs' interest, and were,

as we think, instructed properly in this regard—"that the value of the plaintiffs' special interest in the property would be the amount due upon the note." Then the jury were further instructed that, from the value of the plaintiffs' interest, so ascertained, the jury might deduct any damages suffered by defendant on account of a breach of the warranty alleged in the answer. True, the court, in its final instructions, withdrew from the jury the question of defendant's damages, but in so doing it in no wise modified its former instructions as to the mode of determing the plaintiffs' interest. But, as we have stated, by the neglect of the jury, this feature of the direction to the jury was not embodied in the verdict. Under the instructions of the court, the jury should have made the computation from the face of the note, and returned the total sum as the value of the plaintiffs' interest. In such cases, as well as others, where the facts are admitted or not contested, it becomes the province of the court to intervene, and direct the jury as to what fact or facts they should find. See Cobbey, Repl. § 1026. In this case the court below discharged this duty, not only with respect to the value of the plaintiffs' interest, but also as to the matter of the right of the plaintiffs to have a return of the property to them. This feature, also, was not a contested question, after the matter of defendant's damages had been eliminated. Aside from damages, there was no issue in the case for the jury. The material facts appear of record in the pleadings. The value of the property embraced in the mortgage was alleged in the complaint, and not denied in the answer.

Respondent's counsel contend that no valid judgment can be entered upon the verdict returned, because the verdict does not respond to the issues in this: that the value of the plaintiffs' interest was not found by the jury. It is true that all verdicts must respond to every material fact in issue. This general rule is the rule in replevin cases. Cobbey, Repl. § 1049. But, as we have seen, in the case at bar there was no issue on this feature. Under the pleadings, the nature and the value of plaintiffs' interest were conceded, and subject to be modified only by any damages

which the defendant was entitled to deduct from the value of plaintiff's interest as shown upon the face of the note. In replevin, as in other cases, verdicts will be considered and construed together with the pleadings, and it will suffice to sustain a judgment if the facts found by the verdict and those admitted in the pleadings, when considered together, show what a judgment should be. Cobbey, Repl. § 1025; *Blakeslee* v. *Rossman*, 44 Wis. 550; *Brookover* v. *Esterly*, 12 Kan. 149; *Ela* v. *Bankes*, 37 Wis. 89. In the case last above cited it is held that when, in replevin, the value may be ascertained by simple computations, it need not be specially found for the jury. It follows, as a result from the view we have taken of the law as applied to the facts found in this record, that the final order of the trial court directing the verdict which was afterwards returned was not erroneous, but was a valid and proper order, under the issues and the evidence in the case, and, consequently, that the order vacating the verdict and granting a new trial was erroneous, and must be reversed. But plaintiffs' counsel did not pursue the rules of strict practice in moving the court below for the entry of judgment upon the verdict without, at the same time, or prior thereto, moving for an amendment of the verdict, so as to make it conform to the instructions of the court, and to the conceded facts and issues of the case, after the question of damages had been eliminated. Counsel should, in strictness, have applied to the court below to amend the verdict by inserting therein the amount of plaintiffs interest, and for judgment upon the verdict so amended. The power of a trial court to amend a verdict under such circumstances is ample, as will be seen by the following cases: *Hodgkins* v. *Mead*, 119 N. Y. 166, 23 N. E. Rep. 559; *Schweitzer* v. *Connor*, 57 Wis. 177, 14 N. W. Rep. 922; *Clarke* v. *Lude*, 63 Hun. 363, 18 N. Y. Supp. 271; *Dalrymple* v. *Williams*, 63 N. Y. 361; 2 Thomp. Trials, §§ 2642, 2643; *Clark* v. *Lamb*, 8 Pick. 415; *Acton* v. *Dooley*, 16 Mo. App. 441-447; *Murphy* v. *Stewart*, 2 How. 263-279.

The orders appealed from will be reversed, and the trial court, on plaintiffs' application therefor, will enter an order amending

the verdict by inserting therein the value of plaintiffs' interest, which value will be ascertained by computing the amount due on the note at the date of returning the verdict. The court will then direct the entry of judgment in favor of the plaintiffs upon the verdict as so amended. All the judges concurring.

(69 N. W. Rep. 53.)

GUARANTY SAVINGS BANK *vs.* ALBERT BLADOW, *et al.*

Opinion filed November 10th, 1896.

Public Lands—Patent—Cancellation—Notice to Mortgagee.

The fact that the mortgagee of the holder of a patent certificate may not have had notice of the proceedings to cancel such certificate, or any opportunity to be heard therein, does not render void the action of the land department in canceling such certificate, but merely entitles him to a hearing on the question of the legality of the original entry in a proper action in court. In such action the burden of proof is upon him to make out a *prima facie* case, the certificate after cancellation being no longer any evidence to support his claim.

Rights of Mortgagee Before Foreclosure Not Determined.

Whether a mortgagee, without foreclosing his mortgage, and securing by purchasing on the foreclosure sale the interest of the mortgagor, can maintain an action to have the holder of a patent based upon a subsequent entry decreed to be a trustee for him on the theory that the original entry was legal, and should not have been canceled, not decided in this case.

Appeal from District Court, Richland County; *Lauder*, J.

Action by the Guaranty Savings Bank against Albert Bladow, Charles Anderson and Franklin Hall. From a judgment for defendants plaintiff appeals.

Affirmed.

Fred B. Morrill, for appellant.

The entry made by Anderson was cancelled by the commissioner on the contest initiated by Bladow, in which case the mortgagee was not made a party defendant or served with any notice whatever. The power vested in the commissioner is not

arbitrary, unlimited or discretionary, but must be exercised in accordance with law. *Bogan* v. *Edinburgh, etc., Co.*, 63 Fed. Rep. 192; *Cornelius* v. *Kessel*, 128 U. S. 456; *Lindsey* v. *Hawes*, 2 Black 554; *Stimson* v. *Clark*, 45 Fed. Rep. 760. Anderson's proof and payment had been accepted by the agents of the government and final receipt issued to him. By such purchase the land became subject to the incidents of private ownership and Anderson could legally mortgage it before issuance of a patent. *Carrol* v. *Safford*, 3 How. 450; *Witherspoon* v. *Duncan*, 4 Wall. 210; *United States* v. *Budd*, 144 U. S. 154. The mortgagee acquired a property interest in the land and the ruling of the commissioner without notice to him was not due process of law. 2 Kent Com. 13; *Westervelt* v. *Greggs*, 12 N. Y. 202; *Bank* v. *Akely*, 4 Wheat 235; *Hurtado* v. *California*, 110 U. S. 516; *Leeper* v. *Texas*, 139 U. S. 467. Property rights of an individual cannot be divested without granting him a hearing. *Windsor* v. *McVeigh*, 93 U. S. 274; *Lewis* v. *Shaw*, 57 Fed. Rep. 516; *Hollingsworth* v. *Barbour*, 4 Pet. 466; *Woodruff* v. *Taylor*, 20 Vt. 65. The cancellation of Anderson's entry was void and the entry remains as though it had never been cancelled, and patent to the land should have been issued upon application of the plaintiff under § 7 of the Act of March 3rd, 1891 (26 St., At Large 1095.) This statute is remedial and the broadest possible scope towards effecting the object for which it was enacted, that its language will imply, must be given to it. Suth. St. Cr. § 207; *Hudler* v. *Golden*, 36 N. Y. 446; *Cullerton* v. *Mead*, 22 Cal. 96; *Oates* v. *First Nat. Bank*, 100 U. S. 239; *Smith* v. *Stevens*, 82 Ill. 554; *C., B. & Q. Ry. Co.* v. *Dunn*, 52 Ill. 260; *Rockford R. I. & St. L. Ry. Co.* v. *Heflin*, 65 Ill. 366; *Hudley* v. *Morrison*, 39 Ill. 392. Where the land department has mistaken the law, courts of justice have power to inquire into and correct mistakes, injustice and errors. *Johnson* v. *Towsley*, 13 Wal. 72; *Stark* v. *Starrs*, 6 Wal. 402; *Lindsey* v. *Hawes*, 2 Black 554; *Cornelius* v. *Kessell*, 128 U. S. 456; *Widdicombe* v. *Childers*, 124 U. S. 400; *Moore* v. *Robbins*, 96 U. S. 530; *Bernier* v. *Bernier*, 147 U. S. 242; *Perry* v. *O'Hanlan*, 11 Mo. 373;

Risdon v. *Davenport*, 57 N. W. Rep. 482. The defendant, Bladow, became the owner by purchase of the title acquired by Anderson subject to the mortgage. He is estopped from setting up any defense to the validity of the mortgage subject to which he purchased the land. Jones on Mortgages, §736; *Johnson* v. *Thompson*, 129 Mass. 393; *Luite* v. *Stevens*, 98 Mass. 305; *Howard* v. *Chase*, 104 Mass. 249; *Hancock* v. *Fleming*, 3 N. E. Rep. 254; *Atherton* v. *Toney*, 43 Ind. 211; *Manwarring* v. *Powell*, 40 Mich. 371; *Fuller* v. *Hunt*, 48 Ia. 163; *Swertzer* v. *Jones*, 35 Vt. 317; *Thredgill* v. *Pintard*, 12 How. 24.

W. E. Purcell and *Chas. E. Wolfe*, for respondents.

An entryman making a fraudulent entry of public land acquires no vested right of property in it. *American Mortgage Co.* v. *Hopper*, 64 Fed. Rep. 557; *U. S.* v. *Peterson*, 50 Fed. Rep. 507. The Amistead, 15 Pet, 518; *League* v. *De Young*, 11 How. 185; *Parsons* v. *Venzke*, 4 N. D. 452, 61 N. W. Rep. 1036. This court can not question the finding of fact by the commissioner. *Mortgage Co.* v. *Hopper*, 64 Fed. Rep. 557; *Parsons* v. *Venzke*, 61 N. W. Rep. 1036, 4 N. D. 452. Anderson acquired no title and plaintiff could acquire none. The protection of a *bona fide* purchaser relates to the legal title, or to such a right as is completely determined. So long as something remains to be done affecting the right those purchasing do so at their peril. *American Mortgage Co.* v. *Hopper*, 56 Fed. Rep 74, S. C. 64 Fed. Rep. 553; *Jordan* v. *Ward*, 64 Fed. Rep. 905. In this case Bladow's land would not be liable to the mortgage even if he had given it himself. *Bull* v. *Shaw*, 48 Cal. 455; *Anderson* v. *Carkins*, 135 U. S. 483. Bladow is not estopped to defeat the pretended lien of this mortgage. *Kraft* v. *Baxter*, 16 Pa. 739; *Shoreman* v. *Eakin*, 1 S. W. Rep. 559; *Bowling* v. *Roork*, 24 S. W. Rep. 4. The mortgage in so far as it might affect the real title to this land was void at its inception. *Mellison* v. *Allen*, 2 Pa. 97; *Brewster* v. *Maddon*, 15 Kan. 249; *Webster* v. *Luther*, 52 N. W. Rep. 271; *Gregory* v. *Kenyon*, 52 N. W. Rep. 685. *Mulloy* v. *Cook*, 10 S. W. Rep. 349. The cove-

nants in the mortgage would estop the mortgagor. *Robinson* v. *Bailey*, 26 Fed. Rep. 223; *Alt* v. *Banholzer*, 40 N. W. Rep. 830; *Giles* v. *Miller*, 54 N. W. Rep. 551.

CORLISS, J. As originally instituted, this action had for its sole object the foreclosure of a mortgage. But on the trial it developed into a controversy over the legality of the cancellation by the land department of a homestead entry. The cause has been argued in this court on the theory that the plaintiff was in position to challenge the validity of such cancellation, and to secure the benefits of the patent subsequently issued by the government to a third person, based upon a new entry. The original entry was made by one Anderson in January, 1881. In July, 1881, he executed a mortgage upon his interest in the land to secure the payment of $450. This mortgage was in June, 1882, assigned to plaintiff. It is to foreclose this mortgage that this action was commenced. Subsequently to the execution thereof the land was conveyed to the defendant, Bladow. Thereafter such proceedings were had before the land department that on November 14, 1887, the commissioner thereof ordered that the entry made by Anderson be cancelled. In these proceedings the commissioner found as a fact that Anderson had never resided upon the land, as required by law, but that his entry was fraudulent, and the entry was canceled on that ground. Neither the original mortgagee nor the plaintiff was a party to these proceedings; or had any notice of them. So far as they were concerned, such proceedings were *ex parte*. Notice of the hearing was, however, served on Anderson by publication in accordance with the rules and practice of the land department. It is undisputed that the mortgagee loaned his money and took his mortgage in good faith, and for value, and that he had no actual knowledge of the fact that Anderson's entry was fraudulent. After the original entry was canceled, defendant, Bladow, made a homestead entry upon the same land, and subsequently obtained a patent therefor, based upon such entry. The decree in this case sustains this patent, and adjudges that the mortgage

is therefore not a lien upon the land, but is a cloud thereon, and should accordingly be canceled. From this decree the plaintiff appeals.

In deciding this case we will adopt a theory more favorable to the plaintiff than the record will justify. We will assume that it has foreclosed its mortgage, and has secured the rights of the mortgagor in the land. The only feature which distinguishes this case from *Parsons* v. *Venzke*, 4 N. D. Rep. 452, 61 N. W. Rep. 1036, is the fact that the holder of the mortgage was not a party to the proceedings in the land department which culminated in the cancellation of Anderson's entry. This fact does not, however, render the cancellation a nullity as to the mortgagee. The land department has, until a patent has been issued, complete control of the question whether it will cancel an entry. Its power is not dependent on jurisdiction over the person of any one, as the authority of a court is. By the issue of a certificate it does not lose control over the land. Such certificate is, in effect, no more than a statement that *prima facie* the person to whom it is issued appears to be entitled to a patent. Whether subsequent investigation will lead to a different conclusion is left unsettled; and whoever deals with the holder of such certificate is chargeable with knowledge that the proceedings instituted to secure the legal title to the land from the goverment are in fieri, and that the land department may at any time revoke the certificate, thus destroying the entryman's *prima facie* right to the patent. What procedure it will adopt, what persons it will notify, or whether it will proceed on notice at all or not, are matters within the discretion of the department, so far as the mere matter of power is concerned, congress not having prescribed any practice in such cases. No matter how abitrary the land department may act, its cancellation is not a mere nullity. But such arbitrary action will, however, entitle the entryman to a hearing in court; and on this hearing he will be allowed to show that as a matter of fact his entry was not fraudulent. But no such showing was made in this case. Indeed, it is not claimed that the entry was

not in fact fraudulent. The land department has in such a case, it is true, in the exercise of its undoubted power, destroyed his *prima facie* evidence of right to a patent, but because it has acted in an arbitrary manner—has denied him a hearing—the law will permit the entryman to prove in court the facts showing his entry to be valid, because the law regards the rights of an entryman, who has in good faith complied with the statute, as property rights, and will give him an opportunity to defend such rights, either in the land department, or if he is there denied a chance to protect himself, in the proper judicial tribunals. The only effect of the doctrine that an *ex parte* cancellation of an entry is not a mere nullity is to place the burden of proof upon the entryman, or those who claim under him. But it cannot be disputed that the land department might, despite the fact that he holds a certificate, require the entryman to furnish additional proof of his good faith and his compliance with the requirements of law on proceedings in the department instituted for the purpose of canceling his entry. The land department may, notwithstanding the fact that it has issued a final certificate, compel the entryman, or any one claiming under him, to assume the burden of proof on penalty of having the entry canceled if additional proof is not produced. The utmost scope of the effect of the doctrine that an *ex parte* cancellation is valid is to cast upon the entryman in the court the very burden of proof which may be imposed upon him in the department itself. The contention against the soundness of this doctrine must be that he has a vested right to use the certificate as *prima facie* evidence of his right to a patent. There is nothing in the acts of congress to warrant such a view; and to assert that it is sound on general principles is to assume the very point in controversy. The utmost which it can be said that the government has done in issuing the certificate to him is to give him an instrument which will *prima facie* show that he is entitled to a patent so long as this instrument remains unannulled; but the same power which issued it is vested by congress with full control

over it, and may revoke it at any time; and the destruction of it carries along with it the necessary consequence that it can no longer be presented in evidence to any tribunal as the declaration of the government that the person named in it has complied with the law, and is entitled to a patent. But, after a person has been accepted by the government as an entryman, it cannot escape the issuance of a patent to him if his entry was in fact legal, and this fact he may prove in the proper judicial tribunal, if he is denied a hearing in the land department. In this way his property rights are fully protected. As he is compelled to pursue the legal title in the hands of one who has succeeded to the rights of the government, he is of necessity obliged to make out as against such person a legal right to demand the patent from the government. This he must do by evidence showing that his entry was in fact legal. He cannot use the canceled certificate for that purpose, for to insist upon his right to use it is to assume the legality of the entry,—the very question to be established. He could not, as a matter of right, use it as *prima facie* evidence in the land department before cancellation, on the trial of the issue whether his entry was legal. How, then, can he claim that he has such a right to use it as evidence in a court after cancellation, as constitutes a vested property right? It is obvious that, if the mere fact that a cancellation of an entry was *ex parte* gives the entryman an absolute right to secure the patent from a third person, to whom it has been issued, then it is of positive benefit to a fraudulent entryman to be denied a hearing in the land department. The denial of a hearing, although upon such hearing he would be defeated, places him in an impregnable position in his contest for the title. The very most which can possibly be claimed is that the original entryman should not be required to make out a *prima facie* case by evidence, but should be permitted to rely upon the cancelled certificate as creating a presumption in his favor. This position, we have seen, is not tenable. The reasoning of this court in the case of *Parsons* v. *Venzke*, leads logically to the conclusion we have reached. The

case of *Mortgage Co.* v. *Hopper*, 56 Fed. 74, affirmed 12 C. C. A. 293, 64 Fed. 553, is directly in point. See, also, *U. S.* v. *Steenerson*, 1 C. C. A. 552, 50 Fed. 507.

We are not unmindful of the fact that, in view of delays in the issuance of patents, and the rule of law that until a patent has been issued the courts have no jurisdiction to redress the wrong done the original entryman or his grantee or mortgagee by an *ex parte* cancellation, injustice may result from the doctrine that the land department may thus impose upon such persons the burden of proving the original entry to have been legal. The earliest period at which they can adduce proof to sustain the entry may be so remote from the time when such entry was made that no evidence can be obtained by them to support what was in fact a perfectly valid entry. But cases presenting these extreme features will not frequently arise, and those who find themselves in this predicament are always somewhat in fault in not discovering the fact of the cancellation, and making an effort to be heard in the land department, to have the original entry reinstated. Moreover, in such cases the courts would incline to consider slight evidence as sufficient *prima facie* proof that the original entry was in fact valid, and compel the holder of the patent to sustain by evidence the finding of the department that it was illegal. No hardship could result to the holder of the patent from such a rule, for the fact that the cancellation of the original entry was *ex parte* will appear from the records of the land office, and he is therefore chargeable with knowledge that the question of fact whether such entry was legal is still open to investigation in the courts, and that from the very nature of the case the original entryman, or those claiming under him, should not be held, after the lapse of a considerable period of time, to a high degree of proof to establish a *prima facie* right.

It is urged that, inasmuch as defendant, Bladow, who made the second entry, and subsequently secured the patent, was also the person who succeeded to Anderson's interest in the land he is estopped from claiming that the mortgage is not a lien on the

land. But Bladow did not assume the mortgage, nor did the deed to him even state that he took the land subject to the mortgage. There is no element of estoppel in the case. Bladow is not questioning the legal sufficiency of the mortgage as a contract, nor does he assert that it is not a lien on whatever interest Anderson had in the land. He is merely claiming title from a different source. When he purchased the land from Anderson's grantee, he entered into no implied agreement that, in case Anderson's entry was fraudulent, and was finally overthrown, he would not purchase the land from the government without taking care of the mortgage debt. He did not borrow the money, or assume the mortgage, nor are we able to discover from this record that he is even under any moral obligation to see that it is paid. The amount of such mortgage does not appear to have been deducted from the purchase price when he bought from Anderson's grantee; and, if this were the fact, he would be under no legal or moral obligation to pay it under the facts of this case, for it appears that every dollar he paid for Anderson's title was money thrown away. The deed he obtained gave him no title, nor did it place him in a position to contest the legality of Anderson's entry different from that which he occupied before it was delivered to him. It was of no advantage to him whatever.

The judgment of the District Court is affirmed. All concur.

(69 N. W. Rep. 41.)

WILBUR J. HARTZELL *vs.* ANDERS A. VIGEN, *et al.*

Opinion filed November 10th, 1896.

Subject of Action Defined.

The words "subject of the action," as found in Subd. 3, § 5204, Gen. St. Minn. 1894, which requires the plaintiff who desires to serve a summons by publication to make affidavit, among other things, that the court has jurisdiction of the subject of the action, relate to the controversy between the parties, and not the property of the defendant that has previously been seized on attachment.

Corliss, J., dissenting.

Garnishment—Jurisdiction in Rem.

The attachment by garnishment of property of defendant upon which the garnishee has a lien is sufficient, under Minnesota statutes cited in the opinion, to give a court jurisdiction to render a valid judgment in *rem* against a non-appearing nonresident defendant served by publication only. The court has power to make all necessary orders for the ultimate application of defendant's interest in the property in satisfaction of such judgment.

Appeal from District Court, Cass County; *McConnell*, J.

Action by Wilbur J. Hartzell against Anders A. Vigen and John Rustad. From a judgment for defendants, plaintiff appeals. Reversed.

Ball, Watson & Maclay, for appellant.

The subject of the action is the claim of the plaintiff against the defendant or the contract or controversy out of which such claim arose. The phrase "subject of the action" was first used in this connection in the New York Code of 1849. That the phrase is not easily defined is apparent from the cases and authorities which have discussed it. Pomeroys Rem. § § 475, 487, 490, 775-6, 794; Bliss Code Pl. § § 126, 373, 375; *McKinney* v. *Collins*, 88 N. Y. 216. The requirement that the court must have "jurisdiction of the subject of the action" does not mean that the court must have acquired jurisdiction by seizing property of the defendant before ordering the publication of the summons. *Hulbert* v. *Insurance Co.*, 4 How. Pr. 275; *Force* v. *Gower*, 23 How. Pr. 294; *Fiske* v. *Anderson*, 33 Barb. 71; *Corson* v. *Ball*, 47 Barb. 452; *Kerr*

v. *Mount*, 28 N. Y. 659; *McKinney* v. *Collins*, 88 N. Y. 216; *Bryan* v. *University*, 19 N. E. Rep. 825, (dissenting opinion;) *Jarvis* v. *Barrett*, 14 Wis. 591; *Stone* v. *Myers*, 9 Minn. 303; *Cleland* v. *Taveernier*, 11 Minn. 194; *Iowa Bank* v. *Jacobson*, 66 N. W. Rep. 453; Rule 35, N. Y. Sup. Ct. (1858,) 88 N. Y. 223; Rule 25, Dak. Dist. Ct. p. xxxi, 3, N. D. Neither *Cooper* v. *Reynolds*, 10 Wall. 308-320, nor *Pennoyer* v. *Neff*, 95 U. S. 714, hold that the seizure of defendants property must be made before publication of the summons can be begun. The affidavit for publication in the present case showed fully the nature of the action and that the court had jurisdiction, there was a substantial and sufficient compliance with the requirement of the statute. *Inglie* v. *Welles*, 53 Minn. 197; *Crombie* v. *Little*, 47 Minn. 581; *Major* v. *Edwards*, 53 N. W. Rep. 1041; *Shippen* v. *Kimball*, 27. Pac. Rep. 813; *Anderson* v. *Goff*, 72 Cal. 65; *McCormick* v. *Paddock*, 30 N. W. Rep. 602; *Pettiford* v. *Zoellner*, 8 N. W. Rep. 57; *Martin* v. *Pond*, 30 Fed. Rep. 19; *Cooper* v. *Reynolds*, 10 Wall. 308. The notes found in the possession of the garnishee, as a pledge, were subject to garnishment. Minn. Stat. § 5316; *Tucker* v. *Vaughan*, 23 N. W. Rep. 846; *Ide* v. *Harwood*, 14 N. W. Rep. 884; *Cole* v. *Sater*, 5 Minn. 468; *McCann* v. *Randall*, 17 N. E. Rep. 75; *Storm* v. *Catzhausen*, 38 Wis. 139; *LaCrosse Bank* v. *Wilson*, 43 N. W. Rep. 153; *Elser* v. *Romnel*, 56 N. W. Rep. 1107. The law of Minnesota governs the question. *Cronan* v. *Fox*, 50 N. J. Law, 417. The contingency which renders a debt non-garnishable must be a part or condition of the contract itself out of which the alleged indebtedness grows and not a mere uncertainty as to how the account or balance may stand. *Thorndyke* v. *DeWolf*, 6 Pick. 120; *Webster* v. *Peterson*, 27 W. Va. 314; *N. E. Ins. Co.* v. *Chandler*, 16 Mass. 275; *Dwinel* v. *Stone*, 30 Me. 384; 8 Am. and Eng. Enc. Law, 1195, n. 2; *Tucker* v. *Vaughan*, 23 N. W. Rep. 846. The equity of the mortgagor in mortgaged chattels may be garnished. *Becker* v. *Dunham*, 6 N. W. Rep. 406; *Burnham* v. *Doolittle*, 15 N. W. Rep. 606; *Smith* v. *Grant*, 19 N. W. Rep. 184; *Buck* v. *Merrill*, 48 N. W. Rep. 96; *Carty* v. *Fenstemaker*, 14 Ohio St. 457; *McCown* v. *Smith*, 54 N.

W. Rep. 31; *Torbet* v. *Hayden*, 11 Ia. 435. The judgment in the Minnesota action was entered in strict accord with statute and was valid to the extent of the property attached. *Cousins* v. *Alworth*, 47 N. W. Rep. 169; *Anderson* v. *Goff*, 72 Cal. 65; *Cooper* v. *Reynolds*, 10 Wall. 308. The fact that the exemplified record does not show whether the court required proof of the plaintiffs demand before rendering judgment, does not make the judgment void, nor render it subject to collateral attack. *Skillman* v. *Greenwood*, 15 Minn. 102; *Dillon* v. *Porter*, 31 N. W. Rep. 56; *Hersey* v. *Walsh*, 38 N. W. Rep. 613; *Gorman* v. *Ball*, 18 Wis. 24; *Eagan* v. *Sengpiel*, 46 Wis. 703; *Frankfurth* v. *Anderson*, 20 N. W. Rep. 662.

Benton & Amidon, for respondent.

The affidavit for publication was insufficient it simply states that "the court has jurisdiction of this action," it should have stated that "the court has jurisdiction of the subject of the action." The proceeding for service by publication is nonjudicial in its character. The filing of the affidavit with the clerk is merely a performance of a condition precedent to the right of making the publication. *Carson* v. *Shoemaker*, 57 N. W. Rep. 134; *Barber* v. *Morris*, 37 Minn. 194, 33 N. W. Rep. 559; *Cousins* v. *Alworth*, 44 Minn. 505; 47 N. W. Rep. 169. The affidavit was not a sufficient compliance with the statute. *Rhode Island Trust Co.* v. *Keeney*, 1 N. D. 411, 414. The court obtains no personal jurisdiction over nonresident defendants by service of process by publication. An action *in personam* at its commencement becomes as soon as it appears that the defendant cannot be served with process an action *in rem*, and the sole power of the court is to apply the property of the defendant within its jurisdiction to the satisfaction of the amount that shall be adjudged to be due the plaintiff. *Penoyer* v. *Neff*, 95 U. S. 714; *Cooper* v. *Reynolds*, 10 Wall. 308. The first step in acquiring jurisdiction *in rem* is to seize the property to be affected. Conklings U. S. Admiralty, 150-151; Benedicts Admiralty, § § 434, 435. The words "subject

of the action" as used in the Minnesota statute refer to property that has been seized under the attachment. *McKinney* v. *Collins*, 88 N. Y. 216. The notes which the plaintiff sought to reach by garnishment proceedings were held as collateral for an indebtedness which was not then due, and were therefore not subject to garnishment. Wade on attachment, § § 2, 3, 330; § § 5312, 5315, Minn. Stat; *Ettelsohn* v. *Fireman's Fund Ins. Co.*, 31 N. W. Rep. 201; *Perea* v. *Colo. Nat. Bank*, 27 Pac. Rep. 322; *Scurlock* v. *Gulf C. & S. F. Ry. Co.*, 14 S. W. Rep. 148. When the right to money or property depends upon nothing but the running of time, it is due absolutely and without depending upon any contingency. *Edney* v. *Willis*, 36 N. W. Rep. 300. Rustads right to the notes depended entirely upon whether he should pay the indebtedness for which they were pledged as collateral. His right was contingent upon payment and until payment of the principal debt he had no right to the collateral notes whatever. *Wheeler* v. *Day*, 23 Minn. 545; *Thorpe* v. *Preston*, 4 N. W Rep. 227; *Rowell* v. *Felker*, 54 Vt. 524; *Durling* v. *Peck*, 43 N. W. Rep. 65; § 5327, Stats. of Minn; *Neill* v. *Rogers*, 23 S. E. Rep. 702; *Cross* v. *Brown*, 33 At. Rep. 147; Jones on Pledges, 373. It does not appear that there was or would be any surplus in the hands of the bank after applying the notes to the satisfaction of its indebtedness. *Younkin* v. *Collier*, 47 Fed. Rep. 571. Credits of a non-resident debtor cannot be reached by proceedings in attachment or garnishment. *Root* v. *Davis*, 36 N. E. Rep. 669; Reno on Non-residents, § 140.

BARTHOLOMEW, J. This action is based upon a promissory note executed by the defendant Vigen in favor of the defendant Rustad. The note represented a portion of the purchase price of a certain tract of land in Cass County, and, concurrently with the execution of the note, Rustad executed a contract for the sale of said land to the defendant Vigen. It is alleged in the complaint that Rustad sold and transferred the note to plaintiff, and Rustad was made party defendant, and as to him a decree is asked confirming in plaintiff all Rustad's rights under the contract of sale,

which, it is claimed, passed to the plaintiff by the purchase of the note, and as incident thereto. Both defendants answered, denying plaintiff's ownership of the note. This was the only issue tried below, and defendants prevailed. Plaintiff brings the case into this court.

We learn from the record that the plaintiff claims the ownership of the note by virtue of a purchase at execution sale in Hennepin County, in the State of Minnesota, which execution was issued upon a judgment entered in the District Court of said county, in an action brought by one McKindly against the defendant Rustad. A duly authenticated transcript of the entire record in that case was offered in evidence by appellant, and, on objection, was excluded. From that record we learn that Rustad was not a resident of the State of Minnesota when sued there, but was a resident of this state. There was no personal service of summons, but service by publication was made, or, at least, attempted. There was no appearance, and judgment was taken by default. A writ of attachment was issued about the time of the commencement of the action, and a garnishee summons served upon the Washington Bank of Minneapolis. The disclosure of the garnishee showed that the bank held Rustad's note for over $9,000, on which over $7,000 remained due and unpaid, and that as a collateral to this indebtedness, the bank held notes belonging to defendant Rustad to the amount of about $22,000. Such subsequent proceedings were had in the case that all the collateral notes remaining in the hands of the garnishee after the indebtedness of Rustad to the garnishee was satisfied were sold on execution issued upon the judgment in favor of McKindly and against Rustad, and plaintiff herein became the purchaser at the execution sale. His title is assailed upon grounds which go to the jurisdiction of the District Court of Hennepin County, in the State of Minnesota, to enter any judgment against the defendant Rustad. By stipulation in this case the statutes of Minnesota, as published in 1894, are to be treated as in the record. The first attack upon the judgment, and the one chiefly relied upon,

related to an alleged defect in the affidavit for publication of summons. Section 5204 of said Minnesota statutes specifies the cases wherein service may be made by publication, and what the affidavit must contain, and, among others, it provides: "Third. When the defendant is not a resident of the state, but has property therein, and the court has jurisdiction of the subject of the action." In the case under consideration the affidavit omitted the words "of the subject," making the allegation in that behalf read simply, "And the court has jurisdiction of the action." It is conceded that, in order to confer jurisdiction in this class of cases, all the statutory provisions relating to the publication of summons must be substantially complied with in every particular. Appellant insists that there was substantial compliance in this case, and that, for the purpose of this particular statutory provision, the two phrases, "jurisdiction of the subject of the action," and "jurisdiction of the action," are identical in meaning, and have reference only to the cause of action or controversy between the parties. Respondents insist upon a very different construction. They urge that all actions against nonresidents, where personal service within the state cannot be made, are, in their essential nature, actions *in rem*, and not in *personam*, and that the subject of the action is the *res*, which must be some specific property, which has been seized under a writ of attachment and brought under the control of the court, so it may by proper order be applied to the satisfaction of any judgment that plaintiff may obtain in the case. This, of course, requires that a writ of attachment be issued, and property seized thereunder, in every case under this subdivision, before an affidavit for publication of summons can properly be made. It is conceded by respondents, for the purposes of this point, that this was actually done in the Minnesota case. On the other hand, it is conceded by appellant that the jurisdiction must come through the allegations of the affidavit. It thus becomes necessary for us to place a construction upon the subdivision of the Minnesota statute above quoted. It would have afforded us immediate relief could we have found a con-

struction of the language by the very able Supreme Court of that state. But the point seems not to have been raised there. Indeed, the authorities bearing directly upon the point are very few, and not always satisfactory. We have, however, the same statute in this state, borrowed, as was the Minnesota statute, from the New York Code of Civil Procedure of 1849. It must be conceded, in discussing this proposition, that to construe the words "subject of the action" to mean specific property that has been seized in the action, would be, perhaps, in the interests of an orderly and logical practice; that it would more nearly assimilate actions of this character to actions purely *in rem*; that it would more certainly give to the words the same meaning that was given to them in chancery actions at and prior to the time they were first applied to law actions. But these considerations are entirely inadequate to influence a court, unless it be reasonably certain that such was the meaning given to the words by the legislature when it used them. In Kansas the statute specifically provides that in this class of cases the affidavit for order of publication shall show that property of the defendant has been seized under attachment or some provisional remedy. See § 4155, Gen. St. 1889, and the Kansas decisions there annotated. No doubt this is a wise provision, but it is not reached by construction.

Service of publication is of comparatively recent origin. It was not known at common law. There an absent defendant was compelled to appear by means of the writ of *distringas*, requiring the sheriff to seize a certain amount of his property, and this was repeated again and again, even to the extent of outlawry, if necessary. In England, in 1832, by statute, service by publication was authorized in certain cases in chancery. See 1 Daniell, Ch. Prac. p. 449 *et seq.* Similar statutes existed in New York and perhaps in other states. But service by publication in a law action was unknown in New York until the adoption of the Code of Civil Procedure of 1849, containing the provisions under discussion. It will be instructive to discover the construction put upon it at its first appearance. The case of *Hulbert* v. *Insurance*

Co., 4 How. Prac. 275, was decided in 1850, and it was held that it was not necessary that an attachment should accompany the service of summons, but that it might be served afterwards. It is not clear, however, that this particular statute was in the mind of the court when the ruling was made. Nor do we find any authoritative utterance upon the point in New York until 1858. At that time a rule of court was adopted, known as "Rule 25," which provided that "in actions for the recovery of money only, when the summons has been served by publication, no judgment shall be entered unless the plaintiff, at the time of making application for judgment, shall show by affidavit that an attachment has been issued in the action and levied upon the property belonging to the defendant." If the statute required that property should be attached before the affidavit for an order for publication could be made, and that such affidavit should in effect so state, then it was entirely incompetent for the court to declare by rule that it should be sufficient if property had been attached before the application for judgment. Hence, this rule is a deliberate declaration of the judges that the statute did not so require. In fact, the rule was announced because the opposite view prevailed. It had been held in New York, as it was subsequently held in other states, that under this statute it was competent to enter a personal judgment against a nonappearing defendant, served by publication only, and upon such a judgment general execution might be issued, under which any property in the state belonging to the defendant could be seized and sold. See *Force* v. *Gower*, 23 How. Prac. 294; *Jarvis* v. *Barrett*, 14 Wis. 642; *Stone* v. *Myers*, 9 Minn. 313, (Gil. 287;) *Cleland* v. *Taveernier*, 11 Minn. 194, (Gil. 126.) Under the New York rule of court this could not be done. No judgment could be entered unless property of the defendant had been attached at the time of the application for judgment. But the fact that so many able courts, acting under this identical statute, held that no attachment whatever was necessary in the case, would seem to be almost conclusive against respondents' position that an attachment is absolutely

essential before publication of summons. And the rule of court, as we understand it, was not based upon the theory that the statute required any attachment. It was based upon and foreshadowed those great principles enunciated and elucidated in 1877 by the Supreme Court of the United States in the case of *Pennoyer* v. *Neff*, 95 U. S. 714,—a case to be hereafter further noticed. In the case of *Whitehead* v. *Railway Co.*, 18 How. Prac. 218, this same language, but in another provision, was under discussion. That action was brought in 1859 under § 427 of the code then in force, specifying the cases in which the action might be brought against a corporation. The second subdivision provided: "By a plaintiff not a resident of this state where the cause of action shall have arisen, or the subject of the action shall be situated within this state." The defendant's property had been seized under a writ of attachment, and the question arose on motion to discharge the attachment, on the ground that the action could not be maintained under the statute. It was conceded that the plaintiff was a non-resident, and that the cause of action did not arise in the state. Hence the only question to be determined was whether or not the subject of the action was situated in the state. There, as here, it was earnestly contended that the subject of the action was the property which had been seized under the writ. But the court said, at page 233: "What is the subject of the action? Not certainly, the title to the property attached, for the plaintiff asserts no such title here. He claims the right to have that property appropriated to the payment of an alleged debt due him from the defendant. But this right is neither questioned nor questionable, if his right to maintain this proceeding is conceded. The subject of the action is the claim therein asserted by him, and the satisfaction of which he seeks out of the property attached, which he concedes to belong to the defendant. See the opinion of Hand, J., in the case of the President, etc., of *Bank of Commerce* v. *Rutland & W. R. Co.*, 10 How. Prac. 8. On the argument the plaintiff referred to the case of *Ready* v. *Stewart*, 1 Code R. (N. S.) 298, as sustaining the

position in question. But I do not so understand the opinion of the learned judge who delivered the opinion in that case. He says the term 'subject of the action' relates to the nature of the action, or the 'thing' sought to be obtained by the judgment to be given, but not at all to the 'person of the defendant.' The learned judge was commenting upon the third subdivision of § 135 of the code, which requires that, in the case of a nonresident defendant who has property in the state, and the action arises on contract, the court should have jurisdiction of the subject of the action. Now, the thing sought to be obtained by the judgment was the establishment of the claim asserted in the action. The idea that the learned judge was combating was, as I understand his language, simply that the term 'jurisdiction of the subject of the action' did not mean jurisdiction of the defendant." In this language is contained a suggestion that is not always kept in view. It is as to the difference between the terms "jurisdiction of the subject of the action" and "jurisdiction of the action." The latter, in its usual acceptance, means complete jurisdiction,—jurisdiction both of the subject of the action and of the parties to the action. Hence, the terms are not synonymous, and cannot be used interchangeably. The former may exist, and the latter not. But the latter cannot exist without the former, since it necessarily includes the former. Now, the affidavit under consideration declared that the court had "jurisdiction of the action," which necessarily included the jurisdiction of the subject of the action. That much the statute required it to contain, and the fact that it contained something more, which the statute did not require, does not affect its efficiency as an affidavit under the statute.

In the light of the above quotation from 18 How. Prac., we wish to discuss another position maintained by respondent with much confidence. Subdivision 5 of the section of the Minnesota statute, providing cases in which service may be made by publication, reads: "When the subject of the action is real or personal property in this state, and the defendant has or claims a lien or interest therein," etc. Here, it is urged, it is clear that the

subject of the action is specific tangible property, and that the same words used in another portion of the same section must have the same meaning. But wherein lies the difference? In cases arising under subdivision 3 there is no controversy concerning the attached property. Plaintiff, by attaching it, declares it to be the property of the defendant, and he can reap a benefit from it only in case it is the property of the defendant. Both parties are interested in declaring it to be defendant's property, and controversy is impossible. In cases arising under subdivision 5, the whole controversy centers on the property. Each party claims title or interest therein, each adverse to the other. Every issue presented by the pleadings relates to the property. It is the thing about which the controversy arises, just as the contract is the thing about which the controversy arises under subdivision 3. But, were this otherwise, we could concede that a phrase used in chancery proceedings, in actions relating exclusively to specific property, and seeking specific relief, must be given the same meaning when used in law actions, based on contract, and seeking a money judgment only. Again, it is urged that, if the term "subject of the action" means the controversy involved, then the term had no place in the statute, because it was also necessary to state that the action arose on contract, and, as courts of general jurisdiction had jurisdiction of all actions on contract, it was entirely unnecessary after stating that the action arose on contract, to also state that the court had jurisdiction of the controversy. Granting this to be so, equally unnecessary expressions are frequently found in the statutes. But we think the premise unsound. Without having examined in detail as to the constitution of the courts in New York when the statute was adopted, there were at least the Supreme Court, the superior court of the City of New York, and the court of common pleas for the City and County of New York, all of which had jurisdiction in all or some cases arising on contracts, but their jurisdiction was not entirely concurrent. And in Minnesota, when the statute was adopted, the District Courts were without jurisdiction in certain cases

arising on contracts, the jurisdiction of Justice Courts being exclusive where the amount in controversy did not exceed $100. See *Castner* v, *Chandler*, 2 Minn. 86, (Gil. 68.) The same is true now. See § 5, Art. 6, Const. Minn. These facts render the provision strictly necessary.

The case of *Pennoyer* v. *Neff*, 95 U. S. 714, furnishes the groundwork for much of the respondents' contention in this case. But no point was decided in that case that can aid respondents. The facts were that the state court of Oregon had rendered a personal judgment against a nonresident nonappearing defendant, served by publication only. A general execution was issued upon the judgment, and certain lands of the execution defendant were sold, and the purchaser put in possession. Subsequently an action was brought in the Federal Court by the execution defendant against the purchaser to regain possession. The case turned upon the validity of the judgment in the Oregon state court. In the Federal Supreme Court the case received exhaustive consideration, and it was authoritatively announced that no state court had the power to enter a personal judgment against a nonappearing nonresident defendant, served by publication only. These principles, there announced, and which are now universally accepted as sound, rest upon the broad grounds that every sovereign state possesses exclusive jurisdiction over persons and property within its territory, and may properly determine for itself the status and capacity of its inhabitants, and may prescribe all rules for the acquirement and transfer of property, and for the execution and enforcement of contracts, within such territory; but that the writs and processes of a state court can have no extraterrorial force or binding effect. They cannot reach beyond the territorial lines of the state where issued, and directly affect persons or property in another state. It being certain, then, that no valid judgment in *personam* could be rendered in the case, it followed that no valid judgment whatever could be rendered, unless it was in the nature of a judgment *in rem*. But, to authorize a judgment *in rem*, some process of the court must have

been served upon the *res*, and it must have been brought within the direct control of the court, so that the judgment could direct its final disposition. The court declares that a judgment cannot occupy the uncertain position of being valid in case property of the defendant is subsequently seized in the state, or, failing in that, forever remain invalid, and that a judgment, if void when rendered, will forever remain void. This unanswerable argument leads inevitably to the conclusion that, in all actions against nonresident nonappearing defendants, served by publication only, property of the defendant must be seized before any valid judgment can be rendered. As said by the court in that case, the jurisdiction to investigate the controversy depends upon jurisdiction over property. There is no jurisdiction *in personam*, and, unless there is jurisdiction *in rem*, the action must go down. The learned counsel admit that it is only by inference that *Pennoyer* v. *Neff*, can assist respondents in this case. But it is argued that, by the commencement of an action against an avowed nonresident, no personal judgment is expected, and that, while the action is begun in *personam*, it is necessary for the plaintiff to at once proceed as in an action *in rem*; and admiralty works are cited to show that, in actions strictly *in rem*, the first step is to seize the property to be affected. But this was not an action *in rem*. It was begun as an action in *personam*, and no one could say that it would be anything but an action in *personam* until there had been completed service, and the time for answering had expired. The law could not compel defendant to come in and defend, but it had extended to him every opportunity to do so that it could, and no one was warranted in saying that he would not do so until, by his failure, he so declared. As said in *Cooper* v. *Reynolds*, 10 Wall. 308, and quoted with approval in *Pennoyer* v. *Neff*: "But if there is no appearance of defendant, and no service of process upon him, the case becomes, in its essential nature, a proceeding *in rem*." But what obligation rested upon plaintiff to invoke the jurisdiction *in rem* until it was

certain that jurisdiction in *personam* would not be acquired? True, when that time arrives, he must invoke the jurisdiction *in rem*, or suffer his action to fail. But we perceive no reason why he should sooner do so.

But, lastly, upon this point, it is urged—and there is reasoning *arguendo* in *Pennoyer* v. *Neff*, that suggests this line of argument —that the law assumes that property is in the possession of the owner, either in *personam* or by agent, and that, hence, he will have actual notice of its seizure, and can rush to its defense; but that a statute that requires only that property should be seized before judgment would be satisfied with a seizure one hour before judgment, and thus property would be taken without giving the owner any opportunity to be heard, or, in other words, "without due process of law." We think this reasoning places undue stress upon the fact of seizure, and loses sight of the effect of substituted service. Such service the law authorizes and recognizes. It will sustain no personal judgment,—can serve as the basis of no personal liability; but for all other purposes it is effective. The law is careful to conserve the rights of nonresident defendants. It provides that notice shall be published for a specified time, usually six weeks, and in the newspaper in the proper jurisdiction most likely to give defendant notice. It requires a copy of the summons and complaint to be sent to him when his address is known. All this is not mere idle form. It serves a substantial purpose. It is the theory of the law that notice of the pendency of the action is thus brought to the defendant, and only by the grace of permissive statutes is he permitted to deny it. And, when notice is thus received, he may be justified in disregarding it, so far as incurring any personal liability is concerned; but he is not justified in treating it as an entirely unwarranted assumption of power by a foreign court. He is bound to know the law, and he is bound to know that, if he have property in the jurisdiction, it can and will be seized in the action, unless he appears and incurs the liability of a personal judgment. It is, in effect, a modified form of the

old writ of *distringas*. A nonresident defendant, so served, is not compelled to appear; but he refuses at the risk of having his property seized and appropriated, not for the benefit of the state, as in the old writ, but for the benefit of the plaintiff. The writ of attachment, when used against a nonresident, is not necessarily or ordinarily used for the same purpose that it serves in case of a resident defendant personally served. There its object is to secure an insecure or jeopardized claim. But it may be that a personal judgment against the nonresident would be perfectly good, and all that plaintiff could desire. He uses the attachment to force the nonresident defendant either to submit to the chances of a personal judgment or suffer his property to be appropriated. It is the substituted service that gives notice of the pendency of the action, and that notice is a direct challenge to the defendant to appear and protect his property, if any he have in the jurisdiction. He has ample time. There is no legal harship. The New York rule of court did not require any specified time before judgment at which property should be seized. Neither does *Pennoyer* v. *Neff*, nor any other adjudicated case. *McKinney* v. *Collins*, 88 N. Y. 216, is also relied upon by respondents. There is language in that case which, standing alone, and disconnected with the facts, would strongly support respondents' contention. The case, in all its essential features, was a duplicate of *Pennoyer* v. *Neff*. The court followed that case, and went no further; but, in the opinion, the statutes of New York relating to publication of summons and the jurisdiction acquired thereby were discussed at length, and reasoning used which would seem to indicate that the attached property was the subject of the action. But the question was not in the case, and we do not think it was in the mind of the able jurist who wrote the opinion, because, after discussing the statutes and the New York decisions, none of which fairly met the point, he says: "I think, however, that the understanding of the courts having jurisdiction over such questions must be deemed to be expressed in the rule adopted by the judges, in 1858, when —making provision for carrying the statutes above referred to

into effect, and not enacting any new law, for this was beyond their power—they provided by rule 25 that," etc.; quoting the rule already set out in this opinion. It seems clear that the writer did not intend to give the statute any construction that would violate that rule. Thus viewed, the opinion is in entire harmony with what we have said. That such was the view of the decision taken by the court itself, see dissenting opinion of Earl, J., in *Bryan* v. *Publishing Co.*, (N. Y. App.) 19 N. E. Rep. 827. The only case we find, since *Pennoyer* v. *Neff*, where the points here raised were squarely decided, is *Bank* v. *Jacobson*, (S. D.) 66 N. W. Rep. 453; and that case is directly against respondents, and in full accord with what we have said. The statute in question has been in force for nearly 50 years. It has been in practically universal operation in the United States for more than a quarter of a century, yet no court of last resort has even given it the construction contended for by respondents, so far as our investigation can discover. The general, and, we believe, almost uniform, practice has been the other way. Property rights had been everywhere founded upon this practice. However desirable the practice contended for by respondents might be, it must come, if it come at all, from the legislature. Courts cannot, at this late day, torture it out of the existing statute.

One more point is presented in the brief. It is this: Granting the sufficiency of the affidavit for publication, it is contended that the record offered in evidence shows that no property of the defendant was in fact seized before the entry of judgment. The basis of the claim is the fact that the attachment was by garnishment, the garnishee summons being served upon a bank. The disclosure of the garnishee, made before judgment, showed that it held a large amount of notes belonging to the defendant, and which had been transferred to it by the defendant as collateral to his indebtedness to the bank, which at that time amounted to about one-third of the face value of the collateral notes. Section 5312 of the Minnesota statute reads: "No person or corporation

shall be adjudged a garnishee in either of the following cases, viz: First. By reason of any money or any other thing due to the defendant, unless, at the time of the service of the summons, the same is due absolutely, and without depending upon any contingency." It may be conceded that, under this provision, no judgment could at that time have been entered against the garnishee, requiring it to deliver the notes or any part thereof. But that was not the question. Was there any property of the defendant within the jurisdiction of the court? In other words, had the court jurisdiction *in rem*? If so, it had jurisdiction to render a judgment, to the satisfaction of which the property then before the court might ultimately be applied. We think this is reasonably clear. The defendant owed the notes subject to the lien of the garnishee. Or, to put it more favorably for respondents, the defendant's interest in the notes was an equity of redemption. But, under § 6842, Gen. St. Minn., an equity of redemption is clearly property, and, being property, is subject to levy. Whatever steps it may be necessary to take in order to realize upon the property cannot affect the validity of the levy. The court has the power to make all necessary orders to that end, as was in fact done in this case. We think the court had full jurisdiction to render a valid judgment *in rem*.

It follows that the record of the judgment of the District Court of Hennepin County, Minn., when offered in evidence, was not vulnerable to the objections urged. Its rejection was error, which necessitates a new trial in the case, and it is so ordered.

Reversed.

WALLIN, C. J., concurs.

CORLISS, J. I am compelled to dissent from the opinion of this court in this case. The contest before us relates to plaintiff's title to the note sued on. It was executed by defendant Vigen to defendant Rustad, and plaintiff claims the ownership of it under certain judicial proceedings, had in the District Court of the State of Minnesota against the

defendant Rustad, which, it is insisted, operated to transfer to plaintiff Rustad's title to the note. Those proceedings were instituted by a creditor of Rustad. Rustad was never served with process in that state, nor did he appear in the action. He was a nonresident, and the only service upon him was by publication. The note in question was in the hands of the Washington Bank of Minneapolis, Minn., as pledgee, Rustad having assigned it to the bank as collateral to his indebtedness to such bank. In the action against Rustad, garnishment proceedings were instituted against the bank with the view to the garnishment of this and other notes of Rustad held by the bank. In the view I take of the case, it is unnecessary for me to determine any question save that of jurisdiction. Defendant Rustad, the original owner of the note, and defendant Vigen, the maker thereof, unite in the contention that the Minnesota District Court never acquired jurisdiction over the property in question, and, therefore, that no title to such note passed to plaintiff, who purchased it under execution issued in the case, but that the title thereto is still in defendant Rustad. The attack upon the validity of the proceedings in Minnesota, which appears to me to be unanswerable, is based upon the claim that the affidavit for publication of the summons was fatally defective. If the affidavit was silent as to a jurisdictional fact, the service by publication founded upon it is a nullity; and, unless there was legal service of the summons, the judgment is void, notwithstanding the seizure of the *res* by the garnishment proceedings. That the affidavit was defective in the particular mentioned, I think, is capable of complete demonstration. It stated, not that the court "had jurisdiction of the subject of the action," but merely that it had "jurisdiction of the action." By stipulation in this case we are permitted to examine the Minnesota statutes and dicisions with the same effect as though they had been formally received in evidence as facts in the case. The statute relating to service by publication declares that: "When the defendant cannot be found within the state, of which the return of the sheriff of the county in which the action

is brought, that the defendant cannot be found in the county, is *prima facie* evidence, and upon the filing of an affidavit of the plaintiff, his agent or attorney, with the clerk of the court, stating that he believes that the defendant is not a resident of the state, or cannot be found therein, and that he has deposited a copy of the summons in the post-office, directed to the defendant at his place of residence, unless it is stated in the affidavit that such residence is not known to the affiant, and stating the existence of one of the cases herein specified, the service may be made by publication of the summons by the plaintiff or his attorney in either of the following cases." Section 5204, Gen. St. Minn. 1894. Then follows the enumeration of five distinct classes of cases in which the service by publication may be made. Only two of these need be here referred to. They are found in subdivisions 3 and 5 of the section. They read as follows: "Third. When the defendant is not a resident of the state, but has property therein, and the court has jurisdiction of the subject of the action. * * * Fifth. When the subject of the action is real or personal property in this state, and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein." The proceeding, the validity of which is in question in this cause, falls within subdivision 3. It was therefore, necessary for the plaintiff therein to state in his affidavit for publication the facts set forth in that subdivision. A failure to do so would render the publication a nullity. *Cousins* v. *Alworth*, 44 Minn. 505, 47 N. W. Rep. 169; *Barber* v. *Morris*, 37 Minn. 194, 33 N. W. Rep. 559; *Corson* v. *Shoemaker*, (Minn.) 57 N. W. Rep. 134. In my opinion, the words "subject of the action" relate to property brought within the control of the court, and not to the claim on which the action is based. These words cannot be said to have received, at the time they first appeared in a similar statute, or, indeed, at the time they were incorporated in the Minnesota statute we are construing, so definite and fixed a meaning that no room for any other construction is left except

the one that limits their meaning to the claim sued upon. See Bliss, Code Pl. § § 126, 373, 375; Pom. Rem. & Rem. Rights, § § 475, 487-490, 775, 776, 794. On the contrary, at the time they were first inserted in the New York statute, afterwards borrowed by Minnesota from that state, they had been employed by the English court of chancery as referring to the property around which the controversy revolved. See opinion of Lord Westbury in *Cookney* v. *Anderson*, 1 De Gex, J. & S. 365. It is true that, when an attachment is issued in cases in which, by reason of the service of process within the jurisdiction, or the appearance of the defendant, the court has power to render a personal judgment, it cannot be said that the property seized constitutes the matter which the court is acting upon in that particular case. In such a case the attachment is a mere adjunct to the main proceeding, an incident to the leading purpose of the plaintiff, which is to enforce the demand sued on, and secure a personal judgment thereon against the defendant. But, when the defendant is a nonresident, and is not served, with process within the jurisdiction, and does not appear in the action, all possibility of a personal judgment disappears from the case. It proceeds in all respects as a proceeding *in rem*, although, nominally, it is a proceeding in *personam*. The judgment is in form against a personal defendant, but it is in fact as stictly a judgment against the specific property seized as though such property had been seized as the offending thing, or as the *res* liable for the claim embraced in the action, independently of any personal liability of a personal defendant. True it is that there is a personal defendant named in the papers, and it is likewise true that the proceeding can affect only his interest in the property attached. But, with respect to his interest in the *res*, the proceeding, in its essential nature, is strictly a proceedlng *in rem*, if jurisdiction over the personal defendant is not obtained. The case, in legal effect, goes on against the interest of the nominal personal defendant in the actual impersonal defendant, which, by the attachment, has, to the extent of such interest, become as much responsible for the demand sued

on as though it was the offending thing, or the *res*, liable for the claim under admiralty law, and was proceeded against as such without any personal defendant being named in the case at all.

This conclusion results inevitably from settled principles of private international law. The defendant, in the case supposed, cannot be personally subjected to the jurisdiction of the court, so as to be bound in any other jurisdiction by a personal judgment rendered in the action; and, since the decision of the Federal Supreme Court in *Pennoyer* v. *Neff*, 95 U. S. 714, he cannot in this country be so bound even in the very state in which the judgment was rendered. Before that decision was promulgated, the doctrine enunciated in that case was unquestionably the sound doctrine; but some courts, confounding the general jurisdiction of each sovereignty over all property within its borders with the jurisdiction of a particular court over specific property proceeded against, had frequently held before that decision that the property which was in fact within the state when the suit was commenced might be seized after judgment rendered upon service by publication. This position was not tenable on principle. A proceeding must be *in rem* or in *personam*. When personal service is not made, an action can be sustained only as an action *in rem*. It is only on the theory that such an action is *in rem* that the court has power to take a single step. Jurisdiction must attach at the inception of the case. There can be no action without jurisdiction. As it cannot, in the case supposed, ever extend to the person, it must be a jurisdiction over property, and this jurisdiction must be coeval with the action. But there cannot be jurisdiction *in rem*—jurisdiction over property—unless it is proceeded against; and, when the property is proceeded against on the theory that it has been brought within the control of the court by seizure, and not because the suit itself relates to it, or some interest in or lien upon it, the only way in which it can be brought within the jurisdiction of the court is by seizure thereof in some form. Such seizure is indispensable to jurisdiction. Until seizure has taken place, no jurisdiction whatever is vested

in the court, and the proceedings are so much idle parade of arrogated authority. As there is no personal jurisdiction in the case supposed, there can be no power in the court to go on with the cause until property within the state has in some form been proceeded against and brought within the jurisdiction of the court. An attachment or seizure is necessary to institute a proceeding *in rem*; and it is also necessary that such attachment or seizure should precede service of notice, unless the legislature has otherwise provided. Whether such a provision would be valid is not here involved. I incline to the view that the publication of notice might precede seizure provided the statute in terms required the seizure to take place such a reasonable time before the entry of judgment that the defendant would have reasonable notice that his property was being proceeded against, and an opportunity to defend. In such a case the publication of the notice might be regarded as a preliminary step leading up to the seizure. Certainly the defendant would, under such a law, receive timely notice that his property was being proceeded against. But we have no such statute before us for construction. It does not require that the seizure should take place a reasonable time before judgment, unless the requirement that it antedate the publication of the summons is found in the provisions of the statute that the affidavit for publication shall state that the court has jurisdiction of the subject of the action. If we do not adopt this interpretation, terms of the statute are satisfied if attachment precedes judgment only a single minute. Such a construction of the statute is unreasonable, harsh, repugnant to sound principle and to natural justice, conflicts with the settled usages of courts in analogous cases, and it would, in my judgment, render the act void, as authorizing the taking of the property of the citizen without due process of law. We are, therefore, it seems to me, driven back upon the only other possible construction, *i. e.* that the attachment must, under the statute in question, precede the publication of summons, and must exist at the time the affidavit for such publication is made. The plaintiff is required to present

an affidavit showing that an attachment has been made, to the end that the court may see that it has jurisdiction over the *res* before proceeding further with the case; the statute contemplating that no other jurisdiction will be obtained in the case.

In construing the act in question, we find ourselves necessarily dealing with general principles of private international law, and not with the extent of the power of the states to modify such principles by legislation. It is obvious that, if that feature of the proceeding which alone gives it vitality—the seizure of property—may lawfully be absent from it at the time of the service of process, it may likewise be absent until the moment before the entry of judgment, and thus the defendant receive no notice whatever that the court is assuming to exercise jurisdiction over his property until it is too late for him to protect his interest in it. Up to the moment of the seizure, which may be immediately before judgment, the defendant, if he happens to know of the action at all, knows of it only as an unwarranted attempt to to exercise jurisdiction over his person. When the suit relates to to specific property (as in actions to foreclose liens on property, or to partition the same, or to remove a cloud from the title to real property, or to reform an instrument relating to the title,) the defendant, from the very first step in the case, has notice,—what the law regards as notice, and, usually, it is sufficient to apprise him of the action,—has notice that his property is being proceeded against. But, when the action is to recover money, and property is affected only as it is attached in the case, it is not until an actual seizure that the defendant can receive any information that such property forms the real subject of the action. Prior to that time, the suit has the appearance of an unjustifiable proceeding in *personam*. As in actions relating directly to property the defendant is from the beginning informed that property forms the subject of the action, so, where it is made the real subject of the action by seizure for a claim, he must likewise be given this notice from the inception of the case, or, at least, a reasonable time before the entry of judgment. The only

way of giving him such notice, where the demand itself does not relate to property, is by the attachment, of property in some form. In admiralty actions, the seizure always precedes the giving of notice by publication; and, when common law courts proceed on the same principle,—*i. e. in rem*,—the same procedure should be followed, in the absence of clear statutory provisions to the contrary; and, as we said before, if the attachment is to follow the giving of notice, it must at least precede the final judgment such a reasonable length of time as to afford the defendant an opportunity to learn of the attachment, and defend. The seizure is the notice that property is being proceeded against, whether the case is in a court of admiralty or a court of law. The published notice apprises the owner of the property in what court the suit is pending, and when and where he must appear to defend his rights. It is the seizure, therefore, which makes the proceeding one *in rem*; and for this reason the seizure must be the initial step in the case, or must, at least, precede judgment a reasonable time. An action which, because it has proceeded in *personam* against a nonresident not personally served, is without effect down to the time just preceding the entry of judgment, cannot, in a moment, be transmuted into an action *in rem* by seizure of property, and then, without opportunity for the defendant to learn that his property is proceeded against, ripen into a judgment *in rem*, as though the action had been an action *in rem* from the beginning. The Rubicon is crossed when we once reach the conclusion that a suit against a nonresident, based only on seizure of his property to satisfy the plaintiff's claim, is in its essence a proceeding *in rem*. Everything follows from this proposition. The principles which govern courts in proceedings *in rem* against property within their jurisdiction apply, and must be recognized. They are controlling. These principles require that, when the suit does not relate to property directly, but it is sought to be subjected to plaintiff's claim, it shall be seized as the basis of jurisdiction over the *res*,—the only jurisdiction the court can obtain.

That the proceeding by attachment against a nonresident defendant is one essentially *in rem* stands not alone upon principle. The Federal Supreme Court has repeatedly held this to be its real nature. In *Cooper* v. *Reynolds*, 10 Wall. 308, Mr. Justice Miller, speaking for the court, with respect to the character of such a proceeding, says: "But the plaintiff is met, at the commencement of his proceedings, by the fact that the defendant, is not within the territorial jurisdiction, and cannot be served with any process by which he can be brought personally within the power of the court. For this difficulty the statute has provided a remedy. It says that, upon affidavit being made of the fact, a writ of attachment may be issued and levied upon any of the defendant's property, and a publication may be made warning him to appear, and that thereafter the court may proceed in the case, whether he appears or not. If the defendant appears, the cause becomes mainly a suit in *personam*, with the added incident that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But, if there is no appearance of the defendant, and no service of process on him, the case becomes in its essential nature a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. That such is the nature of this proceeding in this latter class of cases is clearly evinced by two well-established propositions: First. The judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court, or in any other; nor can it be used as evidence in any other proceeding not affecting the attached property; nor could the costs in that proceeding be collected of defendants out of any other property than that attached in the suit. Second. The court, in such a suit, cannot proceed unless

the officer finds some property of defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court. Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that, which, in this case, is the same in effect, levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely *in rem*. Without this, the court can proceed no further. With it, the court can proceed to subject that property to the demand of plaintiff." And in *Pennoyer* v. *Neff*, 95 U. S. 714, the court said: "It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state, they are substantially proceedings *in rem*, in the broader sense which we have mentioned."

The reasoning of the Federal Supreme Court in *Pennoyer* v. *Neff*, 95 U. S. 714, seems to lead inevitably to the view that, in cases where property is proceeded against merely by attachment, the seizure must be made at the commencement of the suit, or a reasonable time before judgment. It is, at least, certain that such was and is the practice in analogous cases in admiralty, and it is also true that, to require seizure to precede service by publication, or, at least, to be made a reasonable time before judgment, is in the interests of justice to the owner of the propetty and of orderly practice. Moreover, it is more rational to provide for seizure in advance, for, until seizure, the question of ultimate jurisdiction is unsettled. Jurisdiction may never attach. It is in

the light of these considerations that we must construe the words "subject of the action," as used in the Minnesota statute in question. They impel us to the belief that these words were employed to indicate the seizure of property in the case. It constitutes the subject of the action in such cases, as much as it does when the action is to foreclose a lien upon it. In reality, all the action becomes, after seizure, is an action to enforce the lien against the property seized, created by the attachment. The inquiry whether there is a valid claim is only incidental to the main question whether there is a lien on the property attached for which it should be sold, for without such lien there is no power to proceed. The court has no power to inquire into the merits of the claim for any other purpose than that of establishing such a lien on the property as will warrant its sale to satisfy such lien. Beyond this it cannot go. The question of the defendant's personal liability is not before it. Said the court in *Pennoyer* v. *Neff*, 95 U. S. 714: "The jurisdiction of the court to inquire into and determine his obligation at all is only incidental to its jurisdiction over the property." When there is an attachment against a nonresident, the attached property is, as we before said, as much the subject of the action as is property the subject of an action when it is brought to foreclose a lien. Courts of equity have often referred to the property, in foreclosure and similar cases, as constituting the subject of the action; and subdivision 5 of the section in question (§ 5204) recognizes this use of the phrase: "When the subject of the action is real or personal property in this state, and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein." Gen. St. Minn. 1894, § 5204. It is therefore, apparent that, when the phrase is used in subdivision 3, it refers to the property seized, for, after seizure, it occupies the same relation to the proceeding *in rem* that property on which it is sought to foreclose a mortgage occupies with relation to a foreclosure suit. It is somewhat significant that the Minnesota

statute in terms permits the issue and levy of an attachment at any time after issue of the summons and before the service thereof. Section 5287. It is, therefore, always in the power of the plaintiff to attach before serving the summons by publication. In our view, when he cannot secure jurisdiction over the person, he must, under the Minnesota statute, always attach first. The construction we place on the words "subject of the action" saves our reaching the conclusion that, as originally inserted in the New York statute, they were meaningless. They unquestionably relate to an extrinsic fact, and, if that fact is merely the jurisdiction over the claim in controversy, they had no significance in the New York statute as originally framed, for, on showing, as the New York statute required, that the action was on contract, the jurisdiction of the court of original jurisdiction over the claim in dispute would have been fully established in New York, there being no limitation on the original jurisdiction of the Supreme Court in that state in contract cases. To say that these words relate to the claim sued on is to assert that the legislature in New York required the plaintiff, in an action in the Supreme Court in that state, to state twice in his affidavit that the court had jurisdiction over such claim.

There are, doubtless, decisions which appear to militate against our view, but they were rendered before the mists had lifted from this department of jurisprudence. They ignore, or at least attach but little importance to, the peculiar functions of an attachment in actions against nonresidents. In actions in which a personal judgment can be rendered, an attachment has for its sole object the creating of a lien on property as security for the claim sued on. But where a personal judgment cannot be rendered in an action for money, the attachment of property is an indispensable jurisdictional step. By it, and by it alone, jurisdiction over the *res* is obtained. The question is no longer merely one of lien, but of jurisdiction. Where the plaintiff has obtained jurisdiction over the person, he may postpone the seizure till just before the entry of judgment, for all he is after is

a lien. But where jurisdiction over the person is not secured, he needs more than a lien on property,—must have it. He must obtain jurisdiction over the property itself, or his whole proceeding is abortive; and this jurisdiction like any other jurisdiction, must precede the judgment at least such a reasonable time as will afford the defendant an opportunity to defend. The later utterances of the New York court of appeals on the subject seem to accord with our decision. In *McKinney* v. *Collins*, 88 N. Y. 216, the court said: "By the code of 1849, (Laws 1849, Ch. 438,) to entitle the plaintiff to proceed by publication, it must appear, not only that the person to be served cannot be found within the state, and that a cause of action exists against him, but the case itself must be one of several classes there indicated. Section 135. It is no longer enough that the supposed absent defendant has property in the state, but, if he is a nonresident, it must also appear that the action is on contract [this limitation has abrogated,] and that 'the court has jurisdiction of the subject of the action.' Section 135, Subd. 3. These words seem to me to introduce an important qualification to the general language of the section already referred to. As found in the code of 1849, not only must a cause of action exist against a nonresident defendant, but the court must have jurisdiction 'of the subject of the action.' These three things must be established before a judge has jurisdiction to make an order for service by publication. In Subd. 4, § 135, we find another case stated in which an order for publication may be had, described in these words: 'Where the subject of the action is real or personal property in this state, and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists fully or partly in excluding the defendant from any interest therein.' What do the words 'subject of the action' mean? That they are words of limitation and qualification is plain from the language of both subdivisions 3 and 4. Evidently they are not identical with the words 'cause of action,' and are not satisfied when the court

has before it merely the obligation of a contract. They seem to have relation to some property or thing, concerning which the proceeding is instituted and carried on, and the changes to be effected by it. Similar words are found in § 167, (formerly § 143,) as amended in Laws 1852, Ch. 392, providing that the plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated 'legal' or 'equitable,' or both, where they all arise out of the same transaction, or transactions connected with the same 'subject matter.' And by § 144 it is cause for demurrer that the court has 'no jurisdiction of the person of the defendant, or the subject of the action;' and these words may also be construed with those of subdivision 6, which declares, as cause for demurrer, that the complaint does not state facts sufficient to constitute 'a cause of action.' It is therefore apparent that the phrases 'cause of action' and 'subject of action' are not used interchangeably, or as synonyms. It is not easy to define their precise meaning, but it seems apparent that they relate, not to an action at law, though to one which formerly would have proceeded in equity; the object being to give some specific relief rather than a simple judgment against a person, as in an action to cancel a mortgage upon the ground of usury, or to enforce specific performance, or to attain such relief as by the rules of the common law was denied to the suitor in its forum,—certainly not an action where the only relief sought was a judgment upon contract for the payment of money. There might be jurisdiction of the cause of action. There certainly would be in the case supposed. But there must also be jurisdiction over the 'subject of the action,' and, until the property or thing to be affected by it has been seized or taken by legal process, it is difficult to see how a court can be said to have jurisdiction over it." While entertaining great respect for the decisions of the Supreme Court of South Dakota, I am unable to agree with its ruling in the case of *Bank* v. *Jacobson*, 66 N. W. Rep. 453.

When the words "subject of the action" are found in statutes

relating to the joinder of causes of action and the right to interpose counterclaims, the very nature of the subject makes it obvious that such words could have no reference to property attached. But these words have no such rigid significance that their meaning may not be radically different when they are used in a statute which contemplates that property, and property alone is to become the real subject of the controversy, because of the fact that the statute proceeds on the theory that no personal judgment, enforceable as such, can be rendered in the case. The Minnesota statute authorizing service by publication is, as all such statutes are, based upon the fundamental idea that the proceeding in which such service is to be made will be exclusively a proceeding *in rem*,—a proceeding against specific property; that such property will form the real subject of the litigation. When, in such a statute, the words "subject of the action" are found, in a provision requiring the affidavit, which must precede service by publication, to state that the court has jurisdiction of the subject of the action, it is to my mind a natural inference that these words refer to property which, by being seized in such a proceeding, wherein a personal judgment cannot be rendered, becomes the only substantial subject of the action,—the only matter on which the court can act with any legal effect. The court cannot take jurisdiction of the cause of action, except as incidental to its jurisdiction over the real subject of the action, —the property seized. It cannot render a personal judgment on such a cause of action which will be of any legal effect as a judgment enforceable generally against the property of the defendant. Such a personal judgment would be void. We can see no reason why the plaintiff should be required to state in his affidavit, on which he must base his service of the summons of publication, that the court has jurisdiction of the subject of the action, if these words mean only the claim he is seeking to enforce. The District Court of Minnesota is a court of general original jurisdiction, and, as such, has original jurisdiction of all civil actions (*Agin* v. *Heyward*, 6 Minn. 110 [Gil. 53;]) and it is only in civil

actions that service by publication is provided for. Therefore, whenever a civil action is commenced, whatever be its nature, the District Court of that state does, as a matter of fact, have jurisdiction of the subject-matter. Why should the plaintiff be required to state this conclusion in his affidavit when such conclusion is apparent from the mere fact that he has instituted a civil action? It is impossible to serve a summons by publication in a civil action without the court having jurisdiction of the subject matter of the action, for it has jurisdiction of the subject matter of all civil actions. If, therefore, these words mean only the claim sued upon, the statute requires the plaintiff to swear to an idle thing,—a mere proposition of law, and not a fact. When the plaintiff is required, in proceedings essentially *in rem*, to swear to the fact that the court has jurisdiction of, not "the cause of action," or of the "subject matter," but of the "subject of the action," it is to compel him to bring upon the record of the case an extrinsic fact, on which the power of the court to proceed in the action with legal effect depends, and not to force him to bring upon the record a declaration of a mere legal proposition, of which the District Court would necessarily be informed, from the simple fact that a civil action was being instituted in that court. It is urged that, if the purpose had been to require seizure of property before publication of the summons, the language of the statute would have been, "when the defendant has property within the state which has been attached," or that equally explicit language would have been used. But it is notorious that the most accurate mode of expression is not necessarily or even generally adopted in the drafting of statutes. Felicity of diction in the framing of laws is seldom attained. Had the art of formulating statutory provisions reached anything like perfection, the courts would not be constantly besieged by litigants seeking to have the doubtful meaning of legislative enactments set at rest. It has been the experience of all judicial tribunals that the interpretation of statutes is involved in a large percentage of cases, that no more difficult duty devolves upon them than that of constru-

ing acts of the legislature, and that often the conclusion reached is, because of the hopeless ambiguity of the law, a conclusion with which the court is not altogether satisfied.

The argument advanced by counsel for plaintiff has a double edge. If the object was to provide that the plaintiff was to state in his affidavit that the court had jurisdiction of the claim sued upon, why was not the phrase "subject matter" employed? Then no uncertainty could have existed. This phrase was not employed; but, on the contrary, another phrase was used, which, in courts of equity, had been long understood to refer to the property which formed the real subject of the controversy. In a proceeding *in rem* to foreclose a mortgage the foreclosure in one sense constitutes the subject of the action. But courts of equity had come to speak of the property itself as the real subject of the action. And so, when the legislature, under our blended systems of procedure, embracing both legal and equitable actions, assimilated the procedure in legal and equitable actions, in the matter of reaching the property of nonresidents as well as with regards to other matters, it naturally used the words "subject of the action" to express, with respect to legal actions, the same meaning which it had in equitable causes. In both classes of cases, the statute, contemplating that there can be no personal judgment, refers by the use of the words "subject of the action" to the only thing which constitutes the real subject of the action, *i. e.* the property proceeded against. In an action to foreclose a mortgage against a nonresident, the subject of the action might, as we before stated, be regarded, in one sense, as the foreclosure of the lien. So, in an action at law against a nonresident upon contract, the enforcement of the contract might in the same sense be considered the subject of the action. But courts of equity have long regarded the property in such a foreclosure action as constituting the real subject of the action, for it is all that can be reached in the proceeding. Why should not the same court, which administers equitable relief, regard, in a legal action of which it also has jurisdiction, the property attached as the

real subject of the action, in view of the fact that, just the same as in the foreclosure action referred to, the property is the thing against which the proceeding is leveled, and which, alone, can be affected by it?

It is said that, if these words, "subject of the action," mean seizure of property, why was the plaintiff required to state, also, that the defendant had property in the state? Proof that property had been seized in the state would be proof that the defendant had property therein. But there is no incongruity in the use of these two phrases. The provision, as we construe it, in effect reads as follows: "That the defendant has property within the state which has been attached." Certainly it would not be claimed that such a provision was open to serious criticism for redundancy, although it would be strictly true that the same idea might have been expressed by a declaration that the plaintiff should state, in his affidavit, that property of the defendant had been attached. Over against these arguments of counsel for plaintiff, which are by no means destitute of force, are set the following arguments, which in my judgment are controlling: First. On their view of the meaning of those words, such words require the plaintiff to state that which the court knows from the mere fact that it is in a civil action that the plaintiff desires to serve a summons by publication,—to state, not an extrinsic fact, or, indeed, a fact at all, but a mere proposition of law, which must invariably be true in all such cases. Second. Considering the essential nature of the proceedings, the anologies of the law, and the meaning given to these words by courts of equity, they are in this statute more susceptible of the construction we place upon them than the one for which plaintiff's counsel contends. Third. It is only through this interpretation of these words that any provision can be found in the statutes which makes it necessary for the plaintiff to attach a reasonable time before judgment, or at any time until the moment before judgment is entered; and to hold that the statutes authorize such a belated attachment, in a proceeding which can have no force

except as to property attached, is to conclude that such statutes authorize a proceeding repugnant to the state and the federal constitutions, and to that fundamental principle of natural justice, that a person, before being affected by the judgment of a court, shall have such a notice as calls upon him to defend in time to enable him to make his defense. Notice that a foreign court is seeking to obtain a personal judgment, without personal service of process in the foreign jurisdiction, is notice to which a defendant is under no legal obligation to respond. Notice, through attachment of his property, that the same court is assuming to exercise jurisdiction over such property, is not reasonable notice when it immediately precedes judgment. As the affidavit did not state that the court had jurisdiction of the subject of the action, and as no other language appears therein showing that property of the defendant had been seized, I am of opinion that the court was without jurisdiction, and that, therefore, its judgment, and the sale thereunder of the note sued upon in this action, were void. Hence, the plaintiff is in my opinion without title to this note.

I fully agree with my associates in the disposition of the other point in the case.

(69 N. W. Rep. 203.)

FRANK G. BIGELOW, *et al vs.* C. E. V. DRAPER, *et al.*

Opinion filed November 11th, 1896.

Action to Condemn Property—Name of Corporation.

An action to condemn property for railroad purposes should be brought in the name of the company, despite the fact that its property is in the hands of receivers appointed in foreclosure proceedings, who are operating the road.

Amendment as to Party Plaintiff After Verdict.

Such action having been brought in the name of the receivers, *held*, that it was not error for the court, after verdict fixing the compensation to be paid for the taking of the property condemned, to amend the pleadings and all proceedings by inserting the name of the corporation on its own motion. Also, *held*, that as the action was brought by and in the names of the receivers, on behalf of the corporation, it was not necessary to dismiss the action, and institute a new suit, as would be necessary where the sole plaintiff, who sues on his own behalf, has no interest in the cause of action, the right to sue being in another.

Issues in Condemnation Triable to Court—Exception.

All issues in a condemnation action, except the issue of compensation, are triable by the court, without a jury.

Necessity of Condemnation is Question for the Court.

The question of the necessity of condemning the property sought to be condemned, while in its essential nature a political question, has been made a judicial question in this state by statute; but it is triable by the court, and not by a jury.

What is Legal Necessity.

A legal necessity, within the meaning of the statute, for the taking of private property for railroad purposes, exists when it appears that such property is needed by the corporation to enable it to augment the safety of its roadbed at points where the roadbed is unsafe at a particular time of the year.

Diversion of Water Course.

Section 210 of the constitution does not prohibit the diversion of a portion of a non-navigable water course, where such diversion is needed for a public use, the substantial integrity of the stream not being thereby impaired.

Riparian Rights—Condemnation of.

Under the statutes of this state, the right of the riparian owner to have a natural stream flow over his land is such property as may be condemned for railroad purposes.

Verdict on View Must be Within Limits of Evidence.

While a jury which has taken a view, under the statute, of the premises which it is claimed will be damaged by a proposed diversion of a water course therefrom, may weigh the evidence as to value in the light of what they have seen, yet their verdict must be within the limits of such evidence. It cannot rest alone upon their own judgment, based upon mere inspection of the property.

Order of Condemnation Reversed as to Part of Defendants.

An order of condemnation in proceedings under the eminent domain statute may be reversed as to one of the parties, and affirmed as to others.

Question of Compensation Resubmitted.

The court being of the opinion that the compensation awarded one of the defendants was insufficient under the evidence, *held*, that the order should be reversed as to such defendant, and the single question of compensation be submitted to another jury.

Appeal from District Court, Morton County; *Winchester*, J.

Action by Frank G. Bigelow and Edwin H. McHenry, as receivers of the Northern Pacific Railroad Company, and others, against C. E. V. Draper and others. Judgment for plaintiffs. Defendants C. E. V. Draper and others appeal.

Modified.

Newton & Patterson, *E. C. Rice*, and *James G. Campbell*, for appellants.

The plaintiffs could not maintain this action without authority from the court appointing them, and none was shown. High on Rec. § 200; *M. & St. L. R. Co.* v. *M. W. R. Co.*, 63 N. W. Rep. 1035; *Booth* v. *Clark*, 15 L. Ed. 164; *Davis* v. *Gray*, 21 L. Ed. 447; *Pendleton* v. *Russell*, 36 L. Ed. 547; Rev. Codes, § 5406. The order making the Northern Pacific Railroad Company a party plaintiff, after verdict and repeated objections of appellant was error. 1 Enc. Pl. & Pr. 585 and cases cited. *Beard* v. *Telgman*, 66 Hun. 12, 20 N. Y. Supp. 736. The enforcement of the right of eminent domain is a matter entirely dependant upon statute. Mills Em. Dom. § 48; Lewis Em. Dom. § 37; 1 Rorer on Railroads, 291. The power is strictly construed. 6 Am. and Eng. Enc. Law, 522; Mills Em. Dom. § 48; *Barre R. Co.* v. *M. & W.*

R. R. Co., 4 L. R. A. 785, and statutes authorizing it will not be extended in their operation by implication. 1 Rorer on Railroads, 298. By § 210, constitution, the legislative power is restricted, in its right to delegate to plaintiff authority to turn the course of a natural stream. *M. & R. R. Boom Co.* v. *Patterson*, 98 U. S. 206; Lewis Em. Dom. § 10. This section of the constitution is self executing. *Peo.* v. *Palmer*, 64 Ill. 41; *State* v. *Holladay*, 64 Mo. 526; *Hills* v. *Chicago*, 60 Ill. 86; *Willis* v. *Ry. Co.*, 16 L. R. A. 286. It is disabling, not enabling. *State* v. *C. R. Co.*, 46 N. J. L. 289. The necessity for diverting the Heart river is not shown. Section 5959, Rev. Codes. The word "*necessary*" as used in this statute means indispensible, requisite or essential. *M. & St. P. R. Co.* v. *City*, 34 Wis. 271-277. The question of necessity is a judicial one. Pierce on Railroads, 148; *M. & St. P. R. Co.* v. *City*, 23 Minn. 167; *In re St. P. & N. P. R. Co.*, 33 N. W. Rep. 701. And no mere matter of convenience, economy or caprice will create the necessity mentioned in the statute. *Seattle & M. R. Co.* v. *State*, 22 L. R. A. 217; *Pugh* v. *Golden Valley R. Co.*, (L. R.) 12 Ch. Div. 274; 6 Am. & Eng. Enc. L. 539; *Watson* v. *Acq. W. Co.*, 36 N. J. L. 196; *U. S.* v *Chicago*, 12 L. Ed. 660.

Ball, Watson & Maclay, for respondent.

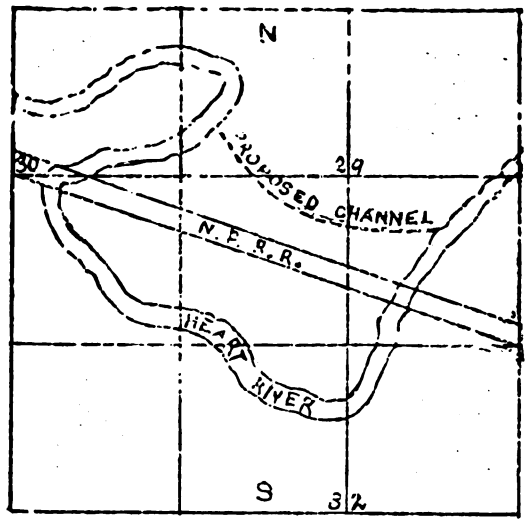
The order allowing amendment of the summons and complaint by adding the name of the Northern Pacific Railroad Company as party plaintiff was proper. Section 5297, Rev. Codes. The railroad company was a necessary party. Sections 5962, 5956, 2947, Subd. 3, Rev. Codes. The corportion which owns the road is the proper plaintiff in condemnation proceedings. *Kip* v. *Railway*, 67 N. Y. 227; *Railway* v. *Union Boat Co.*, 1 N. E. Rep. 27; *In re Railway*, 2 N. Y. Supp. 278; *Cory* v. *Ry.*, 44 A. and E. Ry. Cases, 183; *Dietricks* v. *Ry. Co.*, 13 N. W. Rep. 624. Both the corporation and the receivers were interested and proper parties plaintiff. Section 5229, Rev. Codes. The issues both of law and fact, the method of trial and the testimony were the same as they would have been if the corporation had been named as one of the plain-

tiffs when the proceedings were begun. The amendment was purely formal. *Perine* v. *Grand Lodge*, 50 N. W. Rep. 1022; *Railway* v. *Boswell*, 36 N. E. Rep. 1103; *Estes* v. *Thompson*, 17 S. E. Rep. 98; *Eve* v. *Cross*, 76 Ga. 693; *Thornton* v. *Britton*, 22 At. Rep. 1048; *Meyer* v. *State*, 25 N. E. Rep. 351; *Stanton* v. *Kenrick*, 35 N. E. Rep. 19; *Ins. Co.* v. *Mueller*, 77 Ill. 22; *Chandler* v. *Frost*, 38 Ill. 559; *Hume* v. *Kelley*, 43 Pac. Rep. 380; *Railway* v. *Bowles*, 24 S. E. Rep. 388; *Dean* v. *Gilbert*, 36 N. Y. Supp. 1004. The amendment permitting the receivers to allege and prove their authority to sue was proper. Sections 5297, 5300, Rev. Codes; 1 Enc. Pl. & Pr. 515-516; *Morgan* v. *Smith*, 95 N. C. 396; *Maddox* v. *Thorn*, 60 Fed, Rep. 217; *Hartford & Co.* v. *Love*, 25 N. E. Rep. 346; *Wild* v. *Railway*, 27 Pac. Rep. 954; *Clough* v. *Adams*, 32 N. W. Rep. 10; *Claude* v. *Handy*, 34 At. Rep. 532; *Hall* v. *Rice*, 64 Cal. 463; *Richmond* v. *Irons*, 121 U. S. 27; *Baggot* v. *Engleson*, Hoff. Ch. 377. The right of trial by jury and due process of law have no application to condemnation proceedings. Cooley's Const. Lim. § § 563, 673, n; *Beekman* v. *Railway*, 3 Paige, Ch. 45; *Peo.* v. *Smith*, 21 N. Y. 595; *Ex parte Reynolds*, 44 Am. and Eng. R. R. Cases, 60; *Willyard* v. *Hamilton*, 7 Ohio, 111; *Ames* v. *Ry.*, 21 Minn. 241, 291; *Hoppikus* v. *Com'rs*, 16 Cal. 248; *Great Falls Co.* v. *Garland*, 25 Fed. Rep. 521. The question of the amount of damages is for the jury in this state. Section 14, Const. § § 5955, 5965, Rev. Codes. The order appointing receivers gave them power to begin this suit. *Davis* v. *Gray*, 16 Wall. 203; *Harland* v. *Bankers, etc. Co.*, 33 Fed. Rep. 199; *Southerland* v. *Railway*, 9 Bank Reg. 306; 20 Am. & Eng. Enc. L. 230. The lands under a river may be condemned for use of a railroad. *Kerr* v. *R. Co.*, 27 N. E. Rep. 833; *In re N. Y. Cent. Ry Co.*, 77 N. Y. 248; *Gould* v. *Ry.*, 6 N. Y. 522; *Getty* v. *Ry.*, 21 Barb. 617; *Ormerod* v. *Ry.*, 13 Fed. Rep. 317. Under a statute similar in phraseology to 5957, and 5958, Rev. Codes, it is held that the right of an individual to enjoy the flow of water in its natural channel upon or along his land can be condemned for public use. *St. Helena Water Co.* v. *Forbes*, 62 Cal. 182. There was evidence to sustain the finding,

that the taking was necessary, and the finding is conclusive. *Port Huron, etc. Ry.* v. *Vorheis*, 15 N. W. Rep. 882. The awards of damages are in no instance for a smaller sum than estimated by one or more witnesses, and should not be disturbed. *Fremont, etc. Ry. Co.* v. *Meeker*, 44 N. W. Rep. 79; *Clark* v *Ry. Co.*, 37 N. W. Rep. 484.

CORLISS, J. The object of this action is to condemn certain property, in order that the Northern Pacific Railway Company (formerly the Northern Pacific Railroad Company) may divert from its accustomed channel, for a distance of two miles, the flow of the Heart river, a non-navigable water course, restoring the water to its old channel further down the stream. The end which the company has in view is to so change the bed of the stream, that it may be no longer compelled to cross the river at two points at which the water course intersects its right of way, thus obviating the necessity of maintaining two bridges at these places where the road is carried over the stream. The following diagram exhibits the proposed alterations in the channel of the river:

EXHIBIT "A."



In consummating this project, it became necessary to obtain the title, by condemnation proceedings or otherwise, to the real estate over which the artificial channel was to be excavated, and also the extinguishment of the riparian rights of the owners of the real property from whose land the water course was to be diverted. The action now before us for final disposition was instituted under our statute for the purpose of condemning these two classes of property. Section 5961 of the Revised Codes provides that all proceedings under the chapter regulating the exercise of the power of eminent domain must be prosecuted by civil action. The issues relating to the necessity for the condemnation of the property in question and the matter of compensation were tried before a jury. The verdict was in favor of the railroad company on the question of necessity. The damages of the various owners of the property affected by the proceedings were assessed by the jury. A final order of condemnation having been made and entered, under § 5970, Rev. Codes, three of the defendants have appealed to this court, and here insist that several errors were committed by the court in the course of the trial, and also that the damages assessed are inadequate under the evidence.

The first point urged by the defendants is that the court erred in permitting the plaintiff, after the verdict, to amend the summons, complaint, and all the proceedings by adding the name of the Northern Pacific Railroad Company as a party plaintiff. The action was originally instituted in the name of the receivers of the company, such receivers having been appointed by the proper United States Circuit Court in foreclosure proceedings. We think it was necessary that the action should be carried on in the name of the corporation itself. Section 5962, Rev. Codes, declares that the complaint must contain the name of the corporation, association, commission, or person in charge of the public use for which the property is sought. We do not think that the word "person," in the statute, was designed to embrace a person acting as receiver for a railroad corporation. This word was

employed to confer authority to institute a condemnation action upon a person in charge of some public use, when the title to the property condemned is vested in the public. Without attempting in this case to define the exact significance of the phrase "the person in charge of the public use," we are clear that it was not intended to cover the case of the temporary control of a railroad coporation by receivers. Within the meaning of the statute, a railroad corporation is still in charge of the public use, despite the fact that, for a brief period, the actual operation of the road is in the hands of receivers. The title to the railroad property is not in them, and the interest in the property condemned will not vest in them. But the corporation, under the law, will hold such property, as it holds all of its property, impressed with a public trust. We think that the following cases support our view, although not directly in point: *Kip* v. *Railroad Co.*, 67 N. Y. 227; *New York, L. & W. R. Co.* v. *Union Seamboat Co.*, (N. Y. App.) 1 N. E. Rep. 27; *In re Railway*, (Sup.) 2 N. Y. Supp. 278; *Cory* v. *Railroad Co.*, (Mo. Sup.) 13 S. W. Rep. 346; *Dietricks* v. *Railway Co.*, (Neb.) 13 N. W. Rep. 624.

As we consider that the corporation was a necessary party plaintiff, it was proper to amend the summons and pleadings by inserting its name as a plaintiff. This was done upon its own petition, and on due notice to the defendants. It is true that this amendment was not made until after verdict; but the corporation had practically been a party to the action before that time, and the amendment simply brought it formally upon the record in the case. No right of the defendants could possibly be prejudiced by such amendment. The defendants were fully heard on the two questions on which they were entitled to be heard,—the question of necessity, and the question of damages. Making the corporation a party plaintiff did not affect their rights with respect to either one of these matters. They were as fully investigated and fairly tried as if the corporation had been a party plaintiff from the inception of the action. Moreover, in view of the fact that the corporation was actually engaged, through its

attorneys, in carrying on the action up to the time of verdict, it is obvious that it would have been bound by the final order in the action without ever being made a party plaintiff thereto, as effectually as if it had been a party to the action from the beginning. Our statute relating to amendments is very broad in its provisions. Rev. Codes, § 5297. If the amendment is in furtherance of justice, it may be made. To hold that the amendment we are discussing should not have been made would be to return to the highly technical and extremely rigid rules of the common law relating to procedure. See 1 Enc. Pl. & Prac. 515, 516; *Maddox* v. *Thorn*, 8 C. C. A. 574, 60 Fed. 217; *Morgan* v. *Smith*, 95 N. C. 396; *Perine* v. *Grand Lodge*, (Minn.) 50 N. W. Rep. 1022; *Lake Erie & W. R. Co.* v. *Town of Boswell*, (Ind. Sup.) 36 N. E. Rep. 1103; *Meyer* v. *State*, (Ind. Sup.) 25 N. E. Rep. 351.

It is true that the case is very closely assimilated to the case of an amendment by which the name of a sole plaintiff is stricken out, and the name of another plaintiff is inserted in its place. There is authority for the proposition that such an amendment is not within the statute; that the action must be dismissed, and a new suit commenced. *Wilson* v. *Kiesel*, (Utah,) 35 Pac. Rep. 488; *Wood* v. *Insurance Co.*, (Mich.) 56 N. W. Rep. 8; *Davies* v. *Mayor, etc.*, 14 N. Y. 527, 528; *State* v. *Rottaken*, 34 Ark. 144-157, 158; *Pickens* v. *Oliver*, 32 Ala. 626; *Tarver* v. *Smith*, 38 Ala. 135; *Liebmann* v. *McGraw*, (Wash.) 28 Pac. Rep. 1107. But the action, before the amendment was made, purported to be carried on in the interests of the Northern Pacific Railroad Company to condemn for the benefit of that company the property in question. The receivers were named as the formal plaintiffs. But it was apparent from the complaint that the real party in whose behalf the action was prosecuted was the company itself, the receivers being named in the pleadings as the temporary custodians of the company's property. Under the circumstances of this case, we regard the amendment allowed as within the letter and spirit of our statutes relating to amendments. Nor do we lack the support of authority in placing this construction upon the statute. *State*

v. *Baker*, 38 Wis. 71; *Buckland* v. *Green*, 133 Mass. 421; *Winch* v. *Hosmer*, 122 Mass. 438; *Costelo* v. *Crowell*, 134 Mass. 280; *Wood* v. *Circuit Judge*, (Mich.) 47 N. W. Rep. 1103; *Morford* v. *Diffenbacker*, (Mich.) 20 N. W. Rep. 600; *Kinney* v. *Harrett*, (Mich.) 8 N. W. Rep. 708; *Wellman* v. *Dismukes*, 42 Mo. 101; *Suber* v. *Chandler*, 28 S. C. 382. See, also, *Weaver* v. *Young*, 37 Kan. 70, 14 Pac. Rep. 458; *Miles* v. *Strong*, (Conn.) 22 Atl. Rep. 959; *Denton* v. *Stephens*, 32 Miss. 194; *Stratton* v. *Taylor*, *Id.* 201; *Lombard* v. *Morse*, 155 Mass. 136, 29 N. E. Rep. 205; *Wilson* v. *Welch*, 157 Mass. 77, 31 N. E. Rep. 712; *Insurance Co.* v. *Mueller*, 77 Ill. 22; *Lake Erie & W. R. Co.* v. *Town of Boswell*, (Ind. Sup.) 36 N. E. Rep. 1103; *Henry* v. *Sansom*, (Tex. Civ. App.) 21 S. W. Rep. 71; *Wood* v. *Baker*, 38 Wis. 71; *Railroad Co.* v. *Bedell*, (Ga.) 15 S. E. Rep. 676; *Estes* v. *Thompson*, (Ga.) 17 S. E. Rep. 98; 5 Enc. Pl. & Prac. pp. 466, 468, 538, and notes

We are of the opinion that the trial court might have stricken out the names of the receivers (assuming that they were not proper parties plaintiff,) and inserted the name of the Northern Pacific Railroad Company. But the names of the receivers were not stricken out. If they were not proper parties, no harm could result to the defendants from their names remaining upon the record in the case. If they were proper parties, then it was not error for the court to leave them in the case as parties plaintiff.

It is alleged that the court erred in permitting the amendment of the complaint, after verdict, setting forth the authority of the receivers to institute all necessary legal proceedings. But, in our judgment, this amendment was unnecessary, and therefore harmless. It was not necessary to aver in the complaint that the receivers had been given authority to institute the action, for they were not the real plaintiffs. As the law would not allow them to institute a condemnation action, it would be idle to allege in the complaint that they had been given such authority by the court that appointed them. But assuming that the receivers were necessary parties plaintiff, and that the complaint must show that they had been empowered to institute such a proceeding, still we

fail to discover how any prejudice resulted to defendants from the amendment of the complaint, inserting an allegation as to the receivers' authority to commence the action. While this was done after verdict, yet the defendants were allowed to put in issue this new allegation. It was not an issue which the jury had any right to pass upon. It was purely a question for the court. The sole power of a jury in proceedings of this character is to assess the damages. The defendants denied the allegation as to the receivers' authority to bring the action, and evidence to establish such authority was introduced. This evidence consisted of the order appointing the receivers. In this order they were given power "to institute and prosecute all such suits, actions, and proceedings as may be necessary, in their judgment, for the proper protection of the property and the trust vested in them." No attempt was made to overcome the legal effect of this order, and the authority of the receivers to institute or join in such condemnation proceedings as the local law would permit them to institute or join in was clearly conferred upon them by this order

It is next urged that the statutes relating to eminent domain do not authorize the condemnation of the riparian rights of the owner of land through which flows a water course. The provisions of our statutes on this subject do not sustain this contention. Rev. Codes, § 5958, Subd. 6, declares that "all classes of private property not enumerated may be taken for public use when such taking is authorized by law." Rev. Codes, § 2947, Subd. 3, provides that railroad corporations authorized to operate or maintain railroads in this state shall have power to acquire, under the provisions of the chapter on eminent domain, all such real estate and other property as may be necessary for the construction, maintenance, and operation of the road, etc. Here is distinct authority to condemn any kind of property that is necessary. See, also, 1 Ror. R. R. 444; *Old Colony & F. R. Co.* v. *Inhabitants of Plymouth*, 14 Gray, 155. Surely, it will not here be claimed that the riparian rights of these defendants do not con-

stitute property. If they are not property, on what principle can the defendants claim damages for their destruction? Indeed, there is eminent authority for the doctrine that such a right is real estate. *Johnson* v. *Jordan*, 2 Metc. (Mass.) 234. See, also, *Water Co.* v. *Forbes*, 62 Cal. 182. That real property may be condemned does not admit of question. Rev. Codes, § 2947, Subd. 3; *Id.*, § 5958, Subd. 1. Under statutes similar to ours, riparian rights have been condemned. *Water Co.* v. *Forbes*, 62 Cal. 182. See, also, *Rumsey* v. *Railroad Co.*, (N. Y. App.) 30 N. E. Rep. 654. It was not necessary to condemn the land through which flows the portion of the river to be diverted from its channel. There appears to be no necessity for the taking of the real estate itself; and it is a familiar principle of law that the wresting of private property from the hands of its owner for a public use should never be permitted to extend beyond such property or such interest in property as is reasonably required to subserve the public interests. It would be unnecessarily burdensome to the company, and inexcusably oppressive against these defendants, to compel or even allow the company to take the fee of the lands involved, when the public use requires merely that they should be damaged, and not that they should be taken wholly from their owners. That the company could, under our statute, condemn the riparian rights without also taking the fee of these lands, does not admit of doubt. See *Water Co.* v. *Forbes*, 62 Cal. 182.

It is also contended that, if our statute permits the diversion of a water course, such a statute is repugnant to the state constitution. Section 210 of the constitution provides that "all flowing streams and natural water courses shall forever remain property of the state for mining, irrigation and manufacturing purposes." It was conceded in the argument of this case that this section of the original law does not impair the property rights of a riparian owner in the waters of a natural stream. At common law, the owner of land through which a non-navigable stream flowed was possessed of the title to the bed of the stream, as well as the

right to a reasonable use of the water. The land under the water was his. The right to a reasonable use of the stream was as much his property as the land itself. The course of the stream could not be so diverted as to cause it to cease to flow in its accustomed channel upon his property. Gould, Waters, § 4; Ang. Water Courses, § § 1-4; *Green Bay & M. Canal Co.* v. *Kaukauna Water Power Co.*, 90 Wis. 370, 61 N. W. Rep. 1121, and 63 N. W. Rep. 1019, and cases cited. These doctrines of the common law were in force in the Territory of Dakota at the time of the adoption of the constitution of this state. By virtue of them, the riparian owners in the territory were vested with the specified property rights in the bed of all natural water courses, and in the water itself. Such rights were under the protection of the fourteenth amendment to the federal constitution, which protects property against all state action that does not constitute due process of law. It follows that § 210 of the state constitution would itself be unconstitutional in so far as it attempted to destroy those vested rights of property, if it should by construction be given a scope sufficiently wide to embrace such matters. For this reason, we feel constrained to hold, despite its broad language, that § 210 was not framed to divest the rights of riparian owners in the waters and bed of all natural water courses in the state.

On the other hand, we do not wish to be understood as expressing such a view as to its proper interpretation as would utterly emasculate it. So far as it can have constitutional effect, it should be construed as placing the integrity of our water courses beyond the control of individual owners. Should all the riparian proprietors along the course of a stream so join in the sale of their riparian rights as to work an utter destruction of the stream so far as its channel was within the bounds of this state, it might be that the sovereignty of the state could invoke this provision of the constitution against such attempted annihilation of the water course. But no such case is before us. After the diverson sought to be accomplished by the company by this

proceeding has been consummated, the substantial integrity of the Heart river will not be impaired. Every drop of water that flowed in its channel before will still continue to flow therein. The channel itself will be altered for only a short distance compared with the length of the stream itself. This slight change, of course, will not remove the river beyond the limits of the state. If, in the future, it becomes desirable to take the waters of this stream for public use, those waters will be found to be within the reach of the sovereign power as fully then as now. The diversion which the company is essaying to make effects only rights of private property. For these rights, compensation must, of course, be made. But, when made, there stands no obstacle in the way of their destruction, for such rights the constitution does not attempt to protect against the exercise of the power of eminent domain. Had one person owned all of the land in question, there could be no doubt about his right to cut off a portion of the river on his own land, and carry it across by an artificial ditch to the channel further down the stream, just as the railroad company proposes to do. Nor can there be any question touching the rights of the owner of the land through which flows that section of the stream sought to be diverted to sell, to the owners of the land on which the ditch in question is to be dug, the right to turn the stream from its old channel into this artificial conduit, that its waters might be discharged into the old channel at a point further down the stream, thus stopping the flow of the river upon the lands over which it was wont to be current. If this right can be sold, it can be condemned. *Water Co.* v. *Forbes*, 62 Cal. 182.

We next come to the consideration of the question of necessity. It is apparent that our statute does not contemplate the submission of any question to a jury, save the question of compensation. The constitution requires this question of compensation to be left to a jury. Const. § 14. Section 5955 of the Rev. Codes, declares, in the language of the constitution, that "compensation shall in all cases be ascertained by a jury unless a jury is waived."

In the absence of the provision contained in § 14, a jury trial in such cases could not be demanded as a constitutional right. The owner of property taken for public use has no constitutional right to submit to a jury any question arising in the proceedings, unless the constitution specifically so declares. The guaranties of the right to a trial by jury, and that property shall not be taken without due process of law, found in the various state constitutions, do not confer upon the citizen the right to a jury trial in such cases. Cooley, Const. Lim. 563, side paging; *People* v. *Smith*, 21 N. Y. 595; *Ames* v. *Railway Co.*, 21 Minn. 241-291; *Manufacturing Co.* v. *Garland*, 25 Fed. Rep. 521; *Koppikus* v. *Commissioners*, 16 Cal. 248; *Ex parte Reynolds*, (Ark.) 12 S. W. Rep. 570; *Beekman* v. *Railway Co.*, 3 Paige, 45; *U. S.* v. *Jones*, 109 U. S. 519, 3 Sup. Ct. 346; *Ligat* v. *Com.*, 19 Pa. St. 456-460; *Railroad Co.* v. *Trout*, 32 Ark. 17; *Johnson* v. *Railroad Co.*, 23 Ill. 202. In most of the states, proceedings to condemn property for public use do not take the form of civil actions, but are classed as special proceedings, and are more or less summary in character. In not a few of the states the question of necessity is not made a judicial question, either by the constitution or by statute. True it is that the courts can always inquire into the nature of the use for which the property is to be condemned for the purpose of determining whether such is, in fact, a public use. Cases cited in 4 Rap. & M. Ry. Dig., at page 457; Lewis, Em. Dom. § 158. But, that proposition being once judicially established, it is within the exclusive province of the legislature to pass upon the question of necessity, unless it has declared that that shall be a judicial question, or such a provision is found in the constitution itself. *O'Hare* v. *Railroad Co.*, 139 Ill. 151, 28 N. E. Rep. 923; *State* v. *Rapp*, 39 Minn. 65, 38 N. W. Rep. 926; *Trust Co.* v. *Harless*, 29 N. E. Rep. 1061; Lewis, Em. Dom. § § 61, 62, 571; Cooley, Const. Lim. 538, side paging. In this state the legislature has seen fit to take it out of the power of any person or corporation to settle the question of necessity, and to trust the determination of that issue to the judicial branch of the govern-

ment. Rev. Codes, § 5959. Making it a judicial question does not render it a question for trial before a jury. Nor can the right to have a jury pass upon this point be inferred from the fact that in this state the power of eminent domain is to be exercised by proceedings which shall take the form of a civil action. All civil actions are not triable by a jury, and in transferring these proceedings, in which the right to a jury trial had never been enjoyed save in states in which an exceptional policy had been adopted, to the category of civil actions, the utmost purpose of the legislature was to affect matters of procedure, and not to vest in the citizen the substantive right to a jury trial of the whole case. To the extent that the lawmaking power was constrained by the constitution, it provided for a jury trial; but it is very significant that the statute expressly gives the right to a trial by jury only with respect to the single question of compensation. The maxim "*Expressio unius exclusio alterius*," applies to the construction of this statute. It is evident that the legislature thought that the right to a jury trial of the issues had not been conferred by other provisions of the law. On no other theory can the explicit declaration of the statute that the compensation should be ascertained by a jury be accounted for. If we are to find elsewhere authority for submitting the whole case to a jury, why was the same ground covered a second time with respect to the element of compensation? As the issues in such proceedings were not wont to be tried by a jury, as, with the exception of the matter of compensation, there is no constitutional right to such a mode of trial, we cannot infer from the mere fact that the proceeding in this state is to assume the form of a civil action that a jury trial of the whole case was designed. Such radical change in the manner of settling the controverted points in such a proceeding must not be built up on a mere inference in the face of an implication so strong as to be practically equivalent to an express declaration that no other question except that of compensation should be submitted to a jury. Section 5965, Rev. Codes, furnishes additional evidence to our minds that it was

intended to leave only the matter of compensation to the jury for settlement. And section 5420, Rev. Codes, is conclusive on this point. It declares that every issue, except those arising in an action for the recovery of money only, or specific real or personal property, must be tried by the court.

Having reached the conclusion that the question of necessity need not have been submitted to the jury, and it appearing from the record that the trial judge found that question of fact in favor of the plaintiffs, it is evident that the inquiry whether the charge of the court to the jury on this point was correct is unimportant. But in our judgment there was no error in the charge of the court on this point.

It is further urged that the evidence does not warrant a finding of necessity. Under the statute it is not essential that the property taken should be necessary for the construction of the road. It is sufficient if it is necessary for the maintenance and operation of such road. Rev. Code, § 2947, Subd. 3. We have carefully analyzed the testimony in the case, and have reached the conclusion that the trial judge was fully warranted in making the finding on the question of necessity which he did. The object to be affected by these condemnation proceedings is to place the railroad company in a position where it can increase the safety of its track by constructing a solid embankment at the two points where the road is carried over the Heart river, by means of two bridges. That in the spring season the safety of these structures is endangered by ice gorges is shown by the testimony of competent civil engineers. Their evidence tended to show that the danger of injury, damage, and destruction to passengers, employes, and freight would be considerably diminished by constructing a solid embankment where the bridges in question now stand; and that, independently of such damage being done to persons or property, there was danger every spring that traffic would be temporarily suspended by a break at this point in the line of the road, through the demolition of one or both of these bridges by the impact of large fields of moving ice in times of high water,

resulting from gorges. If the evidence is true, it is apparent that public interests will be subserved by the change in the roadbed which is projected, and this change cannot be affected unless the property involved in the case be condemned. The question is not one merely of economy. The result will not be simply a saving of money to the railroad, but an increase in the safety of travel over this portion of the company's line. That property the taking of which will enable the railroad company to enhance the safety of passengers and property intrusted to its charge, as a common carrier, and also of its employes, is property necessary for the maintenance and operation of the railroad, we have no doubt. There is and can be no more beneficial purpose for which the power of eminent domain can be exercised than that of augmenting the security of persons and property in the hands of common carriers. Property needed to increase the safety of those who travel upon our railroads is necessary for the maintenance and operation of such railroads, within the meaning of our statute, which must have a reasonable construction. See *Milwaukee & St. P. R. Co.* v. *City of Milwaukee*, 34 Wis. 271-277.

Assuming that the condemnation of the property involved was necessary to render safe at these two points the transportation of passengers and freight, then the proposition that there was a necessity for the taking of such property for the operation and maintenance of the road, within the meaning of the statute, would not seem to admit of doubt. It is true that there was evidence that the bridges could, so far as the superstructure is concerned, be lifted above the point of danger, by elevating the roadbed for a considerable distance. But the chief engineer of the road, who testified in the case, and whose testimony at this point does not appear to have been controverted, stated under oath that it would be impracticable to raise the grade the necessary height, and yet operate the trains; that it would be impracticable to make the change that way. He testified, further, on this point, as follows: "There is no other practicable way from an engineering standpoint to insure the safety of travel and freight that is

passing over the line of this road at these points, save by making the improvements that are proposed. It is policy to keep the ground low, to give the water a chance to flow over the whole valley. If we raise the grade, it is going to carry the water through one spot, and we could not get the bridges high enough to take all the water." At another point in his testimony, he stated that the only way of rendering these points of intersection with the river safe for traffic, and of removing all danger, was to get rid of the bridges in question. It is thus made apparent that the trial court was warranted in finding that there was no other practicable way of getting rid of the danger at these two points but by the removal of these bridges and the construction in their place of solid embankments of earth. But, even if the evidence made imperative the conclusion that the superstructure of these bridges could be lifted beyond the reach of movable fields of ice, still the fact would remain that these two links in the road would be by no means rendered as safe for travel as by taking out the bridges altogether. The evidence shows the river to be very tortuous in its course. Like all streams in a level country, it has many sharp bends and these, as the evidence discloses, facilitate the formation of dangerous ice gorges. The piers of these bridges would, after the superstructures had been elevated, still be battered by these huge masses of moving ice. The dangers from this source would not be diminished in the least; and all the danger from the abrading action of a great volume of swiftly running water, pouring tumultuously through these openings between the embankments on either side, would, so far from being decreased, be augmented, because all the water would be forced by the higher embankment to flow through the openings, instead of spreading over a wider surface, and finding other places for passage. The chief engineer testified that it is hard to ascertain whether water is washing out piling or approaches, or doing damage to the piers, when the water is high; that there is always more or less of an element of danger of that kind in times of ice gorges and floods. "Sometimes," he testified, "the ice does damage them

[the bridges] when it does not get up to the guards. It is likely to damage the piers. We have had to rebuild the piers a long time before we did the bridges. Generally, it is the other way. It has damaged the piers a number of times." At another point in his testimony, he said: "You cannot always tell by an inspection whether an injury is being done when the ice gorges are forming and high water is present. This fact renders travel very dangerous during these times of high water, both for passengers and freight. We never know whether a train is going to get across safely or not." It is obvious from this and other evidence which might be quoted that the dangerous character of those bridges would not be materially altered by their higher elevation above the water. The chief engineer positively asserts that these bridges are more dangerous than ordinary bridges, on account of the action of that river. There is nothing in this testimony which bases their dangerous character solely on the fact that the superstructures are so low as to be struck at high water by moving ice. The whole case shows that their dangerous character is owing to the peculiarities of the stream they span. We will content ourselves with one further quotation from the testimony of one of the railroad engineers: "The stream, as it is crossed by the railroad between crossing 2 and 3, forms a complete loop south of the track. The river bed makes, at least, two abrupt changes in this direction during that time. It is always more liable for a gorge to form in the bend of the river than it would if it was straight. The loop, from the place where we start to build the new channel following the old bed of the river, to the place where it is intersected again by the channel, is probably a mile and a half or two miles. Following the present bed, it is two miles. There are two sharp turns in the river at that distance. One is at the third crossing, and the other one directly south of the second crossing. These bridges are in danger by forming of ice gorges in the spring when the water goes out. The danger is of the ice gorge, tearing away the bridge. It would be hard to ascertain if the water was washing

out piling or approaches, or doing damage to the piers when the water is high. There is always more or less of an element of danger of that kind in times of ice gorges and floods. There would, I should judge, be necessary dangers and undiscoverable dangers, to both the passenger and freight traffic of the road, at the times when the ice gorges had formed at or in the vicinity of these two bridges. I have had experience in railroad engineering for about 12 years. In my opinion, good engineering and good railroading require the digging of the channel as proposed by the company in these proceedings, and, by diverting the channel, getting rid of these two bridges. I should think that that would conserve the safety of the business of the railroad to do that. I consider that that change should be made for the safety of the traffic, and to avoid loosing those two bridges in the case of an ice gorge."

On a review of the whole case, we are satisfied that the public interests will be subserved by the condemnation of the property in question, to the end that these two dangerous points in the railroad may be rendered safe; and we are also of the opinion that in no other way can this increase in safety be as effectually accomplished. That the necessity for the taking of the property involved is therefore established is amply supported by authority. *Colorado E. R. Co.* v. *Union Pac. Ry. Co.*, 41 Fed. Rep. 299; *Forney* v. *Railroad Co.*, (Neb.) 36 N. W. Rep. 806; *Railway Co.* v. *Hooper*, (Cal.) 18 Pac. Rep. 599-603; *Commissioners* v. *Moesta*, (Mich.) 51 N. W. Rep. 903; Lewis, Em. Dom. § 393, note 4, and cases cited; *Forney* v. *Railroad Co.*, (Neb.) 33 Am. & Eng. Ry. Cas. 162, note (36 N. W. Rep. 806;) *Taylor* v. *Railroad Co.*, 6 Cold. 646. See, also, *New York Cent. & H. R. R. Co.* v. *Metropolitan Gas Light Co.*, 63 N. Y. 326; *Milwaukee & St. P. R. Co.* v. *City of Milwaukee*, 34 Wis. 271-277.

We come to the final point in the case. It is urged that the compensation assessed by the jury is inadequate, under the evidence. With respect to the land owned by the appellants Kasson and Strauss, we are clear that the claim of insufficiency

of the evidence cannot be sustained. It is true that the jury fixed a much lower sum as the measure of damages sustained by these parties than some of the evidence would have warranted. But the verdict was, so far as their property was concerned, within the limits of the evidence, and must therefore be sustained. The jury, in arriving at their conclusion, had the benefit of a personal inspection of all the property involved. In the course of the trial, the court directed that the jury be conducted by the sheriff to the premises in question, for the purpose of examining the same. This was done. The jurors, therefore, in forming their judgment as to the damages sustained by all the parties, were aided by a personal inspection of the property, and, in the light of what they saw, could determine what weight was to be given to the conflicting opinions of the several witnesses as to the damages which the various parties would sustain. But these observations do not apply to the Goff land. It is true that the jury inspected this land also, but the verdict with respect to two parcels of this land is without support in the evidence; *i. e.* the S. ½ of S. E. ¼ of section 30, and the S. ½ of the S. E. ¼ of section 29. In the case of each of these parcels, the compensation allowed by the jury was less than the lowest damages testified to by the witnesses. While a jury is not bound to shut its eyes to what it sees when an inspection is allowed by the court, and while it may, even on a matter of opinion as to value and damages, weigh the evidence of experts in the light of its own examination of the property, the verdict must find support in some of the evidence. It cannot fix the value of the damages above the highest or below the lowest figure which is fixed by expert evidence, unless there are other circumstances proved in the case which would justify it in so doing. If the value of a tract of real estate is in controversy, and the only evidence is that of experts, who differ in their opinions as to its value, the jury may not disregard all the evidence in the case, and fix its value below the lowest or above the highest estimate of the experts, despite the fact that they may have inspected the land under the order of

the court. We regard this as the sounder and safer rule, although there are authorities to the contrary. It is certainly buttressed more strongly by the decisions of able courts than the doctrine which is opposed to it. *Peoria Gaslight & Coke Co.* v. *Peoria Terminal Ry. Co.*, (Ill. Sup.) 34 N. E. Rep. 550; *Railroad Co.* v. *Parsons*, (Kan. Sup.) 32 Pac. Rep. 1083; *City of Topeka* v. *Martineau*, (Kan. Sup.) 22 Pac. Rep. 419; 1 Thomp. Trials, § 895; *Heady* v. *Turnpike Co.*, 52 Ind. 117; *Railroad Co.* v. *Bowen*, 40 Ind. 545; *Close* v. *Samm*, 27 Iowa, 503; *Railroad Co.* v. *Mouriquand*, (Kan. Sup.)25 Pac. Rep. 567; *Wright* v. *Carpenter*, 49 Cal. 608. That we have power to reverse the order in part, and affirm as to the other parties, we have no doubt. See Rev. Codes, § 6528; *Railroad Co.* v. *Galgiani*, 49 Cal. 139; *Railroad Co.* v. *Hilderbrand*, (Ill. Sup.) 27 N. E. Rep. 69.

There is no occasion for opening up the whole case even with respect to the defendant Goff. The order of condemnation is reversed so far as it affects her property, and a new trial is ordered of the single issue of compensation to be awarded her for the damages she will sustain by reason of the proposed diversion of the stream from its channel, so far as such diversion affects the value of her property. Upon this compensation being fixed by a jury, a new order of condemnation will be entered with respect to her property rights in the Heart river, as it flows over her land. No other question will be submitted to the jury, or tried by the court.

The order of condemnation is in all other respects affirmed. All concur.

(69 N. W. Rep. 570.)

NOTE—Pleadings may be amended to correspond with the proofs. *Moore* v. *Booker*, 4 N. D. 543, 62 N. W. Rep. 607; *Anderson* v. *Bank*, 5 N. D. 80, 64 N. W. Rep. 114; *Johnson* v. *Burnside*, 3 S. D. 230, 52 N. W. Rep. 1057; *Jenkinson* v. *City*, 3 S. D. 238, 52 N. W. Rep. 1066. The mode of amending pleadings recognized by our practice is to rewrite the pleading so that all the parts shall be in one instrument complete in itself. *Caledonia G. M. Co.* v. *Noonan*, 3 Dak. 189, 14 N. W. Rep. 426. Essential facts should not be pleaded by way of exhibit only. *Wright* v. *Sherman*, 3 S. D. 290, 53 N. W. Rep. 425. An irregularity in the mode of amending a pleading cannot be taken advantage of for the first time on appeal.

Caledonia G. M. Co. v. *Noonan*, 3 Dak. 189; *Wright* v. *Sherman*, 3 S. D. 290. Where parties stipulate that pleadings may be amended to correspond with the evidence, such amendment should be made before appeal is taken to the Supreme Court. *Farrington* v. *N. E. Inv. Co.*, 1 N. D. 102, 45 N. W. Rep. 191. The allowance of an amendment so as to permit averments as to the general usage of the language was improper. *Power* v. *Bowdle*, 3 N. D. 122, 54 N. W. Rep. 404. Under § 4938, C. L. (5297, R. C.) It is the rule to allow amendments to refuse is the exception. *Kelsey* v. *C. & N. W. R. Co.*, 1 S. D. 80, 45 N. W. Rep. 204. And where a defect in pleading can be cured by amendment under § 4938, C. L. (§ 5297, R. C.) and no demurrer has been interposed, the evidence should be received and amendment made on trial. *Johnson* v. *Burnside*, 3 S. D. 230. As where demand before suit was necessary, the demand was in fact made, but no demand was averred, and the pleading was not demurred to *Jenkinson* v. *City*, 3 S. D. 238. Unless advantage of a defective pleading is taken by demurrer, great indulgence of amendment will be permitted upon the trial. *Jenkinson* v. *City*, 3 S. D. 238. Where a pleading however is fatally defective in a particular incapable of amendment, the objection to it may be taken at any stage of the proceedings. *Johnson* v. *Burnside*, 3 S. D. 230, 52 N. W. Rep. 1057. A defendant will not be permitted to amend his answer after trial to plead noncompliance by plaintiff with § § 4066, 4068, C. L. (§ § 4410, 4412, R. C.;) *Heegard* v. *Dak. L. & T. Co.*, 3. S. D. 695, 54 N. W. Rep. 656. A defect in pleading as to nonjurisdictional fact cannot be first urged upon appeal. *Paulson* v. *Ward*, 4 N. D. 100, 58 N. W. Rep. 792. A summons may be amended. *Gans* v. *Beasley*, 4 N. D. 140, 59 N. W. Rep. 714. But an affidavit for attachment cannot be amended in a matter of substance, *Id.* District Court cannot amend record on appeal after same has been certified to the Supreme Court. *Moore* v. *Booker*, 4 N. D. 543, 62 N. W. Rep. 607. But so long as the record is in the District Court, that court may amend it even after appeal. *Coulter* v. *G. N. R. Co.*, 5 N. D. 568, 67 N. W. Rep. 1046. The court has power in a criminal case to amend its record so as to set forth the proceedings as they were actually had, even after the term. *Ty* v. *Christensen*, 4 Dak. 410, 31 N. W. Rep. 847. The Supreme Court in remitting a case may direct that a pleading may be amended in the trial court, and such power should be liberally exercised in furtherance of justice. *Evans* v. *Hughes County*, 4 S. D. 33, 54 N. W. Rep. 1049.

ALBERT H. SOBOLISK *vs.* CHARLES A. JACOBSON.

Opinion filed November 12th, 1896.

Res Judicata—Action on Contract—Extraneous Issues.

A defendant in an action on contract is under no obligation to litigate in that action the extraneous issue whether the debt sued on was incurred for property obtained under false pretenses. Accordingly, *held*, that when, in an action of that character, the complaint embodied allegations of facts relating to false pretenses, and the judgment by default adjudged that the debt on which the judgment was rendered was incurred for the property obtained under false pretenses, such judgment was no evidence whatever as to the fact of false pretenses, in an action brought by the defendant in the judgment against the sheriff for seizing exempt property, such property not being exempt as against a judgment founded on a debt incurred for property obtained under false pretenses. The question of false pretenses must be litigated as a fact in the action brought by the owner of the property against the sheriff.

Appeal from District Court, Walsh County; *Sauter*, J.

Action by Albert H. Sobolisk against Charles A. Jacobson, sheriff. From a judgment for defendant, plaintiff appeals.

Reversed.

H. A. Libby, for appellant.

Gray & McMurchie, for respondent.

CORLISS, J. Plaintiff is seeking to recover the value of personal property seized by the defendant, as sheriff, under an execution against the plaintiff. The property levied upon by the sheriff was claimed by the plaintiff as his alternative exemptions under the statute. The only question before us is whether the debt on which the judgment on which the execution was issued was founded was a debt incurred for property obtained under false pretenses. If it was, the plaintiff cannot claim the property seized as exempt. Section 5526, Rev. Codes. On the other hand, if it was not, then the property levied on was exempt from seizure, and the defendant was guilty of a conversion of it. On the trial the defendant offered no evidence of the fact that the debt was incurred for property obtained under false pretenses, except the judgment roll in the action brought by the plaintiffs

in the execution against the plaintiff herein to recover judgment for the amount of their claim. The action was upon a promissory note. The complaint contained averments to the effect that in contracting the debt for which the note was given the defendant in that case (the plaintiff in this action) was guilty of false pretenses. The prayer for relief was simply a demand for a money judgment for the amount due on the note. Judgment in that action was rendered by default. It is now insisted—and this was the contention below—that the question of false pretenses was forever set at rest by the judgment so rendered, such judgment in terms adjudging that the debt for which such judgment was rendered was a debt incurred for property obtained under false pretenses. The trial court sustained the position of counsel for defendant, and directed a verdict in his favor. In so doing we think that a fatal error was committed. We are unable to discover on what principle the judgment in that action can be regarded as *res adjudicata* on the question of false pretenses. That question was extraneous to the cause of action sued on, and therefore the allegations relating to it were not properly inserted in the complaint. A defendant cannot be forced by his antagonist to contest every issue which his caprice may embody in the pleading. Only those matters which the law contemplates shall be investigated in that particular case can be forced upon the defendant, to be litigated by him. Generally speaking, these are only such matters as are connected with the cause of action. True it is that the legislature may require the defendant to anticipate future litigation, and take issues upon questions foreign to the claim in controversy. That body might have declared that the question of false pretenses should be tried, and forever set at rest, in the action to recover judgment on the debt. But it has not enacted any such law. It has merely provided that the fact that the debt was incurred for property obtained under false pretenses shall be fatal to the claim of alternative exemptions, leaving that question of fact to be tried in the ordinary way when it becomes an issue important to be settled. Before there has

been a levy on the property followed by the claim of exemptions, it cannot be known whether the fact of false pretenses will ever become the subject of judicial investigation. The judgment may be paid. The plaintiff may seize property not exempt under any circumstances. Very explicit language should be required to satisfy a court that the legislature intended that in an action upon contract the defendant should be compelled to litigate an issue utterly foreign to the cause of action, and one which might never become such an issue between the parties as would affect their respection rights. The case of *Hall* v. *Harris*, (S. D.) 46 N. W. Rep. 934, is cited. It is not in point. No such question as the one here involved was before the Supreme Court of South Dakota in that case. The doctrine there enunciated was not that, under circumstances similar to those in the case at bar, the defendant must defend himself against the charge of false pretenses, but merely that, having been heard on that question on a motion to dissolve an attachment, it was *res adjudicata* in an action against the sheriff for the conversion of the property seized by him under the attachment; the action being founded on the theory that the property attached was exempt, and the claim to exemption being defeasible by proof of false pretenses in the incurring of the debt sued on. We would hesitate long before holding that a defendant cannot attack an attachment, based on the ground that he has been guilty of false pretenses in contracting the debt for which he is sued, without incurring the risk of being deprived of his constitutional right to a jury trial of that issue when he sues the sheriff for seizing his property on the theory that it is exempt from seizure under judicial process. This court particularly guarded against committing itself to such a doctrine in *Bank* v. *Jennings*, 4 N. D. 228, 59 N. W. Rep. 1058. In the case we said: "Of course, the decision on the motion to dissolve the attachment might not, in all cases, affect the decision of the same question of fact when involved in another action." In distinguishing the South Dakota decision from the case at bar, we do not wish to be

regarded as expressing our approval of the ruling of that court in that case. There the question was as to the effect in another action of the litigation of a matter of fact which the law required the defendant to litigate as a condition of securing the dissolution of the attachment issued against his property. Here the question is whether the defendant was bound at all to anticipate the future, and litigate an extraneous question in an action upon contract to recover money. We are clear that he was not bound to take issue with the plaintiff in that case on that point, or to pay any attention to the allegations to the complaint relating to it. See *Rogers* v. *Brackett*, (Minn.) 25 N. W. Rep. 601. See, also, *Taylor* v. *Rice*, 1 N. D. 72, 44 N. W. Rep. 1017. Having reached this conclusion, it is too obvious to require elucidation that the judg- by default in that action is neither conclusive nor *prima facie* evidence on the question of false pretense. 2 Black. Judgm. pp. 618, 619; *People* v. *Johnson*, 97 Am. Dec. 770; 21 Am. & Eng. Enc. Law, 203; *Woodgate* v. *Fleet*, 44 N. Y. 13; *Tams* v. *Lewis*, 42 Pa. St. pp. 402-411.

It is urged that the defendant was protected, as sheriff, in holding the property claimed as exempt, for the reason that the execution under which he seized the property recited that the judgment on which it was issued was rendered for a debt incurred for property obtained under false pretenses. But the sheriff was bound to know that there was no authority under the law for settling this question in the action on the note, and also that there was no warrant for the insertion of such a recital in the execution. The doctrine which protects a sheriff who is acting under process fair upon its face has no application to a case of this character. As well might a sheriff claim protection against a defendant's claim for exemption from a recital in the execution he holds that the defendant is not a resident of that state, a nonresident not being allowed exemptions. The case of *Sundback* v. *Griffith*, (S. D.) 63 N. W. Rep. 544, is not an authority in favor of the respondent. The only question decided in that case was that the Supreme Court would not control the discretion of the trial judge

in refusing to allow the defendant to open up his default for the purpose of striking from the judgment a clause adjudging that the debt on which such judgment was rendered was incurred for property obtained under false pretenses. What effect such a clause in the judgment would have upon the rights of the parties in future litigation was not passed upon. However, it appears to have been considered by the parties to that cause that such a clause in the judgment might have a binding effect upon the judgment debtor when he should subsequently claim his exemptions. But there is nothing in the opinion of the court to indicate that it intended to dispose of that particular question. Moreover, we should feel compelled to refuse to follow that learned court, if it had announced any such doctrine as the one contended for by the respondent in this case.

The judgment of the District Court is reversed, and a new trial is ordered. All concur.

(69 N. W. Rep. 46.)

THE NATIONAL BANK OF COMMERCE OF SEATTLE *vs.* CALEB C. JOHNSON.

Opinion filed November 14th, 1896.

Bank as Collecting Agent.

When an instrument is intrusted to a bank for collection, the bank secures no title thereto, and no right to hold it in any other capacity than as agent.

Relation of Debtor and Creditor.

If, from the indorsement, or the circumstances of the case, it appears that the bank was to credit the owner of the paper with the amount thereof, when collected, such bank becomes, upon receipt of the money, the debtor of the owner, and at this moment the relation of principal and agent is transmuted into that of creditor and debtor.

Indorsement for Collection Does Not Transfer Title.

When the owner of paper indorses it for collection, this is notice to every person or bank into whose hands the paper may come that the owner has not parted with his beneficial title, but has merely parted with possession, for the sole purpose of collection. The paper remains the paper of the owner down to the moment of collection, no matter how many hands it may pass through in the process of transmitting for collection; and no one through whose hands it passes can, before such collection, by credits, advances, or in any other way, secure any lien thereon or right thereto as against the owner, who may at any time prior to collection follow it into the hands of any subagent.

Agent Must Collect in Cash Only.

In the absence of circumstances showing a contrary purpose on the part of the owner, the agent or subagent has authority to receive only cash in making the collection; and, if he accepts other paper instead of cash,--as a draft or check,--the owner may treat either the original or the substituted paper as his property, and may follow it in the hands of the bank receiving it, although such bank has credited it as cash to the bank transmitting the original paper to it for collection. The right to make such credit, and thereby change the relation of principal and agent to that of creditor and debtor, does not exist until the agent collects the claim in money, unless there is something in the circumstances of the case showing that the parties intended that the agent should be authorized to accept, at its own risk, a draft or check instead of cash.

Right of Owner to Trace Funds.

But when cash is received, and credited to the transmitting bank, the relation of principal and agent between the collecting bank and the owner of the paper ceases; and thereafter whatever right the owner has as against the collecting bank is to the credit in favor of the transmitting bank, so far as he can trace the proceeds of his property into such credit.

Intervener Entitled to Dividends.

Intervener held a certificate of deposit issued to him by the Lloyds National Bank. He indorsed it for collection and credit to the Anacortes Bank, which forwarded it for collection to the plaintiff. Plaintiff received from the Lloyds National Bank its draft on a St. Paul bank, and surrendered the certificate. It gave the Anacortes Bank credit for the amount of the draft, and that bank reported to intervener that the certificate had been collected, and, at his request, issued to him its certificate for the amount reported as collected. The St. Paul draft was not paid. The plaintiff immediately notified the Anacortes Bank that the collection had not been made, and charged the amount back to it. The Anacortes Bank notified the intervener of this fact, and he surrendered his certificate issued by it. That bank credited to the plaintiff the amount of the supposed collection. The plaintiff at no time since this has claimed to be the owner of the draft, or to have any interest therein, save as collateral to its claim against the Anacortes Bank for an overdraft. *Held*, that the intervener is the owner of such draft, and entitled to receive the dividends thereon payable out of the assets of Lloyds National Bank declared by the comptroller of the currency.

Time Certificate Surrendered Immaterial on the Facts.

The fact that the intervener did not surrender up his certificate until after the Anacortes Bank had suspended operations does not affect the question; it appearing that the plaintiff had, in accordance with the facts claimed that the collection had not been made, and had charged back the draft to the Anacortes Bank, and the intervener having acted on such claim, and acquiesced therein, by surrendering his certificate issued to him by the Anacortes Bank, without any withdrawal of such claim being made by plaintiff, and the plaintiff insisting down to and upon the trial that it had not made the collection, but that it merely held the draft as collateral to its demand, against the Anacortes Bank for an overdraft.

Appeal from District Court, Stutsman County; *Rose*, J.

Action by the National Bank of Commerce of Seattle against Caleb C. Johnson, receiver of the Lloyds National Bank of Jamestown. Adolph W. Geschke intervened, and from a judgment in his favor plaintiff appeals.

Affirmed.

Edgar W. Camp, for appellant.

Fredus Baldwin, for respondent.

CORLISS, J. The contest before us relates to the rights of the parties to this litigation to two dividends declared by the comptroller of the currency, payable out of the assets of the Lloyds National Bank, which had become insolvent and had been placed

in the hands of a receiver. The claim on which the dividends were allowed was presented by the plaintiff. But, after they had been declared, the intervener, who had attempted without success to prove the same claim against the assets in the hands of the receiver, notified the receiver not to pay such dividends to the plaintiff. As a consequence, the receiver refused to pay the plaintiff, and, being sued by him to recover the same, he asked to be released on paying into court the amount due. The intervener appeared in the action, and filed his complaint in intervention. The receiver, on paying the money into court, was discharged from all liability, and the struggle is now between the plaintiff and the intervener to obtain possession of this fund in court. The plaintiff answered the complaint in intervention, and the case was tried before the court without a jury. The learned trial judge awarded the fund to the intervener, and the plaintiff brings the case to this court for a trial *de novo*. No serious controversy with respect to the fact seems to exist. The intervener was the owner of a certificate of deposit issued by the Lloyds National Bank, payable to his order. On June 23, 1893, he left it with the Anacortes Bank of Anacortes, in the State of Washington, for collection, taking a receipt therefor from such bank. It was indorsed by him as follows: "Pay to the order of Bank of Anacortes for collection for account of Adolph W. Geschke." The Anacortes Bank forwarded it in due course to the plaintiff, its regular correspondent at Seattle, Wash., for collection and credit. The intervener knew that it would be so forwarded for collection to a Seattle Bank. The plaintiff sent the certificate directly to the Lloyds National Bank, which, on receipt of the same, issued and sent to the plaintiff its draft for the amount due, on the National Bank of St. Paul, Minn. On receipt of such draft the plaintiff credited the Anacortes Bank with the amount due, and notified it of such credit, and also forwarded the St. Paul draft to its correspondent in St. Paul, the Merchants' National Bank of that city, for collection. The Anacortes Bank received notice of the credit July 13, 1893, and on that day charged up to the plain-

tiff the amount thereof; and thereafter it issued to the intervener, at his request, a certificate of deposit for the amount of such collection, he surrendering to the Anacortes Bank the receipt given him by such bank for the certificate of deposit issued by the Lloyds National Bank at the time he intrusted it to the Anacortes Bank for collection. Shortly afterwards the plaintiff received word that payment of the St. Paul draft had been refused, and immediately notified the Anacortes Bank of that fact by wire and by mail, and charged back to it the amount of such draft. This was July 14th. On or about the 15th the Anacortes Bank credited the plaintiff with the amount of such draft, and the intervener returned the certificate of deposit issued by it to him. The Anacortes Bank, however, received word of the dishonor of the St. Paul draft on the 14th; and on that day the intervener was notified by it of such fact, and requested to surrender his certificate of deposit. At this time he did not respond to this request, but shortly thereafter he did surrender it, and take from the Anacortes Bank a duplicate receipt for the original certificate issued to him by the Lloyds National Bank. The Anacortes Bank did not open its doors to transact business after the close of business hours on the 15th of July. Whether the intervener surrended his certificate before or after this suspension of business is not very clear. The only evidence which bears at all on the point is the testimony of Mr. Merritt, the cashier of the Anacortes Bank, that the intervener never, to his knowledge, surrendered the certificate while the bank was solvent, and the testimony of the intervener himself, that he thought that the duplicate receipt was issued to him after the bank had failed. It is perhaps a fair inference from this evidence that the surrender of the certificate was not made until after the bank had closed its doors. Upon these facts, we are to answer the question which of the two parties to this controversy has the legal right to the fund in court? What our answer to this inquiry will be will depend upon the further question whether the title to the claim against Lloyds National Bank, on which the two dividends have

been declared, was and is in the plaintiff or in the intervener.

The certificate of deposit issued by the Lloyds National Bank was the property of the intervener. He did not sell it to the Anacortes Bank, but merely intrusted it to such bank as his agent to collect the same and place the amount of such collection to his credit. By indorsing it for collection and credit, he notified the whole world that he had not parted with his title to the paper; that whoever might secure possession of it in the course of its transmission from bank to bank in the process of making the collection, according to the usages of banks, would hold it as his property, and therefore could not treat it as the property of any other person or of any corporation. The authorities are unanimous on this point. *Naser* v. *Bank*, 116 N. Y. 492, 22 N. E. Rep. 1077; *First Nat. Bank* v. *Bank of Monroe*, 33 Fed. Rep. 408; *Bank* v. *Armstrong*, 39 Fed. Rep. 684; *Bank* v. *Hubbell*, 117 N. Y. 384, 22 N. E. Rep. 1031; *Blaine* v. *Bourne*, 11 R. I. 119; *Claflin* v. *Wilson*, 51 Iowa, 15, 50 N. W. Rep. 578; *Hoffman* v. *Bank*, 46 N. J. Law, 604; *Bank* v. *Gregg*, 79 Pa. St. 384; *Bank* v. *Clark*, 23 Minn. 263; *First Nat. Bank of Crown Point* v. *First Nat. Bank of Richmond*, 76 Ind. 561; *Tyson* v. *Bank*, 77 Md. 412, 26 Atl. 520; *Armstrong* v. *Bank*, 90 Ky. 431, 14 S. W. Rep. 411; *Freeman's Nat. Bank* v. *National Tube-Works Co.*, (Mass.) 24 N. E. Rep. 779; *Sweeny* v. *Easter*, 1 Wall. 166; *Manufacturers Nat. Bank* v. *Continental Bank*, 148 Mass. 553, 20 N. E. Rep. 193; *Bank* v. *Hanson*, 33 Minn. 40, 21 N. W. Rep. 849; *Boykin* v. *Bank*, (N. C.) 24 S. E. 357; *Bank* v. *Armstrong*, 148 U. S. 50, 13 Sup. Ct. 533; *Old Nat. Bank* v. *German-American Nat. Bank*, 155 U. S. 556, 15 Sup. Ct. 221. The certificate being, to the knowledge of the plaintiff, the property of the intervener, it could not make advances thereon to the Anacortes Bank, or in any manner deal with it except as the property of the intervener. Until it should have collected the same, the relation of principal and agent would exist between it and the intervener. Any advance or credit which it might make prior to that time would not in any manner prejudice the intervener's right to it, or to other property in the hands of the

plaintiff which had been substituted for it. See authorities above cited. The intervener, having employed bank agencies to collect his paper,—having placed it in the channels of banking business for that purpose,—must be deemed to have assented to the usages of banks in transacting business of that character. *Freeman's Nat. Bank* v. *National Tube-Works Co.*, 151 Mass. 413, 24 N. E. Rep. 779. He testified that he was informed that the Anacortes Bank would make the collection through a bank in Seattle, and, having made no provision to have the identical money collected sent to him (there being no pretense that he expressed a willingness to pay the heavier charges incident to this mode of making the collection,) he must be deemed to have assented to the transmission of the money from one subagent to another, and finally to the original agent, by the well known and universally employed system of bank credits. The form of his indorsement to the Anacortes Bank rather strengthens this inference. He indorsed it to that bank, not only for collection, but for credit also; thereby authorizing that bank, the minute it should receive the money, to mingle it with its own funds, and give him credit for the same, thus changing the relation between him and the bank from that of principal and agent to that of creditor and debtor. *Freeman's Nat. Bank* v. *National Tube-Works Co.*, 151 Mass. 413, 24 N. E. Rep. 779; *Manufacturers' Nat. Bank* v. *Continental Nat. Bank*, (Mass.) 20 N. E. Rep. 193. He intended that the Anacortes Bank should, on collecting his money, become his debtor therefor; and, not having made provision for the transmission of the actual cash from bank to bank, he must be deemed to have agreed that the remittance should be made, through such intermediate agents as should be engaged in the collection and transmission of the money to the Anacortes Bank, by bank credits and debits. If the plaintiff had actually collected the amount due on the certificate, it could lawfully have credited the amount of such collection to the Anacortes Bank, and thus have transmuted its relations of agent for the owner to that of debtor to the Anacortes Bank. Thereafter the only right which

the owner would have had against the plaintiff would have been to claim that he could follow his property, in this changed form (*i. e.* the credit to the Anacortes Bank,) until, in due course of business, such credit should have been extinguished. So long as the plaintiff should continue to owe the Anacortes Bank on this credit, the intervener could claim the same as his own property in another form, and therefore could, while this condition existed, compel the plaintiff to account to him for the amount of such credit. But the plaintiff did not receive cash in making the collection. It violated its duty to the intervener in two important particulars. It sent the paper direct to the debtor, and it accepted a draft instead of money in payment of the certificate which it surrendered. That it should not have sent the paper direct to the debtor is obvious. *Bank* v. *Goodman*, 109 Pa. St. 422, 2 Atl. Rep. 687; *Drovers' Nat. Bank* v. *Anglo-American Packing & Prov. Co.*, 117 Ill. 100, 7 N. E. Rep. 601. And it is equally true that it had no authority to receive anything but cash in payment of the certificate, unless the tacit consent of the intervener that it might do so can be inferred from the circumstances of the case. 1 Morse, Banks, § 247; *Levi* v. *Bank*, 15 Fed. Cas. 415-417; *Foster* v. *Rincker*, (Wyo.) 25 Pac. Rep. 470-472; *Bank* v. *Ashworth*, (Pa. Sup.) 16 Atl. Rep. 596. Without passing upon this point, it is sufficient to say that only on receipt of cash had it implied authority to alter, by its own act of crediting the amount to the Anacortes Bank, the relation of principal and agent between it and the intervener. See cases last above cited. The true doctrine is that, up to the moment of receiving cash, the relation of principal and agent remains unaltered. Whatever change of form the principal's property undergoes while in the hands of the agent, it is still the property of the principal, and may be followed by him as such. If the agent surrenders the paper it holds, and receives other paper in its place, the owner of the original paper may claim the substituted paper, or he may repudiate the unwarranted action of his agent, and claim the original paper in the hands of the debtor. The latter is bound to take notice of the limitation

on the power of the agent which renders nugatory every act he does in connection with the collection, unless it is the surrender of the paper to the debtor for cash. In this case, after the plaintiff had accepted the draft, the intervener might, at his option, have treated the draft as his own property, or have insisted that the act of the plaintiff in surrendering the certificate without receiving cash was unauthorized, and that, consequently, the surrendered certificate was still his property. Unless he has by his conduct destroyed his right to follow the draft or the certificate, this privilege he may still enjoy. Although the plaintiff had credited the Anacortes Bank with the amount of this draft, the intervener had an undoubted right to follow the draft, and claim it as his property. But he did not elect so to do. On the contrary, he took the position that the money had been collected, and had reached the Anacortes Bank, and he accordingly took from such bank its certificate of deposit for the amount of such collection. Although this was done by him in ignorance of the facts, it is probable that, if the plaintiff and the Anacortes Bank, had not wished to take advantage of the fact that those credits had been made on a mistaken assumption, the intervener would not have been heard to complain.

If the history of this case embraced no other facts, we would be obliged to render judgment against the intervener. But at this particular point in the transaction the plaintiff elected to treat all that was done by it after receipt of the St. Paul draft as being done under a miscalculation as to the future payment of such draft, and notified the Anacortes Bank of such election. It charged back the amount of the collection, on the theory that the credit had been provisionally made. See *Fletcher* v. *Osbourne*, (Minn.) 57 N. W. Rep. 336; *Levi* v. *Bank*, 15 Fed. Cas. 415; *Balbach* v. *Frelinghuysen*, 15 Fed. Rep. 675. In this the Anacortes Bank acquiesced, and thereafter, acting upon the demand of the plaintiff that the mistake regarding the collection should be rectified, the intervener surrendered his certificate of deposit to the Anacortes Bank, and accepted in lieu thereof a duplicate of

his old receipt for the original certificate. The attitude of all the parties was, therefore, at this time, that the collection had not been made. On this point they were all of one mind. Certainly the plaintiff cannot be allowed to change front again, after the intervener has acquiesced in and acted upon its demand. The demand was reasonable, for, as a matter of fact, the collection had not been made. It is by no means certain that the plaintiff could not have enforced such demand, and compelled the refunding of the money. See 1 Morse, Banks, § 249. Still it is possible that the intervener could have resisted the attempt to compel him to refund by insisting that the plaintiff, having, in violation of its duty, accepted a draft instead of cash in payment, was liable to him the same as if it had received the money. But the intervener relinquished this vantage ground upon the plaintiff's own demand. He agreed with the plaintiff to treat the collection as not having been made, and surrendered the certificate issued to him by the Anacortes Bank. The consequence was that he became entitled to his original certificate, or the draft accepted in lieu of it. Only on one theory can the plaintiff claim the right to the dividends on such draft, and that is that it has made the collection. If it has made the collection in the form of a draft, and wishes to treat that draft as its property, it must then account for the value thereof. But this it has refused to do, and the intervener has acquiesced in the stand it has thus taken. On what principle, then, can it claim that it has any title to the draft? Indeed, it does not claim any title. Its whole case is overthrown by the testimony of its own cashier, and in its letter to the intervener, in which it refused to turn over to him the St. Paul draft. The substance of its claim is that it has a lien on the draft for advances it has made to the Anacortes Bank. But the draft did not belong to the Anacortes Bank. It was the property of the intervener, to the knowledge of the plaintiff, unless the plaintiff wished to treat it as so much cash received from the Lloyds National Bank, and take all the risk of its payment. But the plaintiff had distinctly announced that it was not willing to

assume such risk, but would take the position that the collection had not been made. Such being the case, it cannot treat the draft as its own property, nor can it claim any lien thereon growing out of an indebtedness owing to it by one not the owner of such draft. It must either treat the draft as cash, and remit the amount thereof, or it must hold it as the property of the intervener, as being a substitute for the certificate formerly belonging to him, which it had surrendered on receiving such draft. It could take no stand between these two inconsistent positions. Not only did it elect, with the full concurrence of the Anacortes Bank and the intervener, to treat the collection as not having been made, and to lay no claim to the draft as owner thereof, but it continued to adhere to this position down to and including the time of the trial of the case. The cashier of the plaintiff testified as follows: "When we received word that the draft was protested, we charged the amount back to the Bank of Anacortes. We held the certificate as we hold any collateral. We held it as security for the amount we paid out on the same to the Bank of Anacortes. That is our claim to the draft." When the intervener wrote to the plaintiff, demanding the draft as his property, the plaintiff replied that it held the draft as collateral to its advances to the Anacortes Bank. But it is urged that the intervener responded too late to the demand of the plaintiff that the mistake be rectified. It is insisted that, when he returned his certificate of deposit to the Anacortes Bank, that bank was insolvent, and had suspended operations. But we fail to see how that circumstance can affect the right of the intervener to act upon the demand of the plaintiff. The plaintiff did not assert that it would insist that the collection had not been made only in the event that the Anacortes Bank remained solvent and a paying concern. It took the broad position that it had not collected the original certificate, and this was strictly in accordance with the facts. Having assumed this position, and the intervener having abquiesced in its claim, it took the risk of collecting such advances as it might have made to the Anacortes Bank, and

therefore subjected itself voluntarily to all the hazards of the intervening insolvency of such bank. It doubtless thought that it had a lien on the intervener's draft for its advances to the Anacortes Bank, but such belief was utterly unwarranted by a single adjudication, or by any principle of law. The situation of the parties, therefore, is that the plaintiff did not make the collection, but took a draft in lieu of intervener's certificate. That draft belongs to him, the same as the certificate did. Indeed, he might have claimed that the act of the plaintiff in accepting such draft was wholly unauthorized, and insisted that he was still the owner of the original certificate. But he has demanded the draft, and has therefore elected to treat it as his property, so that whatever rights he has arise out of the ownership of such draft. It is upon this draft that the dividends sued for have been declared. They belong to the intervener. So does the draft.

The judgment of the trial court is affirmed. All concur.

(69 N. W. Rep. 49.)

THOMAS ASHE *vs.* GEORGE M. BEASLEY & CO.

Opinion filed November 19th, 1896.

Certificate of Protest Prima Facie Evidence.

Under the statutes of this state the certificate of protest of a notary public is *prima facie* evidence of the facts of presentment, demand, and dishonor therein set forth, as well in the case of an inland bill or note as in the case of a foreign bill.

Notice to Take Depositions—Sufficiency.

A notice to take depositions should state the name of each witness to be examined.

Abstract Must Contain Sufficient to Sustain Contention.

The appellant must embody in his abstract the necessary facts to sustain his contentions. The court will not explore the record for the purpose of finding something to induce it to arrive at a different conclusion from that reached by the trial court.

Presentment for Payment.

When a note is payable at a bank, a statement in the certificate of protest that it was presented at the place of payment, and payment demanded, is sufficient evidence of a legal demand, without a further statement to whom it was presented for payment.

Notice of Dishonor—Who Entitled To.

In determining whether due notice of the dishonor has been given to indorsers, each agent and subagent for collection is to be regarded the same as a purchaser of the paper.

Agent or Subagent May Give Notice of Dishonor.

Any agent or subagent holding the paper for collection may give notice of dishonor with like effect as an owner of the paper.

Notice of Dishonor—Whose Benefit.

Notice given by a proper party inures to the benefit of every party to the paper whose right to give a similar notice had not at that time been lost.

Variance Between Allegation and Proof.

When there is a variance between the allegations of the complaint and the evidence, but no objection is made to the evidence on that account, the appellate court will treat the pleading as amended to conform to the proof.

Appeal from District Court, Stutsman County; *Rose*, J.

Action by Thomas Ashe against W. W. Beasley, Nat. C. Beas-

ley, and George M. Beasley, partners as George M. Beasley & Co. From a judgment for plaintiff, defendants appeal.

Affirmed.

James G. Campbell, for appellant.

E. W. Camp, for respondent.

CORLISS, J. Judgment has been rendered in favor of the plaintiff, as holder of a negotiable note, against the defendants, as indorsers thereof. The defendants appeal from that judgment, and the whole case is before us for a trial *de novo*, the action having been tried before the court. One of the grounds of the defense was the alleged failure to present the note at maturity, and demand payment, and give timely notice of its dishonor to the defendants. In order to charge the defendants as indorsers, it was, of course, necessary that due presentation and demand should be made, and that proper notice of dishonor should be given to the defendants. The only evidence that payment had been demanded and refused was a notarial certificate of protest. Defendants objected to the introduction of this certificate in evidence, on the ground that the note sued upon was a domestic or inland note, being made and payable in this state. It is here urged that this court should not regard this certificate as any evidence of the facts of presentment, demand, and nonpayment therein set forth; and, if this contention be sound, the plaintiff must fail in making out a case against the defendants. Unless the statutes of this state have wrought within this jurisdiction a change in the common law, defendants' counsel is correct in his position. At common law the notary's certificate of protest of a foreign bill was received in evidence of the facts therein set forth, so far as they were facts relating to his official duty with respect to the paper he had protested. This doctrine rested upon the ground of commercial convenience. The courts, from the beginning, have always recognized the fact that such a rule is a departure from the settled principle of the law of evidence that the best evidence must be produced; and they have, therefore,

been careful to restrict its operation to foreign bills of exchange. 2 Daniel, Neg. Inst. § § 926, 927; 16 Am. and Eng. Enc. Law, 776; 3 Rand. Com. Paper, § 1171; *Corbin* v. *Bank*, (Va.) 13 S. E. Rep. 98; Story Prom. Notes, § 297; *Nicholls* v. *Webb*, 8 Wheat. 326; *Young* v. *Bryan*, 6 Wheat. 146. While there is some authority for the proposition that foreign promissory notes are within the rule (*Williams* v. *Putman*, 14 N. H. 540,) yet the disposition of the courts has been to limit this exception to the general rule of evidence to a single class of negotiable instruments; *i. e.* foreign bills of exchange. Indeed, there is authority for the doctrine that the notary's certificate is not evidence in any case where he resides in the same country in which the action is tried. 1 Pars. Notes & B. 635; *Nicholls* v. *Webb*, 8 Wheat. 326. But this doctrine has not obtained very wide acceptance. If this paper sued on were a foreign bill of exchange, instead of a promissory note, we would hold that the certificate of protest would be competent evidence, notwithstanding the fact of the residence of the notary public in this state.

On the other hand, we are unable to agree with counsel for plaintiff that the fact that the defendants are nonresidents (if such is, indeed, the fact) is sufficient to make the certificate of protest evidence as against them when they are sued in a state in which the notary public who made such certificate resides. They are at most merely nonresident indorsers of a domestic promissory note. That at common-law the certificate would not constitute evidence against them for any purpose is too plain for argument. See cases first above cited. Have our statutes changed this common-law rule? In construing them we must bear in mind the fact that the almost uniform trend of legislation in this country is along the line of the enlargement of the use of a notary's certificate as *prima facie* evidence. See these statutes as referred to in 3 Rand. Com. Paper, § § 1149-1161. In most of the states the notary's certificate of protest is by statute made evidence whatever the character of the negotiable paper is,

whether it is a foreign bill or inland bill or note. In many of the states there is cast upon the notary a new duty, which at common law did not rest upon him. At common law, when he had presented the paper, demanded payment, and protested it for nonpayment, his duties with respect to that paper were ended. He was under no obligation to give notice of dishonor, and if he did give such notice, his certificate of that fact was not evidence thereof, for the reason that such an act was not an official act. To prove the giving of notice by the notary, he must in the absence of a statute, be called the same as any other witness. 3 Rand. Com. Paper, § 1181. But under modern legislation the duty of notifying the indorsers of the dishonor of the paper, is as a general rule, imposed upon the notary, and his certificate of that fact is made evidence thereof. These statutory provisions are made applicable to all kinds of negotiable paper. The great mass of legislation, all directed to one end, is significant of the fact that it is the settled convictions of the commercial world that the use of a notary's certificate as *prima facie* evidence is a great business convenience, and that giving it the force of *prima facie* evidence will not tend to pervert truth or defeat justice. It is in the light of this condition of public sentiment that we must interpret our somewhat ambiguous statutes on this subject. They are § § 499-501, Comp. Laws, and are couched in the following language:

Section 499: "It shall be the duty of every notary public personally to serve notice upon the person or persons protested against, or by properly folding the notice, directing it to the party to be charged, at his place of residence, according to the best information that the person giving the notice can obtain, depositing it in the United States mail or post-office most conveniently accessible from the place where the protest was made, and prepaying the postage thereon."

Section 500: "The officer making such protest shall receive the sum of twenty-five cents and postage for each and every notice so made out and served."

Section 501: "Each and every notary public shall keep a record of all such notices, and of the time and manner in which the same shall have been served, and of the names of all the parties to whom the same were directed, and the description and amount of the instrument protested; which record, or copy thereof, certified by the notary under seal, shall at all times be competent evidence to prove such notice in any trial before any court in this territory where proof of such notice may become requisite."

It is obvious that one purpose of these sections was to cast a new duty upon the notary,—*i. e.* the duty of giving notice; and the record he makes of the giving of such notice or a certified copy thereof is made evidence of the fact that the notice was so given. But it is nowhere declared in these sections that the notary may protest an inland bill or note, or that his certificate of protest of such paper is evidence of any of the facts set forth in such certificate. The statute seems to recognize an existing custom to protest all kinds of negotiable paper, but it does not, in terms, provide that the notary's certificate will be evidence in any case, apparently leaving the matter to common law regulation. And yet the statute plainly makes it the duty of a notary who protests an inland bill or note to give notice, and declares that his record of the giving of such notice shall be evidence thereof. It is singular that the legislature should have taken pains to make the notary's record of the giving of notice evidence, and at the same time leave his certificate of the protest of the very same paper subject to the common law rule that it is not evidence of presentment, demand, or dishonor. Were there no other statutory provisions on the subject, the question of construction would be a very difficult one. But § 507 of the Comp. Laws declares that full faith and credit shall be given to all the protestations of all notaries public. It is to be noticed that the phrase "full faith and credit," contained in § 507, is the very phrase employed by Mr. Parsons in his work on Notes and Bills. He says: "In the case of foreign bills protested in a country other than that in which the suit is brought, full faith and credit are

given to the instrument of protest, and the original or duly certified copy are admissible in evidence of the acts therein stated as far as those acts are within the scope of the notary's official duty." Pars. Notes & B. p. 635. It is thus made apparent that the legislature, in framing § 507, employed the very language which had been used to express the doctrine that a notarial certificate was evidence of certain facts therein stated. It is, therefore, our opinion that a notary's certificate of protest is, under our statutes, *prima facie* evidence of the facts of presentment, demand, and dishonor, if such facts are set forth in the certificate. It follows that there is sufficient evidence of these facts in this case to support the finding of the trial court in this respect, and to justify, and indeed compel, us to find the same facts on the trial here of this case *de novo*. It is next urged that the statement in the certificate is not sufficient to show a legal demand the statement is that the notary "presented the note at the place where the same is payable, and demanded payment thereof, which was refused." The note was payable at a specified bank, and the statement that it was presented at the place at which it was payable carries with it the assertion that it was presented at the bank at which it was payable. The statement that payment was there demanded and refused is clearly a statement that the demand was made of some one connected with the bank. The contention of counsel that it is entirely consistent with the language to assume that the notary went to the front door of the bank, and made a demand of a passer-by, is too hypercritical to merit serious consideration. When a note is payable at a bank, it is sufficient for the notary to state in his certificate that he presented the paper at the place of payment, and made a demand, without specifying the person upon whom the demand was made. *Douglas* v. *Bank*, (Tenn.) 36 S. W. Rep. 874-877; 2 Daniel, Neg. Inst. § 955; *Hildeburn* v. *Turner*, 5 How. 69.

It is next claimed that there is no evidence in the case that the defendants were notified in due time of the dishonor of the paper, or were notified at all. The notarial certificate already

referred to is silent on the question of notice to the defendants. It appears from the face of such certificate that the notary who protested the paper did not in fact serve any notice upon the defendants. The only evidence on that point is contained in the deposition of E. H. Talcott. It is urged that his evidence should not be considered, for the reason that the notice to take depositions did not contain his name, and that both at the commencement of the taking of his deposition and before the beginning of the trial the defendants objected to the sufficiency of the notice, and insisted before the notary that his deposition, for that reason, should not be read in the case. If the appellant had properly brought before us in his abstract the fact that the notice did not contain the name of E. H. Talcott, we should be inclined to uphold his contention in this behalf. We think that the letter and spirit of the statute require that the name of the witness whose deposition is desired should be inserted in the notice. Any other construction of the statute would, moreover, place the opposite party in a very embarrassing position, he being unable to ascertain, down to the moment the witness was sworn before the notary, what witness he must prepare himself, or advise his assistant counsel to prepare himself, to meet. The party who desires to take depositions can always ascertain what witness it is necessary for him to examine. There is, therefore, no reason why he should not be required, in the interests of fair play, to disclose to his antagonist in advance the names of the witnesses who will be sworn at the specified time and place. Our statute contemplates that the adverse party shall have such notice as will enable him to reach the place designated, and prepare for the examination. Section 5289, Comp. Laws. It is idle to expect him to prepare for the examination if he has no means of discovering what witnesses will be examined. And it is too clear to admit of countervailing argument that, if the doctrine is once enunciated that the name of the witness examined need not be stated in the notice, which contains at least one name, it will follow that the notice need not contain any

name whatsoever. We believe our statute contemplates the giving of a notice which shall fully apprise the attorney for the opposite party as to the particular witnesses to be examined, to the end that he may determine whether it is necessary for him to be present at such examination, or to employ local counsel for that purpose, and to afford him opportunity for preparation to subject the witnesses to the test cross-examination. The decision of the Michigan Supreme Court in *Patterson* v. *Railway Co.*, 19 N. W. Rep. 761, is directly in point on this question. The court says: "Section 7461, How. Ann. St. provides that when a witness whose testimony is required in any civil cause pending in this state shall live more than thirty miles from the place of trial, or shall be about to go out of the state, and not return again in time for the trial, or is so sick, infirm, or aged as to make it probable that he will not be able to attend the trial, his deposition may be taken in the manner herein provided. The three following sections provide for the notice to be given, by whom, and the time and manner of service. Although the statute does not, in express words, declare that the name shall be given in the notice, yet it is clearly implied by its terms that the name of the witness shall be given, in order to apprise the adverse party who it is he proposed to examine, as well as the time and place where he shall be examined." See, also, *Pape* v. *Wright*, (Ind. Sup.) 19 N. E. Rep. 459-462; *Robertson's Adm'rs* v. *Campbell*, 1 Overt. 172; *Smith* v. *Westerfield*, (Cal.) 26 Pac. Rep. 206; *Strayer* v. *Wilson*, (Iowa,) 7 N. W. Rep. 7. But the point is not properly before us, for the reason that the appellant has failed to incorporate in his abstract the notice to take depositions. Although the case comes here for a trial *de novo*, the rules of this court relating to printed abstracts are nevertheless applicable. On the face of the abstract, it does not appear that the notice was insufficient.

It is next contended that the witness Talcott does not testify to a timely service of notice of dishonor on the defendants, or, indeed to the service of any such notice at all. The evidence does not justify this claim. In this connection a further reference to the facts is

necessary. The plaintiff was the indorser upon the note sued upon. At the time it fell due it was the property of certain indorsers, who delivered the same to the National Park Bank, of Livingston, Mont., for collection. That bank forwarded it to the James River National Bank, where it was payable; and on the day it fell due it was presented for payment by a notary, and notice of its dishonor was given by mail to the Livingston bank. Immediately on receipt of such notice, the Livingston bank mailed to the defendants at Rockfeller, Ill., a sufficient notice of dishonor. It accurately described the note, stated the facts of presentment, demand, and dishonor, and notified the defendants that the holders looked to them for payment, The president of the bank testified that from considerable correspondence with the defendants he considered that that was their place of residence. And it is not here claimed that it was not the proper place to which to mail them notice of dishonor. While it is doubtless the case that neither the Jamestown bank nor the Livingston bank was at any time the owner of this paper, and while it is apparent that their sole relation to it was that of collecting agent, yet it is clear, both under the authorities and under our statutes, that for the purpose of giving notice of dishonor, and of determining whether sufficient diligence has been employed to charge indorsers, each one of these banks is to be treated as a purchaser in due course of the paper. Comp. Laws, § 4506; 3 Rand. Com. Paper, § 1241. Our statute provides: "When the holder of a negotiable instrument, at the time of its dishonor, is a mere agent for the owner, it is sufficient for him to give notice to his principal in the same manner as to an endorser, and his principal may give notice to any other party to be charged, as if he were himself an endorser. And if the agent of the owner employs a sub-agent, it is sufficient for each successive agent or sub-agent to give notice in like manner to his own principal." It is apparent that the Livingston bank was not a stranger to the paper within the rule that notice given by a stranger is ineffectual. Section 4500, Comp. Laws, declares that

notice may be given by a holder of the paper, and the provisions of § 4506 show that the word "holder" in § 4500 is not there used as synonymous with "owner," for § 4506 declares that the holder who is a mere collecting agent may give the notice. A notice given by a proper person or corporation inures to the benefit of all parties to the paper whose right at that time to give notice to the particular parties notified is not lost. Section 4508, Comp. Laws. That the plaintiff had not lost his right to give notice at the time the Livingston bank mailed notice to the defendants does not admit of controversy. He was an indorser of the paper before it passed into the hands of the Livingston bank for collection, and was not notified by the Jamestown bank of the dishonor thereof. At the time the Livingston bank mailed the notice to the defendants his right to give a similar notice had not expired. He had not yet been himself notified, and he would have until the next day after receiving notice in which to serve notice on the defendant and such other indorsers as he might desire to hold. Sections 4505, 4507, Comp. Laws. That the Livingston bank mailed to defendants notice the very day it received notice from the Jamestown bank is evident from the testimony of the president, who states that the notice was sent immediately upon receipt of notice from the Jamestown bank.

A single question remains. The complaint averred that the plaintiff purchased the note, and was at the time of the commencement of the action the holder and owner thereof. The evidence discloses the fact that the plaintiff was an accommodation indorser, and as such was compelled to take up the paper. That this gave him title to the same, and the right to sue thereon, cannot be doubted. It is true that there is a variance between the allegations of the complaint and the evidence touching the mode of obtaining title; but the evidence was not objected to on that ground, and it is therefore our duty to treat the complaint as amended to conform to the proof. Finding no reason for arriving at a conclusion different from that reached by the learned trial judge.

The judgment of the District Court is affirmed. All concur.

(69 N. W. Rep. 188.)

NOTE—Notice for depositions in the absence of prejudice shown is not fatally defective for not stating street and number of notary's office. *Moore* v. *Booker*, 4 N. D. 543. Certificate to deposition need not show that notary is not a relative of either party or otherwise interested in the action. *Moore* v. *Booker*, 4 N. D. 543. A general objection that it does not appear that witness was out of the county or that the notice for taking was appended to the deposition is not sufficient to exclude it. *Caledonia G. M. Co.* v. *Noonan*, 3 Dak. 190; *Bank* v. *Sherman*, 70 N. W. Rep. 647. In the absence proof to the contrary it will be presumed by the appellate court that the proper foundation was laid for the admission of depositions in evidence. *Caledonia G. M. Co.* v. *Noonan*, 3 Dak. 190. What is sufficient filing of depositions under the statute. *Stone* v. *Crow*, 2 S. D. 526. When question of insufficient time will be deemed waived. *Bem* v. *Bem*, 4 S. D. 138. Notice held sufficient. *Moline P. Co.* v. *Gilbert*, 3 Dak. 239; *Case T. M. Co.* v. *Pederson*, 6 S. D. 140.

LEWIS R. CORNWELL *vs.* FRATERNAL ACCIDENT ASSOCIATION.

Opinion filed November 19th, 1896.

Violation of Game Laws—Accident Insurance.

One who has started to hunt prairie chickens with a loaded gun at a season of the year when it is unlawful to kill prairie chickens has not, by such act, committed the offense of attempting to kill prairie chickens.

Unnecessary Danger—Voluntary Exposure.

One who hunts for game with a loaded gun cannot be said to have voluntarily exposed himself to unnecessary danger by such act, within the meaning of the provision in an accident insurance policy which declares that, for injuries sustained by reason of a voluntary exposure to unnecessary danger, there can be no recovery.

Scaling Bank With Loaded Gun.

Nor is an attempt to scale a bank with a loaded gun in hand a voluntary exposure to unnecessary danger, within the meaning of such a provision.

Appeal from District Court, Ransom County; *Lauder*, J.

Action by Lewis R. Cornwell against the Fraternal Accident Association of America. Judgment for plaintiff. Defendant appeals.

Affirmed.

T. A. Curtis, for appellant.

P. H. Rourke, for respondent.

CORLISS, J. From a judgment in favor of the plaintiff, based upon a verdict in his favor directed by the court, the appeal in this case was taken. The object of the action was to recover the amount due under an insurance policy issued by defendant to the plaintiff. Among other provisions, the policy contained one entitling the plaintiff to $1,000 for the loss of a hand through external, violent, and accidental means. The plaintiff lost his left hand by the accidental discharge of a gun he was carrying. Only two defenses are relied on. The facts do not appear to be in controversy.

It is first urged that the plaintiff was injured while violating the laws of this state. The policy declares that it does not cover injuries resulting wholly or partly, directly or indirectly, from violating rules or laws of a corporation. We shall assume, for the purposes of this case, that this language embraces the laws of this state, and does not relate solely to laws of a corporation, and rules of a corporation, as is contended by counsel for the plaintiff. What law of this state, then, was the plaintiff engaged in the violation of at the time he was injured? He had started out with his loaded gun for the purpose of killing prairie chickens. To have killed them at that season of the year (it being December 12th) would have been a violation of Ch. 69, of the laws of 1891. But the plaintiff was not engaged in the killing of anything at the time the accident occurred. He was climbing a bank, and, his foot having slipped, he caught hold of a limb, and was in the act of drawing himself up by means thereof, when in some way the gun was discharged; the contents lodging in his left hand, shattering it so terribly that amputation was necessary. The only possible ground on which it can be claimed that the plaintiff was violating the laws of this state at the time the gun was discharged, and that the injury he sustained resulted from such violation, is that he was guilty of attempting to kill prairie chickens. Under provision of § § 7693, 7694, Rev. Codes, an attempt to commit a crime is of itself a substantive offense. Section 7693 declares that "an act done with intent to commit a

crime, and tending but failing to affect its commission, is an attempt to commit that crime;" and § 7694 provides that "every person who attempts to commit a crime and in such attempt does any act toward the commission of such crime, but fails or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempt, as follows," etc. It is too clear for discussion that, at the time the plainff was injured, he had not done any act tending to effect the commission of the offense of killing prairie chickens out of season. Intent had ripened into preparation. But the plaintiff had not, in deeds, passed beyond the point of preparation, and entered upon the execution of his criminal project. It is impossible to formulate a rule which will constitute an unerring guide in assigning to cases which occupy the debatable ground their respective places upon one side or the other of the line which separates preparation from legal attempt. The question must, from its very nature, always remain difficult of solution. The wisest course for tribunals to pursue with respect to it is to deal with each cause as it arises, in the light of a few general principles applicable to such cases. We shall content ourselves with the statement of our conclusion that the plaintiff had not, within the meaning of our law, attempted the killing of prairie chickens, although he had formed the purpose to shoot them, and had made preparations to accomplish such object. The authorities fully sustain our view. *Mulligan* v. *People*, 5 Parker, 105; *State* v. *Clarissa*, 11 Ala. 57; *Hicks* v. *Com.*, (Va.) 9 S. E. Rep. 1024; *Stabler* v. *Com.*, 95 Pa. St. 318; *State* v. *Butler*, (Wash.) 35 Pac. Rep. 1093; *People* v. *Murray*, 14 Cal. 159; 1 Bish. Cr. Law, § § 760, 762, 764; *Reg.* v. *Cheeseman*, 9 Cox, Cr. Cas. 103; *Reg.* v. *Taylor*, 1 Fost. & F. 511.

The second ground of defense is that the plaintiff voluntarily exposed himself to unnecessary danger. The policy provides that it shall not cover such injuries as result from voluntary exposure to unnecessary danger. There is no merit in this defense, under the facts of this case. It will hardly be insisted

that one who, in the ordinary way, hunts for game, has by such an act exposed himself to unnecessary danger, within the meaning of such a provision in an insurance policy. Nor can it be said that the plaintiff voluntarily exposed himself to unnecessary danger by assaying to scale the bank, or by attempting to draw himself up the bank with his left hand, while the loaded gun was held in his right hand. We cannot say that this act was one which reasonable men would pronounce dangerous. To go through a dense thicket with the hammer of a gun raised, and the muzzle pointed towards one, would be to voluntarily expose oneself to unnecessary danger. But no reasonably prudent man would have deemed it probable, or even possible, that injury would result from scaling a bluff with a loaded gun in hand. The danger was a hidden danger. No one can be said to have voluntarily exposed himself to unnecessary danger when no hazard is visible to an ordinarily prudent man. He would justly be chargeable with having voluntarily exposed himself to unnecessary danger who should essay to leap a wide and deep chasm. But no such charge could be laid at the door of one who, in the night, should unexpectedly walk into an unprotected ditch. The authorities fully sustain our ruling upon this point. *Keene* v. *Association*, 161 Mass. 149, 36 N. E. Rep. 891; *Jones* v. *Association*, (Iowa,) 61 N. W. Rep. 485; *Burkhard* v. *Insurance Co.*, 102 Pa. St. 262; *Association* v. *Osborn*, 90 Ala. 201, 9 South. 869; *Miller* v. *Insurance Co.*, 92 Tenn. 167, 21 S. W. Rep. 39. See, also, 1 Am. and Eng. Enc. Law, (2d Ed.) 309; May Ins. § 409; *Indemnity Co.* v. *Dorgan*, 7 C. C. A. 581, 58 Fed. Rep. 945; *Follis* v. *Association*, (Iowa,) 62 N. W. Rep. 807; *Investment Co.* v. *Martin*, 32 Md. 310; *Marx* v. *Insurance Co.*, 39 Fed. Rep. 321; *Sutherland* v. *Insurance Co.*, 87 Iowa, 505, 54 N. W. Rep. 453.

The judgment of the District Court is affirmed. All concur.

(69 N. W. Rep. 191.)

WILLIAM FLUGEL, JR. *vs.* FRANK HENSCHEL.

Opinion filed November 19th, 1896.

Vacation of Verdict of Courts Own Motion.

Evidence and instructions in this case examined. *Held*, construing § 5475, Rev. Codes, that the court was not warranted in vacating the verdict, and granting a new trial on its own motion.

Verdict Contrary to Evidence and Courts Instruction.

Held, further, that under said section the trial court would not be justified, as a rule, in vacating a verdict of its own motion merely upon the ground that the verdict violates the instructions of the court, or is not justified by the evidence. These are grounds available on motion made by the party aggrieved by the verdict.

Verdict Result of Passion or Prejudice.

Unless there has been such a manifest disregard of instructions or of the evidence that the court is at once satisfied that the verdict is the result of passion or prejudice, or of a plain disregard of the court's instructions to the jury, the court cannot be sustained in vacating a verdict on its own motion. The power to vacate should be exercised with great caution, and only in extreme cases.

Appeal from District Court, Cass County; *McConnell*, J.

Action by William Flugel, Jr., against Frank Henschel on an account. There was a verdict for plaintiff, and from an order granting a new trial, plaintiff appeals.

Reversed.

M. A. Hildreth, for appellant.

Charles A. Pollock, for respondent.

WALLIN, C. J. In this case the jury returned a verdict for the plaintiff, whereupon the trial court, upon its own motion, and before the jury was discharged, entered an order vacating the verdict, and granting a new trial of the action. The order recites that it is made "for the reason that the court is of the opinion that there has been by the jury such a plain disregard of the evidence in the case as to satisfy the court that the verdict was rendered under the influence of prejudice, and also for the reason that

there has been such a plain disregard by the jury of the instructions of the court as to satisfy the court that the verdict was rendered under such misapprehension." To this order the plaintiff's counsel saved an exception, and the order is assigned as error in this court.

The action is upon an account, and the complaint embraces three items of account, which are severally set out as independent causes of action. The controversy in this court, as counsel concedes, turns wholly upon the third and last cause of action stated in the complaint. The item in question consists of a claim for the board, care, and maintenance of a minor son of the defendant, which service was rendered by the defendant's father-in-law under the following circumstances: The mother of the child, who was the wife of the defendant, died on the 3rd day of September, 1891, leaving the child in question, who was then about four years of age. After the funeral, the father-in-law (the grandfather of the boy) took the boy home, and kept him until April, 1895, and then the boy was taken to the house of another son, and was there kept for a period of 32 weeks. The testimony shows that the grandfather paid the boy's board during said period of 32 weeks at the rate of $2 a week. There is no claim that the defendant ever paid anything for the boy's keeping, or for the sum paid out by his father-in-law for the boy's board as above stated. The testimony is undisputed that the care and maintenance of the boy was reasonably worth the sum of two dollars per week. The undisputed testimony further shows that the claim in question was sold and transferred to the plaintiff before this action was brought, and that this plaintiff paid $275 for the claim. For this claim the jury returned a verdict for plaintiff for the sum of $287, the face of the claim being $551.25. At common law the claim of a relative for the support of a minor child, in the absence of an agreement for compensation, would not be sustained. This principle is voiced in § 99 of what is known as the "Field Code of New York," and the same provision is incorporated in the code of California. In this state the

doctrine is embraced in § 2789, Rev. Codes, which reads: "A parent is not bound to compensate the other parent or a relative for the voluntary support of his child, without an agreement for compensation," etc. In this court respondent's counsel contends that there was no evidence introduced at the trial of an agreement to compensate the father-in-law for his care and support of the child. This contention presents one of the vitally important questions to be determined on this appeal. The record embraces the testimony on this point, and we give it in substance: In behalf of the plaintiff the father-in-law testified, referring to a conversation had with the defendant about three months after the death of the boy's mother: "He said, 'You pay attention to him,' and he said, 'I will settle that business after that.' After that he told me, if I would pay attention to the child for him he would settle for it. I tried to get a settlement before this suit was commenced. I wrote him a letter, and he did not mind it, and I went and told him to settle with me, and he wouldn't settle with me." On cross-examination he testified: "I took the child, and kept him there, and he never said he should take him back. I think it was about three months after that he said, 'If it wasn't for me, I would go crazy, and I would settle for this business;' and I said, 'Don't bother your head now. We can settle that after.'" The plaintiff, referring to a conversation had with the defendant in December, 1891, testified: "I had a talk with Hentchel in regard to paying for the child's support. He said that if it hadn't been for us taking the child over there, and taking care of it, he wouldn't know what he would have done; and he was willing to do something for it. This little trouble Henschel and I had had nothing to do with bringing this suit. My father tried to get a settlement with him long before this account was assigned, but he paid no attention to it." The defendant testified, in substance, that the conversation above referred to never took place, and that he never agreed to settle for the services rendered to his son. While the witnesses did not speak the English language perfectly, it seems to us that the testimony

on plaintiff's part tended to establish the fact that an agreement was made some three months after the boy was taken home by his grandfather, between the defendant and the grandfather, that the former would become responsible for the maintenance of the child. True, the agreement did not go so far as to state any specific amount of compensation which should be paid for the services. Nor was this necessary. All the statute requires is that an agreement to compensate should be made before any liability to pay arises. An agreement to compensate having been entered into, the law will require the party making such an agreement to pay a reasonable amount, according to the value of the services rendered. In this action the plaintiff does not allege an agreement to pay any specific sum, but alleges that the services were rendered, and that they were reasonably worth a certain sum. Considering the whole evidence upon this feature of the case, we are far from agreeing with the view taken of such evidence by the learned trial court. We cannot discover in the verdict either a disregard of the evidence, or any indication of prejudice operating upon the minds of the jury. On the contrary, it is quite clear to our minds that, if a motion for a new trial had been regularly heard below upon the grounds that the verdict was not justified by the evidence, such motion would have been denied. The evidence, from our standpoint, fairly preponderates in favor of the conclusion reached by the jury.

Turning now to the charge of the court to the jury, we find that, after reading to the jury § 2789, Rev. Codes, the court proceeded at some length to charge the jury relative to the law of the case. We think the law as given to the jury was correctly stated, and properly applied to the evidence in the case. The court squarely submitted the question to the jury whether an agreement to compensate for services rendered to the child by its grandfather was ever made, and the jury was distinctly instructed to find against the plaintiff on this item unless the plaintiff established the agreement to compensate by a preponderance of testimony. We cannot, therefore, concur in the view of the trial

court as expressed in its order setting aside the verdict, that there has been a plain disregard by the jury of the instructions of the court." On the contrary, we are unable to see where the jury disregarded the instructions given them in the case. At the common law, the power of the trial court to vacate a verdict on its own motion was plenary. See *Weber* v. *Kirkendall*, (Neb.) 63 N. W. Rep. 35. But in this jurisdiction, and in many other states, the common law right to do so has been restricted by statute. Section 5475, Rev. Codes, limits the right of the District Court to set aside the verdict to cases where there has been "such plain disregard by the jury of the instructions of the court or the evidence in the case as to satisfy the court that the verdict was rendered under a misapprehension of such instructions or under the influence of passion or prejudice." The abridgment of the common law right of a trial court to vacate a verdict on its own motion became highly proper, and indeed necessary, after the legislative branch of the government had made ample provision to facilitate the setting aside of illegal and unjust verdicts by means of a motion made for that purpose by a party to the action whose rights have been prejudiced by any such verdict. Under the statutes regulating motions for a new trial a defeated party has a sufficient remedy as against an illegal verdict whether the vice of the verdict lies in an error of law or an error of the jury in considering the evidence. Taking all of the statutes relating to the subject of new trials into account, it becomes apparent that a trial court is not justified in vacating a verdict upon its own motion upon the ground merely that the verdict is not justified by the evidence, or is contrary to law, or for errors of law occurring during the trial of the case. All of these grounds are specifically enumerated in the code as grounds for a motion for a new trial to be made by the party aggrieved by the verdict. To justify the action by the court on its own motion, the case must be gross, and one obviously requiring immediate action. To come within § 5475, there must be a plain disregard

of instructions on the part of the jury, or the verdict must have been rendered under the influence of passion or prejudice. In *Clement* v. *Barnes*, 6 S. D. 483, 61 N. W. Rep. 1126, construing the same statute, the court say: "And a careful consideration of the various quotations of the statute relating to the subject of new trials leads us to the conclusion that the verdict must be so perceptibly in disregard of the instructions or the evidence as to satisfy the court upon its announcement, and without the necessity of mature reflection, that the same is grossly erroneous, or the result of passion or prejudice. In the case of any other misconduct on the part of the jury, or where the evidence is insufficient to justify the verdict, or when excessive damages have been awarded by the jury apparently through the influence of passion or prejudice, a notice of intention and a motion for a new trial must be made and served upon the adverse party in order to give the court jurisdiction to hear and determine an application to set aside a verdict and grant a new trial." The language we have quoted meets with our full approval, and harmonizes with both reason and the statutory provisions relating to new trials.

Applying the law to the facts in the record, we are compelled to hold that the order vacating the verdict and granting a new trial was made erroneously, and without warrant of law, and that it must be reversed. But it must not be understood from what we have said that the defendant has been cut off from his statutory right to move for a new trial by the premature action of the trial court in the premises. If the defendant desires to apply for a new trial by motion in the court below, it would only be simple justice to him to allow him to do so, even at this late date, and the court below ought, in justice to the defendant, to extend time to him for that purpose, if such extension becomes necessary.

The order appealed from is reversed. All the judges concurring.

(69 N. W. Rep. 195.)

NOTE—When the verdict is either without support of evidence or contrary to

instructions it will be set aside. *McArthur* v. *Dryden*, 6 N. D. —, 71 N. W. Rep. 125; *McMillen* v. *Aitchinson*, 3 N. D. 187, 54 N. W. Rep. 1030; *Cronk* v. *C. M. & St. P. Ry. Co.*, 3 S. D. 93; *Clement* v. *Barnes*, 6 S. D. 483. Verdict should not be vacated by the court of its own motion unless there has been such clear disregard of the instructions or the evidence that the court is at once satisfied without argument or mature reflection that the verdict is the result of passion or prejudice or was rendered under a misapprehension of the courts instructions. *Clement* v. *Barnes*, 6 S. D. 483, 61 N. W. Rep. 1126; *Gould* v. *Duluth & Dak. Elev. Co.*, 2 N. D. 216, 50 N. W. Rep. 969. Where upon the evidence in the record a verdict for plaintiff would properly be set aside on application, the court should direct a verdict for defendant. *Bowman* v. *Eppinger*, 1 N. D. 21, 44 N. W. Rep. 1000. When the court directs a verdict the evidence must be considered as undisputed. It must be given the most favorable construction for the party against whom direction is made, and it is only where the testimony thus considered could not legally sustain a verdict in his favor that the court is warranted in directing a verdict against him. *Carson* v. *Gillitt*, 2 N. D. 255, 50 N. W. Rep. 710; *Purcell* v. *Ins. Co.*, 5 N. D. 100, 64 N. W. Rep. 943; *Roberts, Throp & Co.* v. *Laughlin*, 4 N. D. 167, 59 N. W. Rep. 967; *Russell & Co.* v. *Amundson*, 4 N. D. 113, 59 N. W. Rep. 477; *Hodgins* v. *Ry. Co.*, 3 N. D. 382, 56 N. W. Rep. 139; *Haugen* v. *C. M. & St. P. Ry. Co.*, 3 S. D. 394, 53 N. W. Rep. 769. It was formerly the rule in the territory that a peremptory non suit could not be ordered against the will of the plaintiff. *Holt* v. *Van Eps*, 1 Dak. 210, 46 N. W. Rep. 689. This ruling was not followed, but gave way to the rule which has since obtained both in the territorial and state courts, that where the evidence will not support contrary verdict, a directed verdict is proper. *Finney* v. *Ry. Co.*, 3 Dak. 270, 16 N. W. Rep. 500; *Star Wagon Co.* v. *Matthiessen*, 3 Dak. 233, 14 N. W. Rep. 107; *Knapp* v. *Bank*, 5 Dak. 378, 40 N. W. Rep. 587; *First Nat'l Bank* v. *Comfort*, 4 Dak. 168, 28 N. W. Rep. 855; *Cronk* v. *Ry. Co.*, 3 S. D. 93, 52 N. W. Rep. 420; *Longley* v. *Daly*, 1 S. D. 257, 46 N. W. Rep. 247; *Peet* v. *Ins. Co.*, 1 S. D. 462., 47 N. W. Rep. 532; *Fletcher* v. *Nelson*, 69 N. W. Rep. 53. It may become proper upon motion for the court to strike out all evidence and to direct a verdict. *Martin* v. *Hawthorne*, 3 N. D. 412, 57 N. W. Rep. 87; *Haveron* v. *Anderson*, 3 N. D. 540, 58 N. W. Rep. 340. A verdict in conflict with the courts instructions will be vacated. *McMillen* v. *Aitchinson*, 3 N. D. 187. The party assailing a verdict as not sustained by evidence must specify the particulars where in the evidence is insufficient. *Holcomb* v. *Kelher*, 3 S. D. 497, 54 N. W. Rep. 535; *Gaines* v. *White*, 1 S. D. 434, *Hostetter* v. *Brooks Elevator Co.*, 4 N. D. 357; 61 N. W. Rep. 49. A verdict based upon conflicting evidence will ordinarily not be disturbed by the court. *Halley* v. *Folsom*, 1 N. D. 325; *Slattery* v. *Donnelly*, 1 N. D. 264; *Gleckler* v. *Slavens*, 5 S. D. 364; 59 N. W. Rep. 323; *Vickery* v. *Burton*, 69 N. W. Rep. 193; *Vermillion* v. *Vermillion*, 6 S. D. 466, 61 N. W. Rep. 802; *Huron P. & B. Co.* v. *Kittleson*, 4 S. D. 520, 57 N. W. Rep. 233; *Peet* v. *Ins. Co.*, 1 S. D. 462, 47 N. W. Rep. 532. The conflict in evidence that prohibits a court from interfering with the verdict of a jury should be a substantial not an illusory one. *Fuller* v. *Elev. Co.*, 2 N. D. 220, 50 N. W. Rep. 359. Where the court is satisfied that a great injustice has been done by the verdict it may be set aside. *Finney* v. *Ry. Co.*, 3 Dak. 270, 16 N. W. Rep. 500. A verdict which fails to pass on all the issues will be set aside. *Uhlig* v. *Garrision*, 2 Dak. 99, 2 N. W. Rep. 258; *Holt* v. *Van Eps*, 1 Dak. 207, 46 N. W. Rep. 689. Affidavits of jurors are incompetent to sustain the verdict. *Glaspell* v. *N.*

P. Ry. Co., 43 Fed. Rep. 900, but see *State* v. *Kent*, 5 N. D. 516, also incompetent to impeach it. *Murphy* v. *Murphy*, 1 S. D. 316, 47 N. W. Rep. 142; *Peet* v. *Ins. Co.*, 1 S. D. 462; *Ulrick* v. *Dak. L. & T. Co.*, 2 S. D. 285; *Gaines* v. *White*, 1 S. D. 434. A refusal of the court to direct a verdict in a proper case is error. *Sanford* v. *Duluth & Dak. Elev. Co.*, 2 N. D. 6; *Hodgins* v. *Ry. Co.*, 3 N. D. 382. It is a prerogative of the court to direct a verdict where the evidence is in such condition with reference to its probative force that the court would be bound to set aside any other verdict. *Robert* v. *McDonald*, 2 S. D. 495. If the courts ruling in taking a case from the jury, by directing a verdict is erroneous, it may be reviewed without first making a motion for new trial in the court below. Such ruling is error in law occurring at the trial. *Jones Mercantile Co.* v. *Faris*, 5 S. D. 348, 58 N. W. Rep. 813; *Jones Mercantile Co.* v. *Faris*, 6 S. D. 115; *Sioux Banking Co.* v. *Kendall*, 6 S. D. 543. A verdict may be amended. *Fletcher* v. *Nelson*, 69 N. W. Rep. 53.

CHRISTIAN HANSON *vs.* CUMMINGS STATE BANK.

Opinion filed November 19th, 1896.

Action to Recover Usury.

Under Ch. 184, Laws 1890, no action can be maintained against the original owner of a usurious promissory note by the maker to recover the amount thereof, unless such original owner transfers or parts with such note before maturity, without giving the purchaser notice of its usurious character.

Appeal from District Court, Traill County; *Templeton*, J.

Action by Christian Hanson against the Cummings State Bank. From an order sustaining a demurrer, plaintiff appeals.

Affirmed.

B. E. Ingwaldson, for appellant.

Cochrane & Feetham, for respondent.

BARTHOLOMEW, J. On June 5, 1893, the plaintiff and appellant executed and delivered to the defendant and respondent a certain promissory note due on the 1st of November, 1893. The note was paid. Subsequently this action was brought to recover the original sum for which the note was given, with interest from the date of the note. A demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action was sustained, and this appeal is from such order.

At the time of the execution of the note, Ch. 184, Session Laws, 1890, was in force. The allegations of the complaint show that the note was usurious, under § 3 of that act, the interest reserved being more than 12 per cent. per annum. Sections 5 and 6 of that act provide that in all cases where the original owner of any usurious promissory note shall sell or part with the same before the maturity thereof, the maker may at once bring an action against such original owner, and recover the full amount of such note, and the usurious interest thereon up to the date of the maturity of such note; and in such action it is not necessary to allege or prove payment of such note. The statute proceeds upon the theory that by the transfer of the note before maturity the maker becomes liable to the purchaser for the full amount of the note, and will be obliged to pay it at maturity; whereas, had it remained in the hands of the original owner, he had an absolute defense under the statute against the note, and the whole thereof. Therefore the maker is given this right of action against the original owner so that he may not, by the transfer, be deprived of his rights under the statute. But he is given such right of action only in case of a transfer as aforesaid. Section 7 of the act—and this is a section upon which plaintiff bases his right of recovery—creates another class of usurious notes, not in any manner covered by the preceding section. It provides that when any broker, loan agent, or other person charges a fee or compensation for procuring a loan of money, or an extension of time upon an existing loan, and such fee or compensation, added to the interest reserved in the note, exceeds 12 per cent. per annum, then the note is declared usurious, within the meaning of the act, and void from the beginning in the hands of the original owner, and the maker is given the same remedy in law against the original owner that is provided for in the preceding sections of the act. In our judgment, there is an unassailable ground upon which the demurrer must be sustained. The note did not come within the provisions of § 7, but of § 3. There was no broker or loan agent known in the transaction. The contract was

made between plaintiff and defendant direct. The money reserved was for interest, and did not represent any fee or compensation for obtaining the loan. But, were it otherwise, the result would not be different. Sections 5 and 6 give a right of action against the original owner only in case of a transfer. Section 7 gives a right of action under the same circumstances, and no other. There was no transfer in this case. None is claimed. Hence there was no right of action under the statute. Nor can the complaint be sustained as a common law claim for usurious interest paid. Whether or not usurious interest, voluntarily paid, can be recovered in the absence of express statutory authority, is a point upon which the decisions are far from unanimous. Some courts declare that usurious interest is never voluntarily paid; that the law conclusively presumes that it was paid under stress of necessity, or under coercion, and hence that it may be recovered back in the action for money had and received. The cases may be found in 27 Am. and Eng. Enc. Law, 959, note 4. But this doctrine is denied in other cases, and it is declared that usurious interest voluntarily paid cannot be recovered in the absence of statute authorizing such recovery. *Perkins* v. *Conant*, 29 Ill. 184; *Manny* v. *Stockton*, 34 Ill. 306; *Reinback* v. *Crabtree*, 77 Ill. 182; *Anderson* v. *Bank*, (Minn.) 54 N. W. Rep. 1062; *Cornell* v. *Smith*, 27 Minn. 132, 5 N. W. Rep. 460; *Blain* v. *Willson*, 32 Neb. 302, 49 N. W. Rep. 224; *Quinn* v. *Boynton*, 40 Iowa, 304. But we express no opinion on that point in this case, as we think the allegations of the complaint cannot fairly be construed into a claim to recover only usurious interest paid, as for money had and received. The action is brought under the statute, and is not based upon money paid. It is based upon the fact that a usurious promissory note was given. As we have seen, that fact alone constitutes no cause of action. Plaintiff drew his complaint, and argued it upon the theory that the law imposes upon one who receives a usurious promissory note an arbitrary penalty equal to the face of the note and the interest; and then, to show that the payment of the note does

not at common law destroy the right to recover this penalty, he cites some of the cases which hold that usurious interest paid may be recovered. But he nowhere claims, even in his brief, that he is seeking to recover under his complaint, or can recover simply the usurious interest. It is clear that no such point was presented to the trial court.

Affirmed. All concur.

(69 N. W. Rep. 202.)

AUGUST F. KUHNERT *vs.* W. S. CONRAD.

Opinion filed November 19th, 1896,

Mortgage—Homestead Acquired Subsequently.

M. and R., to secure a debt due to A., jointly executed and delivered a mortgage to A. upon a certain city lot, located in the City of Fargo, N. D. When the mortgage was delivered, M. and R. were seised, as tenants in common, of the fee-simple title to said lot, and said lot was wholly unincumbered except by said mortgage. When the mortgage was delivered, M. was a married man, but had never resided upon said lot, but did live with his family upon another lot in said city. Subsequent to the delivery of the mortgage to A., M. moved into a building situated on said lot, and established his residence and home therein, and continued to reside in said building with his family until after said lot had been sold to A., at a foreclosure sale had pursuant to said mortgage. There was no redemption made from the foreclosure sale. *Held*, that M. and his family acquired homestead rights in and to said premises, but said rights were wholly subordinate to the superior rights acquired by A. as purchaser at the foreclosure sale.

Wife Interest Subject to Mortgage.

Held, further, that the wife of M. had no homestead rights as against the mortgagee, which would entitle her to be made a party defendant in an action brought by A. to foreclose the mortgage; nor had she any homestead rights as against A. after the title passed from her husband, and ripened in A., by a regular foreclosure of a valid mortgage.

Abandonment of Homestead.

M. and his family removed from said homestead to another state in June, 1888, and since such removal, and until the trial of this action, have never resided in this state, and so far as appears in the record, have never manifested an intention to return to this state to reside. About four years subsequent to

such removal from this state, M. and his wife, by a deed of quit-claim, conveyed all their right, title, and interest in said lot to the defendant. *Held* that, prior to the execution of said quit-claim deed, said removal of M. and his family from this state, and their continued residence in another state after such removal, operated as an abandonment and forfeiture of such homestead rights as they had acquired in and to said lot and premises, and that no homestead rights passed to the defendant by said deed of quit-claim.

Appeal from District Court, Cass County; *McConnell*, J.

Action by August F. Kuhnert against W. S. Conrad. From a judgment for plaintiff, defendant appeals.

Affirmed.

Ball, Watson & Maclay, and *Charles E. Joslyn*, for appellant.

Leonard A. Rose, for respondent.

WALLIN, C. J. This action was brought to determine a certain homestead claim of the defendant to lot 2 of block 2 in Keeney & Devitt's addition to the City of Fargo, which claim the complaint alleges is unfounded in law. The action was tried without a jury, and, after filing its findings of fact and conclusions of law, the District Court entered judgment upon the findings in favor of the plaintiff, declaring the said claim of the defendant to be groundless in law, and null and void. Defendant appeals from said judgment. The evidence is not brought to this court. The only error assigned here is that the conclusions of law found by the trial court, and the judgment, are not warranted by the facts found.

The facts which, in our opinion, are decisive of the case in this court, are as follows: On the 3rd day of June, 1884, one Frank B. McCauley and one Reynolds each owned an undivided one-half interest in, and had a fee-simple title to, the lot in controversy, and which is above described, viz. lot 2. On the date above stated, said McCauley and Reynolds (said lot being then wholly unincumbered) executed and delivered their mortgage to one William Aylmer upon said lot, to secure a debt of $2,000. The mortgage was duly recorded. At the time the mortgage was delivered, and continuously thereafter up to the 20th day of

November, 1888, said premises were used by McCauley and Reynolds, as a theatre and saloon, and for no other purpose whatever. At the time said mortgage was delivered, and long prior thereto, said McCauley was a married man, and lived with his wife, one Florence A. McCauley, on lot 11 of block 33 in said addition to the City of Fargo, and continued to reside on said lot 11 until the year 1886, when they removed to lot 3 in said block 2 in said addition, which lot is contiguous to and adjoins the premises in controversy. Said McCauley and Reynolds each owned an undivided one-half interest in said lot 3, from a period long prior to the date of the delivery of said mortgage, and until the same was foreclosed, as hereinafter stated. Default having been made in the payment of the debt secured by the mortgage, an action to foreclose said mortgage was instituted, wherein said Aylmer was plaintiff, and said Frank B. McCauley and said Reynolds were the sole defendants. A judgment of foreclosure was entered, and pursuant thereto, and on due notice of sale, said lot 2, on November 9, 1887, was sold, and was bid in by said William Aylmer. Said premises were not redeemed from said sale, and, pursuant thereto, a sheriff's deed of said premises was, on November 20, 1888, issued, and delivered to William Aylmer, the purchaser. On the 18th day of October, 1889, William Aylmer sold said lot 2 to this plaintiff, and, by a deed of warranty, conveyed to plaintiff all the right, title, and interest obtained by him under the foreclosure sale. By virtue of said sale and deed of warranty, the plaintiff took possession of lot 2, and ever since that date has had quiet and peaceable possession of the same. The building on lot 3, into which McCauley and his wife moved in 1886, was not erected until some time subsequent to the erection of the building on lot 2, which lot (lot 2,) as has been stated, was used exclusively as a saloon and theater by McCauley and Reynolds. In February, 1888, Frank B. McCauley went to Spokane, in the State of Washington, where he was followed by his wife and family in June, 1888; and there the family resided for about three years continuously thereafter, and during said

period Frank B. McCauly exercised the right of suffrage, by voting at a general election held at Spokane. The court also finds that, during said period of residence at Spokane, "said Florence A. McCauley ceased to regard Fargo, aforesaid, as her home." Either in 1890 or 1891 the McCauley family removed to Aberdeen, in the State of Washington, where they resided continuously until the year 1893, and where said Frank B. McCauley again exercised the right of suffrage. Since September, 1893, the McCauley family has continuously, and until the present time, resided at the City of Ashland, in the State of Wisconsin. About four years after Frank B. McCauley was joined by his wife and family at Spokane, as before stated, to-wit, on June 2, 1892, a quitclaim deed of conveyance was made of the premises in question (lot 2,) whereby McCauley and his wife, for an expressed consideration of one dollar, conveyed to the defendant in this action all the right, title, and interest of the McCauleys, or either of them, to said lot 2. The defendant bases all of his rights in the premises upon this quit-claim deed. The building on lot 3, which, as has been stated, was erected later than the building on lot 2, used as a theater and saloon, was occupied as follows: "The ground floor was used as a billiard room and office, and the second floor was used by McCauley and his family as a place of residence, from some time in 1886, to the month of June, 1888. Lots two (2) and three (3) constitute less than one acre in area; and at all times after the erection of the building upon lot three (3,) as above stated, two openings existed between the building on lot three (3,) and the building on lot two (2.) One of said openings or doors was on the first floor, and the other on the second floor. On account of the existence of such openings and connections between the buildings standing, respectively, upon lots two (2) and three (3,) a homestead right is claimed by the defendant in behalf of the McCauleys, in lot two (2,)—the premises in question,—as appurtenant to lot three (3,) upon which last mentioned lot the McCauleys resided for the period of time above stated, and during which period McCauley owned an

undivided one-half interest in said lots (2) and three (3). On the 15th day of August, 1887, and while living on said lot three (3,) McCauley and his said wife caused to be filed in the office of the register of deeds of Cass County a certain written declaration, wherein they designated said lots two (2) and three (3) as their homestead."

From the findings of fact which we have narrated, in substance, the trial court deduced the following conclusions of law: First, that, at the time the McCauleys made and delivered their quit-claim conveyance of lot 2 to this defendant, they had no right, title, or interest in said lot, and, consequently, that the defendant acquired no interest whatever by said deed of quit-claim; second, that the plaintiff was entitled to a judgment declaring that the plaintiff's title is good and valid, and free and clear of any cloud or incumbrance caused by said deed, or the record thereof.

We have no doubt or hesitation in saying that the legal conclusions of the trial court were entirely correct and proper. The conceded facts do not permit of doubt that, when the McCauleys executed their quit-claim deed of the premises in question, and upon which alone the defendant predicates his alleged interest in the premises, the McCauleys had definitely, and with no expectation to return, removed from the territory (now state) of North Dakota, and had, without any possible doubt, purposely given up and abandoned their residence in the City of Fargo, and had been out of the territory and state for a period of about four years before the deed was made. Not only is there no finding of a purpose on the part of the McCauleys to return to their residence in Fargo at any time after their removal to the State of Washington, in 1886, but the findings preclude any theory that such purpose existed. They were nonresidents at the time of the trial, and nothing in the record indicates any intention on their part to return to this state at any time. Their absence, therefore, from their former place of residence in the City of Fargo, exhibits a fixed purpose to live out of the state, and therefore a fixed purpose to finally abandon their former homestead premises

within this state. The fact of such abandonment, as well as the purpose to abandon, exist in this case, and both are transparently clear and free from doubt. Nor does it matter that the McCauleys had in 1887, and some five years before, executing said quit-claim deed to defendant, caused to be filed in the register of deeds office in Cass County a writing whereby said lots were claimed or designated as their homestead. Whatever rights or advantages may result from filing such a declaration, there can be no doubt that it does not operate to preserve a homestead right for a single day after the homestead has been abandoned in fact and in intention. Abandonment is a mixed question of intention and fact, and each case will rest upon its own facts and circumstances; but in the case at bar there is no room for doubt as to either the intention or the fact. It is, moreover, in our opinion, quite doubtful whether one who actually has a homestead right, and no other right, in land, can transfer such right to a stranger by deed of conveyance; but it is quite unnecessary in this case to pursue this point further. The defendant is seeking, under the facts of this case, to redeem from the foreclosure sale, and bases his claim to redeem entirely upon the assumption that Mrs. Florence A. McCauley had a homestead right in the premises in question when the foreclosure took place, and that, by virtue thereof, she had a right, under the law, to redeem, and that her right to redeem has not been cut off by the foreclosure, for the reason that she was not made a party to the foreclosure action.

In making this claim, however, the defendant, in terms, concedes—and is forced to do so when he seeks to redeem—that the foreclosure was entirely regular, and that the purchaser at the sale acquired the fee-simple title vested in the mortgagors (McCauley and Reynolds) when the mortgage was made. This is tantamount to saying that the entire fee was by the foreclosure divested from McCauley and Reynolds, and that the purchaser became seised of the entire fee-simple title to the lot in question. That such foreclosure had this effect is not open to doubt; nor

can there be any question whatever that, at the moment the title passed to the purchaser under the sale, that moment the homestead right of the husband, at least, ceased to exist in the premises in question. The homestead rights of the husband rested upon the fact of his ownership, coupled with his residence upon the premises. When the ownership ceased, the homestead right of the husband—a mere possessory right, springing from ownership—ceased also. Mrs. Florence A. McCauley had no title or estate in the land. Her homestead rights, as in all similar cases, rested upon the marital relation, coupled with her husband's ownership of the fee. Her mere possessory right was founded upon her husband's ownership and her marital relation to him. When the foundation was removed by a valid transfer of the title from her husband to a stranger, her possessory right vanished at once. It is elementary that the forclosure of a mortgage relates back to the date of the execution and delivery of the mortgage, and operates to transfer to the purchaser at the sale the entire estate and interest which the mortgagor had at the date of the delivery of the mortgage, or at any subsequent date. When the mortgage in question was made and delivered, the entire fee-simple estate of the premises in question was vested in the mortgagors, and was not burdened by any homestead rights, and not otherwise incumbered. It follows, therefore, that the purchaser at the sale acquired a fee-simple title to the premises, free and clear from any homestead rights subsequently acquired by the mortgagor, or through him by his wife. This reasoning does not imply that the McCauleys never at any time acquired a homestead right in the premises; but it does imply that whatever homestead rights were acquired by them, from the inception thereof, inferior and subordinate to the paramount rights acquired by Aylmer under his mortgage, antedating the homestead rights attempted to be assigned by the McCauleys.

It follows from these considerations that if the McCauleys had never removed from the premises, and abandoned their homestead,—as they certainly did,—an action of ejectment could be

maintained by the plaintiff against them, or either of them, to remove them from the premises in question. It being conceded that the mortgage covered the entire estate, and that no homestead right existed in the premises when it was delivered, and further conceded that the mortgage was valid, and the foreclosure was regular, as to the mortgagors, it follows as a legal sequence that the mortgage was superior to any homestead right to the land subsequently acquired either by the mortgagor or his wife. The principles of law upon which our conclusions depend are so entirely elementary that we do not care to cite authorities in their support.

The judgment of the District Court will be affirmed. All the judges concurring.

(69 N. W. Rep. 185.)

SWEDISH AMERICAN NAT'L BANK *vs.* DICKINSON COMPANY, *et al.*

Opinion filed November 19th, 1896.

Supplemental Complaint—When Proper.

The facts embodied in a supplemental complaint under the code must relate to the cause of action set forth in the original complaint, and must be in aid thereof.

New Cause of Action Cannot be Alleged in Supplemental Complaint.

It is not proper to bring into a case, by supplemental complaint, new facts which have arisen since the action was commenced, and which by themselves constitute a new and independent cause of action, without reference to the facts alleged in the original pleading.

Judgment in Foreign State—Bar.

Accordingly, *held*, that when, pending an action upon notes, judgment thereon was recovered in another state, the plaintiff could not file a supplemental complaint alleging recovery of such judgment, but that the rendition thereof constituted a bar to the further prosecution of the action.

Appeal from District Court, Cass County; *McConnell*, J.

Action by the Swedish American National Bank against the Dickinson Company and C. G. Dickinson. From an order

refusing permission to file a supplemental complaint, plaintiff appeals.

Affirmed.

Newman, Spalding & Phelps, for appellant.

Ball, Watson & Maclay, for respondents.

CORLISS, J. The sole question of law at issue on this appeal relates to the extent of the power of the District Court to allow a plaintiff to file a supplemental complaint. The causes of action set forth in that pleading in this case were promissory notes. While this suit was pending the plaintiff recovered in the State of Minnesota, against the same defendants, a judgment upon the identical causes of action embraced in the complaint. Thereafter its counsel applied in this action to the District Court for permission to file a supplemental complaint, averring the recovery of this judgment. The court refused to grant this motion, on the sole ground of a want of power. The correctness of this ruling is the only question before us. Should we reach the conclusion that the power exists, it would be our duty to reverse the judgment and order appealed from, and direct the District Court to bring to bear upon the application its judicial discretion. But, in our judgment, the court did not err in its decision. A few fundamental principles of law control this case. It has long been the doctrine that a final judgment merges, within the jurisdiction in which it is rendered, the original cause of action on which it is founded. 1 Freem. Judgm. § § 215–217; 15 Am. and Eng. Enc. Law, 336. This rule applies in this country to judgments rendered in the different states, on the ground that, under the provisions of the federal constitution, they are practically assimilated to domestic judgments. 1 Freem. Judgm. § 221; 15 Am. and Eng. Enc. Law, 341; *Barnes* v. *Gibbs*, 31 N. J. Law, 317; *Bank of U. S.* v. *Merchants' Bank of Baltimore*, 7 Gill, 415; *Bank* v. *Wheeler*, 28 Conn. 433; *Rogers* v. *Odell*, 39 N. H. 452; *McGilvray* v. *Avery*, 30 Vt. 538; *Child* v. *Powder Works*, 45 N. H. 547; 2 Black, Judgm. § 864. A different rule applies in the case of a

foreign judgment. 2 Black, Judgm. § 847. The origin of this rule was the technical basis of the doctrine of merger. It was supposed to rest upon the principle that a higher security or evidence of liability swallowed up that of inferior character. A foreign judgment not being regarded in England as technically a matter of record, the foreign judgment was not there looked upon as an evidence of indebtedness superior to the claim on which it was founded. See cases cited in 2 Black, Judgm. § 847; 2 Freem. Judgm. § 220; 15 Am. and Eng. Enc. Law, 341, note 7. In this country there has been a disposition to follow the English decisions in all cases not falling within the class of judgments specified in the federal constitution. See 2 Black, Judgm. § 847. But if a foreign judgment is, on sound principles of private international law, conclusive between the parties, there is no reason, save an extremely technical one,—a reason unsuited to jurisprudence in its present stage of development,—why such a judgment should not in every civilized country be treated as merging the original cause of action upon which it rests. As Chief Justice Beasley said in *Barnes* v. *Gibbs*, 31 N. J. Law, 317: "The doctrine of merger arises out of the quality of the judgment which renders it conclusive upon the parties as to the questions which it involves." See, also, Freem. Judgm. § 220; *Jones* v. *Jamison*, 15 La. Ann. 35.

From these elementary principles to which we have referred, we are forced to deduce the conclusion that, the moment the judgment was recovered in Minnesota, the plaintiff's causes of action on the notes sued upon were utterly extinguished. This judgment would, if pleaded, by the defendants, constitute a complete bar to the further prosecution of the action. 15 Am. and Eng. Enc. Law, 341, note 5; *Rogers* v. *Odell*, 39 N. H. 452; *McGilvray* v. *Avery*, 30 Vt. 538; *Bank* v. *Wheeler*, 28 Conn. 433; *Child* v. *Powder Works*, 45 N. H. 547; *Bank of U. S.* v. *Merchants' Bank of Baltimore*, 7 Gill, 415.

How the plaintiff can gain any advantage by setting forth in its own pleading facts which, if averred in the answer, would

constitute a perfect defense to the further prosecution of the suit, is beyond our comprehension The office of a supplemental bill in equity was to bring into a case, by a new pleading, facts which had occurred or become for the first time known to the plaintiff subsequently to the commencement of the action, and which related to the case set forth in the original bill. Just how far the courts of chancery will go in permitting new facts to be brought by supplemental bill into a pending suit in equity has never been stated with the utmost precision. But there are two general classes of cases with respect to which the law on this subject has been for many decades very clearly settled. If the original bill is not defective in substance, new facts may, by supplemental bill, be incorporated into the cause of action, although they necessitate an enlargement or change in the character of the relief originally sought. But in every decision on this point the qualification is stated or plainly to be inferred from the opinion that a new cause of action cannot be substituted for the one set forth in the original pleading. *Jacob* v. *Lorenz*, (Cal.) 33 Pac. Rep. 119–121; *Candler* v. *Pettit*, 1 Paige, 168; *Jaques* v. *Hall*, 3 Gray, 194; *Winn* v. *Albert*, 2 Md. Ch. 42; *Edgar* v. *Clevenger*, 3 N. J. Eq. 258. But in the case at bar the plaintiff does not seek to enlarge its relief, or to alter the character thereof. It merely asks that it be allowed to obviate a perfect defense to its causes of action on the notes, and recover the same money judgment upon an entirely distinct cause of action, not in existence when it brought the suit, but arising subsequently to its commencement. No adjudication, no statute, no principle of law or equity, can be found to sustain its contention in this behalf. In interpreting our statute permitting the filing of supplemental complaints, we must fall back upon the settled practice in chancery before the adoption of the code. The statute embodies the rule of procedure in equity. It has merely made applicable to actions at law, as well as suits in equity, the rules prevailing in chancery with respect to supplemental pleadings. Counsel for plaintiff does not claim that our

statute has any wider scope; and he could not successfully make such contention in view of the language of the statute that the new facts must be material to the case, and the fact that in other states similar provisions have been uniformly treated as merely voicing the existing rule of practice in equity. *Prouty* v. *Railroad Co.*, 85 N. Y. 272–275; *Buchanan* v. *Comstock*, 57 Barb. 583; *Wattson* v. *Thibou*, 17 Abb. Prac. 184; *Bank* v. *Duryee*, 74 N. Y. 491–495; *Gleason* v. *Gleason*, 54 Cal. 135, 136; *Jacob* v. *Lorenz*, (Cal.) 33 Pac. Rep. 119–121; *Eastman* v. *Power Co.*, 17 Minn 48, (Gil. 31;) *Bull* v. *Rothschild*, (Sup.) 4 N. Y. Supp. 826; *Tiffany* v. *Bowerman*, 2 Hun. 643–646; *Cohn* v. *Husson*, 67 How. Prac. 461. In this connection it is well to state the other general rule on the subject of supplemental bills in equity. It is a rule of limitation of power. The plaintiff cannot, by supplemental pleading, bring into the action a distinct cause of action arising since the beginning of the suit. Every one of the decisions last above cited recognizes this rule. And in most of these cases it is enforced under a statute identical in its language with ours. If the original bill is defective in substance, the plaintiff cannot, by supplemental bill, bring into the case new facts constituting a distinct cause of action, which has arisen since the suit was instituted. *Milner* v. *Milner*, 2 Edw. Ch. 114; *Putney* v. *Whitmire*, 66 Fed. 388; *Bernard* v. *Toplitz*, (Mass.) 35 N. E. Rep. 673; *Fahs* v. *Roberts*, 54 Ill. 195; *Patten* v. *Stewart*, 24 Ind. 332–343; *Orton* v. *Noonan*, 29 Wis. 547; Story Eq. Pl. § 339.

The groundwork of this doctrine is that the plaintiff cannot recover on a cause of action which does not exist when he sues. He must dismiss his action, and plead anew. It follows from this that the rule that a new cause of action, which had not accrued when the writ was served, cannot be brought into the case by supplemental complaint, applies not only to cases where no cause of action existed at all when the suit was brought, but also to cases where a cause of action was in existence, and was set forth in the original complaint, and the plaintiff seeks to abandon that cause of action, and inject into the suit an entirely different

cause of action; and the authorities cited below fully sustain this proposition. Indeed, this practice of changing the cause of action has never been sustained even in a case where the new cause of action was in existence when the suit was commenced. Much less should this be allowed when the cause of action sought to be made the basis of the suit by supplemental complaint arose during the pendency of the case. *Milner* v. *Milner*, 2 Edw. Ch. 114; *Eastman* v. *Water Power Co.*, 17 Minn. 48, (Gil. 31;) *Prouty* v. *Railroad Co.*, 85 N. Y. 272–275; *Buchanan* v. *Comstock*, 57 Barb. 583; *Wattson* v. *Thibou*, 17 Abb. Prac. 184; *Cohn* v. *Husson*, 67 How. Prac. 461, 462; *Gleason* v. *Gleason*, 54 Cal. 135; *Bull* v. *Rothschild*, (Sup.) 4 N. Y. Supp. 826; *Tiffany* v. *Bowerman*, 2 Hun. 643–646. In this last case the court said: "It seems only necessary to state the facts, in order to show that the motion for leave to file this supplemental complaint for such a purpose should have been at once denied. A supplemental complaint must be consistent with, and in aid of, the case made by the original complaint. A new and substantive cause of action cannot be set up, by way of supplemental complaint, as a ground of recovery; more especially a cause of action to which the plaintiff was not entitled when he commenced the action." In *Prouty* v. *Railway Co.*, 85 N. Y. 272, the court said: "The principle invoked by the appellant to sustain this theory is the well established doctrine that the plaintiff cannot file a supplemental bill to introduce new facts which have occurred since the filing of the original bill, and upon which a decree can be had without reference to the original bill; and in such case the original bill should be dismissed and a new one filed." In *Gleason* v. *Gleason*, 54 Cal. 135, the court said: "This is, therefore, a new controversy between them,—a new and independent cause of action about the title to property acquired since the judgment; and it is not allowable to substitute a new and distinct cause of action by way of supplemental complaint." In *Eastman* v. *Water Power Co.*, 17 Minn. 48 (Gil 31,) the court states the rule to be that "a supplemental complaint must be for the same

substantive cause of action as that set out in the original complaint." The doctrine as it was enunciated by the vice chancellor in *Milner* v. *Milner*, 2 Edw. Ch. 114, has never been questioned, and is undoubtedly sound. The vice chancellor said: "The question to my mind is whether the complainant, upon her intending to rely upon the new facts, must not file an entirely new bill. I consider it not a case for amendment or supplemental bill. The latter is generally filed to continue the original suit, or is in its matter, directly connected with it, and because of the original bill being somewhat defective. But here there is a new substantive cause of action, upon which a decree can be had without connecting it with the original bill. The complainant is here wanting to go upon entirely new ground; in fact, to make a new case. If this is to be done, it must be by a dismissal of the present bill, and filing of a new one. I must refuse this motion." The decision of the court in *Barnes* v. *Gibbs*, 31 N. J. Law, 317, is directly in point. The court was called upon to decide whether a supplemental complaint could be filed setting up the recovery of a judgment upon the claim sued upon, and the ruling of that tribunal was that this could not be done. Chief Justice Beasley, speaking for the full bench said: "The case certified calls for the opinion of this court on a second point, viz. whether, upon the assumption of a merger having taken place, the writ and pleadings in this case can be so amended as to transform the action from assumpsit to debt, and to permit the judgment obtained in New York to become the foundation of the suit? Allowing the utmost amplitude to the power of this court to alter forms and correct errors, the present application seems to be much beyond the scope of such power. It is obvious that the proposition is not to amend defects, but to substitute one cause of action for another. Besides, even if the court should permit the proposed commutation to be made, it would not avail the plaintiffs, because the ground of action sought to be substituted has arisen since the commencement of this suit."

But it is urged that there is authority for the proposition that a supplemental complaint may embrace such matters as are sought to be incorporated in the complaint in the case at bar, and that such authority should be followed. To sustain this claim, the case of *Jenkins* v. *Bank*, 127 U. S. 484, 8 Sup. Ct. 1196, is cited. But, in our opinion, that case is plainly distinguishable from the case now before us. That action was instituted to foreclose a lien upon certain property pledged as collateral to a debt. Pending this action, a decree was rendered in another case which so adjudicated the amount due upon the claim to secure which the collateral security had been given as to preclude the relitigation of that question in the pending suit. The Supreme Court of Illinois and the Supreme Court of the United States both held that it was proper to incorporate in a supplemental bill the fact of the rendition of this decree. But it is obvious that there is no parallel between that case and the action which is before us. The cause of action in that case was not the indebtedness, but the lien. The object of the action was to foreclose that lien. The plaintiff did not seek to change the object of the action, nor did he attempt to incorporate in his supplemental bill a new cause of action. The lien constituted his sole cause of action before the supplemental bill was filed and it still remained his sole cause of action after the decree had been rendered, and after the fact that it had been rendered was brought into the case by the supplemental bill. The action was not originally brought upon the indebtedness, but it was founded upon the lien; and this continued to be the cause of action after the supplemental bill had been filed. The lien was not divested by the decree which conclusively established the amount due. 2 Freem. Judgm. §§ 229, 230, and cases cited. In both of these courts the distinction was made which we here outline. Had the action been, not to foreclose a lien, but to recover a money judgment on the indebtedness, it is apparent from the language of both these tribunals that their decisions would have been different. The Illinois Supreme Court said on this point at pages 470 and 471, 111 Ill.

(*Jenkins* v. *Bank*:) "We do not consider the supplemental bill as introducing a new cause of action. The indebtedness is the same. The evidence of it at the time of filing the original bill in this case consisted in notes from Walker to the bank. The notes have since, as said, become merged in the Wilshire decree. There has been, then, a change in the evidence of the indebtedness,—from notes to a decree upon them. That is all. The collaterals sought to be foreclosed by sale of them were pledged for the payment of the indebtedness. A decree upon the notes, and the running of the statute of limitations against the decree, is not any payment of the indebtedness. The simple effect is that the statute is a bar to a suit upon the decree. The collaterals may be held until the indebtedness is paid according to the terms of the pledge. We do not consider that there has been any new suit brought upon the decree, but that there is, under the supplemental bill, the assertion of the right to claim the benefit of the Wilshire decree as *res ajudicata*, and that the statute of limitations set up is not a bar to that right." And in the Federal Supreme Court the same distinction is stated in the following language: "In support of this proposition, it is argued, on behalf of the plaintiff in error, that the supplemental bill set out, and sought a recovery upon, a cause of action distinct from that stated in the original bill. The original bill prayed for a decree against Walker upon his notes held by the bank, and, for the satisfaction thereof, a sale of the property held as security therefor. During the pendency of that bill, precisely the same matters were put in issue in the Wilshire suit between Walker and the bank, and in that suit a decree was rendered finding the amount due. That decree in the Wilshire suit stands unreversed, and operates as an estoppel by way of *res adjudicata* between the parties. By way of proof or in pleading, it would be good as a bar in any subsequent suit between the same parties upon the same issues. Having been rendered after the institution of the present suit, it was competent for the complainant to bring it forward, by a supplemental bill, as conclusive evidence of the

amount due, for which it was entitled to take a decree, and as a complete answer to the defense set up by the plaintiff in error, as the assignee of the bankrupt, to the relief prayed for in the original bill, and to the relief sought by the cross bill. It was strictly new matter arising after the filing of the bill, properly set up by way of supplemental bill, in support of the relief originally prayed for. It can in no sense be considered as a new cause of action. It was not a bill to enforce the decree, nor was the complainant obliged to rely upon it as the sole ground of recovery, on the ground that the original cause of action had become merged in it. If the notes were merged in the decree, it was simply a change in the nature of the evidence to support the complainant's title to relief. The indebtedness remained the same, and the equity of the complainant to a foreclosure and sale of the securities remained unchanged." In fact, the courts in that case were but applying the familiar rule that the holder of collateral security may, in the absence of a statute to the contrary, recover a personal judgment upon his claim, and thereafter foreclose his lien notwithstanding such judgment. See 1 Freem. Judgm. § § 229, 230; *Bank* v. *Brown*, 112 Ind. 474, 481, 482, 14 N. E. Rep. 358. The cause of action in such a foreclosure suit being the lien, the recovery of a judgment on the debt before or after the commencement of the foreclosure action does not create a new cause of action; does not extinguish the old. The original lien continues in existence, securing the new evidence of the debt the same as it did the old. By the recovery of a judgment, the cause of action is not wiped out. The only effect is to conclusively establish the amount which the lien secures. It is a significant fact that in New York the legislature has, in express terms, incorporated into the statute regulating the filing of a supplemental complaint a provision that the plaintiff may in this way bring into the case "the judgment or decree of a competent court, rendered after the commencement of the action determining the matters in controversy or a part thereof." Code Civ. Proc. N. Y. § 544. It is evident that in New York the law was

considered to be settled the other way, in the absence of an explicit statute on the point. Our code merely permits the plaintiff to set up in his supplemental bill "facts material to the case." Rev. Codes, § 5301. What in this action is "the case" of the plaintiff as his suit was originally brought? The answer is obvious. It is the cause of action set up in his complaint. That constitutes his case. Another and entirely distinct cause of action does not constitute his case, as it appears in his original pleading. As we have already seen, the decisions are unanimous to the effect that, under just such a statute as ours, the plaintiff cannot, by supplemental complaint, introduce a new and distinct cause of action.

The argument of hardship does not appeal to us with any force. It is true that in this case—and it will likewise be true in many other cases—a refusal to allow the subsequent recovery of the judgment to be set up in a supplemental complaint will result in the loss of priority of lien upon property secured by an attachment in the action, because the plaintiff will be compelled to dismiss his action upon the claim, and bring a new suit upon the judgment itself. This same argument was advanced in *Bank* v. *Wheeler*, 28 Conn. 433, against the proposition that the effect of the recovery of a judgment in one state was to extinguish the original cause of action in every other state. It will be observed that the precise question here presented was there involved, for if the judgment extinguishes the original cause of action, and creates a new cause of action, there is no logical escape from the conclusion that the suit cannot be kept alive by supplemental complaint. On this point of hardship the court says: "The plaintiffs urge the inconvenience arising from holding the judg- in New York to be a defense in the present suit, in consequence of the loss of the security obtained by attachment in the latter. We are not, however, at liberty to impair the effect which the constitution and laws of the United States give to judgments rendered in the several states, although it may be attended with inconvenience, or even apparently unjust consequences. The remedy is

elsewhere. When suits are pending in different states upon the same cause of action, the plaintiff must elect in which he will proceed to final judgment." And in two other cases, in which it was held that the recovery of a judgment upon the claim sued for was fatal to the further prosecution of the action, it appears that the attachments had been issued and levied, and that, of course, the liens secured thereby would be lost. *Bank of U. S.* v. *Merchants' Bank of Baltimore*, 7 Gill, 415; *Child* v. *Powder Works*, 45 N. H. 547, (see 549, 550.)

The recovery of the judgment in Minnesota was the result of the voluntary act of the plaintiff. It could have kept alive this action by refraining from entering judgment in the Minnesota suit, and in this way it could have preserved its lien. But it did not see fit to do so. It frequently happens that the judgment rendered is not a personal judgment in more than one state, jurisdiction being acquired in other state solely over property by attachment or garnishment. A judgment purely *in rem* would not merge the cause of action on the original claim, and therefore would not constitute a bar to an action thereon in another jurisdiction. *Whittier* v. *Wendell*, 7 N. H. 257; *Fitzsimmons* v. *Marks*, 66 Barb. 333; *Rangeley* v. *Webster*, 11 N. H. 299; 1 Freem. Judgm. § § 218, 219. In many cases there will therefore be no hardship to the creditor. In many others he will hold in his own hands the power to prevent a merger. And, over against the loss of priority of lien which may in a few cases result from this doctrine, it is proper to set the moral right of the debtor not to be harassed by numerous suits upon the same demand at the same time. The rule being settled that the pendency of an action in a foreign state or country does not constitute a good plea in abatement, the debtor has no legal protection against the institution of any number of actions against him in different jurisdictions upon the same claim. It would therefore seem to us not a matter for regret that his moral right to be exempt from undue harassment should receive some slight legal sanction. If, however, it be thought that a different rule

should prevail, the arguments in that behalf should be addressed to that body whose province it is to make, and not to the department whose duty it is to declare, the law.

The order and judgment of the District Court are in all things affirmed. All concur.

ON RE-HEARING.

Counsel for plaintiff very earnestly press upon us the reconsideration of the point which seemed to us so clear that we did not discuss it at length. They concede the doctrine of merger, and the rule that the supplement bill must not embody facts creating an independent cause of action. Their whole contention ranges around the question, what is the real cause of action in this case? They insist that the debt is the primary right, and that this right, in connection with defendant's failure to respect it, constitutes the cause of action. Hence it follows, they urge, that that cause of action was not extinguished by the judgment, but exists today as much as ever it did, despite the fact that it has assumed a new form. There is much ambiguity on this subject. Jurists have found it difficult to define with precision the meaning of the phrase "cause of action." While it may be that this is a difficulty which inheres in the subject itself, and is therefore unsurmountable, yet we do not consider that there should be, despite this fact, much controversy in a case like this as to the cause of action set up in the original complaint. If counsel's claim that the debt is the cause of action be sound, then there is no distinction between an action for services, for goods sold, and for money loaned. In each case there is a debt. But in no two of these suppositive cases did the debt grow out of the same facts. In each of these cases the peculiar distinctive facts out of which the obligation arises are what constitute the cause of action, when coupled with the omission of the defendant to respect the plaintiff's rights thereby established. It is not the mere existence of a debt—an element common to them all—which constitutes the cause of action in either of these cases. If the debt were the cause of action, it would be unnecessary for the

plaintiff to do more than aver in his complaint that the defendant was indebted to him in a specified sum. On this theory the same complaint would do for all actions belonging to these three classes. All that it is necessary for the pleader to do in any case is to set forth the facts constituting his cause of action. No one would think of stopping with a bare allegation of indebtedness; and yet this is all that is required if that indedtedness alone constitutes the cause of action. There is an element common to all causes of action, but it does not of itself constitute a cause of action. In every case there is present the fact that the defendant has neglected to observe his legal duty to the plaintiff. In an action at law to recover money, the cause of action is not simply the withholding of the money from the plaintiff by the defendant. In a sense, that may be said to be the legal wrong for which the law furnishes a remedy. But why is it a wrong of which the law takes cognizance? Because, and only because, by reason of certain antecedent facts, the plaintiff has become vested under the law with a right to demand the money. In seeking for one element of the cause of action, we must go back of the mere right to demand that the money claimed shall not be withheld, and ascertain what are the particular facts out of which that right springs. When we have discovered these facts, we have found out that which differentiates the particular cause of action from another, which, while showing, perhaps, an indebtedness of like amount, arises out of different circumstances. The cause of action is always disclosed by the answer to the inquiry: "How did the defendant become liable to be prosecuted by the plaintiff in this particular action?" It is true that a cause of action is not in cases of contracts complete until the defendant has failed to pay in accordance with his legal obligation. But the foundation for it is, in all such cases, laid before the default occurs; and in many instances this element of default is not a constituent part of the cause of action, as in tort cases, where the cause of action accrues the moment the wrong is committed. No one would speak of the failure of a slanderer of character to indemnify the person

vilified as constituting the latter's cause of action. It is the slander which forms the plaintiff's cause of complaint in such a case. A plaintiff may have three different causes of action against the same defendant,—one for money loaned, one for goods sold, and one for services rendered. If in each case the withholding of the money alone is the cause of action, then all of the causes of action are identical in character. Would this be seriously claimed by any one?

We have used these few observations for the reason that the plaintiff's counsel seem to take the position that in this case the witholding of the money constitutes the cause of action. We will now turn to the plaintiff's contention that the debt, coupled with defendant's default, is the cause of action. If the mere fact that there is a debt, independently of the circumstances out of which such debt arose, constitutes the cause of action in any case, then all legal distinctions are in this regard obliterated. The real essence of this contention is that, in all cases to recover money, it is the original obligation to pay, in connection with defendant's default, which constitutes the plaintiff's cause of action. If this be so, then a cause of action for libel is not affected by the fact that the defendant has, in full settlement of the claim, given his note for a certain sum of money. A note is not actual payment. The original obligation to pay damages lies at the basis of such note. It is, in substance, the same claim as the original claim for damages. So, it is after judgment upon the note. But the cause of action is not the same in each case. The statute of limitations as to each is different. The action for libel would have to be brought within two years after that cause of action accrued. The action upon the note would have to be commenced within six years after that new cause of action, resting upon different facts, accrued. And the action upon the judgment could be instituted within 10 years after that cause of action, based upon still different facts, had accrued. Rev. Codes §§ 5200, 5201, 5203. Sections 5199 to 5201, Rev. Codes, differentiate a cause of action upon a judgment from the cause of action upon the claim upon

which it was rendered. Under these provisions, an action upon contract must be brought within six years after that cause of action accrues; and an action upon a judgment rendered upon the same contract may be brought within ten years after that cause of action—that new and distinct cause of action—accrues. How can it be said that a cause of action upon a judgment accrues if no cause of action upon it does in fact accrue, but the old cause of action, for the original claim, still continues unaffected, and the judgment is only the same cause of action in another form? No judgment for money ever has been or ever can be rendered of which it cannot be as truthfully said as of this judgment in the case at bar that it is only the original claim in another form. Is it a fact that lawyers, judges, and codifiers have so long been mistaken in supposing that a distinct cause of action upon a judgment accrues when the judgment is rendered. The fact that the same debt lies at the foundation of distinct causes of action does not render them identical. If one who has borrowed money fails to pay it, a cause of action against him for money loaned exists. If his creditor thereafter takes the debtor's note in full payment, the old cause of action is extinguished, and a new one is created. The fact that there was an original debt is important only for the purpose of showing a consideration for the note. But an action upon such a note, under such circumstances, cannot be regarded as an action for money loaned. The original cause of action in the case supposed has been wiped out. If, in turn, a bond should be executed in payment of the note, the cause of action on the note would, in turn, be destroyed. If judgment should finally be recovered upon such bond, the cause of action upon the bond would likewise be extinguished. In the case supposed, there would exist, in succession, four distinct causes of action, all founded upon the same debt, which had at no time been paid, despite all the various changes which had taken place in the form of the evidences of such indebtedness. Would counsel for plaintiff seriously contend that in such a case there existed at all times only one cause of action,—the original cause of action, for money

loaned? Pushed to its logical consequences, the doctrine contended for would make it necessary for a court to apply to an action upon the judgment here involved the statute of limitations applicable to the original cause of action, the six years statute of limitation. All must agree that no action upon the notes can be maintained after judgment. This is conceded. All will assent to the proposition that the action must be maintained upon the judgment. And yet if it is the same cause of action as that upon the notes, or for the original debt, the six-years statute of limitation governs. This will be true in all cases. The consequence will be that in every instance the statute of limitations applicable to the cause of action upon which the judgment is founded will govern in actions upon such judgment. Would counsel for plaintiff concede that their cause of action upon this judgment would be barred in six years? Here is a decisive test.

It is urged that the facts set up in the supplemental complaint do not of themselves constitute a cause of action, independently the facts alleged in the original complaint; that the execution of the notes or the existence of the original debt is an essential element of the cause of action upon the judgment. We can see no force in this claim. The judgment is the cause of action, irrespective of the character of the claim on which it rests. No averment as to the nature of such anterior cause of action is necessary or even proper. Such an allegation would be stricken out as surplusage. In an action upon a judgment, the only inquiry which a court will make is whether there is a valid judgment, unsatisfied and unpaid. The test as to the necessity of an allegation in a complaint is whether that specific fact need be proved to make out a case. When a judgment is sued upon, it is a matter of no moment what lies behind the judgment, if it is valid; or, indeed, whether there was any claim behind it at all. That question is forever foreclosed by the judgment itself. If an allegation as to the existence of the notes set forth in the original complaint is vital to the cause of action upon the judgment, then issue upon that fact might be taken by the defendant. Will it be urged that

the defendant would be allowed to go into that question in a suit upon the judgment which had forever set that question at rest? Section 5291, Rev. Codes, provides that the plaintiff cannot unite in the same complaint a cause of action for slander and another cause of action based upon a contract. If the same defendant should thrice slander the same plaintiff, and judgment for one of such slanders should be recovered by the plaintiff, and the defendant should give him his note in settlement of the damages sustained by him by reason of another thereof, would it be contended that thereafter the plaintiff might, in the same complaint, join the cause of action upon the judgment and the cause of action upon the note with the cause of action for the third slander, on the ground that the note and the judgment had not changed the essential nature of the original causes of action for the two slanders, but had merely given the original obligations to pay damages for such slanders another form? In all causes of action there exist, as we have before observed, two fundamental elements. There are the facts which create the obligation. There is the other fact that that obligation has not been respected. In this action, as originally instituted, upon the notes, the fact which constituted the obligation was the execution and delivery of notes for a consideration. The default of the defendant was in failing to pay them when due. But neither of these particular elements enters into the cause of action upon the judgment. The obligation in the latter case is created by the judgment, and not by the notes. The default is the failure to pay such judgment, and not an omission to pay the notes, which can no longer be paid, because the judgment has as completely extinguished any cause of action upon them as payment would have done. How can a cause of action based upon one kind of obligation arising out of a certain fact, coupled with a failure to discharge that obligation, be the same cause of action as that which rests upon another and different obligation, springing out of a new fact, coupled with a a failure to comply with such new obligation. Every cause of action is the invasion of the plaintiff's rights by the defendant, or

the latter's failure to discharge some legal duty to the plaintiff. If a defendant assaults a plaintiff, he invades his rights. If he omits to pay when due his note held by the plaintiff, he fails to discharge a legal duty to the plaintiff. In each case, these respective elements constitute the plaintiff's cause of action. A court, in determining whether the defendant has invaded plaintiff's rights, or neglected to discharge a legal duty which he owes the plaintiff must make the preliminary inquiry as to the facts out of which plaintiff's alleged rights arises. If that right rests upon the defendant's obligation to pay a note, it is that particular right, in connection with defendant's failure to respect it, that constitutes the plaintiff's cause of action. If it rests upon the defendant's obligation to pay a judgment rendered against him upon such note, it is that particular right, in connection with the defendant's disregard of it, which constitutes that particular cause of action. This is the utmost scope of Prof. Pomeroy's language in his work on Remedies and Remedial Rights (§ 453). The primary right therein referred to is the plaintiff's right in the particular case. If it rests upon contract, it must stand upon the particular contract sued upon. A plaintiff's primary right in an action upon a note is the defendant's duty to him which the note creates. When a judgment is rendered upon such note, the primary right is the defendant's duty to the plaintiff created by such judgment, and not by the note, which has ceased to be the source of any duty of the defendant to the plaintiff.

Counsel essay to distinguish the case of *Wattson* v. *Thibou*, 17 Abb. Prac. 184, from the case at bar. We are unable so to distinguish it. It is true that the notes in that case were not extinguished by a judgment, but by bonds received in payment thereof. But wherein does this difference affect the principle? The original debt had not been paid by the bonds, any more than the original debt in this case has been paid by the judgment. Accepting such bonds in satisfaction of the notes is strictly analogous to recovering judgment upon notes in the case at bar, and thus extinguishing them as subsisting obligations. Each act

is the voluntary act of the creditor. Whether he, in terms, extinguishes the original cause of action, or invokes the powers of a court of justice to do that which has the same effect,—*i. e.* render a judgment upon such original cause of action,—is immaterial. Nor does it make any difference that the act of extinguishing the original cause of action by accepting a new obligation is called "novation," whereas the act of destroying such cause of action by the recovery of judgment is not called "novation," but "merger." The vital question is: Has the original cause of action been destroyed, and a new one substituted for it? The very argument made by counsel for plaintiff in this case could have been employed by the court in the Wattson case to justify the allowance of plaintiff's motion that he be permitted to file a supplemental complaint. The court could have said with as much truth as can be here asserted that the original debt had not been affected, but only a new evidence of indebtedness substituted for the old. But this was not regarded by the court in that case as at all important. The court saw and held that a cause of action upon bonds was not the same as a cause of action upon notes previously given, although the same debt furnished the consideration for each of these classes of obligations.

It is urged that we did not speak with precision when, in distinguishing the case of *Jenkins* v. *Bank*, 127 U. S. 484, 8 Sup. Ct. 1196, we asserted that the cause of action in that case was the lien sought to be foreclosed. We fail to discover our error in this respect except that we should have spoken of the lien as constituting the cause of action when coupled with defendant's failure to perform his legal duty to satisfy the lien. It is said that if the lien constituted one element of the cause of action in that case, in contradistinction from the debt, the indebtedness need not have been set up in the complaint therein; that it would have been necessary to refer to nothing but the lien in the bill. But a lien presupposes a debt. It cannot exist without one. A lien is the legal grip of a debt upon property. When it is said

that a lien constitutes an element in a cause of action in a particular case, the assertion is made that this grip of a debt upon property is the cause of action which the plaintiff is seeking to enforce by a foreclosure suit. In an action to foreclose a lien, the lien is the main thing. It is illogical to speak of the lien being a mere incident of the debt in such a case. The debt is a component part of the lien, and not something separate from it, of which the lien is a mere incident. One who has secured a lien upon property is vested with an equitable cause of action, distinct from his mere legal cause of action to recover a personal judgment against the debtor. It is the lien, and not the mere debt, which gives him that equitable cause of action. If the indebtedness constitutes the cause of action in such a case, then an action to foreclose a lien is an action at law, the same as an action against the debtor to recover a mere money judgment, for the cause of action in each case is the same,—*i. e.* the debt. A plaintiff brings an action on a note, and also an action to foreclose a lien which secures such note. Are the two actions the same? All know that they are not. What distinguishes them is the lien. When the suit is to foreclose the lien, the cause of action is the lien to be foreclosed, coupled with defendant's default. When the object of the action is to obtain a money judgment merely, the note, coupled with defendant's default, constitutes the cause of action. If, in a foreclosure action, the lien is not one of the elements in the cause of action, in contradistinction from the debt, we are at a loss to know what, in such a case, does, in fact, constitute one of the elements of the cause of action. If a complaint in a foreclosure action should fail to allege the existence of the lien, it would be demurrable. When it does properly set forth the fact of a lien, it necessary contains an averment as to the debt, for this is an essential ingredient in every lien. A lien is not alleged unless a debt of some character is set up. But the debt is not stated in the pleading, as the substantive cause of action, but merely to make complete the allegations of the complaint as to the existence of a lien, the lien being the real cause

of action sought to be enforced by the suit, when coupled with defendant's failure to satisfy it. A cause of action is that which enables the plaintiff to maintain the particular action he seeks to prosecute. What is it that gives the plaintiff a right to institute and carry on a suit to foreclose a lien if it is not the lien itself, in connection with the debtor's default?

It is insisted that the change proposed to be made by the supplemental complaint is one which relates to the form of the action only. We are unable to assent to this view. If the plaintiff had brought debt upon the judgment in question after the same had been rendered, and if forms of action had not been abolished by the code, and if it were the doctrine in this country, as in England, that a foreign judgment is not a record, and hence that an action of debt would not lie thereon, then in case the plaintiff should seek to change his action from debt to assumpsit, we would have the mere question of a change in the form of the action, the cause of action remaining the same. But it is not a change of this character which is attempted in this case. The plaintiff is not essaying to alter the mere form of his action (a thing never done by supplemental complaint,) but to bring into the case an entirely new cause of action. He seeks to eliminate from the complaint a cause of action which, since the commencement of this action, has been extinguished, and substitute in its place a new cause of action, which accrued after this action was instituted.

It is urged that the New Jersey case is not in point, for the reason that no radical changes had been made by statute in that state in the rules of procedure. But we have seen—and counsel for plaintiff assent to this conclusion—that the statute of this state regulating the filing of supplemental complaints has not altered the old rule that a new cause of action cannot by such means be substituted for the old. Nor is there anything in the language or spirit of our code which in any manner affects the significance of the phrase "cause of action." On the contrary, several provisions of the code to which we have referred

conclusively show that the old meaning of that phrase has not been disturbed. That which before the code system was adopted was not the cause of action, is not now the cause of action. It is therefore apparent that the statutory regulations of practice in this state have in no respect affected the two inquiries which lay at the foundation of the decision in the New Jersey case, and which also lie at the basis of our judgment in this cause,—*i. e.*: Can a new cause of action be substituted for the original by supplemental complaint? Does a new cause of action arise in this country when a judgment is recovered upon a claim in any of the courts thereof? The importance of this question to the profession is our apology for the length of this additional opinion.

The petition for a rehearing is denied.

WALLIN, C. J., concurs.

(69 N. W. Rep 455.)

NOTE—See Ch. 50, Laws 1897.

DANIEL W. VICKERY *vs.* M. H. BURTON, *et al.*

Opinion filed November 19th, 1896.

Burden on Party Alleging it to Prove Indorsement.

Where issue is joined on an allegation in the complaint that promissory notes, payable to order, on which the action is brought, were sold, indorsed, and transferred to the plaintiff in good faith, before maturity, the burden is on the plaintiff to establish the truth of such allegations by evidence; and, among other things, the plaintiff must show that the notes were in fact indorsed by the payee.

Actual Indorsement Must be Shown.

The mere fact that a promisory note, when offered in evidence, had indorsed upon its back the name of the payee, does not establish the fact that the payee endorsed the same, in the absence of proof of actual indorsement.

Name of Payee on Back of Note Does Not Prove Indorsement.

Plaintiff alleged that he was the owner of promissory notes payable to the order of Pulaski J. Scovil, and at the trial put the notes in evidence. On the back of each appeared the following indorsement: "P. J. Scovil." *Held*, that such indorsement does not raise a presumption of law that the notes were indorsed in fact by Pulaski J. Scovil, and, without further evidence, such indorsement furnishes no proof that the payee indorsed said notes. There is no legal presumption that P. J. Scovil is the same person as Pulaski J. Scovil.

Directed Verdict Improper.

Evidence in the record examined, and *held* that an order of the District Court, made at the close of the evidence, directing a verdict for the plaintiff, was unwarranted by the state of the evidence, and hence was erroneous.

Appeal from District Court, Burleigh County; *Winchester*, J.

Action by Daniel W. Vickery against Melkert H. Burton and another. From a judgment for plaintiff, defendant's appeal.

Reversed.

Newton & Patterson, for appellants:

This action was to recover the amounts of certain notes by foreclosing the mortgage given to secure them. They were open to any defense arising out of the same transaction between the original parties. *Olds* v. *Cummings*, 31 Ill. 188; *Edgerton* v. *Young*, 43 Ill. 464; *Kluman* v. *Frishie*, 63 Ill. 482; *White* v. *Sutherland*, 64 Ill. 181; *Haskell* v. *Brown*, 65 Ill. 29; *International Bank* v. *Bowen*,

80 Ill. 541; *Melendy* v *Keen*, 89 Ill. 395; *Bailey* v. *Smith*, 14 Ohio St. 396; *Bush* v. *Lathrop*, 22 N. Y. 535; *Johnson* v. *Carpenter*, 7 Minn. 176; *Hostetter* v. *Alexander*, 22 Minn. 559; *Schmidt* v. *Frye*, 5 La. Ann. 435; *Garner* v. *Gay*, 26 La. Ann. 376; *Morris* v. *White*, 28 La. Ann. 855; *Butler* v. *Slocum*, 33 La. Ann. 170; *Wright* v. *Eames*, 10 Rich. Eq. 585; *Shaw* v. *Carpenter*, 54 Vt. 155. A mortgage is an assignable but not negotiable instrument, §§ 4716–4717, Rev. Codes. The court cannot presume as a matter of law that P. J. Scovil written upon the back of the notes is the payee Pulaski J. Scovil. *Andrews* v. *Wynn*, 54 N. W. Rep. 1047; *Spinning* v. *Sullivan*, 11 N. W. Rep. 758; *Central Trust Co.* v. *First National Bank*, 101 U. S. 68, 25 L. Ed. 876. The plaintiff in the first instance had made out a case by the production of the notes and an indorsement to him. The burden was then cast upon defendants to show some illegality or other matter that would defeat the notes in the hands of the payee. Thereupon such defense having been introduced, the burden shifted back upon the plaintiff to show that he was holder in due course. *Clark* v. *Pease*, 41 N. H. 414; Bigelow on B. and N. 507; *Heath* v. *Sanson*, 2 B. and Ad. 291; *Brown* v. *Philpot*, 2 M. and Rob. 285; *Bailey* v. *Bidwell*, 13 M. and W. 73; *Mills* v. *Barber*, 1 M. and W. 425; *Bingham* v. *Stanley*, 2 A. and E. 117, 2 Greenl. Ev. § 172; *Monroe* v. *Cooper*, 5 Pick 412; *Woodhul* v *Holmes*, 10 Johns 231; *Vallett* v. *Parker*, 6 Wend. 615; *Small* v *Smith*, 1 Den. 583; *Worcester Co. Bank* v. *D. & M. Bank*, 10 Cush 488; *Wyer* v. *D. & M. Bank*, 11 Cush. 52; *Crosby* v. *Grant*, 36 N. H. 273; *Rockwell* v. *Charles*, 2 Hill 499; *Bissell* v. *Morgan*, 11 Cush. 198. Whether a transaction is *bona fide* is a question of fact for the jury. *Slattery* v. *Donnelly*, 1 N. D. 264. Plaintiff must show not only that he purchased for value before maturity, but also that he acted in good faith to overcome defendants showing of illegality. *Canajoharie Nat. Bank* v. *Diefendorf*, 1 N. Y. Supp. 58, 23 N. E. Rep. 801, 10 L. R. A. 626; *Cummings* v. *Thompson*, 18 Minn. 246; *Sullivan* v. *Langley*, 120 Mass. 437; *Smith* v. *Livingstone*, 111 Mass. 342; *Paton* v. *Coit*, 5 Mich. 505; *Bank* v. *Richter*, 57 N. W. Rep. 61; *First Nat. Bank* v. *Helan*,

65 N. W. Rep. 952; *Averill* v. *Bayles*, 3 N. W. Rep. 731; *Wortendyke* v. *Meehan*, 2 N. W. Rep. 199; *Darst* v. *Backus*, 24 N. W. Rep. 681; *Colby* v. *Parker*, 52 N. W. Rep. 693; *United States, etc.* v. *Crosby*, 53 N. W. Rep. 352.

Boucher & Philbrick, for repondent.

The burden of proving that the assignee took the mortgage with notice or that he is not a *bona fide* purchaser is on the party who sets up fraud. *Marshall* v. *Billingsby*, 7 Ind. 250; *Farmers Bank* v. *Douglas*, 19 Miss. 469; *Langdon* v. *Keith*, 9 Vt. 299; *Hotchkiss* v. *National Bank*, 88 U. S. 354; *Murray* v. *Lardner*, 69 U. S. 110. The holder of negotiable paper before maturity and without notice takes it clear of equities between the original parties and neither fraud nor duress will invalidate it in his hands. *Clarke v. Pease*, 11 N. H. 425; *Hogan* v. *Moore*, 48 Ga. 162; *Hall* v. *Wilson*, 16 Barb. 551; *Phelan* v. *Moss*, 67 Pa. 59; *Magee* v. *Badges*, 34 N. Y. 247; *Bank* v. *Hoge*, 35 N. Y. 65. The purchaser in good faith of a promisory note before maturity who takes an assignment of a mortgage securing the same, takes the security as the note free of equities. 1 Jones Morts. §§ 834–840; *Beals* v. *Neddo*, 2 Fed. Rep. 41; *Carpenter* v. *Langan*, 16 Wall. 271; *Renicott* v. *Supervisors*, 16 Wall. 452; *Sawyer* v. *Picket*, 19 Wall. 146; *Hayden* v. *Drury*, 3 Fed. Rep. 782; *Swett* v. *Stark*, 31 Fed. Rep. 858; *Sprague* v. *Graham*, 29 Me. 160; *Pierce* v. *Fannee*, 47 Me. 507; *Paige* v. *Chapman*, 58 N. H. 333; *Taylor* v. *Page*, 6 Allen 86.

WALLIN, C J. This action is brought to foreclose a mortgage given to secure the payment of two promissory notes dated October 12, 1892, of $300 each. The notes were executed by the defendants, and delivered to one Pulaski J. Scovil, to whose order they were made payable, and the mortgage was made and delivered by the defendants to Scovil at the same time the notes were delivered. The mortgage covered real estate situated in Burleigh County, and was properly recorded. The complaint alleges: "That thereafter the said notes were, by the indorsement of the said Pulaski J. Scovil, for a valuable consideration,

and before the same became due, transferred and delivered to the plaintiff; that the said mortgage at the same time was sold and transferred to the said plaintiff by the said Pulaski J. Scovil; that thereafter said Pulaski J. Scovil, by an instrument in writing, duly executed, acknowledged, and delivered, assigned to the said plaintiff the above described mortgage, and the said assignment was thereafter, on the 18th day of March, 1895, filed in the office of the register of deeds of said County of Burleigh, and recorded in Book E of Mortgages." The allegations of the complaint above quoted, and having reference to the transfer and indorsement of the notes and the assignment of the mortgage, are put in issue by the defendants' answer. As new matter, and as a defense, the answer sets out, in effect, that the notes in suit were given by the defendants to Scovil for a part of the purchase price of a certain threshing machine outfit sold by Scovil to the defendants; that certain false and fraudulent representations concerning the qualities of said machinery and outfit were made to the defendants by said Scovil as an inducement to them to purchase the same, and that such representations were believed and relied upon, and the defendants were induced thereby to purchase the same, and did accordingly purchase the same; that said representations were known to be false by Scovil when they were made, and the same were false and fraudulent, and that the said machinery and threshing outfit were not worth a greater sum than was paid down in cash for the same at the time of the purchase; and that the notes and mortgage were wholly without consideration.

The fraud in the sale of the machinery, as set out in the answer, was established by the testimony offered at the trial in behalf of the defendants, and no evidence was offered by plaintiff to disprove such fraud. The fraud pleaded must therefore be regarded as an established fact in the case. But fraud, as between original parties, would not be available to the defendants in this action if the plaintiff in this action is a good faith purchaser of the notes, in due course, and without notice of

such fraud. There is much conflict of judicial opinion as to whether, where fraud in a sale of property, as between the vendor and vendee, is shown, such showing operates to shift the burden of proof to the plaintiff in a case where negotiable paper given for the property by the purchaser is sued on by an indorsee of the paper. We think the better reason and the weight of authority support the view that proof of such fraud does shift the burden of proof, and that in such cases, after proof of fraud, the plaintiff has the burden of showing a good faith purchase of such paper, in due course and without notice. See *Vosburgh* v. *Diefendorf*, (N. Y. App.) 23 N. E. Rep. 801; *Id.*, (Sup.) 1 N. Y. Supp. 58; *Bank* v. *Crosley*, (Iowa,) 53 N. W. Rep. 352; *Colby* v. *Parker*, (Neb.) 52 N. W. Rep. 693; *Darst* v. *Backus*, (Neb.) 24 N. W. Rep. 681; *Averill* v. *Boyles*, (Iowa,) 3 N. W. Rep. 731; *Bank* v. *Holan*, (Minn.) 65 N. W. Rep. 952; *Bank* v. *Richter*, (Minn.) 57 N. W. Rep. 61; *Smith* v. *Livingston*, 111 Mass. 342-344; *Sullivan* v. *Langly*, 120 Mass. 437. Under the rule of evidence established by these authorities,—fraud as between original parties having been shown,—the burden of showing a good faith purchase, in due course, of the notes in suit, was cast upon the plaintiff. Plaintiff assumed this burden, and undertook to show by his testimony that he was such good faith purchaser, in due course of business. And this issue—which was tendered squarely by the defendants answer—presents the turning point of the case.

The notes matured, respectively, in November, 1893 and 1894, and were put in evidence without objection, as was the original instrument of assignment, whereby the mortgagee (Scovil) assigned the mortgage to the plaintiff. The notes were indorsed with the following words: "P. J. Scovil." The instrument of assignment bears date the "14th day of March, A. D., 1895," and said instrument was recorded in the office of the register of deeds on the "18th day of March, A. D. 1895." Said instrument of assignment recites that the mortgagee, in addition to the mortgage, does grant, bargain, sell, and set over the "notes or obligations" described in the mortgage. To show that the notes to the plaintiff were trans-

ferred to him in good faith, and in due course, before their maturity, the plaintiff put in evidence his own deposition, that of Pulaski J. Scovil, and the deposition of one Charles Chambers. No other testimony was offered on this feature of the case. It will serve no useful purpose to set these depositions out at length. It will suffice to say that they sufficiently established the following facts, viz.: First, that before the maturity of either of the said notes, and on or about March 13, 1893, the plaintiff sold and conveyed to said Scovil certain town lots situated in Mason City, in the State of Illinois; second, that the plaintiff received in payment from Scovil, for said town lots, the two promissory notes in question; third, that the plaintiff at the time of the purchase of said notes, had no notice or knowledge of any of the defenses or fraud alleged in the answer. It is not stated in either of said depositions that the notes in suit were actually delivered by Scovil to this plaintiff at the time or on the occasion of the transfer of the town lots to Scovil, or at any other time. It does appear that when suit was commenced, in March, 1895, the notes were in the hands of plaintiff's attorney, but when they were delivered to him or to the plaintiff does not appear in evidence. Nor does any witness testify that the notes were actually indorsed by Scovil at the time of their purchase by the plaintiff, or at any time. In his deposition, Scovil uses the following language: "That he assigned to G. W. Vickery at the time all right, title, and interest in said notes and mortgage, and that said G. W. Vickery became the *bona fide* and legal owner of said notes and mortgage at the date aforesaid." No reference to an assignment of either the notes or mortgage is made in either of the other depositions, but in all the depositions there is, or seems to be, a studied effort to avoid the crucial matter of the actual indorsement of the notes prior to their maturity, or at all; and at the same time all of the witnesses swear, in substance, to the conclusion that after the transaction had on or about March 13, 1893, the plaintiff was the lawful owner and holder of the notes and mortgages. Upon this testimony, after the evidence had

been closed, the plaintiff's counsel (assuming that the evidence demonstrated that the plaintiff was a good faith purchaser of the notes and mortgage, before maturity, and in due course of business) moved the trial court for a directed verdict in plaintiff's favor. The motion was granted, and such verdict was returned, and upon it judgment was entered in plaintiff's favor. The ruling of the court below in directing the verdict is assigned as error in this court. We are satisfied that the ruling was erroneous. It is elementary that an indorsement by the payee of the note is essential to a transfer in due course, and that, without such indorsement, a good faith purchaser before maturity will not take the paper free from defenses existing between original parties. *Spinning* v. *Sullivan*, (Mich.) 11 N. W. Rep. 758; *Dunham* v. *Peterson*, 5 N. D. 414, 67 N. W. Rep. 293; *Bank* v. *Kingsland*, 5 N. D. 263, 65 N. W. Rep. 697.

In this case the words "P. J. Scovil" appeared on the back of the notes when they were put in evidence, but, as has been seen, there was no testimony whatever tending to show when, or by whom, these words were placed upon the notes. Counsel argue that, where the name of the payee appears on the back of a note, the law will supplement such name by a *prima facie* presumption that the name was written there in due course, and before maturity. Such is the settled rule of law where the fact of the payee's signature is duly established. This elementary rule is enunciated by § 4867, Rev. Codes, which reads: "The signature of every drawer, acceptor and endorser of a negotiable instrument is presumed to have been made for a valuable consideration before the maturity of the instrument and in the ordinary course of business." And in defining an "endorsee" the statute declares that the instrument must be "duly endorsed to him or endorsed generally, or payable to the bearer, or one other than the payee who acquires such an interest of such an endorsee thereof." Rev. Codes, § 4884. Only such an indorsee is entitled to protection. Id. § 4885. It therefore appears that under the provisions of the Code of this state, as well as by the rules of the law merchant, in a case like

the case at bar an indorsement by the payee is essential, in order to vest the purchaser with the rights of an indorsee of negotiable paper. In our view of the evidence in this record, the plaintiff has signally failed to show the essential fact of indorsement by Scovil, the payee named in the notes. Not one syllable of evidence was offered at the trial tending to prove an indorsement of the notes in suit by the payee either before or after maturity, or at all. As has been said, no evidence was offered to show when, where, or by whom the words "P. J. Scovil" were written on the back of the notes. It is clear that, until the primary fact of indorsement is established, the presumption that the holder of the paper, other than the payee, received it in due course, cannot attach. See authorities cited in Abb. Tr. Ev. p. 403. This well-settled rule of law is changed by statute in the State of Minnesota. See Gen. St. Minn. 1894, § 5751; *Tarbox* v *Gorman*, 31 Minn. 62, 16 N. W. Rep. 466; 2 Rand Com. Paper, § § 774, 775. But in this state, as has been seen, an actual indorsement is requisite, as a condition to a good-faith purchase in due course. See *Blakely* v. *Grant*, 6 Mass. 386; *Spicer* v. *Smith*, 23 Mich. 96.

Counsel for respondent points to an expression found in Scovil's deposition, as follows: "That he assigned to D. W. Vickery, at that time, all right, title, and interest in said notes and mortgage." It will be noticed that neither the plaintiff nor Chambers, in their testimony, refer to any aisignment, or instrument of assignment, of either the notes or mortgage, as having been made or signed by Scovil at the time referred to, at which it is claimed the notes were sold; and a careful perusal of all the evidence brings out the fact that Scovil must have used the term "assign," in his deposition, in a general sense, and as synonymous with the terms "transferred," "set over," and like general expressions, and did not intend to be understood as testifying that he made a written assignment, much less an indorsement, of the notes, at the time referred to. In fact, this construction of the evidence becomes manifestly the correct one, in view of the fact that the plaintiff's own evidence shows conclusively that the mortgage, at least, was

not assigned by writing until long after the note matured, and not until March, 1895, which is the date of the instrument of assignment put in evidence by the plaintiff. From the whole evidence when considered together, it sufficiently appears, and we are satisfied of the fact, that Scovil did not intend to swear that he affixed his signature to either the notes or the assignment of mortgage in the month March, 1893. In his testimony he couples the notes with the mortgage, and refers to both as being assigned by him at one and the same time. From this it is clear that the witness must, as we have suggested, have used the word "assign" only in a general sense. In this condition of the evidence, we are at a loss to understand upon what theory the learned trial court assumed that the evidence was conclusive, and showed clearly that the plaintiff had shown an indorsement of the notes to him, in due course, by the payee, before their maturity. There is a marked unanimity of reticence on the part of the witnesses with respect to the decisive matter of an indorsement of the notes by the payee thereof. Parties and counsel are presumed to know that this matter of the indorsement of the notes was the controlling issue in the case, and yet upon this point the plaintiff offered no evidence. Comment would seem to be unnecessary. But counsel say the words "P. J. Scovil" appeared on the back of the notes when they were put in evidence. This is true, but from this fact no legal inference can be drawn that such words were written on the notes by the payee. Nor is there any presumption of law that the letters "P. J." are intended to stand for the initials of Pulaski J. Scovil, the payee. See *Andrews* v. *Wynn*, 4 S. D. 40, 54 N. W. Rep. 1047. It cannot be too frequently stated that great caution is necessary in taking a controverted question of fact from a jury, and this should never be done in a case where there is reasonable doubt upon the state of the evidence. See *Pirie* v. *Gillitt*, 2 N. D. 255, 50 N. W. Rep. 710; *Slattery* v. *Donnelly*, 1 N. D. 264, 47 N. W. Rep. 375; *Finney* v. *Railway Co.*, 3 Dak. 270, 16 N. W. Rep. 500.

The judgment of the District Court is reversed and a new trial ordered. All the judges concurring.

(69 N. W. Rep. 193.)

C. W. BENJAMIN *vs.* NORTHWESTERN ELEVATOR COMPANY.

Opinion filed November 20th, 1896.

Payment—Evidence.

Where the only controverted point related to the matter of payment for wheat delivered by plaintiff to defendant's elevator, *held*, it was proper to prove by the plaintiff that defendant's agent assigned as a reason for refusing to pay him that the wheat had never been delivered.

Appeal from District Court, Pembina County; *Sauter*, J.

Action by C. W. Benjamin against the Northwestern Elevator Company. Judgment for plaintiff. Defendant appeals.

Affirmed.

Ball, Watson & Maclay, for appellant.

N. C. Young, for respondent.

CORLISS, J. Only a single point is presented in this case. The suit was instituted to recover the value of two loads of wheat sold and delivered to defendant by plaintiff. The defense was payment. The plaintiff, as part of his testimony that the wheat had not been paid for, gave evidence as to a certain conversation with defendant's agent, in which such agent stated that plaintiff's men had not delivered such wheat at defendant's elevator. It is here urged that this is error. The ground of this contention is that it was a declaration by the agent at a time subsequent to the transaction of sale, and therefore mere hearsay. It is apparent that if the agent, at a later period, had stated to plaintiff that the employes of the latter had delivered two loads of wheat at defendant's elevator, the evidence would not have been competent. But the declaration of the agent, so far from being adverse to the interests of his principal, was precisely contrary in its effect. It is insisted, however, that there was no occasion for proving this conversation with the agent for the reason that the only question in controversy related to payment; the defendant conceding that the wheat had in fact been delivered at its elevator, as claimed by plaintiff. And it is urged that the effect of the denial by the

agent of the receipt of the wheat would have a natural tendency to convince a jury that such agent had never paid for it. But in proving the fact of nonpayment the plaintiff had a right to testify to all that was said by the defendant's agent at the time he demanded payment, for the purpose of showing the attitude of the agent with respect to the matter of payment. He had an undoubted right to lay before the jury all the facts, as part of the *res gestæ*. Plaintiff's counsel having proved by plaintiff that the agent had refused to pay, it was entirely legtitimate to inquire of plaintiff why the agent had declined to pay,—what reason he had assigned for his refusal.

The judgment of the District Court is affirmed. All concur.

(69 N. W. Rep. 296.)

STANDARD OIL COMPANY *vs.* MIKE ARNESTAD.

Opinion filed November 20th, 1896.

Sureties on Bond—Liabilities.

Sureties who sign a bond for the fidelity of a firm as agents for the obligee are not liable for funds misappropriated by one of the members of such firm after the dissolution of the partnership and the retirement of the other partner from the business of such agency. And this is the rule notwithstanding the fact that the obligee knew nothing of such dissolution.

Appeal from District Court, Cass County; *McConnell*, J.

Action by the Standard Oil Company against Mike Arnestad and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

M. A. Hildreth, for appellant.

F. W. Ames, for respondents.

CORLISS, J. The object of this suit is to hold the defendants, as sureties upon a bond, liable for the embezzlement of one of the principals in such obligation. The Standard Oil Company, the plaintiff herein, having selected as it agents at Mayville, in this

state, the firm of Arnestad & Eggerud, required of them a bond with sureties as a condition of shipping them its goods, to be handled by them as such agents at that point. In response to this demand the bond in suit was executed by the firm, and by defendants Hanson and Gullicks as sureties. The sole question before us relates to the liability of the sureties. Their only defense is that the bond secured the honesty of only the firm, and that before the embezzlement in question took place Eggerud had withdrawn from the firm, and that at the time the money sued for was misappropriated the business of such agency was being carried on by Arnestad & Lindstrom. As the construction of the bond is involved, we deem it necessary to quote it in full: "Know all men by these presents: That we, Mike Arnestad and Ole Eggerud, co-partners as Arnestad & Eggerud, principals, and John P. Hanson and C. Gullicks, sureties, are held and firmly bound unto the Standard Oil Company in the sum of five hundred ($500) dollars, lawful money, to be paid to the Standard Oil Company, its executors, administrators, and assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, severally and collectively, firmly by these presents. The condition of the above obligation is such that if, through the neglect, carelessness, or inattention to the business of the said company by the said Arnestad & Eggerud, or either of them, or any of their employes to whom they may intrust the business of the said company, the company shall sustain any loss, or damage, then the said Arnestad & Eggerud, and parties hereto subscribed as sureties, shall indemnify the said company to the amount of this bond; and the subscribing parties also firmly bind themselves to sustain and pay the Standard Oil Company, not to exceed the amount of this bond, any loss resulting to the said company through the theft or fraud on the part of the said Arnestad & Eggerud, or any one to whom they may intrust the business of the company. The direct purpose of this bond is to secure and indemnify the said company against any loss from shortage on account of stock not being properly accounted for,

and loss on account of funds belonging to the said company being misappropriated by the said Arnestad & Eggerud, or either of them, or any one to whom they shall intrust the business of the said company. If the said Arnestad & Eggerud shall faithfully and accurately perform the duties as agents for the Standard Oil Company, and shall correctly account for all stocks or funds belonging to the said company which shall be intrusted to him or his employes acting in his stead, whose acts he herein directly assumes, then the above obligation to be void; otherwise to remain in full force and virtue."

It is urged that by the use of the words "or either of them" the parties intended to cover the individual defalcation of either member of the firm as well after the dissolution of the firm as before. But we are unable to discover any justification for such a construction of the instrument. We think that these words were employed (unnecessarily employed, it is true) to express what the law would have implied had they been omitted; *i. e.* that both partners need not join in the wrongful act to render all parties to the obligation liable. The bond was given to secure the paintiff from loss growing out of the agency held by the co-partnership, and there is nothing in its language to indicate that the parties were contracting with reference to a possible dissolution of the partnership and the continuance of the agency by one of the firm. Other provisions of the bond indicate the exact reverse. The instrument declares that "the subscribing parties also firmly bind themselves to sustain and pay to the Standard Oil Company, not to exceed the amount of this bond, any loss resulting to the said company through the theft or fraud on the part of said Arnestad & Eggerud, or any one to whom they may intrust the business of the company." Again, the bond provides that: "If the said Arnestad & Eggerud shall faithfully and accurately perform the duties as agents for the said Standard Oil Company, and shall correctly account for all stock or funds belonging to the said company which shall be intrusted to him or

his employes acting in his stead, whose acts he herein directly assumes, then the above obligation to be void," etc. It is evident that the words, "to him or his employes acting in his stead, whose acts he herein directly assumes," were intended to express the plural instead of the singular. In preparing the bond, a blank was probably used which had been so worded as to apply to a single agent. Looking at the whole instrument, and interpreting it in the light of surrounding circumstances, we are unable to find in it any purpose on the part of the obligors to give, or on the part of the obligee to exact, security for the act of either partner after the partnership as such had ceased to act for the plaintiff. Had this been the object of the parties, an explicit provision to that effect could, and certainly would, have been incorporated in the bond. We are therefore forced to fall back upon the inquiry whether the law will imply any promise on the part of the sureties to be responsible for Arnestad's honesty after he had ceased to be associated with Eggerud in the business. On this point we have no doubt. A surety who engages to be responsible for the honesty of a firm may be entirely influenced by the consideration that one of the partners is a man of integrity, and of such strength of character, and such shrewdness and watchfulness in business affairs, that the risk of dishonesty from the action of the other partner, in whom the surety may place no trust, is reduced to the minimum. The sureties in this case may have been willing to become bounden for the fidelity of Arnestad & Eggerud while acting as a firm, and yet at the same time not willing to incur the hazard of obligating themselves as sureties of the partner Arnestad alone. Based upon such considerations as these, the rule of law has long been established that the surety, standing upon the very letter of his contract, may insist that he cannot be held for aught that is done after the dissolution of the firm, for which alone he became responsible. *Backhouse* v. *Hall*, 6 Best and S. 507; *Dupee* v. *Blake*, (Ill.) 35 N. E. Rep. 867; 2 Bates, Partn. § § 648–655; *Birch* v. *De Rivera*, (Sup.) 6 N. Y. Supp. 206. See, also, *Penoyer* v. *Watson*, 16 Johns. 100; *Crane Co.*

v. *Specht*, (Neb.) 57 N. W. Rep. 1015; *Gaslight Co.* v. *Ely*, 39 Barb. 174; *Machine Co.* v. *Hines*, (Mich.) 28 N. W. Rep. 157; *Barnett* v. *Smith*, 17 Ill. 565; 24 Am. and Eng. Enc. Law, 764, 765. The case of *Dupee* v. *Blake*, (Ill.) 35 N. E. Rep. 867, so far as the principle of law is concerned, presents the same features as the case at bar. The court there said: "The rule is that, if a surety engages for an individual, the engagement is understood to extend to the acts of the individual alone, and will not continue if he takes in a partner; in other words, the surety for an individual is not liable for a partnership of which he is a member. A surety who guaranties that a firm composed of particular individuals will do certain acts or discharge certain duties, cannot be held liable where there is a change in the firm, although the firm name is not changed. As a surety's liability is *strictissime juris*, and cannot be extended by construction, his guaranty to a partnership is extinguished if any partner is taken into or retires from the partnership, unless it appears from the terms of the instrument that the parties intended the guaranty to be a continuing one, without reference to the composition of the firm. A party may be induced to become surety for the individuals who compose the firm, because of his confidence in their integrity, prudence, accuracy, and ability as business men; but he cannot be presumed to have intended to become responsible for the possession of such qualities by some third person who may afterwards be taken into the firm without his knowledge or consent. It is often in the power of one partner, by want of discretion and integrity, to ruin another."

Our attention has been called to certain decisions which it is urged with great earnestness are opposed to the authorities already cited, and we are requested to follow them as enunciating the sounder doctrine. These decisions are *Palmer* v. *Bagg*, 56 N. Y. 523, 64 Barb. 641; *Hayden* v. *Hill*, 52 Vt. 259. But, in our judgment, these cases are plainly distinguishable from the case before us for final settlement. Their facts were different from the facts of this controversy in vital particulars. The sureties there had

become responsible for the honesty of an individual agent. As the court very properly held, such sureties took the risk, not only of their principal's dishonesty, but also of the dishonesty of those whom he might employ in any capacity to assist him in the prosecution of the business of the agency. Should he hire a subagent as an assistant, the sureties would still be bound. And so they would remain liable if he should see fit to give such assistant an interest in the profits of the business of the agency, provided the obligee did not deal with the new firm as agents, and thus extinguish the original agency. The sureties in those cases undertook to guarantee the fidelity of the agent to his trust, and therefore necessarily agreed to be responsible for whatever he should do himself or through his agents and employes. They agreed to assume the risk of his integrity and his business judgment in employing assistants in any capacity. It is upon this ground that all these decisions relied on by counsel for plaintiff proceed. In *Hayden* v. *Hill*, 52 Vt. 258, the court said on this point: "(1) The report shows that Mitchell took in one Clapp as a partner, and that said agency was managed, and funds therefor received, during a portion of the time, by the partnership; and it is claimed that a portion of the funds from sales and leases of the property were received by Clapp, and never actually came into the hands of Mitchell. But the report further states that the plaintiff never recognized such partnership, and dealt solely with Mitchell. He refused even to receive a note indorsed by the partnership name. If the plaintiff had seen fit to have consigned the property to the partnership, and dealt with it in such a manner that the firm of Mitchell & Clapp would have been the responsible parties in the accounting, these defendants, as sureties for Mitchell on the bond, could not be liable to respond for the laches of the firm, for it would be the default of a different party from that for which they were bound. Mitchell was at liberty to employ such agency as he choose to assist him. He could pay assistants a stipulated salary, or compensate them with a portion of the profits of the business. It was a matter of indifference to

the plaintiff, so long as Mitchell fulfilled all the stipulations of the agreement. If he employed unfit agencies, and thereby the property was squandered and lost, it was, so far as this plaintiff is concerned, the default of Mitchell alone, and he and his sureties must respond. If the fact that defendant took in a partner in conducting the business of the agency did enhance the risk of these defendants, as the sureties of Mitchell, it was not induced or recognized by plaintiff, and was a matter over which the defendants had quite as much control as the plaintiff. We think that the referee was right, under the circumstances of the case, in finding that Mitchell was 'responsible for the acts of Clapp,' as for any other agent or assistant that he employed, in conducting the business of the agency; and that money that came to the hands of Clapp in the conduct of the business by legal intendment came to the hands of Mitchell." And in *Palmer* v. *Bagg*, the court said: "We do not think this sufficient to change the relations between Fanning and the plaintiffs. The latter did no act creating or recognizing any change. The agencies or means which Fanning employed to dispose of the machines after receiving them did not necessarily interfere with the relations between him and the plaintiffs. He might employ other persons to aid in the selling, and pay them wages or a percentage, or a share of profits as partners. So long as the plaintiffs confined their dealings with him under the power of attorney, they would not be affected by any arrangements he should make." In neither of these cases did it appear that the obligee had dealt with the firm. Had this appeared, a different question would have been presented, for then the sureties could have claimed that their bond did not cover a partnership agency, but only an individual agency. And it is apparent from the language of the courts in these cases that this fact would have constrained them to hold that the sureties were not liable.

Finally, it is said that it does not appear that the plaintiff knew of the withdrawal of Eggerud from the firm, and that hence it follows that the old firm, as a firm, was still liable to the plain-

tiff for the funds misappropriated, no matter by whom they were embezzled. Upon this foundation plaintiff builds up the argument that, inasmuch as the princpals in the bond are liable, so are the sureties. But this reasoning entirely misapprehends the nature of the obligation of the sureties in this case. By signing the bond, they did not, in effect, assert to the plaintiff that they would be bound whenever the principals in the bond were liable in any way to the plaintiff, whether because of their having embezzled the property, or by reason of the doctrine of estoppel which would seal their lips against a denial of liability. They merely agreed to become responsible for the fidelity of the firm so long as each of the members of the firm should remain in the business. They contracted to be bound for the acts of Arnestad so long as they could have the protection resulting from the association of Eggerud with him in the same business. But they did not guaranty the integrity of Arnestad alone, unwatched and influenced by Eggerud, who may have been the only person in whom they reposed any trust. If the plaintiff was ignorant of the change in the firm, so were the sureties; and, if the sureties have a right to stand upon the terms of their contract, then it behooved the plaintiff to ascertain at its peril whether all the persons for whom the sureties had become responsible still remained at the helm of the business of the agency. On this point the decision of the court in *Birch* v. *De Rivera*, (Sup.) 6 N. Y. Supp. 206, is decisive. The court there said: "The fact that plaintiffs were not notified of the change is immaterial. They may have an action against the firm as it existed before the change, because of a failure to notify them of the change, or to publish the notice of dissolution. That proceeds on another principle,—presumption attached to continued firm dealings without notice. The guarantor is not responsible for a state of facts which might justify a recovery against the original members. There is no evidence that he was aware of the change. He seems to be as much without notice as the plaintiffs. But, were it otherwise, we may say, in the language

of Lord Blackburn, 'nothing is stated to show that the defendant was under obligation to inform the plaintiff banking house of the fact, or that he took steps to conceal it. At all events, his contract is to guaranty a co-partnership composed of certain persons, and that contract cannot be altered or extended without his consent.'" See, also, *Backhouse* v. *Hall*, 6 Best and S. 507.

We are unable to agree with counsel for plaintiff that there is not sufficient evidence of the dissolution of the firm of Arnestad & Eggerud. The evidence on the point is very satisfactory. Nor do we find anything in the case to rebut it. The deficit sued for having resulted from misappropriation of funds by Arnestad after Eggerud had retired from the business, the District Court was right in rendering judgment for the sureties on the bond.

It follows that such judgment must be affirmed, and it is so ordered. All concur.

(69 N. W. Rep. 197.)

JOHN H. VAN DYKE *vs.* HUGH DOHERTY, *et al.*

Opinion filed November 20th, 1896.

Demurrer to Answer—Form.

A demurrer to an answer, under § 5277, Rev. Codes, need specify no particulars wherein the answer is insufficient. It is sufficient if such demurrer follow substantially the language of the statute.

Answer Pleading Conclusions Only Demurrable.

An answer which sets forth new matter, consisting of conclusions only, and pleads no probative facts upon which such conclusions are based, raises no issue of fact, and is vulnerable to a demurrer.

Denial on Information Insufficient.

A party may not deny an allegation in his adversary's pleading by stating that he "has not sufficient knowledge or information to form a belief thereon, and hence denies the same," when the means of full and positive information in the form of public records are readily accessible to him.

Appeal from District Court, Ransom County; *Lauder*, J.

Action by John H. Van Dyke against Hugh Doherty and others.

From a judgment sustaining a demurrer to his answer, defendant Doherty appeals.

Affirmed.

Hugh Doherty, for appellant.

D. A. Lindsey, for respondent.

BARTHOLOMEW, J. Action to foreclose a mortgage on real estate. The defendant Doherty, who was the original mortgagor, answered. To his answer a general demurrer was interposed. On the argument of the demurrer, the defendant attacks the original complaint. The court held the complaint good, and sustained the demurrer to the answer, and from such ruling the defendant appeals. The original mortgage was dated March 6, 1884, and secured a note of same date for $2,100, due in five years, with interest at 7 per centum per annum, interest payable on January 1st of each year. The complaint alleges that on July 22, 1889, plaintiff, by an instrument in writing, extended the time of payment of said note for another five years from March, 1889, (the time of its maturity,) and in January, 1894, in the same manner, granted another extension for one year from December 1, 1893.

It is urged that the complaint is bad because a portion of the time covered by the last extension was covered by the first, to-wit, from December 1, 1893, to March 6, 1894. If there be any merit in this objection to the complaint, we confess our inability to grasp it. The fact was that the time of the maturity of the note was extended to December 1, 1894; and whether that be said to be one year from December 1, 1893, or 8 months and 24 days from March 6, 1894, could make no possible difference with defendant, so far, as we can discover. The complaint also shows that during the second five years the interest was six per centum per annum, and after that time 7 per centum is claimed.

It is urged that the complaint is defective in not alleging that defendant agreed to those extensions of time, and the reduction of the rate of interest. But these things were manifestly in

defendant's favor, and his acceptance of them will be presumed; particularly when, as in this case, it conclusively appears that he took advantage of them.

The further objection to the complaint that it does not allege that no other proceedings have been had to collect the debt, as required by § 5869, Rev. Codes, proceeds upon a mistake of fact. The complaint does so allege in the exact words of the statute. The objections to the complaint were not well taken.

It is first urged that the demurrer to the answer is too general. Counsel makes his argument under § 5268, Rev. Codes, which relates only to demurrers to the complaint. His argument is of force under that section. But a demurrer to an answer is governed by § 5277, which declares that "a plaintiff may in all cases demur to an answer containing new matter when upon its face it does not constitute a counterclaim or defense." It is clear that the grounds for special demurrer enumerated in § 5268 cannot apply to an answer purely defensive in character, because such grounds—to-wit, want of jurisdiction, lack of legal capacity to sue, pendency of another action, defects of parties, and improper joinder of causes of action—cannot in their nature apply to such an answer. In this case plaintiff demurred to the answer, "on the ground that said answer is insufficient in law, upon the face thereof, to constitute a defense to the complaint herein." The new matter in this answer is purely defensive. There is no attempt to plead a counterclaim; and, while the demurrer is not identical in terms with the statute, it is identical in meaning, and clearly sufficient.

The answer is very voluminous. From it we learn that defendant originally made a written application to one Laughlin for a loan of $2,100, for a term of five years, at 10 per cent. interest. Laughlin sent the application to one Hodgson, a loan agent at St. Paul, who accepted the same, and agreed to make the loan. A check for $2,100, payable to defendant, was sent to Laughlin. Defendant indorsed the check, and returned it to Laughlin, who used the proceeds in purchasing Northern Pacific preferred stock

for defendant, and with which defendant purchased from the Northern Pacific Railroad Company the land upon which the mortgage was given. Laughlin retained $52.50 for his services, but we do not understand that any claim is made that this was not a proper charge against defendant. It appears from the answer that Hodgson completed the transaction, and it is admitted that the note and mortgage were given and extended as alleged, and that the same has not been paid except in the manner and to the extent as specially pleaded in the answer. It is alleged that when the papers were finally executed, instead of making a principal note of $2,100, with annual interest at ten per cent., and due in five years, such note drew only 7 per cent. annual interest, and two other notes were executed by defendant, both payable to one Day. These notes were for $150 and $165, respectively, making in the aggregate $315, or just 3 per cent. per annum on the principal note of $2,100 for five years. But these notes were payable, the first on January 1, 1885, and the second on January 1 1886; were of the same date as the principal note, to-wit, March 6, 1884; and drew interest at the rate of 12 per cent. per annum from date. It is claimed that the transaction was thus shaped by Hodgson to avoid the statutes against usury then existing, and that the contract was in fact usurious. But this is a mistake. The statute then in force permitted parties to contract for 12 per centum per annum, and did not purport in any way to regulate or control the form of the contract. A calculation will demonstrate that on no theory can it be claimed that the defendant paid as much as 12 per cent. per annum upon his indebtedness. The transaction was not usurious. But it is iterated again and again that the transaction was a fraud on the defendant; that the relations between Hodgson, Day, and Van Dyke were not revealed to defendant; that, in fact, Hodgson was interested in the loan; that defendant would not have executed the papers as he did, did he know of such interest; that Hodgson, Day, and Van Dyke contrived to place defendant in a position where he would be a loser if the loan was not consum-

mated, and then Hodgson insisted on different and more onerous terms than specified in the original application for the loan. It will be noticed that these allegations are conclusions merely. No probative facts are set forth. Nothing is shown to indicate to a court that any fraud was practiced on defendant. It may be true that by some arrangement between Hodgson, Day, and Van Dyke, Hodgson had an interest in the loan. He certainly was interested to the extent of his commissions. But, whatever his interest may have been, it could not affect defendant's rights to refuse to consummate the loan on terms different from these contained in his application. In dealing with Hodgson as agent, defendant's rights were in no manner curtailed. Nor is there any fact pleaded from which a court can see that defendant would have been a loser by not consummating the deal. So far as disclosed, the facts are all the other way. The money had been advanced, the stock purchased for defendant, and the land bought from the railroad company, with the stock, by defendant, before he could mortgage it. He seems to have been in shape to dictate terms to Hodgson, and not Hodgson to him, so far as the facts set forth in his answer fix their relations. When he executed the papers, defendant knew exactly what they were, and knew that they were not strictly within the terms of his original application. But the parties had the legal right to vary from that application, and make the contract just as they did make it; and defendant can be released from its obligations only by showing fraud or mistake, neither of which is properly pleaded in this answer.

Another attempted defense, when stripped of its circumlocution, is, in substance, this: At the time the original principle note matured, to-wit, March 6, 1889, defendant was ready and willing to pay the same according to its terms, but that plaintiff refused to receive the same unless defendant would repay a certain interest installment which he had already paid, but which payment was denied by plaintiff; and foreclosure proceedings were threatened unless payment was made as demanded, and, to

prevent such foreclosure proceedings, defendant renewed the note for another term of five years. The utter futility of this statement is apparent on its face. If defendant was prepared to pay the amount due, as alleged, he had but to make and preserve a proper tender thereof, and he had an absolute defense to all foreclosure proceedings.

The complaint alleges payment of certain taxes on the mortgaged land, and seeks to recover such amounts, and also asks an attorney's fee of $100, as provided in such mortgage. It is claimed that the answer denies these items, and hence the demurrer was improperly sustained. The answer says: "This defendant has no knowledge or information sufficient to form a belief as to a payment of taxes by plaintiff for this defendant, as set forth in the complaint herein, and therefore denies the same." The mortgaged property is situate in Ransom County. The defendant is an attorney at law located and doing business at the county seat of the said county. The public records of the county furnished the evidence that would demonstrate to a certainty whether plaintiff had or had not paid the taxes. With this means of positive information open before him, a party is not permitted to say that he has no knowledge or information sufficient to form a belief. While the statute authorizes a denial in that form, yet it requires good faith and honesty of purpose; and it cannot be tolerated that a party may shut his eyes to information thrust before them in order to be technically able to say that he has no such information. *Russel & Co.* v. *Amundson*, 4 N. D. 112, 59 N. W. Rep. 477, and authorities cited on page 117, 4 N. D., and p. 479, 59 N. W. Rep. Such a denial must be disregarded. There is no denial whatever that the mortgage provides for the attorney's fee as claimed; but it is alleged that the attorney's fees are fixed by statute, and are a part of the costs. This is simply pleading the law, and raises no issue of fact.

Lastly, it is claimed that there is a general denial of all allegations in the complaint not specifically admitted, qualified, or explained. But holding, as we must, that the attempted qualifi-

cations and explanations of certain admitted allegations are ineffective and futile, every material allegation necessary to enable plaintiff to recover stands admitted. The answer was clearly insufficient, and the demurrer properly sustained.

Affirmed. All concur.

(69 N. W. Rep. 200.)

EDWARD L. WILLIAMS *vs.* KATE L. WILLIAMS.

Opinion filed November 21st, 1896.

Divorce—Acceptance of Alimony—Appeal.

When, as part of the order of the court for judgment in favor of the plaintiff in a divorce suit, the court directs that the plaintiff pay the defendant a specified sum in full for all claims for alimony, costs, etc., whether for the past or future, and it is apparent that this sum was ordered to be paid on the theory that the marital relations were to stand forever severed by the decree, and because of that fact, and when the defendant accepts said sum, and the final judgment contains no provision relating to the matter, because the same has been settled, the defendant is by the acceptance thereof precluded from prosecuting an appeal from such judgment just as effectually as she would have been had such provision been formally incorporated in the judgment.

Appeal from District Court, Cass County; *McConnell*, J.

Action by Edward L. Williams against Kate L. Williams for divorce. Judgment for plaintiff, and defendant appeals.

Dismissed.

Newman, Spalding & Phelps, for appellant.

Ball, Watson & Maclay, for respondent.

CORLISS, J. The motion to dismiss appeal must be granted. The appeal is from a judgment rendered in an action for divorce. Findings of fact and conclusions of law having been waived, the court made its order for judgment in the following form: "Ordered that a final decree be entered herein, absolutely vacating and dissolving the bonds of matrimony formerly and now existing between the parties hereto, and absolutely divorcing said parties each from the other. It is further ordered that said

marriage between the parties hereto, which was solemnized at the City of New York, State of New York, in the month of July, 1888, be absolutely dissolved, and that said parties be freed and released from any and all of the rights, duties, and obligations resulting from their said marriage. It is further ordered that the defendant is justly entitled to receive the sum of fifty-two hundred ($5,200) dollars, of and from the plaintiff herein, as and for her temporary and permanent alimony, support money for the past and future, counsel fees, and for any and all other purposes whatsoever; that such sum of $5,200 is the total proportion of all of plaintiff's property to which she is entitled, either in law or equity, and that, upon payment of such sum, said plaintiff shall stand forever released from any and all claims of defendant against him in that behalf; that the plaintiff herein be required to pay to said defendant the sum of $5,200, in full payment, discharge, and satisfaction of all of the claims aforesaid. Let judgment be entered accordingly." The final judgment entered by the clerk in the judgment book contained no provision relating to the sum of $5,200 ordered to be paid by the plaintiff to the defendant. The explanation of this appears to be the fact that, at the time the order for judgment was rendered, the plaintiff paid this sum to the defendant, who by an instrument in writing acknowledged the satisfaction of the money portion of such order. Despite the fact of such payment, the defendant might have insisted that the clerk incorporate in the judgment these provisions of the order. The fact that she had received the sum ordered paid to her would not have destroyed her right to claim that the judgment so entered should embody these features. It would merely prevent her compelling a second payment of the sum awarded her. While, technically speaking, the judgment itself did not give the appellant the right to receive the sum paid to her, yet it is plain to be seen that the consideration for the order that she be allowed such sum is the other provision of the order relating to the subject of divorce. These two provisions of the order are bound up together. Each is dependent on the other. It is true

that the court might have awarded the defendant this sum independently of the granting of a divorce in favor of either party. But it is clear that this is not what was done. The language of the order forbids such a construction. If the order had granted alimony only up to the time it was made, and had not provided for the future, there might be some force in the appellant's contention. But the order goes further. It in effect declares that, as part of the decision of the court that the plaintiff should have a divorce as against the defendant, the court, on the assumption that the divorce is to remain undisturbed, awards the defendant a gross sum for her support, on the theory that she is to be no longer his wife. The language of the order is: "Ordered that the defendant is justly entitled to receive the sum of fifty-two hundred ($5,200) dollars, of and from the plaintiff herein, as and for her temporary and permanent alimony, support money for the past and future, counsel fees, and for any and all other purposes whatsoever; that such sum of $5,200 is the total proportion of all of plaintiff's property to which she is entitled, either in law or equity, and that, upon payment of such sum, said plaintiff shall stand forever released from any and all claims of defendant against him in that behalf; that the plaintiff herein be required to pay to said defendant the sum of $5,200, in full payment, discharge, and satisfaction of all the claims aforesaid."

We have considered this question on the theory that the judgment is adverse to the defendant on the subject of divorce, for it is only on that theory that she has any standing here to complain of it in that regard. The position of the defendant before this court is that she has been defeated in a divorce action on the main point of dissolution of the marital relation, the decision being in favor of the plaintiff for a divorce, and, on the basis that this condition is to continue, has been awarded a gross sum of money in lieu of all her former claims upon the plaintiff as his wife; and yet she insists that she can secure the fruits of this decision, so far as favorable to her, and at the same time be allowed to overthrow the other portions of the decision with

which those parts are indissolubly bound up. We attach no importance to the fact that the clause in the order for judgment relating to the payment of the $5,200 was not embodied in the judgment itself. The question is, not what is in the judgment, but whether the defendant has accepted benefits under the decision of the court which could not have been enjoyed by her had the decision not been made. The test is this: Suppose the judgment should be reversed, will the appellant then hold some substantial advantage to which she would not have been entitled had not the judgment been rendered? It is clear that she will. She will have possession of $5,200 of the money of the plaintiff, given her by the court on the theory that the marital relation should stand dissolved by the judgment of the court; and yet the judgment itself annulling the marriage would be overthrown. A moment's reflection will show the injustice of making a distinction founded upon the fact that the judgment itself does not award, in terms, the money which the court decided that the appellant should have, such money having been paid to the appellant, and received by her before the final judgment was entered. Suppose a plaintiff, who recovers a verdict for only a portion of his claim, should accept the taxable costs before judg ment, and for that reason the judgment itself should contain no mention of costs; would it not savor of the most technical refinement to answer the motion to dismiss the appeal by the argument that he (the appellant) had not accepted anything which the formal judgment awarded him? One who accepts the benefits of a decision accepts the benefits of the judgment based upon such decision just as much when the judgment is silent on that subject as when the judgment contains a provision embracing such matter. Should a court decide that a defendant in an action for specific performance must convey certain land on the payment of a certain sum, and should he receive this amount before the entry of final judgment, and for that reason the judgment should contain no reference to the matter of payment, but should unconditionally require him to convey, would it be seriously urged that

he had not received such a benefit as would preclude the right to reverse the judgment on appeal? And yet such is the exact position of the appellant in this case. Had the money not been paid to her in advance of the entry of judgment, the provision in the order relating to its payment would have been inserted in the jugdment itself. In fact, it was the duty of the clerk to insert it there; for his act in entering the judgment was purely ministerial. It was his duty to follow explicitly the order of the court touching the character and terms of the judgment to be entered. Especially is such the case in a suit in which findings have been waived, for then only the order can be looked to for the purpose of discovering the character and terms of the judgment which the court has directed to be entered. For the purposes of this motion it is entirely proper for us to treat the judgment as embodying the provisions which the court ordered should be incorporated in it. The case of *Carll* v. *Oakley*, 97 N. Y. 633, is nearly in point. On appeal from an order of the general term of the Supreme Court dismissing an appeal, the court of appeals said: "The acceptance by the defendant's attorney of the costs in the action after the withdrawal of the first appeal was a good answer to the second appeal. It is true that the amount of costs was not fixed by the judgment of April 21, 1881. But the right of the defendant's attorney to costs was adjudged, and the receiver was directed to pay him the costs and disbursements, 'to be adjusted by the clerk.' The insertion of the amount of the costs must be referred to his right under the judgment, and cannot be regarded as a voluntary payment by the receiver, but as a payment in pursuance of the judgment. The affidavits disclose nothing inconsistent with this view of the transaction. It seems to be well settled that a party by accepting a benefit under a judgment precludes himself from subsequently appealing therefrom. *Bennett* v. *Van Syckel*, 18 N. Y. 481; *Radway* v. *Graham*, 4 Abb. Prac. 468." On the general proposition that the acceptance of benefits under a judgment which a party could

not claim independently of such judgment is a bar to the right to appeal, see the decision of this court in *Tyler* v. *Shea*, 4 N. D. 337, 61 N. W. Rep. 468.

Having reached the conclusion that the appeal should be dismissed, the other questions discussed are not before us for decision.

The order of the court is that the appeal be dismissed. All concur.

(69 N. W. Rep. 47.)

FRED UNDERWOOD *vs.* ATLANTIC ELEVATOR COMPANY.

Opinion filed November 21st, 1896.

Conversion—Evidence.

Evidence *held* to be sufficient to justify the verdict.

Harmless Error.

Error without prejudice is not ground for reversal.

Appeal from District Court, Ransom County; *Lauder*, J.

Action by Fred Underwood and Emma A. Powell, co-partners, as Fred Underwood & Co., against the Atlantic Elevator Company. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Ball, Watson & Maclay, for appellant.

Ed. Pierce, for respondents.

CORLISS, J. Plaintiffs are chattel mortgagees of a crop of wheat. As such mortgagees, they have sued the defendant for the conversion of the wheat covered by their mortgage. The ownership of the wheat by the mortgagor is not in dispute. Nor can we discover any issue as to the execution of the mortgage. This fact is admitted by the answer, when construed as a whole. Therefore we are not called upon to settle the very interesting question of evidence discussed by appellant's counsel relating to

the proof of instruments without calling a subscribing witness who is living within the jurisdiction of the court. There is sufficient evidence to warrant a finding that the amount of wheat covered by the mortgage was 800 bushels, and that all of this grain was drawn to defendant's elevator, and by it sold and shipped out of the state. In addition to this, a demand was proved. There was therefore ample evidence of conversion. While it is possible that incompetent evidence relating to the value of the wheat was received, yet the error, if any, was without prejudice, for the reason that the verdict was for only $142.08; and it is too clear for discussion that the competent evidence in the case would compel a finding by the jury that the grain was worth at least 20 cents a bushel. As defendant was proven to have converted 800 bushels of wheat on which plaintiff had a mortgage lien, and as the amount of the verdict could be sustained even on the theory that the wheat was worth not to exceed 20 cents a bushel, we cannot discover how the defendant has suffered any prejudice from the admission of the incompetent evidence relating to value.

The judgment of the District Court is affirmed. All concur.

(69 N. W. Rep. 185.)

GULL RIVER LUMBER COMPANY *vs.* OSBRONE MCMILLAN ELEVATOR COMPANY.

Opinion filed November 21st, 1896.

New Trial—Discretion of Trial Court.

When a motion for a new trial embraces the ground that the evidence does not justify the verdict, the motion, upon such ground, is addressed to the sound judicial discretion of the trial court; and the order made thereon, based upon such ground, will not be reversed in this court, unless the record discloses a case of abuse of discretion. This is especially true in cases where a new trial is ordered in the court below.

Appeal—Review.

Evidence examined, and *held*, that the order granting a new trial upon the ground that the verdict was not justified by the evidence was not an abuse of judicial discretion, and hence the same is affirmed.

Appeal from District Court, Ransom County; *Lauder*, J.

Action by the Gull River Lumber Company against the Osbrone McMillan Elevator Company. Verdict for plaintiff. From an order granting a new trial, it appeals.

Affirmed.

Ed. Pierce and *Edward Engerud*, for appellant.

P. H. Rourke, for respondent.

WALLIN, C. J. This action is brought to recover damages for the conversion of certain wheat covered by a chattel mortgage owned by the plaintiff. The trial resulted in a verdict for the plaintiff. Defendant, upon a statement of the case, moved for a new trial of the action upon several grounds, among which was the ground that the evidence was insufficient to justify the verdict. The motion was granted, and, appended to its order granting a new trial, the learned trial court has set out a memorandum of the grounds or reasons upon which a new trial was ordered. After pointing out the fact that from the standpoint of the trial court, at least, the verdict returned was an unjust one, the court stated, in substance, that it granted a new trial chiefly for the reason that the verdict was not justified by the evidence.

We have read the evidence with care, and are satisfied that the view of it taken by the trial court was entirely proper; but, as it could serve no useful purpose as a guide to the solution of future cases to set out the evidence, we shall refrain from doing so. We need only call attention to the familiar rule that where a motion for a new trial is made in the trial court upon the ground that the verdict is not justified by the evidence, such motion is addressed to the sound discretion of the tribunal which heard and saw the witnesses, and therefore had advantages in weighing the testimony which are not possessed by an appellate court. In such cases, and especially where the verdict is set aside, and a new trial granted, an appellate court will not reverse the order merely upon the ground that there was some conflict in the evidence. The application for a new trial upon such ground being addressed to the sound discretion of the court below, an order of that court will not be reversed unless the record discloses a case of abuse of discretion. This is especially true where a new trial has been granted. This rule has long since passed the boundaries of debate. See Hayne, New Trial, § 97, and cases cited in the notes to said section.

The order granting a new trial is affirmed. All the judges concurring.

(69 N. W. Rep. 691.)

NOTE—The discretion of the trial court in awarding new trials will not be interfered with except in case of abuse. *Braithwaite* v. *Aiken*, 2 N. D. 57; *Patch* v. *N. P. Ry. Co.*, 5 N. D. 55.

F. H. McDERMONT *vs.* JOHN DINNIE, *et al.*

Opinion filed November 23rd, 1896.

Constitutional Law—Abolition of Court.

When the constitution creates a judicial office and court, and prescribes the jurisdiction of such court, neither the office nor the court can be abolished by statute, nor can the jurisdiction of such court as to amount involved be diminished or increased by the legislature.

Police Magistrates of Constitutional Creation.

Section 2209, Rev. Codes, undertook to supercede the police magistrates and their courts, provided for by § 113 of the state constitution, by the municipal courts therein established, which last named courts were given all the powers and jurisdiction of such police magistrates, and, in addition thereto, other jurisdiction not mentioned in said section of the constitution. *Held*, that said § 2209, Rev. Codes, is unconstitutional and void.

Mandamus—Questions Determined.

In an application by a party elected as judge of the municipal court under said section for a mandamus against the mayor and auditor of the city where such party was so elected judge, to compel the issuance of city warrants for the salary of such judge, *held*, that the defendants could properly raise the question of the constitutionality of said section. The writ cannot be invoked to compel an officer to do an unlawful act.

Appeal from District Court, Grand Forks County; *Templeton*, J.

Application by F. H. McDermont against John Dinnie, as mayor, and Frank A. Brown, as city auditor, of the City of Grand Forks, for a writ of mandamus. From a judgment for plaintiff, defendants appeal.

Reversed.

Bangs & Fisk, for appellants.

The jurisdiction attempted to be conferred upon municipal courts, cannot be conferred under the constitution. Sections 85, 113, Const. The powers of police magistrates are expressly conferred, defined and enumerated in the constitution and this jurisdiction cannot be wiped out or superceded by legislation. *Platteville* v. *Bell*, 28 N. W. Rep. 404; *United States* v. *Hudson*, 7 Cranch. 32; *Marbury* v. *Madison*, 1 Cranch. 137; Pomeroy Const. Law, 760;

Cooley Const. Lim. 27, 100; Endlich on Interpretation, §§ 151, 522; *California* v. *S. P. Ry. Co.*, 157 U. S. 229. Where a constitutional provision is self executing and needs no legislation to give it full force and operation, it controls in the matter and no legislative act can modify, repeal or affect it. This principal has been applied in many cases to provisions creating courts and defining their powers. *Peo.* v. *Bradley*, 60 Ill. 370; *Ex parte Snyder*, 64 Mo. 58; *Miller* v. *Wheeler*, 33 Neb. 765, 51 N. W. Rep. 137; *State* v. *Hall*, 66 N. W. Rep. 642; *Sevinsky* v. *Wagus*, 76 Md. 335; *Campbell* v. *Campbell*, 22 Ill. 664.

Burke Corbet and *Tracy R. Bangs*, for respondent.

BARTHOLOMEW, J. Section 2209 of the Revised Codes reads as follows: "A municipal court is hereby established in each incorporated city of this state, having a population of five thousand inhabitants or over. Such municipal courts shall have in addition to the jurisdiction hereinafter conferred, exclusive jurisdiction of all violations of ordinances of the city in which it is established and from the time of its creation all the jurisdiction and the powers heretofore exercised by police magistrates in such cities shall cease. Such court shall be a court of record and have a clerk and a seal, and its jurisdiction shall be coextensive with the limits of the county in which such city is situated. In actions in which there are two or more defendants, if one defendant is served with process within the county, the other defendants may be served at any place within the state." Section 2210 reads: "Such court shall exercise such jurisdiction as is or may hereafter be conferred by law in civil and criminal actions upon county courts having increased jurisdiction, and in addition thereto it shall have and exercise the same jurisdiction as is now conferred upon police magistrates and justices of the peace." Section 2213 reads: "A judge of such court shall be elected by the qualified electors of such city at the general city election held in April, 1896, and thereafter at the general election for city officers in each even numbered year, and the person receiving the highest

number of votes at such election, shall be declared duly elected." At the city election held in the City of Grand Forks, in Grand Forks County on April 6, 1896, the electors voted for judge of the municipal court of said city, and the plaintiff, McDermont, received a majority of the votes so cast. Subsequently, and within the time required by law, he took the oath of office, and tendered to the city council his bond as such judge, and thereafter at the end of each month he presented to the proper city officials the necessary vouchers for his salary as such judge. The city officials refused to draw any warrants for such salary, and this proceeding is brought to compel by mandamus the issuance of such warrants; the defendants being the mayor and auditor of said City of Grand Forks. The defendants answered, raising certain questions of fact as to the qualifications of the city, under the statute, to elect such judge, and also alleging the unconstitutionality of the statute creating the office. The matter was tried by the court, and plaintiff prevailed. The entire evidence and proceedings are brought to this court for review. We shall concern ourselves only with the constitutional questions raised.

Section 85 of our state constitution reads: "The judicial power of the State of North Dakota shall be vested in a Supreme Court, District Courts, county courts, justices of the peace, and in such other courts as may be created by law for cities, incorporated towns and villages." Section 110 provides for the establishment of county courts, and § 111 prescribes the jurisdiction of such courts, and provides the manner in which such jurisdiction may be increased by a vote of the electors of the county, and declares that, when such jurisdiction is so increased, "then said county court shall have concurrent jurisdiction with the District Court in all civil actions where the amount in controversy does not exceed one thousand dollars, and in all criminal actions below the grade of felony, and in case it is decided by the voters of any county to so increase the jurisdiction of said county court the jurisdiction in case of misdemeanors arising under state laws which may have been conferred upon police magistrates

shall cease." Section 112 provides for the election of justices of the peace, limits their numbers, prescribes their jurisdiction, and declares: "The legislative assembly shall have power to abolish the office of justice of the peace and confer that jurisdiction upon judges of county courts or elsewhere." Section 113 reads: "The legislative assembly shall provide by law for the election of police magistrates in cities, incorporated towns, and villages, who in addition to their jurisdiction of all cases arising under the ordinances of said cities, towns and villages, shall be *ex-officio* justices of the peace of the county in which said cities, towns and villages may be located. And the legislative assembly may confer upon said magistrates the jurisdiction to hear, try and determine all cases of misdemeanors, and the prosecutions therein shall be by information." It will be observed that police magistrates and their courts are provided for and established by the constitution. This being the case, the legislature is powerless to legislate the one or the other out of existence. This proposition is admitted in terms by the counsel for respondents, and, being elementary, no authorities need be cited. The term "police magistrate" or "police justice" has a definite and well-understood meaning. Allen, J., in *Wenzler* v. *People*, 58 N. Y. 530, thus defines it: "A police justice is a magistrate charged exclusively with the duties incident to the common-law office of a conservator or justice of the peace, and the prefix 'police' serves merely to distinguish them from justices having also civil jurisdiction." A police magistrate is an inferior judicial magistrate, whose jurisdiction in the absence of constitutional or statutory extensions, is confined to criminal cases arising under the ordinances and regulations of a municipality. Hence a court presided over by such magistrate was never a court of record, never had a seal, or was entitled to a clerk. It will be observed, also, that § 113 of the constitution confers absolutely upon police magistrates a certain jurisdiction, to-wit: jurisdiction of all cases arising under the ordinances of said cities, towns, and villages, and also the jurisdiction of county justices of the peace. It is then left to

the discretion of the legislature whether or not they shall also have jurisdiction to try and determine all cases of misdemeanors. Section 2209, Rev. Codes, declares that, when municipal courts therein provided for are established, all the jurisdiction and powers exercised by police magistrates shall cease. The learned counsel admit—they are forced to admit—that this act, in so far as it tears down all the jurisdiction and powers of the former police magistrates, is unconstitutional unless the statute rehabilitates the same officer under another name. It is urged that the name is not essential, but it is the office. This may be true, but it seems too clear for discussion that the office—the same officer, in effect—is not preserved. The one magistrate presides over a court not of record, the other is of record; the one could have no seal, the other must have a seal; the one has no clerk, the other must have a clerk. Again, police magistrates were given by the constitution the jurisdiction of justices of the peace. This included the power to try and determine civil cases where the amount in controversy did not exceed $200. This jurisdiction the legislature might destroy, because it had the power to abolish the office of justice of the peace under the constitution. But the legislature could not increase this civil jurisdiction by extending it to cases involving amounts beyond the constitutional jurisdiction given to justices of the peace. It is well settled that, where jurisdiction is conferred by constitution, the legislature is as powerless to increase it as to diminish it. Yet the municipal courts, created by this statute are given in counties where the county courts have the increased jurisdiction, power to try and determine civil cases involving $1,000 or less,—a power which could never have been exercised by the police magistrates created by this constitution. These reasons—and others might be named—make it very certain that the court created by § 2209, Rev. Codes, is not the same court, either in its name, its construction, its rank, its nature, or its purposes, as the court created by § 113 of the constitution. Hence it cannot supersede that court, but the constitutional court must continue, and must exercise the jurisdiction expressly conferred upon it by organic law.

It is urged, however, that the legislature is given power, under § 85 of the constitution, to establish other courts for cities, towns, and villages, and that the creation of the municipal courts by § 2209, Rev. Codes, may be treated as an exercise of that power, and as not interfering with the police magistrates' courts, and at most only creating another court with concurrent jurisdiction along certain lines. This would raise the somewhat interesting question whether or not, where a court is created by constitution and given certain jurisdiction, such jurisdiction is not exclusive. But we are not required to meet this question, because we do not think the position taken by counsel can be sustained. It is clear to us that it was not the legislative intent, by the enactment of § 2209, to increase the number of courts. That section expressly declares that the municipal court therein created shall have "exclusive jurisdiction of all violations of ordinances of the city in which it is established, and from the time of its creation all the jurisdiction and the powers heretofore exercised by police magistrates in such cities shall cease." This is a grant, not of concurrent, but of exclusive jurisdiction, and by the language of the statute the magistrates of the constitution are swept out of existence. Undoubtedly, the legislature, under § 85 of the constitution, might create additional courts for cities, incorporated towns, and villages; but it cannot abolish those established by the constitution. In the oral argument it was urged that, granting that the statute creating the municipal courts was unconstitutional in so far as it attempted to abolish or supersede police magistrates, still that portion might be eliminated, and the remainder stand as a valid and subsisting law. In many cases statutes have been thus destroyed in part and upheld in part. But that can only be done where the statute remaining after the elimination of the unconstitutional portion is in itself a complete law, capable of enforcement, and such a one as it is presumed the legislature would have passed without the rejected portions. If the different portions of the statute are so interwoven and interdependent that the rejected portion furnishes to an appreciable

extent the consideration or inducement for the passage of the act, then the entire enactment must be rejected. These principles are well settled. *Quinlon* v. *Rogers*, 12 Mich. 168; *State* v. *Sinks*, 42 Ohio St. 345; *People* v. *Porter*, 90 N. Y. 68; *Jones* v. *Jones*, 104 N. Y. 234, 10 N. E. Rep. 269; *Martin* v. *Tyler*, 4 N. D. 278, 60 N. W. Rep. 392; *State* v. *O'Connor*, 5 N. D. 629, 67 N. W. Rep. 824. Under these anthorities we are clear that this entire statute must fall. As we have seen, it was not the legislative purpose to create an additional court, but it was the intent to abolish one court and substitute another. If the court of the police magistrate remains undisturbed, then that court and the county court with increased jurisdiction have full power to hear and determine all cases that could be heard in the municipal court. It is not pretended, and cannot be, that these courts are overcrowded, or unable to perform all the work that comes before them. These established constitutional courts must be maintained, and it is not conceivable that the legislature intended to burden our young municipalities with a purely ornamental court, with officers and attaches drawing large salaries that must be paid from the funds of the municipalities. It is clear that the abolishment of the police magistrate's court with its attendant expenses was the direct inducement for the establishment of the municipal courts.

Nor is there, in our judgment, any force in the point that these defendants cannot raise the question of the unconstitutionality of this statute. They are municipal officers, charged by their oaths of office with the duty of protecting the funds of the municipality. It would be a violation of their official duty should they proceed to pay out the funds of the city upon unwarranted and illegal claims. The writ cannot be invoked to compel an officer to do an illegal act. *State* v. *Getchell*, 3 N. D. 243, 55 N. W. Rep. 585.

The District Court of Grand Forks County will set aside its order herein, and will enter an order discharging the alternative writ and dismissing the proceeding. All concur.

(69 N. W. Rep. 294.)

STATE *ex rel* BROOKS BROS. *vs.* M. J. O'CONNOR.

Opinion filed November 24th, 1896.

Execution Sale—Redemption.

A redemptioner must redeem from another redemptioner, on sale of real estate under execution, or on foreclosure of a mortgage by advertisement, within 60 days after the last preceding redemption, although a year has not yet expired since the day of sale.

Appeal from District Court, Grand Forks County; *Templeton*, J.

Petition for mandamus by the State of North Dakota, on the relation of Lester R. Brooks, Dwight F. Brooks, and Anson S. Brooks, co-partners as Brooks Bros., against Michael J. O'Connor, sheriff. Judgment for plaintiffs. Defendant appeals.

Affirmed.

Bosard & Burke, for appellant.

Cochrane & Feetham, for respondents.

CORLISS, J. The controversy in this case relates to the right of redemption from a mortgage foreclosure sale. A first mortgage upon the premises involved was foreclosed by advertisement, and the sale under such foreclosure took place June 24, 1895. On the 23rd of April, 1896, Brooks Bros., who (we will assume, for the purposes of this decision) held a third mortgage upon the property, redeemed the same from such foreclosure sale. On the 23rd of June, 1896, the Security Trust Company, holding a second mortgage upon the land, attempted to redeem from the third mortgagee, who had redeemed. The only question necessary for us to consider is whether this second redemption was in time. The appeal is from a final order, in a special proceeding, directing that a peremptory writ of mandamus issue commanding the defendant, as sheriff, to execute and deliver to the relators, Brooks Bros., a sheriff's deed of the property sold. If the attempted redemption by the Security Trust Company was ineffectual, we must affirm this order. That it was ineffectual we have no doubt, for the reason that it was not made in time.

While it was made within a year of the day of sale, yet more than 60 days had elapsed since the preceding redemption by Brooks Bros. They redeemed from the purchaser on the 23rd of April, 1896, and the Security Trust Company sought to redeem from them on the 23rd of June, 1896, 61 days later. That a redemptioner is not accorded by the statute a full year after the sale in which to redeem from another redemptioner, but that he must redeem from another redemptioner within 60 days after the last preceding redemption, although the year has not expired, is too obvious, from the language of the statute, to admit of question. Section 5854 of the Revised Codes declares that the subject of redemption from sale of foreclosure of mortgage by advertisement is governed by the sections of the statute relating to redemption from sales upon execution. These sections, so far as they bear upon the question now before us, provide as follows:

"Sec. 5540. Property sold subject to redemption, or any part sold separately, may be redeemed in the manner hereinafter provided by the following persons, or their successors in interest: (1) The judgment debtor, or his successor in interest. (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. The persons mentioned in the second subdivision of this section are in this chapter termed redemptioners.

"Sec. 5541. The judgment debtor or redemptioner may redeem the property from the purchaser within one year after the sale on paying the purchaser the amount of his purchase with twelve per cent. interest thereon, together with the amount of any assessment or taxes which the purchaser may have paid thereon after the purchase and interest at the same rate on such amount; and if the purchaser is also a creditor, having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien with interest.

"Sec. 5542. If the property is so redeemed by a redemptioner, another redemptioner may within sixty days after the last re-

demption again redeem it from the last redemptioner on paying the sum paid on such last redemption, with like interest thereon in addition, as provided by the preceding section, and the amount of any assesment or taxes which the last redemptioner may have paid thereon after the redemption by him with like interest on such sum, and, in addition the amount of any lien held by said last redemptioner prior to his own interest; but the judgment on which the property was sold need not be so paid as a lien. The property may be again, and as often as a redemptioner is so disposed, redeem from any previous redemptioner within sixty days after the last redemption on paying the sum paid on the last previous redemption with interest at the same rate as provided for the first redemption in § 5541 in addition, and the amount of any assessment or taxes which the last previous redemptioner paid after the redemption by him with like interest thereon and the amount of any liens, other than the judgment under which the property was sold, held by the last redemptioner previous to his own, with interest."

"Sec. 5544. If no redemption is made within one year after the sale, the purchaser or his assignee is entitled to a conveyance; or if so redeemed, whenever sixty days have elapsed and no other redemption has been made and notice thereof given and the time for redemption has expired, the last redemptioner, or his assignee is entitled to a sheriff's deed; but in all cases the judgment debtor shall have the entire period of one year from the date of the sale to redeem the property."

It is clear that § 5541 relates to only cases of redemptions from the purchaser at the sale, and not from a redemptioner. It is only when the redemptioner is redeeming from the purchaser that he is allowed the full year in which to redeem. In the very next section the case of a redemption from another redemptioner is specifically provided for. That section in terms limits the exercise of the right in such a case to the period of 60 days after the last preceding redemption. That it was the purpose of the law-making power to grant to the redemptioner the full period of one

year only in cases of redemption from the purchaser, and to restrict him to the period of 60 days since the last redemption when he redeemed from a redemptioner, is conclusively evinced by the concluding clause of § 5544, which declares: "But in all cases the judgment debtor shall have the entire period of one year from the date of the sale to redeem the property." Placing these provisions of the statute together, the intent of the legislature is very plain. The redemptioner is to have one year when he redeems from the purchaser, but only 60 days since the last preceding redemption when he redeems from a redemptioner; "but in all cases the judgment debtor shall have the entire period of one year from the date of the sale to redeem the property." Our statutes on this subject have a history. Prior to 1873 they constituted §§ 701 to 703, both inclusive, of the Califoruia Code of Civil Procedure, with the exception of the clause last quoted While the statutes remained in this condition in the State of California, the Supreme Court of that state decided that even the judgment debtor himself could not redeem from a redemption after more than 60 days had expired since such redemptioner had redeemed from the purchaser, despite the fact that a year had not elapsed since the sale. *Boyle v. Dalton*, 44 Cal. 332. That court held that the statute put both the judgment debtor and the redemptioner in the same category, whether redemption from the purchaser or from one who was a redemptioner was attempted. Either could redeem from the purchaser within the year. Neither could redeem from a redemptioner beyond the period of 60 days since the last redemption, although the year had not then expired. It was to take the judgment debtor out of this class, in which the statute had previously placed him, and to give him the exceptional privilege to redeem within the year in all cases, whether from the purchaser or a redemptioner, that the statute was amended in California, after the decision of the court in *Boyle* v. *Dalton*, 44 Cal. 332, by inserting therein the provision, "But in all cases the judgment debtor shall have the entire period of one year from the date of the sale to redeem the property." Having

restricted this provision to the case of a judgment debtor, the legislature disclosed a purpose to leave the statute unchanged, so far as the case of a redemptioner redeeming from another redemptioner was concerned. It was in this form that we adopted the statute in this state. The interpretation placed upon it by the Supreme Court of the state from which it was taken is, upon a familiar principle of law, to be deemed as having been adopted as part of the statute itself.. But, aside from this consideration, we would be compelled to construe it as we do. Its language is too unambiguous to justify any uncertainty as to its meaning. The Supreme Court of Minnesota, interpreting a statute practically the same as ours, reached the same conclusion in *Gilfillan* v. *Ryder*, 22 Minn. 87.

We have assumed that a redemption must be made within the period provided by the statute, in the absence of peculiar circumstances calling for a relaxation of this strict rule. On this point it is only necessary to state that, as the right is created by statute, the beneficiary of such legislation must take the privilege burdened with all its restrictions. The two cases already cited enforce this doctrine, and it has been often recognized and applied. *Gilchrist* v. *Comfort*, 34 N. Y. 235; *Morse* v. *Purvis*, 68 N. Y. 225; *Ross* v. *Mead*, 5 Gilman, 172; 2 Freem. Ex'n. §§ 314, 316. The redemption not having been made in time, it follows that the Security Trust Company has no right to a deed of the premises involved, but that the sheriff should execute and deliver the deed to the relators, Brooks Bros. The order of the court awarding the peremptory writ of mandamus is therefore affirmed. All concur.

ON PETITION FOR REHEARING.

Counsel for appellant urges with great earnestness that we have misconstrued the statutes regulating redemptions. Reduced to its ultimate analysis, his claim is that, while a third mortgagee is a redemptioner as to a fourth mortgagee, he is not a redemptioner as to a second mortgagee. This distinction is purely

fanciful. It finds no support in the statute. A redemptioner is therein defined. Every person having a lien by judgment or mortgage on the property is a redemptioner. Section 5540. This embraces a third, as well as a second mortgagee. There is no such classification in the statute as redemptioners absolute and relative redemptioners,—those who are redemptioners with respect to one class of persons, but are not redemptioners with reference to another class. All persons who are redemptioners at all are redemptioners as to the whole world. A third mortgagee is, therefore, as much a redemptioner with regard to a second mortgagee as with respect to a fourth mortgagee. He is a redemptioner as to every one. The statute allows him to redeem the moment the sale is effected. Section 5542, Rev. Codes. If the property "is so redeemed by a redemptioner," another redemptioner has only 60 days after the last redemption in which to make his redemption. The words "is so redeemed by another redemptioner" refer to a redemption by a third as well as one by a second, mortgagee. The shorter redemption period is applicable in every case in which a redemption from the purchaser is effected by a redemptioner, whatever the rank of such a redemptioner's lien may be. If a third mortgagee redeems the property, it has been redeemed by a redemptioner. If not, by whom has it been redeemed? There are only two classes of persons entitled to redeem, *i. e.* the mortgagor and redemptioners. If a third mortgagee is not a redemptioner, then he is not entitled to redeem at all. Would this be claimed? That he may redeem as soon as the sale is completed cannot be successfully controverted. That he must redeem as a redemptioner is likewise true. When he does redeem, the property has been redeemed by a redemptioner. When it has been redeemed by a redemptioner, the explicit language of the statute is that another redemptioner (and a second mortgagee is another redemptioner) has only sixty days after such redemption to redeem. But it is urged that the second mortgagee has no notice of a third mortgage. This, in a restricted sense, is true. But we fail to discover what bearing it has

upon the construction of the statute involved. The legislature has full control over the subject of redemption from execution and mortgage sales. It may declare that all rights shall be divested by the sale, or it may accord to the parties interested in the property any indulgence which appears to it to be wise. The right to redeem after sale is a matter of favor, and the law-making power may prescribe the terms on which such privilege shall be enjoyed. It may declare that in a certain contingency the redemption must be made within a particular period of time, and that in a certain other contingency it must be effected within another prescribed period. This is precisely what our statute has done. Nor have we any right to overthrow the express provisions of the redemption law because to us it may seem to be an impolitic enactment. If any redemptioner suffers loss, it is because of inattention to his own affairs. The meaning of the statute is as plain as the use of language can make it. It declares that, while all parties shall have a full year to redeem from the purchaser, and while the judgment debtor or mortgagor shall have the same period to redeem from any one, a redemptioner shall have only 60 days after the last preceding redemption to redeem from another redemptioner. It notifies the redemptioner that one who takes a lien subject to such redemptioner's lien has the right to redeem from the purchaser, and that after such redemption the time for redemption by a prior incumbrancer is limited to 60 days. It therefore informs him that there is a possibility of a redemption by later incumbrancers, and that he must govern his conduct accordingly. The statute requires a notice of redemption by such later incumbrancer (as well as of all other redemptions) to be filed in a public office, and made a public record. Section 5543, Rev. Codes. The public notice of a redemption which a redemptioner receives as to a redemption by a subsequent incumbrancer is the only public notice which he is given of a redemption by a prior incumbrancer. A redemptioner has the same notice of a redemption by an incumbrancer who is behind him as by an incumbrancer who is ahead of him. Whether

he has actual or constructive notice of the lien which is inferior to his own is immaterial. The only matter in which he is interested is whether there has been a redemption by a redemptioner. The existence of other liens on the property does not affect him the least. The only thing which can affect his rights as a redemptioner is an actual redemption of the property by another redemptioner. The same examination of a public record which will enable him to ascertain whether an incumbrancer ahead of him has redeemed will disclose the fact of a redemption by an incumbrancer whose lien is later than his, if such a redemption has been made. The fallacy of the argument of counsel for appellant lies in the false assumption that notice of the existence of an incumbrance on the property is of any moment whatever. The only notice which the law contemplates that the redemptioner shall have is notice of the fact of a redemption by another redemptioner. This notice is given in precisely the same way when the redemptioner who redeems holds an inferior as when he holds a lien superior to the one held by the person for whose benefit the notice is given. We regard this statute as clear in its meaning as any legislation we have ever been called upon to interpret. The petition for a rehearing is denied. All concur.

(69 N. W. Rep. 692.)

NOTE—See Ch. 121, Laws 1897.

B. F. WARREN *vs.* LESLIE STINSON, *et al.*

Opinion filed November 19th, 1896.

Execution Sales—Vacated for Inadequacy of Price.

While inadequacy of price will not warrant the setting aside of an execution sale for the reason that the opportunity to redeem affords the owner of the property full protection, yet, if he does not know of the sale, and is not chargable with knowledge thereof until the time for redemption has expired, gross inadequacy of price, coupled with unconscionable conduct on the part of the judgment creditor, will constitute a reason for annulling the sale when the judgment creditor buys the property at the sale, and the deed is executed and delivered to an assignee of the certificate of sale, who is not a *bona fide* purchaser, and who is cognizant of all the facts excusing the owner of the property from not knowing of the fact of sale in time to redeem.

Fraud—Ignorance of Fact and Inadequate Price—Cause for Annulment of Execution Sale.

Plaintiff purchased real property on which a judgment was a lien. Defendant, as agent of the judgment creditor, The Altman & Taylor Company, called on him to pay the same. Both went to the former owner of the property, who was under obligation to pay the same as between plaintiff and himself. This former owner promised, in presence of plaintiff and defendant, the agent, to pay it. Plaintiff then departed, leaving the agent and the former owner together. Thereafter the judgment creditor, without notifying plaintiff that the judgment had not been paid, or that it intended to sell his land to satisfy the same, advertised and sold the land under execntion issued upon the judgment. On the sale the judgment creditor bought in the land, and thereafter assigned the certificate to the defendant. Plaintiff did not know of the sale until after the time for redemption had expired. None of the papers relating to the sale were placed on record until after the redemption period had expired. The land was sold for a grossly inadequate price. *Held*, that it was not error to set aside the sale.

Failure to Secure Confirmation of Sale.

Failure to secure confirmation of an execution sale will not of itself warrant the setting aside of the sale. Whether a deed executed without confirmation of the sale is valid, not decided.

Sale Confirmed Upon the Report Alone.

On an application to confirm an execution sale under § 5149, Comp. Laws, the court cannot look beyond the report of sale; and if such report on its face shows that the proceedings were regular, it is the duty of the court to confirm the sale. The application is *ex parte*, and nothing is before the court thereon except the report. No inquiry is to be made as to the facts outside of the report. The order of confirmation settles no question of fact or proposition of law as against the owner of the property sold.

Action to Vacate Sale—When Proper.

While, as a general rule, the proper remedy to set aside an execution sale is by motion, yet under exceptional facts a bill in equity may be filed to accomplish this object. *Held*, that in this case a suit in equity was the proper remedy.

Appeal from District Court, Grand Forks County; *Templeton*, J.

Action by B. F. Warren against Leslie Stinson and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Bangs & Fisk and *Bosard & Burke*, for appellants.

This action will not lie. The appropriate remedy being a motion to set aside the sale and to vacate the order of confirmation. The proceedings not being void cannot be attacked collaterally. *Wilcox* v. *Raben*, 38 N. W. Rep. 844; *Morrow* v. *Moran*, 32 Pac. Rep. 770; *Neligh* v. *Keene*, 20 N. W. Rep. 277; *Willey* v. *Morrow*, 1 Wash. Ty. 474; 2 Freeman on Ex. 310; *Cassidy* v. *McDaniel*, 8 B. Mon. 519; *Prather* v. *Hill*, 36 Ill. 402; *Boles* v. *Johnston*, 23 Cal. 226; *Gould* v. *Mortimer*, 16 Abb. Pr. 448, 26 How. Pr. 167; *Brown* v. *Frost*, 10 Paige 246; *Moody* v. *Butler*, 63 Tex. 210; Van Fleet on Col. Att. 790.

There were no irregularities in the proceedings of the officer. The trial court found the sale irregular in that the property was not sold in parcels of 160 acres. 2 Freeman on Execut's § 296; *Power* v. *Larabee*, 3 N. D. 502. Under the statute, if all proceedings up to the time the order of confirmation is applied for were regular, the court has no discretion but must confirm the sale. § 5539 Rev. Codes; *Kahler* v. *Ball*, 83 Am. Dec. 451.

Burke Corbet, for respondent.

Respondent was not a party to the action in which the judgment was rendered and was not advised in any way of the sale of his land until the redemption period had expired. Under these circumstances it was proper to sue in equity to vacate the sale. *Williams* v. *Allison*, 33 Ia. 278; *Morris* v. *Roby*, 73 Ill. 462; *Fergus* v. *Woodworth*, 44 Ill. 374; *Cowan* v. *Underwood*, 16 Ill. 22; *Douthett* v. *Kettle*, 104 Ill. 356; Freeman on Ex. 310.

The issuance of execution more than five years after the entry of judgment, without leave of court was irregular, § § 5100, 5111, Comp Laws; *Marriner* v. *Coon*, 16 Wis. 465; *Jones* v. *Davis*, 23 Wis. 421. Inadequacy of price coupled with the other circumstances create a presumption that the sale was not fairly conducted, *Stocktons* v. *Owings*, 12 Am. Dec. 303; *Blights Heirs* v. *Tobin*, 18 Am. Dec. 220; *Crary* v. *Sprague*, 27 Am. Dec. 111; *Nesbitt* v. *Dallam*, 28 Am. Dec. 237; *Seaman* v. *Riggins*, 34 Am. Dec. 200; *Smith* v. *Randall*, 65 Am. Dec. 475, 6 Cal. 47; *Swires* v. *Brotherline*, 80 Am. Dec. 603; *Stone* v. *Day*, 5 Am. St. Repts. 17; *Smith* v. *Huntoon*, 134 Ill. 24; *Smith* v. *Perkins*, 26 Am. St. Repts. 794; *Weaver* v. *Nugent*, 13 Am. St. Repts. 799; *Burton* v. *Rogers*, 139 Ill. 554, 29 N. E. Rep. 866; *Kloeping* v. *Stellmacher*, 21 N. J. Eq. 328; *Seaman* v. *Riggins*, 1 Greens Ch. 214; *Howell* v. *Hester*, 3 Greens Ch. 266; *Wetzler* v. *Schaumann*, 24 N. J. Eq. 60. While inadequacy of price alone is not sufficient ground for setting aside a judicial sale. *Hunt* v. *Fisher*, 29 Fed. Rep. 801, inadequacy accompanied by fraud, oppression, or unfairness in the conduct of the sale, will cause its vacation. *Graffam* v. *Burgess*, 6 Sup. Ct. Rep. 686, 18 Fed. Rep. 251, 10 Fed. Rep. 216; *Fitzgerald* v. *Kelso*, 29 N. W. Rep. 943; *Neel* v. *Carson*, 2 S. W. Rep. 107; *Davis* v. *McGee*, 28 Fed. Rep. 867; *Carden* v. *Lane*, 2 S. W. Rep. 709; *Bean* v. *Hoffendorfer*, 2 S. W. Rep. 556.

CORLISS, J. The object of the action the judgment in which is before us for review was to set aside an execution sale and the proceedings subsequent to such sale. The facts do not appear to be in dispute. The premises in question consisted of two quarter sections of land, one of which was owned by H. Edward Anderson, against whom the Altman & Taylor Company held a judgment, and in the other one of which he had an undivided one-half interest. This judgment was a lien on Anderson's interest in these two parcels of real estate. The plaintiff, Warren, became the owner of this property, subject to this judgment. After he became such owner, execution was issued thereon, and under this execution the property was sold to the judgment creditors. The

sheriff appears to have made a report of sale to the court, and on the coming in of this report the following order was made: "On reading and filing the report of John O. Fadden, the sheriff of said county, the person who sold the premises, the property in said report mentioned and described, bearing the date the ——— day of ———, A. D. 1893, and on motion of James H. Bosard, attorney for the plaintiff, it is ordered that said report be, and the same is hereby, in all things confirmed." This order was made without notice to the defendant. This fact, however, as we shall see, is of no importance. After the year for redemption had expired, the sheriff executed and delivered to the defendant, the assignee of the sheriff's certificate of sale, a deed of the property in due form. The learned trial judge rendered judgment in favor of the plaintiff setting aside the sale, and filed a memorandum of the ground of his decision, from which it appears that he took the position that the order of confirmation was void, and that under our statute, to which we will shortly refer, sales under execution are in all respects assimilated to judicial sales, and that, therefore, an execution sale is not complete—is not a sale at all—until it has been confirmed by the court. Conceding, for the moment, the soundness of this view, we are unable to deduce from such premises the conclusion reached by the learned District Judge. The utmost that can be claimed is that the sale in question had not been confirmed. But it had not been set aside. And even if it be conceded that the sheriff has no power to execute a deed until an execution sale has been confirmed, it does not follow that because the deed is void the sale is a nullity. A purchaser at an execution sale secures by his purchase certain rights which the law will protect. The mere failure of the court to confirm the sale will not of itself divest him of those rights. It is true that if the facts show that the sale ought not to be confirmed, but should be set aside, then it is certainly proper to vacate the sale. We are therefore called upon to ascertain something more than the mere fact whether the sale has ever been confirmed. There can be no pretense that it was ever vacated

until the judgment in this case was rendered. That judgment cannot stand alone upon the proposition that the court had failed to approve the sale. It must rest upon the foundation that the sale itself was irregular or illegal. The inaction of the court on the subject of the legality of the sale cannot conclusively establish its invalidity. That must be affirmatively shown by other facts. One of the grounds relied on in this court to show that not only the deed, but the sale itself, should be annulled, is the failure of the sheriff to subdivide each of the two quarter sections, and sell such fragments in separate parcels. No such request was made at any time by the owner of the property, nor have we been able to discover any law which makes it the duty of a sheriff to subdivide a quarter section which is used as one tract, and sell it in separate parcels. However, we do not wish to settle this point in this case. We will merely discuss it. There is no pretense that either of these quarter sections consisted of several known lots or parcels in any other way than every quarter section may be said to consist of four 40-acre parcels or sixteen 10-acre purcels. There is no finding that either of these quarter sections of land consisted of several known lots or parcels. They were merely quarter sections of land, which we must assume, in the absence of any showing to the contrary, were used each as an entire tract. A quarter section is the recognized unit of farm lands in this country. It is in such tracts that the land is acquired from the government; and a sheriff, it would seem, is justified in selling it as one entire parcel, unless it consists of several known lots or parcels. They must be known lots or parcels, otherwise the officer has no guide to shape his course in putting up the land for sale. How minutely must he subdivide a section of land used as one farm,—for we must presume that it is one farm, in the absence of any showing to the contrary? Must he sell in 40 or 10 acre tracts? If, notwithstanding the fact that a quarter section does not consist of several known lots or parcels, a court may set aside a sale because it imagines (for there is no possible certainty about it) that the land would have brought more if sold in 40-

acre tracts. Persons will not bid at such sales. Such rule might prove injurious, and not beneficial, to judgment debtors. It is for this reason that the statute makes it the duty of the sheriff to sell in separate tracts only when the property consists of several known lots or parcels, and not when it is thought by the courts that the land would have brought more if offered in separate pieces. The case before us is not one of the sale of more property than was necessary to satisfy the judgment. The two pieces of land together brought only the amount of the judgment and the expenses of the sale. That they may have been sold for an inadequate price is not of itself decisive. We have practically held that for mere inadequacy of price the law ordinarily gives the owner ample redress by allowing him to redeem within a year after the sale. *Power* v. *Larabee*, 3 N. D. 502–506, 57 N. W. Rep. 789. The law places absolutely in his own hands a perfect remedy against the injustice of a sacrifice of his property. The statute of redemption greatly enlarges his rights. He is not compelled to move with dispatch to vacate the sale for fear that the delivery of the sheriff's deed (which follows close upon a sale where no time for redemption is allowed), and the sale of the land by the purchaser at the sale to an innocent purchaser will cut off his rights. He may wait till the last day of redemption without jeoparding his interests. Neither is he obliged to pray the favor of any court, to invoke its discretion, to throw himself on its indulgence with the risk, and, if there is no other element in the case, the practical certainty of defeat. He can annul the sale by the simple act of redemption, which it is his absolute right to perform. Moreover, the judgment debtor, under our statute, enjoys another advantage. When such a debtor is driven to the necessity of moving to set aside a sale for inadequacy of price because there is no redemption law, he is compelled, if his motion is successful, to allow his property to be sold again; and, if a larger sum is bid on the second sale, he must, if he wishes to hold his property free from the lien of the judgment, pay a greater sum than he would have been obliged to pay to accomplish

this purpose could he have protected himself by proceeding under a redemption law such as ours is. He is, when his land is sold for an inadequate price, the beneficiary of a threefold indulgence: He has the absolute right to protect himself against injury; he has a whole year in which to proceed; he is better off when he redeems than he would have been had he been compelled to submit to a second sale; and he enjoys the peculiar advantage of discharging his property from the lien of the judgment by paying less than the property is worth. One thus favored by the law should be required to be vigilant in protecting his interests. Under ordinary circumstances he should not be heard to plead that he was ignorant of the fact of sale. Knowing that there is a judgment lien against his land, and that the creditor is under no legal obligation to notify him of a single step connected with the sale of his land under the judgment, he must be on the alert to ascertain whether his land has been or is about to be sold. Certainly, it is not a harsh rule which exacts of him such dilligence, such measure of business prudence, in looking after his own interests, as is involved in the not difficult task of discovering within a year of the day of sale that his property has been sold under the judgment, which he knows is a lien against it. He can always absolutely protect himself by paying the judgment; and if he does not pay it he at least knows that a sale may at any time take place, without his being personally notified of such fact. It is customary for the sheriff to make report of the sale, and the law contemplates that an order confirming such sale may be entered. These papers are ordinarily made matters of record about the time of the sale, and it is an almost invariable custom to record the certificate of sale issued at the time the sale is made. For these reasons we do not think that the owner may couple with mere inadequacy of price his own inattention to his personal affairs, resulting in the loss of the right to redeem, and on this basis build up an exception to the rule that inadequacy of price affords no ground for relief, because the debtor might have redeemed. He cannot lose this right of redemption through his

own want of diligence, and then urge its loss as a reason for taking his case out of the rule.

But there are other facts in this case which we think sufficient to excuse the plaintiff from the charge of inattention to his affairs in not knowing of the sale in question until after the time for redemption had expired. The plaintiff was not the judgment debtor. He merely purchased the land subject to the lien of the judgment. The court found that in May, 1893, the defendant, who was at the time the agent of the Altman & Taylor Company, the judgment creditor, called upon plaintiff for a settlement of the judgment; that plaintiff informed the defendant, as such agent, that a man named Cooper was to settle it, and see the land cleared of it, and that plaintiff took defendant to Cooper, and asked him if he would settle the judgment with defendant, and that Cooper replied that he would; that, therefore, plaintiff left the defendant with Cooper, and believed that the matter had been settled, and that, therefore, he gave it no further thought until he was notified of the sale. This notice he did not receive until after the time for redemption had expired. In connection with these facts it is important to note that neither the report of sale, nor the alleged order confirming the sale, nor the certificate of sale was placed on record until after the time to redeem had expired. Nor was plaintiff ever in any manner apprised of the sale by the judgment creditor or the denfendant until after if was too late for him to redeem. These papers were filed just before plaintiff was notified for the first time that he had lost his farm. It is now necessary to refer specifically to the extent of the inadequacy of the purchase price. The judgment was the first lien on both pieces of land. Each piece, the court finds, was worth $2,000. The judgment was a lien on only an undivided onehalf interest in one of these tracts. This one sold for $10. Such a price—$10—for property worth $1,000 is grossly inadequate. The judgment was a first lien upon the whole of the other section. This was worth $2,000. It sold for $251.15. This inadequacy is striking enough, but not so shocking as that with

respect to the other parcel. We would not, however, be inclined to hold that the court should have set aside the sale on this ground alone. But the other elements to which we have referred make out a case of surprise. In our opinion, the plaintiff, under the circumstances, was excusable for being ignorant of the fact that his land had been sold. The judgment creditor, after having witnessed, through its agent, the fact that plaintiff had left such agent with Cooper with the impression on the mind of the plaintiff that he would be no longer troubled by the judgment lien, we think that the judgment creditor owed him the duty of informing him of the intended sale, or that the sale had been made. The advertising the property for sale so soon after this conversation without any notice to the plaintiff, who, the judgment creditors knew, had a right to assume that the judgment would not be enforced against his land, and the failure to place any of these papers on record until after the time for redemption had expired, place the judgment creditor, which merely bought in the property for the amount of the judgment, and its agent, who, with knowledge of all the facts, took an assignment of the certificate, and subsequently the deed, in a position so unfavorable before the court that they should not be permitted to retain this property for, as to one piece, a greatly inadequate, and, as to the other piece, a grossly disproportioned, price. We do not have here the case of a sale originally to a stranger or the purchaser of the property from the judgment creditor by a *bona fide* purchase. The property was bid in by the judgment creditor. The certificate was afterwards assigned to the defendant, who was agent for the judgment creditor in connection with the collection and enforcement of this very judgment. The court finds as to the defendant that he was not a purchaser in good faith for value, and without notice, but that he took the assignment of the certificate with full notice of all the rights and equities of the plaintiff in the real estate sold, and succeeded only to the rights of the judgment creditor. If the land had been sold to a stranger, or if, after it had been bought in by the judgment creditor, an innocent pur-

chaser had secured the tittle, we might hesitate before giving the plaintiff relief as against such a purchaser. The standing of such a person would be much stronger than is the standing of the parties in this case, who bought knowing that, although plaintiff had reason to assume that his property would not be sold, they had not notified him that it would be sold, and who were responsible for witholding from the public records, where they properly belonged, the papers, the filing of which might have given him timely notice of the sale. We are fully aware of the general rule that mere inadequacy of price will not justify the setting aside of an execution sale. 2 Freem. Ex'ns. § 309, and case cited.

Nor is there anything in our decision in this case inconsistent with our ruling in *Power* v. *Larabee*, 3 N. D. 502, 57 N. W. Rep. 789. In that case we expressly qualified the rule that the right of redemption was a sufficient answer to a proceeding to set aside an execution sale for inadequacy of price by the statement that it applied to cases where the owner of the property had knowledge of the sale in time to redeem. We think ordinarily he is chargable with such knowledge from the fact that he knows that his property may be sold at any time without notice to him to enforce the lien of a judgment against it. The judgment creditor has a right to act on the theory that he will look after his own interest, and learn of the sale. But when the creditor knows that the owner assumes, and has reason to assume, that his property will not be sold under the judgment, he cannot, if he gives the owner no notice of the sale, or that he intends to sell, or has sold, urge that the debtor could have protected himself against loss from the sale of the property at a greatly inadequate figure by redeeming the same; and that, if he has lost his right of redemption through ignorance of the sale, it is his own fault. Of course, if this property had been bought by, or was now in the hands of, one who knew nothing of the belief of the plaintiff that his land would not be sold to pay the judgment, the case would be radically different. We might, in favor of such a person, even if he had bought at an inadequate price, hold that the owner was

careless in not ascertaining that the sale had been made in time to redem. That a stranger, ignorant of any irregularity in the sale, who buys at an execution sale, or a stranger who purchases in good faith from a judgment creditor who has bought, stands in a stronger position against an attack upon the sale than the judgment creditor himself, appears to be well recognized; and on principle such a distinction should be made. *Williams* v. *Doran*, 23 N. J. Eq. 385; *Newton's Heirs* v. *Bank*, 22 Ark. 19; *Carden* v. *Lane*, 48 Ark. 216, 2 S. W. Rep. 709. But such a case is not before us. Coupled with very great inadequacy of price, we have circumstances, as we have seen, excusing the plaintiff, as against the defendant, from not knowing of the sale in time to redeem; and to allow this valuable property, under these circumstances, to be swept from him for a paltry sum, would amount to a judicial sanction of a practical fraud. However free from intent to wrong the plaintiff the judgment creditor and the defendant may have been, we cannot shut our eyes to the fact that to insist upon holding this valuable property for this trifling sum is, under the peculiar circumstances of this case, unconscionable. That very slight circumstances justify the setting aside of an execution sale for inadequacy of price in cases where no question of an innocent purchaser is involved, is well settled. *Graffam* v. *Burgess*, 117 U. S. 180, 6 Sup. Ct. 686; *Kloepping* v. *Stellmacher*, 21 N. J. Eq. 328; *Howell* v. *Baker*, 4 Johns. Ch. 118, 2 Freem. Ex'ns. § 309; *Lurton* v. *Rodgers*, 139 Ill. 554, 29 N. E. Rep. 866. Mr. Freeman states the rule with as much precision as is possible in cases of this kind: "If the inadequacy can be connected with or shown to result from any mistake, accident, surprise, misconduct, fraud, or irregularity, the sale will generally be vacated, unless the complainant was himself in fault, or the rights of innocent third parties have become dependent on the sale." Section 309, vol. 2.

We think the action was brought in time. The sale was August 2, 1893. The time for statutory redemption therefore expired August 2, 1894. The plaintiff learned of the sale in September, 1894, and the action was brought early in November of the same

year. The court finds that at once, upon hearing of said sale, and prior to the commencement of this action, plaintiff dilligently endeavored to effect some settlement with said Leslie Stinson, whereby plaintiff would be permitted to pay up and redeem said lands from said sale and sheriff's deed, and that Stinson declined to make any such arrangement, and his attorney, J. H. Bosard, told plaintiff that any such arrangement was impossible. These circumstances do not disclose any laches on the part of plaintiff. It is true that a court of equity may deny relief in these cases, although the action is brought before it is barred by statute. Mr. Freeman says: "Before the statute of limitations interposes any positive bar to the maintenance of a suit to vacate a sale, the court may decline to proceed because of the laches of the complainant. These laches may be fatal to the suit, either because the long delay indicates that the complainant acquieced in or tacitly ratified the sale, or because it has resulted in the purchaser conveying or improving the property, or so altering his condition in other respects that the vacation of the sale is manifestly inequitable." 2 Freem. Ex'ns. § 307a. See, also, § 307; *Lurton* v. *Rodgers*, 139 Ill. 554, 29 N. E. Rep. 866. We do not wish to be understood as holding that mere ignorance of the sale, which can be excused only by showing that the owner of the property was inattentive to his interests, would alone warrant a court in allowing him to obtain annullment of the sale after the redemption period had expired. We limit our ruling to the facts of this case. Under these facts we are clear that the action was commenced in time.

The question of the proper remedy remains for solution. We agree with counsel for defendant that an execution sale cannot be collaterally attacked. But a direct action to set it aside is not a collateral attack. It is as much a direct attack as a motion would be. Nor do we think that under the facts of this case the plaintiff was necessarily driven to a motion in the original action in which the property was sold. We do not wish to be understood as departing from the views expounded by Judge Wallin

in *Power* v. *Larabee*, 3 N. D. 502-512, 57 N. W. Rep. 789. In our judgment, the sound rule is that a party who desired to set aside an execution sale should ordinarily proceed by motion. But this rule is by no means inflexible. Cases will sometimes arise where the person who desires to overthrow the sale may be compelled to resort to an action to secure full redress. When the question is one of mere irregularity, and the steps to set aside the sale are taken before a deed has been delivered, the remedy by motion would seem to be adequate, and hence there would be no reason for invoking the extraordinary jurisdiction of a court of equity. But this case presents other features. The plaintiff was not a party to the action in which the sale was made, nor had he made himself a party in the sense that a purchaser at such a sale makes himself a party. A sheriff's deed had been delivered. The person who held the tittle was not the judgment creditor, but one who might possibly claim to be an innocent purchaser, and whose rights could not, therefore, be fully gone into on a motion heard and decided on affidavits. The plaintiff was compelled to excuse his long delay in attacking the sale, and this question could not be as satisfactorily investigated on the hearing of a motion as on the trial of a suit in equity. While, in many cases, a motion will prove an adequate remedy, yet we think that a court of equity should be very careful not to refuse to take jurisdiction in these cases, lest by driving the parties to a motion a full and fair investigation into the facts be prevented. That the party should proceed by motion in some cases, we have no doubt. See 2 Freem. Ex'ns. § 310. But such a case is not before us. That the learned trial judge sitting as a chancellor was justified in taking jurisdiction of this action under its peculiar facts, we have no doubt. It would have been error for him to have compelled the plaintiff to resort to a motion for relief. See Id.; *Lurton* v. *Rodgers*, 139 Ill., 554, 29 N. E. Rep. 866; *Graffam* v. *Burgess*, 117 U. S. 180, 6 Sup. Ct. 686.

The court did not set aside the sale, but allowed the plaintiff to

redeem. While it is true it is illogical to adjudge a sale to be open to attack, and yet render judgment allowing redemption on the theory of a valid sale, yet this case does not present such a feature. The court, having power to set aside the sale, might, in view of the fact that on plaintiff's own showing the property was sure to bring enough to pay the judgment and expense of sale, give both parties, by its decree, all that they could hope to secure should a sale of the property be ordered. See *Lurton* v. *Rodgers*, 139 Ill., 554, 29 N. E. Rep. 866. If the plaintiff, under the decree which has been rendered, sees fit to redeem, he will secure his property on paying the judgment and expenses; the defendant will be repaid what he has expended; the judgment creditors will be allowed to hold the amount of their judgment received by them from the defendant on the purchase by him of the certificate of sale.

We gather from the argument of counsel for the defendant that it is claimed that the sale has been confirmed, and that, therefore, it is not open to attack. The alleged order of confirmation does not, in terms, confirm the sale. It merely confirms the report of the sale. Nor does it contain the provisions required by § 5149 of the Compiled Laws (§ 5539, Rev. Codes.) It does not, in terms, direct the clerk to make an entry in the journal that the court is satisfied with the legality of the sale, nor does it contain any direction that the sheriff execute to the purchaser a deed of the property. Without passing on the sufficiency of this order as an order of confirmation of sale under the sale, we will assume it to be sufficient. This assumption, however, does not bring us to an agreement with the contention of counsel for defendant. Our statutory order of confirmation of an execution sale has an entirely different effect from a common-law order of confirmation of a judicial sale. Orders belonging to the latter class are made after notice to all parties, and a full hearing of all matters which can in any way affect the legality of the sale. So far as the court has power, on a motion to confirm a judicial sale, to inquire into its legality, the order of confirmation is conclusive on all parties,

because they are all given timely notice of the motion, and an opportunity to be heard thereon. But § 5149, Comp. Laws, does not contemplate any notice to any one, or any hearing as to facts. It provides as follows: "If the court upon the return of any writ of execution, for the satisfaction of which any real property or interest therein has been sold, shall, after having carefully examined the proceedings of the officer, be satisfied that the sale has, in all respects, been made in confirmity to the provisions of this chapter, the court must make an order confirming the sale and directing the clerk to make an entry on the journal, that the court is satisfied of the legality of such sale, and an order that the officer make to the purchaser a deed of such real property, or interest therein, at the expiration of one year from the day of sale unless the same be redeemed as herein provided. And the officer after making such sale may retain the purchase money in his hands until the court shall have examined his proceedings, as aforesaid, when he must pay the same to the person entitled thereto by order of the court." It is apparent from the language of this statute that the court proceeds *ex parte*, and that the utmost scope of its inquiry is to ascertain whether the report of the sheriff shows upon its face that the sale has in all respects been made in conformity to the provisions of that chapter. All the decisions are in harmony on this question under identical statutes. *Buckingham* v. *Society*, 2 Ohio, 360; *Williams* v. *Norton*, 3 Kan. 290; *Challiss* v. *Wise*, 2 Kan. 193; *White-Crow* v. *White-Wing*, 3 Kan. 276; *Koehler* v. *Ball*, 2 Kan. 160; *Rice* v. *Poynter*, 15 Kan. 263; 2 Freem. Ex'ns. §§ 311, 3041. Such an *ex parte* adjudication can bind no one. Certainly it cannot bind the owner of the property, even as to the facts which are set forth in the report, for he has no chance to be heard upon the application to confirm the sale, nor is he given any notice that the application is to be made. Moreover, if he should appear before the court, and offer evidence to show that the report was false, the court would have no power to hear him on that point on the mere application under the statute to confirm the sale. The distinction we have

made is clearly stated by Mr. Freeman in his work on Executions: "In acting upon a report of sale, the court doubtless acts judicially; and in most of the states it does not proceed until notice has been given to all the parties interested in the sale. There therefore exists every reason for giving to decrees of confirmation the effect of final adjudications of all the questions in fact considered and decided, and also of all the questions which the parties ought to have presented for consideration and decision. But their effect as *res adjudicata* is not so conclusive and comprehensive as we might reasonably expect. In Kansas they are entered *ex parte*, and that fact abundantly justifies the court in restricting their effect, and in holding that they amount to no more than a decision that the proceedings, as shown in the return, are not such as require the disapproval of the sale. Upon principle, we do not understand that they can there be given a conclusive effect upon any question whatever, because they lack the essential element of judicial authority, to-wit: notice to the party whose rights are sought to be adjudged. Elsewhere, because made after notice given to the parties in interest, they are conceded a much greater effect." But, even if the defendant had been entitled to and had received notice of the application to confirm the sale, and had also appeared, and had been allowed to contest all questions of fact touching the inquiry whether the sale had been made in conflict with the provisions of the chapter named, yet the order of confirmation entered under these circumstances would not have precluded the investigation here sought to be made. The grounds on which we hold that the sale should be set aside are grounds which a sheriff's report of sale never discloses. Such report in no manner sheds any light on the question whether the property was sold for an adequate price. Nor could the report ever contain any reference to the fact whether the owner of the property had been so misled as to be excusable in not knowing of the sale in time to protect his interests. If, on the application to confirm, the owner of the property could be heard on all matters which the law contemplates shall be embodied in the sheriff's report,

still the order of confirmation would settle no other question of fact or proposition of law. On this branch the case of *Jackson* v. *Ludeling*, 21 Wall. 616–633, is directly in point. In our judgment, § 5149, Comp. Laws, was passed for the protection of judgment debtors. Sales irregularly conducted are not void, and oftentimes the debtor finds that his application to set aside an irregular sale comes too late, because, through inattention to his affairs, he has been guilty of laches. The purpose of this section is to protect debtors against such consequences by rendering it impossible for an irregular sale to be confirmed, and so made effectual, if the sheriff reports the facts as they are, and the judge correctly interprets and applies the law. It is the duty of the court, if on the mere inspection of the report of sale the irregularity is made apparent, to set aside the sale without any application to that effect from the debtor, and without the necessity of his being heard. Section 5142, subd. 2, Comp. Laws, in terms declares that all execution sales made without notice, as provided in that section, must be set aside by the court to which the execution is returnable upon motion to confirm the sale. We also think that the statute has another purpose. It has been held by some courts that when a stranger purchases at an execution sale he is not prejudiced by irregularities of which he had no notice, and for which he was not responsible. Under our statute the stranger who purchases must take his chances of the sale having been so conducted that the court will not confirm the sale. It is obvious that this section can have no other purpose, for an order of confirmation made under it is in no way binding upon the debtor as against a direct attack upon the sale by him. It is purely an *ex parte* order, which embodies no more than the decision of the court that on the face of the return it appears that in certain respects the sale was regular. The soundness of the court's law, and the truth of the facts set forth in the report, may thereafter be contested by the debtor in proper proceedings.

We have not deemed it necessary to pass on the very interesting question whether a deed executed without any confirmation

of an execution sale is void. For the reasons set forth in this opinion, the judgment of the District Court is affirmed. All concur.

(70 N. W. Rep. 279.)

WILLIAM F. KREUGER *vs.* HELMUTH SCHULTZ.

Opinion filed December 28th, 1896.

Adverse Possession—Lands in Indian Country.

There can exist no "adverse possession" of lands, in a private party, while such lands are a portion of the "Indian country," and the right of occupancy in the Indians has not been terminated by the United States.

Possession Under Claim of Title.

Sec. 3303, Comp. Laws, declaring every grant of real property void "if at the time of the delivery thereof such real property is in the actual possession of a person claiming under a title adverse to that of the grantor," has no application where the party in possession relies only upon naked possession, which, upon his own showing, has not continued for sufficient time to ripen into title by prescription under the statute. The possession must be by one claiming under a title.

Judicial Notice.

Courts will take judicial notice that certain described lands were within the "Indian country" and of the date when the Indian right of occupancy was terminated by the general government by treaty.

Appeal from District Court, Ransom County; *Lauder*, J.

Action by William F. Kreuger against Helmuth Schultz. Judment for plaintiff. Defendant appeals.

Affirmed.

Mitchell & Gram, and *P. H. Rourke*, for plaintiff.

J. E. Robinson, and *B. F. Spalding*, for defendant.

BARTHOLOMEW, J. This was an action in ejectment for a tract of land in Ransom County. The land is within the limits of the original grant made by congress to the Northern Pacific Railroad Company on July 2, 1864, and is in one of the old sections covered by the grant. Plaintiff claims title through *mesne* convey-

ances from the railroad company. Defendant claims title by reason of adverse possession, and upon no other ground whatever. Among the instructions given by the court to the jury was the following: "You are further instructed, gentlemen, that unless the jury are satisfied that the defendant was in effective adverse possession of the premises in controversy for the full period of twenty years next prior to the 31st day of October, 1889, the date of the commencement of this action, you must find for the plaintiff." There is no exception to this instruction. The jury returned a general verdict for the plaintiff, and also answered some special interrogations, the first question and answer being as follows: "When did defendant, Schultz, first take possession of the land in question? Answer. After the year 1869." If there was evidence to support this answer,—and there certainly was,—it would seem to be conclusive against defendant's claim of 20 years' adverse possession prior to October 31, 1889. But there is also a legal reason why the defendant could not have acquired any adverse possession of this land in 1869. The land was at that time in the "Indian country," and in possession of the Sisseton and Wahpeton Indians, and so remained until their title was extinguished by treaty,—of which we must take notice,—which was originally entered into September 20, 1872, but was subsequently modified and finally accepted by the secretary of the interior on June 19, 1873, and was ratified by congress on June 22, 1874. 18 Stat. 167. The Supreme Court of the United States, in speaking of other land covered by the same grant, and in possession of the same tribes, said: "The land in controversy, and other lands in Dakota, through which the Northern Pacific Railroad was to be constructed, was within what is known as 'Indian country.' At the time the act of July 2, 1864, was passed, the title of the Indian tribes was not extinguished. But that fact did not prevent the grant of congress from operating to pass the fee of the land to the company. The fee was in the United States. The Indians had merely a right of occupancy,—a right to use the land subject to the dominion and control of the government. The

grant conveyed the fee subject to this right of occupancy. The railroad company took the property with this incumbrance. The right of the Indians, it is true, could not be interferred with or determined except by the United States. No private individual could invade it, and the manner, time, and conditions of its extinguishment were matters solely for the consideration of the government, and are not open to contestation in the judicial tribunals." *Buttz* v. *Railroad Co.*, 119 U. S. 55, 7 Sup. Ct. 100. From this language it is clear that the exclusive possession was in the Indians until the extinguishment of their title, which certainly was not earlier than June 19, 1873. Until that time no private individual could invade that possession, and hence there could have been no adverse possession on the part of the defendant that courts could recognize. The defendant failing to show adverse possession for the time required by law, his claim of title must fall, and it becomes unnecessary for us to discuss the various errors assigned upon the instruction of the court defining adverse possession and its various constituent elements, all of which were given upon the theory that the length of time of such possession should be found in defendant's favor. But defendant was in possession, and could be ejected only by one showing a superior right. This, it is claimed, plaintiff failed to show.

We first notice the pleadings as they stood at the time of the trial. The complaint was exceedingly brief. It alleged that the plaintiff was the fee owner of certain land (describing it,) and that defendant was in possession thereof, and wrongfully withheld the same, and that plaintiff had been damaged in a certain sum. The answer contained no denials, general or special; hence no denial of plaintiff's ownership. True, it alleged ownership in defendant, which was inconsistent with ownership in plaintiff, but that conclusion of ownership was based upon certain allegations of fact in the answer, to-wit, an adverse possession by defendant for more than 20 years prior to the commencement of the action. It is very certain that defendant never intended to deny that plaintiff held the record title. His purpose was to avoid that title

in two ways: First, by showing that his adverse possession had ripened in title by prescription, and that plaintiff was barred, under the statute, from setting up his record title; and, second, he attacked the record title by alleging that the conveyance under which plaintiff claimed was given and received, while the premises were in the actual possession of defendant, claiming the same under title adverse to that of plaintiff's grantor. This latter allegation, if true, rendered the conveyance void, under § 3303, Comp. Laws, then in force. In this state of the pleadings, it is clear that plaintiff's record title stood admitted, and that the burden rested upon defendant to establish one or the other of the matters pleaded in avoidance. As we have seen, he failed in proving the former, the jury having directly found against him. As matter of law, he as completely failed in the latter. It is apparent throughout the case, and is expressly stated in the abstract, that "defendant claims no other than a naked possession of the land, and claims to hold by no other right or title." Section, 3303, Comp. Laws, reads: "Every grant of real property, other than one made by the territory, or under a judicial sale, is void, if at the time of the delivery thereof, such real property is in the actual possession of a person claiming under a title adverse to that of the grantor." This section, ever of doubtful utility, has been dropped from the Revised Codes of 1895. But it could not aid defendant in this case. His possession was not such a one as the law contemplated should defeat a transfer by the true owner. The statute declares that the property must be in the "actual possession of a person claiming under a title adverse to that of the grantor." Under what title was defendant claiming? Confessedly, under nothing but naked possession, which is no title. He could not have been claiming title by prescription, because, under his own testimony, that did not ripen until October 4, 1889, which was subsequent to the conveyance to plaintiff. The statute never was intended to apply to a case where the occupant could base his claim of ownership on nothing higher than a trespass. It cannot be that a deed executed and delivered by the patent holder must be defeated if

it subsequently appear that the day preceding the conveyance a party became a trespasser upon the land, and claimed title to the same by adverse possession. Such a claim would be too absurd for the law to contemplate; yet defendant's position leads directly to it. The object of such statutes was to prevent the transfer of "fighting" titles, whereby the rich and influential might be able to oppress the poor. Consequently, when there were diverging and distinct chains of title, the party whose ownership was not fortified by the strong presumption conferred by possession was prohibited from conveying his interests until he had obtained possession. The transfer was regarded as a species of champerty or maintainance, and received the law's disapproval. The nature and purpose of such statutes are fully discussed in Sedg. & W. Tr. Title Land, § 190. As it is there stated, these statutes have certainly outlived their usefulness; hence courts are entirely unwarranted in giving increased latitude to their operation. See, upon the construction of this statute, *Crary* v. *Goodman*, 22 N. Y. 170; *Higinbotham* v. *Stoddard*, 72 N. Y. 94.

Since the defendant failed to establish by proof any of the allegations by which he sought to avoid the record title of plaintiff, it would seem to be immaterial if plaintiff did fail to make entire proof of such record title, or if the court erred in ruling upon the evidence offered for that purpose. But it is true that plaintiff did assume, in the first instance, to show his record title. Therefore defendant claims that the case was tried below upon the theory that there was a specific denial of the plaintiff's title, and hence the court erred in refusing to permit defendant, after verdict, to file an amended answer denying plaintiff's title. Defendant claimed that the proffered answer represented the issues upon which the case was tried. The court refused to receive it. Under the circumstances, the matter was peculiarly within the judicial discretion of the trial court. The case must be very plain to warrant a reversal. But, had the amended answer been received, the judgment should have been the same. Plaintiff introduced all the deeds to complete the chain of title

from the railroad company to himself. No point is made against these. But it is claimed that he failed to show title in the railroad company. He offered in evidence a properly certified copy, from the general land office, of a list of lands selected by the Northern Pacific Railroad Company, and claimed under the terms of its grant. This was received over defendant's objection of incompetency. It is claimed that we had at that time no statute in this state making such certified copy competent or admissable evidence. We shall not pass upon the point. We confess we do not see the materiality of this evidence. Plaintiff says in his brief that it was offered for the purpose of identifying the land. But the parties were entirely agreed as to the description and location of the land. There was no issue upon that point. Nor was it material or competent on the question of title. As this court said in *Grandin* v. *La Bar*, 3 N. D. 446, 57 N. W. Rep. 241, a selection by the railroad company could not pass title. The title of the railroad company, if it had title, rested in public statutes and treaties, of which the court must take judicial notice. It has frequently been held that the grant to the Northern Pacific Railroad Company of July 2, 1864, was a grant in *præsenti*; that it at once vested the title to the lands granted within the primary limits in the company, subject to be defeated by the terms named in the grant. *Buttz* v. *Railroad Co.*, *supra*; *Grandin* v. *La Bar*, *supra*; *St. Paul & P. R. Co.* v. *Northern Pac. R. Co.*, 139 U. S. 1, 11 Sup. Ct. 389. That the lands in question were at that time within the Indian country, and in the possession of the Indians, is a matter of which the court must take notice. *U. S.* v. *Beebee*, 2 Dak. 292, 11 N. W. Rep. 505; *French* v. *Lancaster*, 2 Dak. 346, 47 N. W. Rep. 395. That such right of occupancy was not terminated prior to June 19, 1873, we have already seen, and such termination rested in a public treaty. As said in *Buttz* v. *Railroad Co.*, *supra*, prior to the termination of the Indian right of occupancy no private right to the land could be initiated, and, upon the termination of that right, *eo instanti* the title vested in the railroad company. No private interest could intervene.

While the offered list was immaterial, it was at the same time harmless, and its admission could not be reversible error.

There were many exceptions to the charge of the court which are here not specifically noticed, but what we have said shows that none of them were well taken.

Judgment affirmed. All concur.

CORLISS, J., concurs in the result, without expressing any opinion on the point whether adverse possession can be initiated while land transferred by the government subject to a right of general occupation by an Indian tribe remains subject to such right.

(70 N. W. Rep. 269.)

DAISY ROLLER MILLS *et al vs.* GEORGE A. WARD.

Opinion filed January 8th, 1897.

Fraudulent Conveyances—Parties to Action.

In an action brought by judgment creditors of the grantors to set aside conveyances of real estate as fraudulent and void, and in which no accounting for rents and profits is asked, it is not necessary to bring in as a party defendant a receiver of the rents and profits of said real estate, appointed long after the conveyances were made, and in an action to which none of the plaintiffs in this action were parties.

Execution in Name of Deceased Judgment Creditor.

Under § 5110, Comp. Laws, where, after judgment is rendered, the judgment creditor dies, execution may properly be issued upon the judgment by the representatives of the deceased, and in his name. Formal proceedings reviving the judgment in the name of the representatives are not now necessary.

Void Transfer.

Following the ruling of this court upon practically the same evidence in *Paulson* v. *Ward*, 58 N. W. Rep. 792, 4 N. D. 100, it is *held* that the conveyances here attacked were executed and received for the purpose of defrauding the creditors of the grantors, and are, as against these plaintiffs, void.

Conveyances Made to Defraud One Creditor Void as to All.

Where, in an action by creditors of the grantors to set aside conveyances of real estate as fraudulent and void, it is shown that the conveyances were executed and received for the purpose of defrauding any creditor of the grantors, then, under § 5052, Rev. Codes, such conveyances are fraudulent as to all creditors of the grantors.

Fraudulent Grantee Cannot Hold Land as Security for Advances.

Where, at the time of the execution of the conveyances of real estate made and received for the purpose of defrauding the creditors of the grantors, the grantee, as a part of the same transaction, agrees with the grantors to pay off certain existing valid encumbrances upon the real estate so fraudulently conveyed, and subsequently, and in pursuance of such agreement, the grantee pays such encumbrances, he cannot, when such conveyances are declared fraudulent and void as against the creditors of the grantors, hold such conveyances as security for the amounts so paid.

Rights of Purchaser of Judgment.

But where, at the suit of one judgment creditor of the grantors, such conveyances are declared fraudulent and void, and the lien of the judgments of such creditor are declared superior to any claim of the grantee under such conveyances, and thereafter such grantee purchases such judgments, and has them assigned to a trustee for his benefit, in such case, when another action is

brought by other judgment creditors of the grantors to set aside the same conveyances, and a decree to that effect is obtained, and the land ordered sold upon executions issued upon the latter judgments, the grantee is entitled to have a provision in such decree declaring the liens of the judgments so purchased and held by him, through his trustee, senior and superior to the liens of any of the judgments held by the plaintiffs in the second action.

Appeal from District Court, Traill County; *McConnell*, J.

Action by the Daisy Roller Mills and others against George A. Ward and others to set aside fraudulent conveyances. From a decree for plaintiffs, defendant's appeal.

Modified.

M. A. Hildreth, for appellant.

An execution issued after the death of the judgment creditor is void, *Stewart* v. *Nuckols*, 50 Am. Dec. 127; *May* v. *State Bank*, 40 Am. Dec. 726; *Meyer* v. *Mintoye*, 106 Ill. 414; *Swink* v. *Snodgrass*, 52 Am. Dec. 190. Hurley, the receiver of the lands of Ward and Hall should have been made a party to this action. In equity actions all persons effecting the status of the property must be brought in and made parties. *Hallet* v. *Hallet*, 2 Paige Ch. 12; *Bailey* v. *Ingley*, 2 Paige Ch. 277; *P. & N. E. R. Co.* v. *Ryerson*, 36 N. J. Eq. 116; *Wilkinson* v. *Dodd*, 40 N. J. Eq. 130; *LaGrange* v. *Merrill*, 3 Barb. Ch. 625; *Armstrong* v. *Hall*, 17 How. Pr. 78. The grantee in a fraudulent conveyance who has paid incumbrances against the property prior to that of the judgment creditor, will be protected to the extent of his advances so made. *Robinson* v. *Stewart*, 10 N. Y. 189; *Loos* v. *Wilkinson*, 113 N. Y. 485; *Hamilton National Bank* v. *Halsted*, 56 Hun. 530, 134 N. Y. 520; *Keene* v. *Wilcox*, 11 Paige Ch. 595; *Clute* v. *Emerich*, 26 Hun. 17; *Phillips* v. *Chamberlain*, 61 Miss. 740. Where there is constructive fraud only a court of equity will protect the purchaser of the property. *Van Kurran* v. *McLaughlin*, 19 N. J. Eq. 193; *Tompkins* v. *Sprout*, 55 Cal. 37; *Cook* v. *Berlin & Co.*, 14 N. W. Rep. 808; *Immigrant Bank* v. *Clute*, 33 Hun. 82; *Cole v. Malcolm*, 66 N. Y. 365; *Twamley* v. *Cassidy*, 82 N. Y. 155.

Carmody & Leslie, for respondents.

By statute an execution can issue after the death of a judgment creditor upon his judgment, § 5110 Comp. Laws. Hurley the receiver was not a necessary party. But if a necessary party the point of his non joinder should have been made by demurrer. Not having been so made it is waived. Sections 4909–4912–4913 Comp. Laws. *Hoard* v. *Clum*, 17 N. W. Rep. 275; *Christian* v. *Bowman*, 51 N. W. Rep. 663; *Beeler* v. *First National Bank*, 51 N. W. Rep. 857; *Cohn* v. *Lipson*, 58 N. W. Rep. 280. Where deeds are void because of actual fraud, they are not allowed to stand as security to the grantee for advances made or responsibility incurred on account of them. *Sand* v. *Codwise*, 4 Johns 534; *Jackson* v. *Ludelig*, 99 U. S. 513.

BARTHOLOMEW, J. The plaintiffs in this case are the Daisy Roller Mills, a corporation; the McCormick Harvester Machine Company, a corporation; J. W. Griggs and E. W. Dyke, co-partners under the firm name of J. W. Griggs & Co.; Helen E. Thompson, as executrix of the estate of Milton H. Thompson, deceased; Cornelia M. Arnold, as administratrix of the estate of Reuben Cole, deceased; Lizzie J. Anderson; and Mabel H. Frances and Harry M. Frances, by Lizzie J. Anderson, their guardian. The defendants are George A. Ward and Jessie S. Ward, husband and wife; H. H. Hall, a son of Jessie S. Ward by a former marriage; Daniel Patterson; and Benjamin Cameron. On December 20, 1888, George A. Ward and Jessie S. Ward, by warranty deed, conveyed to Daniel Patterson about 1,000 acres of land in Traill County. On the same day H. H. Hall conveyed to Patterson, by warranty deed, 320 acres of land in said county. The plaintiffs are, each and all, judgment creditors of the Wards and Hall. The debts upon which their respective judgments are based existed prior to the date of such conveyances, but the judgments have been obtained since that date. The plaintiffs claim that executions were regularly issued upon their respective judgments, and levied upon the real estate described in said conveyances, as the property of the Wards and Hall, and that further proceedings under such executions are held in abeyance

until the powers of a court of equity can be invoked to brush aside such conveyances, which are alleged to be fraudulent and void as against the creditors of the Wards and Hall. As we understand the records, the Wards and Hall make no defense. Patterson and Cameron defended, and the decision of the trial court being against them, they bring the case to this court for trial *de novo*, upon a statement of the case embodying all the testimony offered, and all the proceedings had, in the lower court. These same conveyances were before us in the case of *Paulson* v. *Ward*, 4 N. D. 100, 58 N. W. Rep. 792. In that case, Paulson & Co., judgment creditors of the Wards and Hall, attacked said conveyances as fraudulent and void as to them, and this court affirmed a decree of the District Court so declaring. After such affirmance, Patterson purchased the Paulson judgments at their full face value, and had them assigned to Cameron, in trust for Patterson. It is for this reason that Cameron appears as a defendant herein. He is not otherwise interested in the transaction.

In 1894, in some litigation between the Wards and Hall, on the one part, and Patterson, on the other, a receiver was appointed for the rents and profits of the lands described in the conveyances here in controversy. Defendant Patterson, in his answer herein, and in open court, asked that such receiver be brought in as a party defendant in this case. This the trial court refused, and the point is urged here. But we are unable to see in what manner such receiver is a necessary or even proper party to this litigation. No accounting for rents and profits is asked as against Patterson for any time since such conveyances were made. The sole question here is the validity or invalidity of those conveyances of December 20, 1888, made nearly six years before the receiver was appointed, and with which he was in no manner connected. He is clearly not a necessary party at this stage of the litigation.

The answer of defendant Patterson attempted to raise an issue as to the representative capacity of the plaintiffs, Helen E. Thompson, as executrix, Cornelia M. Arnold, as administratrix,

and Lizzie J. Anderson, as guardian. The records and proceedings of the county court were introduced to show their appointment and qualification respectively. It is urged here that this evidence is insufficient. We are not pointed to the particulars wherein it is defective, nor have we been able to discover them. Moreover, this much is certain: The parties were appointed by the proper court. They qualified, and entered upon the discharge of their respective duties. Under these circumstances, the legality of their appointment cannot be collaterally attacked. *Succession of Dougart*, 30 La. Ann. 268; *Menage* v. *Jones*, 40 Minn. 254, 41 N. W. Rep. 972; *White* v. *Weatherbee*, 126 Mass. 450.

Another preliminary question is raised as against the claims represented by Helen E. Thomson, executrix, and Cornelia M. Arnold, admistratrix. The judgments in these cases were procured in the lifetime of the decedents, and in their names, and the executions in aid of which this action was brought, and which were issued after the decease of the original judgment creditors, were issued in their names, no proceedings having been had, by *scire facias* or otherwise, to revive the judgments in favor of the representatives.

It is urged that an execution issued in favor of a judgment plaintiff then deceased is void; that the death of a judgment creditor suspends the right to issue execution until, by proper proceedings, the judgment is revived in favor of his representatives. No doubt that such was the case at common law. See Freem. Ex'ns, § § 35, 36, where the matter is fully discussed, and authorities cited. But § 5110, Comp. Laws, in force when this action was begun, reads as follows: "The party in whose favor judgment has heretofore been, or shall hereafter be given, and, in case of his death, his personal representatives, duly appointed, may, at any time within five years after the entry of judgment, proceed to enforce the same by writ of execution, as provided in this chapter." No provisions are contained in the chapter for reviving the judgment or substituting parties. Under

statutes similar to this, it has frequently been held that no revivor or substitution was necessary. 4 Wait, Prac. 7. In some cases the statute requires the name of the party in whose interest the writ issues to be indorsed on the execution. *Duryee* v. *Botsford*, 24 Hun. 317; *Meek* v. *Bunker*, 33 Iowa, 169. In other cases the writ is permitted to issue in the name of the representative. *Gaston* v. *White*, 46 Mo. 486. This is matter of detail. Our statutes are silent on the point. They simply declare that personal representatives of the deceased, duly appointed, may proceed to enforce the judgment by execution. We think it was the legislative purpose to permit the writ to issue in the name of the original parties to the judgment in cases of this character.

We need not in this case discuss the detail testimony upon which fraud is predicated. All the testimony introduced in the case of *Paulson* v. *Ward*, *supra*, was introduced in this case. In the former case we discussed the testimony at length, and announced what facts we deemed proven. We need not recapitulate them. From the proven facts in that case, we concluded that the transfers attacked were made by the grantors with intent to hinder, delay, and defraud the plaintiff, and that Patterson, knowing of such intent upon the part of the grantor, actively and purposely aided in its consummation. We need only notice here the points wherein it is claimed the evidence in this case differs from the evidence in the Paulson case. In that case it appeared, as it does in this, that the conveyances were in fact intended as mortgages, and were accompanied by a defeasance, which was not recorded. We commented upon the fact that deeds absolute on their face were taken as security, and no explanation given why the transaction assumed that form. We stated that such fact was a circumstance which might be considered, with the other evidence in the case, as tending to establish fraud. It is claimed that the transaction is explained in this case. The defendant Patterson swears that he took deeds absolute, because he supposed that in case of default it would save foreclosure, and avoid the year given for redemption. This explanation is not very

satisfactory to a chancellor, but, granting its insufficiency, it only removes one of the circumstances in the case indicative of fraud. We think there is sufficient left to warrant the finding of actual fraud.

It is urged, also, that in the former case the evidence showed that Patterson or his agent, Hanson, had actual knowledge of the existence of the Paulson claims at the time the deeds were taken, while in this case it appears that neither Patterson or his agent, Hanson, had at that time any knowledge of the claims of any of the plaintiffs in this case. We cannot concede the latter proposition under the evidence, but, granting it, we are unable to see how it aids appellants. Section 5052, Rev. Codes (§ 4656, Comp. Laws), declares that "every transfer of property or charge thereon made * * * with intent to delay or defraud any creditor or other person of his demands is void as against all creditors of the debtor," etc. Without attempting a full construction of this section, we think this much is clear: If a creditor seeking to set aside a conveyance as fraudulent as against himself shows that the conveyance was made and received for the express purpose of defrauding another creditor, he thereby establishes its fraudulent character as against himself. As we have said, all the evidence in the Paulson Case was introduced as a part of the evidence in this case. If that evidence shows a fraudulent conveyance as to Paulson, the law then declares it fraudulent as to these plaintiffs.

There are, however, certain interesting legal propositions presented in this case that were not in the Paulson Case. At the time of the transfer of the lands to Patterson, and as a part of the transaction, Patterson assumed, by parol, and promised to pay, pre-existing liens and encumbrances against the land, amounting to about $15,000. Upon these claims, Patterson has paid, in principal and interest, large sums of money, and he also paid the taxes for one year. Since all these claims so paid were prior and superior to the claims of any and all of these plaintiffs, and since, if not paid by Patterson, plaintiffs would have been forced to

pay them before they could realize anything upon their own claims, out of the transferred property, it is urged that these payments by Patterson worked no wrong upon or injury to plaintiffs, and that Patterson should be subrogated to the rights of the parties whose claims he has paid, and that his conveyance should be held good as a mortgage to that extent at least, and that if a decree be entered for the sale of the lands, as was done by the trial court, such decree should provide that the amounts so paid by Patterson in extinguishment of superior liens be first repaid to him from the proceeds of such sale. Viewed from the standpoint of plaintiffs' rights alone, there is great, almost irresistible, plausibility in this contention. To require that the amount of the liens subsequently paid by Patterson be first repaid to him from the proceeds of the property would leave plaintiffs in exactly the same position as to those claims that they would have held had the fraudulent transfer never been made. It is clear that plaintiffs have no persuasive equities to oppose this contention of the defendant Patterson. But there are other principles of law almost universally recognized by the courts, which must be considered in any adjudication upon the rights of the defendant.

It must be borne in mind that this is a case of actual fraud, a case where the grantee Patterson actively aided the grantors, the Wards and Hall, in their design to hinder and delay their creditors. Hence the rules that apply in cases of constructive fraud are not applicable to this case. Where the fraud is constructive only, the grantee comes into court with comparatively clean hands, and the courts treat him with leniency. In such cases the fraudulent conveyance has been allowed to stand as security for the purchase price, or for the amount of prior liens or debts of the grantor paid by the grantee, or for taxes paid. *Coiron* v. *Millaudon*, 19 How. 115; *Clements* v. *Moore*, 6 Wall. 312; *Bean* v. *Smith*, 2 Mason, 252, Fed. Cas. No. 1174, also reported 18 Myers' Fed. Dec. bottom page 406; *Tompkins* v. *Sporut*, 55 Cal. 31; *Robinson* v. *Stewart*, 10 N. Y. 189; *Lobstein* v. *Lehn*, 120 Ill.

549, 12 N. E. Rep. 68. This is a case in which a court of equity is asked simply to set aside an alleged fraudulent conveyance. It is brought in aid of executions. If the conveyance be set aside, then the executions from the law courts can reach and appropriate the property. No other relief is asked. The defendant Patterson, the grantee in the conveyances, is not asked to account for the rents and profits accruing since the conveyance to him; nor is he asked to account for the value of the property received. No money judgment is asked. Cases may be found, and they are doubtless well and equitably ruled, where a fraudulent grantee, when called upon to account for rents and profits, or for the value of the property received, has been allowed to reduce the recovery by the amount of liens against the property that he has paid and discharged. *Loos* v. *Wilkinson*, 113 N. Y. 485, 21 N. E. Rep. 392, was a case of actual fraud, and the fraudulent conveyance had been set aside in the same case (see 110 N. Y. 195, 18 N. E. Rep. 99;) and the subsequent proceedings were had to compel the grantee to account for rents and profits, and in such accounting he was allowed credits for repairs and taxes and interest on mortgages on the property which he had paid. The court said: "When the creditors of the grantor come into a court of equity, seeking to compel him (the grantee) to account for rents and profits, the accounting must be on equitable principles; and when he has been compelled to surrender the property conveyed to him, and to account for all the profits he has made, or could have made, or ought to have made therefrom, the ends of justice have been completely attained." This case clearly recognizes the fact that the rule there applied does not obtain in cases where nothing is asked but the concellation of a fraudulent conveyance. We think the case of *Bank* v. *Halsted*, 56 Hun. 530, 9 N. Y. Supp. 852, presents no different principle. In that case, an insolvent father, on the eve of making an assignment, transferred to his son, without any consideration, certain corporate stock, which had previously been hypothecated by the father for a loan of money. Subsequently, the son sold the

stock, paid the amount for which it had been hypothecated, and had a balance in his hands. The creditors of the father sought to make the son account for the full value of the stock, but the court allowed him a credit of the amount paid to release the stock. This was a case when an accounting was asked, and a money judgment. Appellant Patterson relies much upon these cases, but this action is so different in its nature from these cases from New York that it is evident that the ruling in those cases cannot aid appellant. The evidence in this case shows that the gross value of the crops raised upon the land has been about $12,000 per year. If Patterson were required to account to the creditors of the grantors for this sum, he might then confidently rely upon the above cases.

It is not the true province of a court of equity to punish a party for fraud. That is left to the courts of law. Neither will it despoil him of his property. But when it becomes necessary for a party to invoke the equity powers of the court to obtain relief from a position in which he has voluntarily placed himself, —when it becomes necessary for him to assume the position of actor, and appeal to equity for affirmative relief,—then he must come with clean hands. This principle is as old as equity jurisdiction, and knows no exceptions. The very term "equity" bars whatever savors of fraud or wrong. He who appeals to equity for relief from a position in which his own fraud has placed him must ever fail. Equity will leave him where it finds him, irrespective of the financial results to himself. "He that committeth iniquity shall not have equity." In the early and instructive case of *Sands* v. *Codwise*, 4 Johns., at page 598, Chief Justice Kent, in speaking of a claim made by fraudulent grantees that the conveyance be allowed to stand as security for their advances, said: "The denial of this prayer appears to me to result necessarily from a decision against the validity of the deeds. On the ground of absolute fraud, the deeds were void to all intents and purposes. It is the same thing as if no deeds had ever been executed. A fraudulent conveyance is no conveyance, as against

the interests intended to be defrauded. This is the plain language and intelligent sense of the rule of the common law. Rob. Fraud. Conv. 591, 596, 597; *Humberton* v. *Howgil*, Hob. 72b; Dyer, 194, 294, 295a. pl. 16; 3 Coke, 78b. It is impossible that those deeds can be permitted to stand as a security if they are to be adjudged void *ab initio*. If they have no lawful existence, it would be inconsistent and absurd to recognize them for any lawful purpose. I presume there is no instance to be met with of any reimbursement or indemnity afforded by a court of chancery to a *particeps criminis* in a case of positive fraud." In the case already cited from 2 Mason, and Fed. Cas. No. 1174, Judge Story said: "I agree to the doctrine laid down by Mr. Chancellor Kent in *Boyd v. Dunlap*, 1 Johns. Ch. 478, and *Sands* v. *Codwise*, 4 Johns. 536, 549, that a deed fraudulent in fact is absolutely void, and is not permitted to stand as a security for any purpose of reimbursement or indemnity; but it is otherwise with a deed obtained under suspicious or inequitable circumstances, or which is only constructively fraudulent." And also: "In the present case it appears to me that the court is bound by the strict rule. The conveyances were in their very concoction fraudulent. They were, therefore, in the language of the statute, 'utterly void,' as against creditors, and cannot be permitted to stand as a security for any advances subsequently made, or any pretended debts then due. All the reasons of public policy, so forcibly urged in *Sands* v. *Codwise*, 4 Johns. 598, as against such an allowance, command the court to be rigid in denying to those who are guilty of bad faith any such indulgence. Let them reap the due reward of their own misconduct." In *Railroad Company* v. *Soutter*, 13 Wall. 517, a case wherein the railroad company, a fraudulent grantee, was seeking to recover the amount paid by it upon an outstanding mortgage upon the property while in possession, Mr. Justice Bradley, speaking for the court, said: "Who are the complainants? Are they not the very bondholders, self-incorporated into a body politic, who, through their trustee and agent, effected the sale which was declared fraudulent and void, as

against creditors, and made the purchase which has been set aside for that cause? Was it ever known that a fraudulent purchaser of property, when deprived of its possession, could recover for his repairs or improvements, or for incumbrances lifted by him while in possession? If such a case can be found in the books, we have not been referred to it. Whatever a man does to benefit an estate, under such circumstances, he does in his own wrong. He cannot get relief by coming to a court of equity." The same principles are unequivocally announced in the following cases: *Thompson* v. *Bickford*, 19 Minn. 17 (Gil. 1;) *Wood* v. *Hunt*, 38 Barb. 302; *Davis* v. *Leopold*, 87 N. Y. 620; *Allen* v. *Berry*, 50 Mo. 90; *Chapman* v. *Ransom*, 44 Iowa, 377; *Beidler* v. *Crane*, 136 Ill. 92, 25 N. E. Rep. 655; *Ferguson* v. *Hillman*, 55 Wis. 181, 12 N. W. Rep. 389; *Sale* v. *McLean*, 29 Ark. 612. See, also, Bump, Fraud. Conv. (4th Ed.) § 628.

We think these principles must be applied in this case in their full vigor. When the deeds from the Wards and Hall to Patterson were executed, there existed valid liens and incumbrances upon the property conveyed. It was not possible to defraud these secured creditors. Their rights in the property were clearly fixed. But the successful consummation of the scheme to defraud the unsecured creditors, and at the same time secure to the grantors the continual use of the land, and the benefit of the crops raised thereon, required that provision be made whereby the securities would not in the meantime be enforced against the land. Therefore Patterson assumed these incumbrances, and, in addition to deeds absolute of the land, took from the grantors a chattel mortgage for more than $49,000, covering all the personal property then owned by them, and all the crops to be raised by them during a long series of years. The taking of this chattel mortgage and its bearing upon the real estate transaction are fully discussed in *Paulson* v. *Ward*, *supra*. In pursuance of this agreement, Patterson has paid a portion of these secured claims, but all the payments so made by him were in aid of the original corrupt purpose of defrauding these plain-

tiffs. They constitute a part and parcel of the original fraudulent scheme, and are inseparable therefrom. Therefore, when Patterson appeals to a court of equity to be indemnified for such payments, the relief cannot be granted without a violation of plain principles of equity jurisprudence. These principles must apply to the taxes also. Both parties knew that taxation was inevitable, and that the taxes must be paid in order to consummate their purposes. It appears that Patterson paid the taxes or a portion of them for one year. But this must be regarded as a voluntary payment by him, in aid of the original fraud.

There is yet another claim made by appellant Patterson, wherein we think he must prevail. As has been stated, since the final determination in the case of *Paulson* v. *Ward*, *supra*, Patterson has purchased and caused to be assigned to him, or to appellant Cameron in trust for him, the judgments involved in that case. Such purchase was not made in pursuance of the original agreement. In one sense it was not voluntary. It was forced upon Patterson by the decree in the Paulson case. It was not connected with the original fraud. By the purchase, Patterson succeeds to the rights of Paulson also, and no rule of equity prevents the enforcement of these rights. We need not decide in this case whether, in cases of conveyance of real property in fraud of the creditors of the grantor, judgments subsequently obtained against the grantor become liens upon the property conveyed in the order of their rendition, or in the order in which the judgment creditors attack the conveyance. In either case the liens of the Paulson judgments are senior to the liens of any of the plaintiffs in this case. The decree below, so far as it set aside the deeds as fraudulent and void as against these plaintiffs, and allowed appellant Patterson no relief or indemnity, as against plaintiffs, for the payment of the claims which he assumed to pay under his oral contract made at the time of the conveyance to him, and for the payment of the taxes, was in all respects right and proper. But the decree should have declared the lien of the Paulson judgment in the hands of Cameron, as trustee for Patterson, upon

the lands described in such conveyances, to be senior and superior to the liens of the judgments of these plaintiffs. The District Court of Traill County will enter a modified decree in conformity with these views.

Modified and affirmed. All concur.

(70 N. W. Rep. 271.

PLANO MANUFACTURING CO. *vs.* JOHN DALEY.

Opinion filed January 8th, 1897.

Claim and Delivery—General Denial.

In claim and delivery a general denial puts in issue plaintiff's ownership and right of possession, and also the wrongful detention by the defendant, and under such denial defendant may introduce evidence to establish any of the issues so raised.

Chattel Mortgage—Pleading and Proof.

Where, in such an action, plaintiff bases his claim to the property upon a chattel mortgage executed by defendant, and defendant, in his answer, admits the execution of the mortgage, and denies all the other allegations of the complaint, and also pleads certain facts upon which he predicates fraud in procuring the mortgage, if the evidence fails to establish fraud, but does show that defendant never intended to give, and plaintiff never intended to take, a mortgage upon the property in controversy, and that the mistake was not the result of defendant's negligence, then defendant will be entitled to a verdict in his favor, notwithstanding his failure to prove fraud.

Directing Verdict for Defendant.

Evidence examined, and *held*, that the court did not err in directing a verdict for defendant.

Appeal from District Court, Ransom County; *Lauder*, J.

Claim and delivery by the Plano Manufacturing Company against John Daley. From a judgment for defendant, plaintiff appeals.

Affirmed.

Newman, Spalding & Phelps, for appellant.

Hugh Doherty, for respondent.

BARTHOLOMEW, J. Every fact and circumstance surrounding this case, as shown by the record, tends to confirm the justice of the judgment from which the appeal is taken. If that judgment is to be disturbed, it must be by reason of some imperative rule of law. The action was claim and delivery. As we understand it, all the property mentioned in the complaint has been eliminated from the case except the wheat. In this plaintiff claimed a special interest and right of immediate possession by virtue of chattel mortgages executed by defendant. The execution of the mortgages was admitted, but it was claimed that they were obtained by fraud. All the circumstances attending the execution of the mortgage were fully set forth. There was, also, a general denial. After both parties had introduced their evidence, and rested, the court directed a general verdict for defendant. This is the one error assigned, and its consideration necessitates some reference to the testimony.

In the summer of 1893, the defendant became indebted to the plaintiff in the sum of $200 for machinery purchased. On July 28th of that year defendant gave the plaintiff a chattel mortgage securing two notes, of $25 each,—one maturing October 1, 1893, and the other a year later. On August 1, 1893, defendant executed to plaintiff another chattel mortgage securing two notes, of $75 each, maturing at the same dates. The mortgages, as well as those hereinafter mentioned, were drawn upon forms printed with blank spaces, and for the special use of plaintiff in North Dakota. The first portion of the instrument, naming the mortgagor and mortgagee, with their residences, etc., is about in the usual form. Then follow blank lines for the description of property, and, following the blank lines, is the following, in print: "All the crops, of every name, nature and description, now growing, sown, or to be sown, and to be grown, cultivated, and harvested during the years A. D. 1893, 1894, and 1895, and each and every succeeding year until the debt hereby secured is fully paid, on the following described land, now occupied or rented by me, to-wit, —— of section ——, town ——, range ——, county of ——, State

of North Dakota," etc. The mortgages above mentioned were very inartificially drawn, and yet we think their meaning clear. In the first mortgage certain machinery and live stock were described in the blank space, and immediately thereafter was written (the language being corrected) the following: "Also, 25 acres of wheat; also 25 acres of oats. This crop is grown and will be harvested for the Plano Manufacturing Co., of Chicago. This security is good till paid." Immediately followed the printed portion above set forth. In the space left for the description of the subdivision of the section was written "25 acres of wheat, 25 acres of oats." The section, town, and range, were properly filled, being section 1, town 134, range 58. The mortgage of August 1st, covered a binder and two colts, properly described in writing, and, in writing, "Also 10 acres of wheat grown on Sec. 1, 134, R. 58, ready to be harvested." In this mortgage, in the space for the subdivision of the section, was written "Binder, 2 colts, and ten acres of wheat,"—the other blanks being properly filled. The notes secured by these mortgages which matured on October 1, 1893, were not paid. On April 11, 1894, a collection agent of plaintiff called upon defendant for the purpose of extending the notes and taking new mortgages. The only conflict in the testimony relates to what took place at that time. It is undisputed that, at that time, defendant's eyesight was greatly impaired, and that he had recently had an operation performed upon his eyes, and, while he could write his name, he could not read print, or distinguish objects with any accuracy. This condition was well known to the agent, and was spoken of before business was mentioned. The agent had known defendant, as he testifies, for about nine years, and "knew him pretty well." When the agent stated the purpose of his visit, the defendant at once stated that, if additional security was wanted, he could not give it, as he had none to give. He was assured in positive terms (both parties so testify) that no additional security was wanted, and that plaintiff simply wished to extend the notes and renew the mortgage upon the same property. Thereupon the agent proceeded to draw

up new mortgages. These new mortgages covered the same machinery and same live stock described in the original mortgages, but no crop whatever was described in the written portion; but, in the blank left in the printed portion for a description of the subdivision of the section, instead of the matter contained in the old mortgages, the agent wrote in "Northeast ¼," making the renewal mortgages cover all the crops grown on that quarter section until the notes were paid. This controversy arises over wheat the greater portion of which was grown in the year 1895 on this tract of land, it being the quarter section owned by defendant and upon which he resided.

It is perfectly clear that the new mortgages covered property not covered by the old. It is equally clear that defendant never intended to give mortgages on any property not covered by the old mortgages, and equally clear that plaintiff, by its agent, represented and stated to defendant that it did not ask or expect a mortgage on any property not covered by the old mortgages. The presence of additional property in the new mortgages must, then, be the result either of fraud or mistake. If plaintiff took mortgages covering additional property, and knowingly did so, fully understanding, as it must, that defendant did not so intend, it was, under the circumstances of this case, considering the previous conversation, the condition of defendant's sight, his long acquaintance with the agent, and the unquestioned confidence that he placed in him, a gross fraud upon defendant that would avoid the mortgage as to the additional property. On the other hand, if plaintiff's agent inserted the additional property because he believed that it was in the original mortgages, when in fact it was not, and if defendant signed the renewal mortgages believing that they covered only such property as was covered by the old mortgages, then there was a case of mutual mistake, which would equally avoid the new mortgages as to the additional property.

But plaintiff urges that, since defendant pleaded fraud as a defense, he must establish fraud, or his defense must fail. Under

the evidence, it is said, fraud is not conclusively established, and therefore the court should have submitted the case to the jury, with instructions upon the question of fraud. We shall not discuss the evidence further than to say that, on defendant's part, it tended to show a strong case of fraud. On the other hand, the testimony of the agent to some extent, perhaps, qualified the statements of the defendant. We do not indorse counsel's proposition that the defense must fail unless fraud is established. There was a denial in the answer which in effect denied all the allegations of the complaint except the execution of the mortgages. This denied plaintiff's ownership and its right to possession, and also the wrongful detention; and under this denial defendant could prove any special matter that would defeat plaintiff's title or right of possession, or show that defendant did not unlawfully detain the possession. We believe this to be the correct and general rule under code pleading, while it may depart somewhat from the technical rule governing the pleadings in actions of replevin at common law. *Branch* v. *Wiseman*, 51 Ind. 1; *Holmberg* v. *Dean*, 21 Kan. 73; *Jansen* v. *Effey*, 10 Iowa 227; *Bailey* v. *Swain*, 45 Ohio St. 657, 16 N W. Rep. 370; *Richardson* v. *Steele*, 9 Neb. 483, 4 N. W. Rep. 83; *Aultman* v. *Stichler*, 21 Neb. 72, 31 N. W. Rep. 241; *Merrill* v. *Wedgwood*, 25 Neb. 283, 41 N. W. Rep. 149; *Pulliam* v. *Burlingame*, 81 Mo. 111. Indeed, some of the cases hold that special matter in an answer going to show that plaintiff has no right of property or of possession, or that there is no wrongful detention, is improperly pleaded; that it amounts to a pleading of evidence, as all the facts could be shown under a general denial. See *Aultman* v. *Stichler*, *supra*; *Kennedy* v. *Shaw*, 38, Ind. 474; *Davis* v. *Warfield*, *Id.* 461; *Lane* v. *Sparks*, 75 Ind. 278. In this case the evidence to show mistake not only came in without objection, but came largely from plaintiff's witness. It was entirely competent for defendant to show that the mortgages were the result of a mutual mistake, and that the minds of the parties never met in agreement upon any such terms.

But it is urged by appellant that this mistake was due to the negligence of defendant, and therefore he cannot be relieved therefrom. This contention, in this particular case, has no principle of equity or justice to commend it. The mistake, conceding that it was a mistake, and not a fraud, consisted in giving the mortgagee more than the mortgagor intended to give him, and more than the mortgagee asked for or expected to receive. When the mortgagor seeks to correct this mistake, so far as to exclude from the operation of the contract this excess, it is difficult to see any principle of justice upon which the mortgagee can resist it. But, conceding the technical rule of law to be as appellant claims, it is clear, under the evidence, that the mistake was not caused primarily by the negligence of defendant; and this conclusion is based upon the evidence of appellant's witness. We exclude from our consideration the positive testimony of defendant showing that he was not negligent. As we have stated, both parties testified that defendant said he could give no additional security, and that the agent said, in effect, that he simply wanted renewals covering the same property. Defendant did not have the original mortgages. They had been delivered to plaintiff. Plaintiff was chargeable with knowledge of their contents. The agent says that he does not think that he had the old mortgages with him. Defendant thinks that he had, but we assume that he had not. He nowhere claims that he informed defendant that he did not have the old mortgages. He says that he had a brief description of the property covered by the mortgages on the back of one of the notes or upon a slip of paper. He says that, so far as the crop was concerned, the memorandum simply said, "Crops 1—134—58," and that he did not know on what quarter section the crops were. He testifies that defendant gave him the description of the quarter section and of the property described in the mortgages. On cross-examination he says that he so swears because the description is in the mortgages, and he did not know it, and there was no one else to give it to him. It may well be that defendant gave him the description of the land

that he owned and resided upon. That would be entirely proper to fix defendant's residence and locate the property (stock and machinery) described in the old mortgages. He does not testify that defendant authorized him to include in the mortgages all crops to be grown on that land for a series of years. As already stated, that was included in the printed portion of the mortgage. It was only necessary to insert the description to complete the instrument. That there was, in fact, no special conversation or instructions concerning the crops is strongly evidenced by the mortgages themselves. They were given April 11, 1894, but covered the crop on the land described for the year 1893,—a crop already sold or consumed. That was simply because the year 1893 was in the printed form. No jury could properly have found, from plaintiff's evidence alone, that it was through defendants's negligence that the mortgages covered the crops on that quarter section for the year 1895.

But it is said that he was negligent in not discovering the mistake before the mortgage was delivered. This is based upon the fact that he called his daughter to witness the mortgages. She could readily read the instruments, and it is said he was negligent in not asking her so to do. Under the circumstances, we think that fact no evidence of negligence whatever. The condition of defendants's eyes was well known to the agent. He could not help knowing that defendant trusted to his honesty and accuracy. There had been a full understanding that the new mortgage should cover only what was in the old. If, under the circumstances, plaintiff's agent, either by fraud or mistake, included in the mortgages anything that ought not to have been there, plaintiff is in no position to say that defendant was negligent in not discovering it.

The judgment of the District Court is affirmed. All concur.

(70 N. W. Rep. 277.)

W. S. CONRAD *vs.* CHARLES W. SMITH, SHERIFF.

Opinion filed April 15th, 1897.

Fraudulent Conveyance—Change of Possession—Presumption of Fraud—Prospective Statute.

Where at the time of the sale of personal property, and of the attachment thereof as the property of the vendor, and of the first trial of the action brought by the purchaser against the sheriff for conversion, the statutes declared that the fact that a sale was not accompanied by an immediate delivery, and followed by an actual and continued change of possession, should create a conclusive presumption of fraud, and that the sale should for that reason be void, *held*, that under such statute the attaching creditor obtained a vested right which could not be affected by a subsequent act converting the conclusive presumption of fraud into a rebuttable presumption of fraud. Such a statute is not a mere regulation of the law of evidence, but forms part of the substantive law. *Held*, further, that the new statute did not relate to past sales, but was prospective in its operation. A creditor whose claim accrued before the sale, and who did not subsequently to the sale alter his position to his detriment, is nevertheless a creditor, within the meaning of the statute.

Appeal from District Court, Cass County; *McConnell*, J.

Action by W. S. Conrad against Charles W. Smith, sheriff of Cass County. Judgment for plaintiff. Defendant appeals.

Reversed.

J. W. Tilly, for appellant.

This case is controlled by § 4657, Comp. Laws. To apply the amendment as contained in Ch. 78, Laws 1893, to this case would be to give the amendment retroactive effect. A statute should not receive such construction as to make it impair existing rights. New obligations, impose no duties in respect to past transactions unless such plainly appears to be the intention of the legislature. South. on St. Cr. § 464; Potter's Dwaris on Stats. 162, n. g.; Matter of *Oliver Lee & Co.* v. *Bank*, 21 N. Y. 9. The attaching creditor by the seizure in attachment of the stallion acquired a lien and vested right therein that could not be divested by subsequent legislation. *Ryan* v. *Maxey*, 35 Pac. Rep. 514; *Daggy* v. *Ball*, 34

N. E. Rep. 246; *Duggey* v. *Mechanics, etc. Co.*, 32 S. W. Rep. 5; Sedgwick on St. Cr. 188; 23 Am. & Eng. Enc. L. 448.

Ball, Watson & Maclay, for respondent.

The debt of McKee to the Brunswick, Balke Collender Co., having been incurred long prior to Oct. 1st, such company was not a creditor of McKee's within the meaning of that word as found in § 5053, Rev. Codes. The language of this section is substantially the same as that of § 4733, Rev. Codes. One whose debt was not incurred while a chattel mortgage was withheld from record, and who did not alter his position to his detriment after the mortgage was given and before it was filed, was held not a creditor within the meaning of this section. *Union National Bank* v. *Oium*, 3 N. D. 193, 54 N. W. Rep. 1034. Our constitutional provision involved in this controversy is that "no bill of attainder *ex post facto* law, or law impairing the obligation of contracts shall ever be passed." Section 16, Const. There is no constitutional inhibition against the passage of retroactive laws in this state provided such laws do not destroy contract obligations. *Bay City* v. *Austin*, 21 Mich. 390; *Welch* v. *Wadsworth*, 30 Conn. 149; *Bennett* v. *Fisher*, 26 Ia. 497; *State* v. *Squires*, 26 Ia. 340. Cooley's Const. Lim. § 370. The act of 1893 in its retroactive aspect, destroys no vested right but is in its essence and operation a remedial statute relating alone to a rule of evidence. The right to have ones controversies determined by existing rules of evidence is not a vested right. Cooley's Const. Lim. § 367; *Webb* v. *Den*, 17 How. 576; *Howard* v. *Moot*, 64 N. Y. 262; *Peo* v. *Mitchell*, 45 Barb. 208; *Failes* v. *Wadsworth*, 23 Maine—; *Millard* v. *Hawley*, 24 N. H. 351; *Rich* v. *Flanders*, 39 N. H. 304; *Daniels* v. *Nelson*, 98 Am. Dec. 577. A defense upon a mere formality may be taken away. *Tift* v. *City*, 82 N. Y. 204; *Irwin* v. *Pierro*, 47 N. W. Rep. 154; *Larkin* v. *Saffaraus*, 15 Fed. Rep. 150; *Finlayson* v. *Peterson*, 67 N. W. Rep. 953, 5 N. D. 587; Cooley's Const. Lim. 370. Note to *Gasher* v. *Stowington*, 10 Am. Dec. 136. A person cannot have vested rights contrary to equity and justice.

U. S. Mortgage Co. v. *Gross*, 94 Ill. 483; *Baugher* v. *Nelson*, 9 Gill. 299. Contracts bad or defective in form or made void by penal enactment may be validated and confirmed by subsequent legislation. *Dentzel* v. *Waldie*, 30 Cal. 139; *Ewell* v. *Daggs*, 108, U. S. 143; *Waterson* v. *Mercer*, 9 Pet. 110; Myer's Vested Rights, 42; *Satterlee* v. *Mathewson*, 2 Pet. 380; Suth. St. Cr. 617.

CORLISS, C. J. This cause is before us a second time upon substantially the same facts. 2 N. D. 408, 51 N. W. Rep. 720. On the former appeal we held that the case fell within the provisions of § 4657, Comp. Laws, and that, therefore, a conclusive presumption of fraud arose in favor of the attaching creditor who was a creditor of the vendor of the property attempted to be sold. The action was against the sheriff for the conversion of a stallion. The sheriff justified under a warrant of attachment issued against one J. H. McKee, once the owner of the stallion, and upon the trial he took the position that the alleged sale of the animal to plaintiff by McKee was by the law conclusively presumed to be fraudulent, and therefore void as to creditors of McKee, for the reason that the sale was not accompanied by an immediate delivery, and followed by an actual and continued change of possession of property. On appeal we held that the evidence fully warranted the contention of the defendant, and the case was therefore reversed, and a new trial ordered. Before the cause came on for a second trial, the legislature repealed the statute in question, and enacted a substitute for it, from which was eliminated the element of conclusive presumption of fraud. The new statute is § 5053, Rev. Codes, and is couched in the following language: "Every sale made by a vendor of personal property in his possession or under his control, and every assignment of personal property, unless the same is accompanied by an immediate delivery and followed by an actual and continued change of possession of the property sold or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor or assignor, or subsequent purchasers or incumbrancers in good faith and for value, unless those claiming under such sale or

assignment make it appear that the same was made in good faith and without any intent to hinder, delay or defraud such creditors, purchasers or incumbrancers." On the second trial the plaintiff was permitted to introduce evidence that the sale from McKee to himself was made in good faith, and without any intent to hinder, delay, or defraud creditors, purchasers, or incumbrancers. The theory on which the trial court proceeded in allowing this evidence to be introduced was that both of the statutes referred to were statutes regulating evidence, and that, therefore, the one establishing a new rule of evidence before the second trial must govern that trial of the case, although on the first trial a different rule of evidence prevailed because of the statutory conclusive presumption of fraud declared by the law as it stood at that time. Counsel for defendant challenges by this appeal the correctness of this position, and here insists that at the time of the repeal of the old statute and the enactment of the new the creditor whom the defendant represents had become vested with such rights under the provision of the original statute as are protected by the fundamental law against destruction or impairment. It is evident that the pivotal point is the legal character of these two statutes. If they merily establish rules of evidence, then a familiar principle of law requires us to give effect to the one in force when the second trial was had, unless it is apparent that it was designed that the new rule of evidence should not apply to existing causes of action or existing suits. No one has such a vested right in a mere rule of evidence as is protected by the organic law. Judge Cooley ably states and illustrates the doctrine in his work on Constitutional Limitations. He says, at page 452: "It must also be evident that a right to have one's controversies determined by existing rules of evidence is not a vested right. These rules pertain to the remedies which the state provides for its citizens; and generally, in legal contemplation, they neither enter into and constitute a part of any contract, nor can be regarded as being of the essence of any right which a party may seek to enforce. Like other rules affecting a remedy,

they must, therefore, at all times, be subject to modification and control by the legislature; and the changes which are enacted may lawfully be made applicable to existing causes of action, even in those states in which retrospective laws are forbidden. For the law as changed would only prescribe rules for presenting the evidence in legal controversies in the future, and it could not, therefore, be called retrospective, even though some of the controversies upon which it may act were in progress before. It has accordingly been held in New Hampshire that a statute which removed the disqualification of interest, and allowed parties in suits to testify, might lawfully apply to existing causes of action. So may a statute which modifies the common-law rule excluding parol evidence to vary the terms of a written contract, and a statute making a protest of a promisory note evidence of the facts therein stated. These and the like cases will sufficiently illustrate the general rule that the whole subject is under the control of the legislature, which prescribes such rules for the trial and determination as well of existing as of future rights and controversies as in its judgment will most completely subserve the ends of justice." Indeed, it has been held that under constitutions which in terms inhibited the enactment of retrospective laws, changes in rules of evidence might be made applicable to existing cases. *Webb* v. *Den*, 17 How. 576; *Rich* v. *Flanders*, 39 N. H. 304; *De Cordova* v. *City of Galveston*, 4 Tex. 470; *Brandon* v. *Green*, 7 Humph, 130. See, also, *Shields* v. *Land Co.*, (Tenn.) 28 S. W. Rep. 668. In truth, a law relating to evidence cannot be said to have a retrospective effect, when it is applied to subsequent trials notwithstanding the fact that the action was pending when the law became operative. The whole force of such a law is directed to the future,—to the trial of the cause. Its incidental and consequential operation upon the rights of the parties the general law takes no notice of. These remote, contingent, and indirect results are not considered by the courts as affecting constitutional rights. Judge Cooley says: "For the law as changed would only prescribe rules for presenting the

evidence in legal controversies in the future, and it could not be called retrospective, even though some of the controversies upon which it may act were in progress before." Cooley, Const. Lim. p. 452. But we are not called upon in this case to determine whether a change in a rule of evidence is nevertheless inoperative as to existing suits, despite the fact that the fundamental law in terms forbids the enactment of retrospective statutes. Our constitution contains no such article. The crucial question is whether the statute in force when the attachment was made (§ 4657, Comp. Laws.) was a mere regulation of the law of evidence, and therefore subject to change as to existing causes of action, or whether it was not a part of the substantive law under which the creditor by attachment secured a lien which could not thereafter be affected without violating both the state and the national constitutions in their respective articles which protect property rights. See *Ryan* v. *Maxey*, (Mont.) 35 Pac. 514. Section 4657, Comp. Laws, reads as follows: "Every transfer of personal property other than a thing in action, or a ship or cargo at sea, or in a foreign port, and every lien thereon, other than a mortgage thereon, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any person on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or incumbrancers in good faith subsequent to the transfer." It is true that upon a superficial view of the statute it would seem to declare only a rule of evidence. But the mere form of expression is not decisive. It is the substance of the law that is controlling. While a conclusive presumption of fraud is created by the statute, the vital part of the act is that which declares that the sale is void. The sale being void as to

the classes of persons named in the statute, it is beyond the power of the legislature to change the act, and render the sale valid, as against one who has in the meantime secured a lien upon the property. At the time the property in this case was attached the sale was void as to the attaching creditor, and the property was therefore, as to him, the property of the vendor, the defendant in the attachment. It was not in the power of the legislature to divest the lien so created by subsequently declaring the property to be that of the vendee, or by allowing the vendee by proof to establish as to the creditor the validity of a sale declared to be void as to him by the law. Moreover, as the statute was a part of the substantive law, the presumption is that the legislature did not intend to so change it as to effect vested rights. It is only when an act relates to matters of evidence that its language will be construed as embracing existing cases, unless the language compels this construction. So far from showing a legislative purpose to effect past sales, the language of the new statute is clearly prospective. It relates to future sales. Having power to make a new rule as to sales thereafter made, but having no constitutional competence to give that rule retroactive effect so as to destroy vested rights, we must assume that the legislature intended to legislate with respect to future sales only. This view is entirely consistent with the terms of the statute.

That the statute in force when the levy was made was a part of the substantive law is clear. It declared that sales in violation of its provisions were void, not only as to creditors, but also with respect to purchasers. Had the attaching creditor in this case, instead of levying on the stallion, purchased the animal in good faith and for value at the time the levy was made, there could be no question concerning his title. Whether or not he obtained title in the supposed case would not depend upon the future pleasure of the legislature, but would be settled by the law then in force. The law which declared the sale void as to him would vest in him a title to the property purchased from the common vendor, and no subsequent legislation could wrest that title from

him. But the sale in violation of the statute was declared to be just as void as to creditors as with respect to purchasers. Both classes are placed in the same category. It follows that, if the act is substantive law so far as purchasers are concerned, it must likewise be substantive law with respect to the rights of creditors. All rights acquired under its provisions, whether by purchase or by levy of process, were equally entitled to protection against impairment by subsequent legislation. If the legislature could at any time take away the right of the creditor to treat the sale as void, it follows that years after the sale of the property on execution the creditor, the sheriff, and the purchaser would, by a change in the law, become liable for the conversion thereof in a suit by the vendee, although at the time of the levy and of the sale under execution the statute declaring the sale to the vendee void as to creditors was in force. The rights of the attaching creditor having been fixed by the act in force when the levy was made, the court should not have received the evidence bearing on the question of good faith, but, as the same facts were disclosed as on the first trial, should have directed a verdict for the defendant, the law of the case having been settled by this court on the former appeal.

It is urged, however, that the attaching creditor was not a creditor within the meaning of the statute, for the reason that it appeared that his claim was in existence when the sale was made, and that he thereafter did nothing to his detriment, relying upon the apparent continuation of the ownership of the property by his debtor, the vendor; and in this connection our decision in *Bank* v. *Oium*, 3 N. D. 193, 54 N. W. Rep. 1034, is cited. But the statute in force when this sale was made is radically different from the act now in force and also from the statute construed in *Bank* v. *Oium*. Its language is that the sale shall be void, not against creditors simply, but "against those who are his creditors while he remains in possession." Not only those who become creditors after the sale and those who, being creditors, thereafter change their situation, but all who are creditors during the time

the vendor remains in possession, without regard to other circumstances, are within the statute. That an antecedent creditor was in all cases intended to be included within the statute is obvious from the fact that an assignee or trustee for the benefit of creditors was declared to be within the provision of the act. Certainly, if every creditor, without reference to the time when his debt was created, or with regard to the question whether he has altered his position to his detriment while the vendor retained possession, could, through an assignee, overthrow a sale in violation of the statute, the inference is irresistible that such a creditor was intended to be within the protection of the law when he should individually assail the transfer. And the language of the law supports this inference.

The judgment of the District Court is reversed, and a new trial is ordered. All concur.

(70 N. W. Rep. 815.)

ELMER NEARING *vs.* WALTER COOP, *et al.*

Opinion filed April 16th, 1897.

Action for Rent—Possession of Landlord.

In this state when the purchaser of land under a contract for a deed goes upon the same, and crops it for a number of years, and exercises all the acts of ownership and possession over the same necessary to obtain the full beneficial use of the land, he is in actual possession thereof, although he may never have lived upon the land or fenced any portion thereof.

Party in Possession Right to Control Land.

A party, while thus in possession, has a right to the full control of the land, and may lease the same; and neither his tenant nor the vendor can defeat an action to recover the rent by showing that such vendee was in default under his contract, and that the vendor had the legal right to dispossess him by foreclosure or otherwise. So *held* in an action where the tenant claimed to have leased from both parties, and agreed to pay rent to the vendor only in case he had the better right thereto.

Appeal from District Court, Barnes County; *Rose*, J.

Action by Elmer Nearing against Walter Coop and the New

England Mortgage Security Company. Judgment for plaintiff, and defendant's appeal.

Modified and Affirmed.

Young & Burke, for appellants.

Winterer & Winterer, for respondent.

BARTHOLOMEW, J. This action was originally brought in justice's court, to recover rent for a certain quarter section of land in Barnes county for the year 1895. The trial resulted in a judgment for plaintiff, and the defendants appealed to the District Court, where the case was tried by the court without a jury, and plaintiff was again successful, and defendants bring the case to this court for trial *de novo*. The testimony shows that in 1891 the plaintiff purchased from the defendant the New England Mortgage Security Company the said quarter section of land for the consideration of $900.00. The purchase was evidenced by a written contract, on what is known as the "crop payment plan." By the terms of the contract, the purchaser agreed to farm the land in proper manner, and deliver to the vendor the one-half of all the crops grown upon the land each year, until the value of the crops so delivered should extinguish the purchase price and interest. The purchaser was also to pay the taxes, and, upon full compliance by the purchaser, the vendor was to convey by good and sufficient warranty deed. The contract also contained the following provision: "But should default be made in the delivery of said several payments of grain, or any of them, or any part thereof, as herein agreed, or in any of the covenants herein to be by the party of the second part kept and performed, then this agreement to be void, at the election of the party of the first part; time being the essence of this agreement. And in case of default by said second party, in whole or in part, or any or either of the covenants of this agreement by him to be kept and performed, he hereby agrees, on demand of said first party, to quietly and peaceably surrender possession of the said premises, and every part thereof." Under this contract, the purchaser went

into possession of the land, and cropped the same for the years 1892, 1893, and 1894. At the beginning of the cropping season of 1895 he was in default under his contract in not having delivered to the vendor the one-half of the crop raised on the premises in 1894, and in not having paid the taxes. About April 15, 1895, the vendor, the New England Mortgage Security Company, leased the land to the defendant Coop. There were no buildings or fences on the tract. Plaintiff, Nearing, lived upon an adjoining tract, and near the line between the two. Soon after the execution of the lease to him, Coop went upon the premises, and commenced plowing. The second day after he began, he had a conversation with Nearing, in which Nearing told him that he (Nearing) held the tract by contract; that he had bought it, and paid over two hundred dollars on it, and intended to pay the balance. Coop replied that he had rented it of Mr. Young. Mr. Young was the agent of the New England Mortgage Security Company. Nearing replied that Young had nothing to do with it. According to Nearing's testimony, Coop then said, "I will rent it of you if you want to rent it." Nearing replied, "All right, I will rent it to you." Coop then stated the terms upon which he had rented from the security company, and Nearing told him that he could have it from him on the same terms; whereupon Coop said he would take it, and thereafter went on and raised the crop. Coop's testimony differs from Nearing's in this: that he claims that the contract was not positive, he stating to Nearing that he would pay him (Nearing) the rent if he showed the better right thereto. The rent was not paid to Nearing in the fall, and he brought this action to recover. Coop only was made defendant. Plaintiff, in his complaint, alleges that he was in peaceable possession of the property at the time Coop went upon the same. Defendant Coop answered, denying plaintiff's possession or his right to possession, and alleging the lease from the New England Mortgage Security Company, and claiming that he raised the crop under that lease. The New England Mortgage Security Company made application, and was permitted to file an anwer

in such case, and become a co-defendant therein. The legality of this proceeding is not before us, and we express no opinion as to whether or not the New England Mortgage Security Company was properly permitted to become a defendant in the case. The answer of the mortgage company, so far as it is material to this decision, alleges that the contract of purchase between itself and the plaintiff, Nearing, had been cancelled, rescinded, and abandoned prior to the lease to co-defendant, Coop. These matters were all denied by reply.

As we view the case, the controversy hinges upon one point, and that is whether or not plaintiff, Nearing, was in actual, peaceable, and lawful possession of the premises at the time Coop went thereon, and commenced plowing. The allegation that the contract of purchase had been rescinded or abandoned is not, in our judgment, sustained by the evidence, and the turning question in the case must be decided under the terms of that contract. That plaintiff was in default at that time is undisputed. Being in default under the contract, the vendor might have foreclosed said contract, and thereby obtained possession by decree of court. Perhaps, under the contract, he could have maintained an action under our statute in the nature of ejectment, and in such proceedings have obtained possession. We do not, however, decide this latter point.

We think the facts and conditions upon which possession of premises without buildings and unfenced can be predicated are well settled by the decisions, and may be generally summarized as follows: Where a party exercises such acts of ownership and dominion over the premises as are necessary, proper, and usual in order to obtain the full benefit of the use for which such premises are fitted, he is in actual possession thereof. The following cases well illustrate this point: *Goodrich* v. *Van Landigham*, 46 Cal. 601; *Bradley* v. *West*, 60 Mo. 59; *Brown* v. *Volkening*, 64 N. Y. 80. The undisputed evidence shows that plaintiff, Nearing, had for more than three years exercised all such dominion over the premises in controversy. He had farmed the

same, either by himself or through his agent. The premises, at the time Coop went thereon, showed unmistakably that they had been so used. The greater portion of it was stubble ground. About 15 acres had been summer-fallowed the previous season. In this state parties are not required to fence farm land. It was not possible, under the circumstances, for Nearing to exercise further or different acts of ownership or possession than those he had exercised. He was therefore in actual, peaceable possession, unless his contract *ex vi termini* had terminated such possession.

It is urged that time is of the essence of the contract, and appellants seem to think that such fact has a material bearing upon the rights of the parties in this case. We are unable to see in what manner. If, in this case, the parties were litigating or could properly litigate the question of the existence of a default under the contract, then such provision would be material, as tending to show that, to avoid a default, the vendee must perform every covenant on his part at the exact time fixed by the contract. But we regard the existence or nonexistence of default under the contract of purchase as entirely immaterial for the purposes of this action. It has been frequently held that where land is conveyed by contract specifying the time and manner of future payments therefor, which the grantee undertakes to make, the grantor agreeing that, upon the making of such payments, he will convey to the grantee by deed, the grantee at once upon the execution of the contract becomes the equitable and beneficial owner thereof, and that the grantor holds the legal title in trust for the grantee, and as his security for the performance of the covenants on the part of the grantee. In other words, the grantee becomes the equitable mortgagor, and the grantor the equitable mortgagee. See, Jones, Mortg. §§ 226, 1449, and cases cited. That, we think, was the condition of the parties under this contract at the time defendant Coop went on the land. So long as that relation existed, the grantee, Niering, was entitled to treat the land as his own, to crop or rent the same as he might see proper, and, if rented, was entitled to receive or recover the rent therefor.

The appellants cite numerous cases holding that a grantee in default cannot maintain a possessory action against his grantor in possession. We may concede the proposition. In our view, it is not applicable to this case, as clearly appears from what we have already held. The grantee is not attempting to maintain any action to recover or regain possession from his grantor. He was already in possession, and it was not competent or possible for the appellant, the New England Mortgage Security Company to convert an action which had been brought by a lessor against his lessee, to recover rent, into a possessory action, or anything analoguous thereto, by intervening in the case, and disputing the lessor's right of possession. Appellant, in his brief, repeatedly states the vital question to be, who was legally entitled to possession? This is a misconception. So long as the vendee retained actual possession under his contract, his right to control was not impaired by the fact that he was in default. From what we have said, it follows that the judgment of the court below, in favor of respondent, and against appellant Coop, for the rent (there being no dispute as to the amount thereof), was clearly right. It was perhaps by inadvertence that judgment was also entered up against the New England Mortgage Security Company for such rent. The District Court will enter judgment in favor of the respondent, and against the defendant Coop, for the amount of said rent, to-wit, $60, and judgment against both appellants for costs.

Modified and affirmed. All concur.

70 N. W. Rep. 1044.

TERENCE MARTIN *vs.* LUGER FURNITURE COMPANY.

Opinion filed April 16th, 1897.

Contract of Subscription—Construction.

Written instrument construed.

Appeal from District Court, Cass County; *McConnell*, J.

Action by Terence Martin against Ferdinand Luger and Peter Luger, co-partners under the firm name of the Luger Furniture Company. Judgment for defendants, and plaintiff appeals.

Reversed.

John D. Benton, for appellant.

Miller & Resser, for respondents.

CORLISS, C. J. The decision of this case turns upon the construction of a written instrument. The object of the action was to recover the amount of a subscription made by defendants as a bonus to aid the plaintiff in remodeling a building in the City of Fargo. No question touching the validity of the contract sued on is made by the defendants; they contending against their liability on the sole ground that plaintiff had failed to perform a condition precedent. As the facts are undisputed, it is obvious that the only inquiry is whether the agreement requires the performance by the plaintiff of the act which it is admitted was not performed by him. At the time the written subscription was signed by defendants, the plaintiff, as part of the agreement, gave them a written memorandum, and it is the proper construction for this writing which is here involved. It is in the following language: "Fargo, N. D., Jan. 4, 1895. This memorandum is to witness that Luger Furniture Company has this day subscribed $200 towards the payment of a bonus to Terence Martin, or his assigns, for changing and refiting the Argus building, Fargo, N. D., into an hotel, upon the following conditions: That if the said Martin or Robert O'Brien does not furnish said hotel, and if the party that does or may furnish said hotel other than said

Martin or O'Brien does not buy furniture or furnishings from said Luger Furniture Company to furnish said hotel, then the subscription of $200 above named shall be null and void and of no effect; but if the said Martin or O'Brien does furnish said hotel, or if the person who may furnish the same does buy the furniture from the Luger Furniture Company, then said subscription is to be and remain in full force and effect. Terence Martin." The plaintiff himself furnished the hotel, and did not purchase from defendants the furniture used for that purpose. As we read the contract, he was not bound to do so. It was only in the event that persons other than plaintiff or O'Brien should furnish the building that the plaintiff obligated himself to see that the purchases were made of defendants. Obviously they were willing to trust to their ability to secure plaintiff or O'Brien as a customer in case either fitted up the hotel, probably relying on the friendly relations with plaintiff and O'Brien as a ground of hope that they would win with either of them in the competitive struggle to obtain the contract to furnish the hotel building; but whatever thoughts were in their minds, they clearly left themselves entirely unprotected by their contract against the purchase by O'Brien or plaintiff of the necessary furnishings at some other establishment. The provisions of the contract are so clear that we do not feel that any discussion of the question is called for or even warranted. The writing speaks for itself. Its terms are so explicit that no room for construction is left. As the trial court reached a contrary conclusion regarding the true interpretation of the agreement, and therefore directed a verdict for the defendants, we are compelled to reverse the judgment appealed from and order a new trial. All concur.

70 N. W. Rep. 1134.

FRED MCREA *vs.* HILLSBORO NATIONAL BANK.

Opinion filed April 19th, 1897.

Directing Verdict—Conflicting Evidence.

Where there is a substantial conflict in the evidence, it is error to withdraw an issue of fact from the consideration of the jury. Evidence examined, and *held*, that the instructions of the trial court, directing a verdict in plaintiff's favor, constituted an invasion of the province of the jury, and hence were error.

Appeal from District Court, Traill County; *McConnell*, J.

Action by Fred McRea against the Hillsboro National Bank. Verdict directed for plaintiff. From an order refusing to vacate the verdict and grant a new trial, defendant appeals.

Reversed.

Carmody & Leslie, for appellant.

J. H. Bosard, for respondent.

WALLIN, J. The complaint in this action charges, in effect, that on December 1, 1890, the plaintiff was the owner and in possession of a span of black mares, a set of double harness, and a buggy, and that on said day the plaintiff "delivered" said property to one Wright, under a contract whereby Wright agreed to pay as purchase price therefor the sum of $325, within the two weeks after such delivery, said purchase price to be paid in wood; that the title of said property, under said agreement, was to be and remain in the plaintiff until said purchase price was paid, that on January 5, 1891, said Wright paid in wood on said price the sum of $29; and that the defendant on or about the 16th of January, 1891, wrongfully took possession of said property, and converted the same to his own use, to plaintiff's damage, etc. The answer admits the delivery to Wright, and his agreement to pay the price alleged as purchase money, but alleges, in substance, that the transaction between Wright and the plaintiff was an unconditional sale, whereby the title passed at the time of the delivery of the property to Wright, and further alleges that the

defendant came into possession of the property lawfully about January 16, 1891. The case was tried to a jury, and at the conclusion of the testimony the trial court instructed the jury that under the evidence the plaintiff was entitled to a verdict for the value of the property at the time it came into the defendant's possession, and that the jury should, after arriving at the value of the property from the evidence, return a verdict for the plaintiff. This instruction, in so far as the court directed the jury to find a verdict for the plaintiff, was excepted to by the defendant, and the question presented by such exception is the principal question to be determined in this court. Where, at the conclusion of a trial, an issue of fact is withdrawn from the jury, and a verdict is directed upon such issue, the test of the correctness of the ruling has been variously stated in the authorities. Citations upon this familiar feature of the practice would seem to be unnecessary. It is entirely safe to say that, where there is a substantial conflict in the evidence drawn out at the trial, it is error to direct a verdict upon an issue of pure fact. Where honest and intelligent minds might reasonably differ as to the proper conclusions to be drawn from the evidence, it is error to withdraw the case from the jury. A motion made at the close of the trial to direct a verdict is in the nature of demurrer to evidence, and upon such demurrer it is well settled that all fair inferences from the evidence which are favorable to the party opposing such demurrer must be drawn by the court. Applying this test to the evidence in this case, we are of the opinion that the court below erred in withdrawing the principal question of fact in the case from the consideration of the jury, viz. whether the sale transaction set out in the pleadings was or was not an absolute sale, whereby the title passed from plaintiff to said Wright. If title did pass, then the verdict was wrong, both legally and morally.

Looking into the evidence, we find serious discrepancies therein, and to our minds it is, when fairly construed, so conflicting and dubious in its character that it should have been presented to the jury for determination. In describing the sale

transaction, the plaintiff testified: "On the way, we got to talking about business, and I told him I wanted to sell my team. He asked me what I would take for the team, and I told him $325 for the team, rig, blankets, and all. We kept talking, but came to no conclusion until we came to Reynolds. He said 'Drive to the hotel;' and we drove to the hotel to get warm. I drove up, and he said, 'Take them over to the barn and put them up;' and I drove over to the barn and put the team in. We were cold, and went into dinner. After dinner he broached the subject of the team, and I told him I would take wood delivered in Grand Forks. He said he would deliver maple at $5, and oak at $4.50, laid down at Grand Forks. I told him I would take wood delivered at that price. I asked him how the county laid there [meaning at Reynolds;] and I found out that Main street was the county line, and the horses, which at the present time were in the barn, and were on one side of the county line, and we were on the other, and, by taking a mortgage on the team, I would have to record it in both counties. I did not feel like doing that, so I told him I would leave the team in the barn, and, when he delivered to me the wood to that value, he could take the team; but they were to remain in my possession—be mine—until I got the value. I told him he was a stranger to me, and could not expect me to let him take the team. He said he would ship me the wood by the last of the week. I said, 'I have the team in the barn, and, when I get my wood to the full value, then the team shall be yours, and not before that.' I took the train that evening for Grand Forks. He was to take the team out when he paid me in full, and pay the expenses of the team from that day in the barn. Q. Did he ship you any wood? A. After I went to stirring him up for quite a while, there came a carload of wood to Grand Forks, but there was no freight paid on it. I had sold a good deal of other wood for him. I realized out of the wood about $28 or $29, and that is all I have ever received." On cross-examination, plaintiff testified: "I contracted to sell wood for him. He wanted me to go on the road and sell, and at that time

I was out of business. This was the only day he ever shipped to me. I do not remember how long Mr. Wright had the team in his possession before he shipped me a car of wood, but it must have been about five weeks. I had seen him several times, up until about the 1st day of January. I do not remember just the day. Have no record, and cannot tell just what day he shipped me the carload of wood. In the meantime I had conversation with him as to why he did not ship the wood. He claimed all the while that the wood was on the track. I made no attempt to get the team back while it was in Wright's possession, only once. I told him just before he went away that I must have my pay, or would have the team; I wanted one of the two at once. In trying to sell the wood for Wright, I contracted one carload at the Ingalls House, and one at Larimore, five cars to W. H. Robinson, and one car load at the Occidental Hotel, Casselton. I was down there two days, and the balance of the time I was at Grand Forks. I was living there, and working in the store. The wood which I contracted to sell was to be shipped from Wright straight to the parties, and I was to have a commission. I think he could not have shipped wood to other parties without my knowing it. I notified him that I had sold wood to these parties. I do not think he could have shipped the wood to them. They hounded me for it. He did not ship a stick of wood to them. He left the country. That was the forepart of January or February,—the forepart of January, I think." The evidence discloses that, for some five weeks after the sale transaction, Wright had the property in his possession, and used it frequently about his business as a keeper of a feed store at Hillsboro, and that while so using the property he placed certain chattel mortgages upon it, and also sold it, taking a chattel mortgage for the purchase price, and finally that Wright absconded from the state, leaving the property within the state. After Wright disappeared, the plaintiff, learning about one of the chattel mortgages, went to a man named Clure, who had a mortgage upon the property, and gave Clure $100, and thereby obtained possession of it; but the

defendant took it upon other chattel liens placed upon it by Wright to secure a loan from the defendant. A. L. Plummer, a witness for defendant, testified to a conversation had with McRea after the sale, as follows: "He said that he sold him the team, and he was to pay him in wood; that he took him to be an honest man, and that he would get his pay; but, he said, 'I have lost it.' I asked him why he didn't take a mortgage, and he said he didn't know anything about the laws of this country. I said: 'If you had taken a mortgage, you would be safe. You would have a first mortgage.' He said he didn't know anything about it; that he supposed the man was honest and would pay."

Analyzing this testimony, we notice first that it flatly contradicts the plaintiff's complaint in the action, in this: The complaint charges squarely that the plaintiff, as a result of his transaction, "delivered" the property to J. H. Wright. In testifying the plaintiff states and reiterates that he made no delivery of the property, but, on the contrary, says, "I told him I would leave the team in the barn, and, when he delivered to me the wood to that value, he could take the team; but they were to remain in my possession—be mine—until I got the value." This testimony is not only directly opposed to the statement of fact set out in the complaint, but is entirely inconsistent, also, with the statement he makes, as a witness, of his reasons for not taking a chattel mortgage to secure the purchase money. If the team was to remain in his own possession, and to continue to be his property, until the wood was all delivered, then there would be no occasion to take any mortgage to secure the purchase money, nor would Wright hold any interest in the property which he could lawfully mortgage. Both tittle and possession would in such case have been in the plaintiff, and therefore no mortgage would be needed. Again, the evidence shows that Wright made default, and for some weeks failed to deliver the wood as he had contracted to do. To our minds, there is strong ground in the testimony for believing that plaintiff was well aware that the property was in Wright's possession, and that he

acquiesced therein. Plaintiff testifies: "I made no attempt to get the team back while in Wright's possession, only once. I told him just before he went away that I must have my pay, or would have team. I wanted one of the two at once." We think the jury should have been allowed to say whether this last feature of the evidence did not tend to show that plaintiff did in fact deliver the property to Wright, as he alleged that he did in his complaint; and this view is strongly corroborated, we think, in the version of the transaction which A. L. Plummer swears to as that given him by plaintiff in a conversation had at Grand Forks. According to that testimony, the reason why plaintiff did not take a chattel mortgage was not because he retained title and possession until the property was paid for, but because he thought Wright was an "honest man, and he would get his pay." The questions involved were questions of pure fact, and were of a kind which frequently arise in business dealings, and were, therefore peculiarly within the province of a jury to determine from evidence aided by the light of their own experience as practical business men. We think, in view of the discrepancies in the testimony, that the ruling of the court below which we are reviewing was an invasion of the province of the jury, and therefore error. We have heretofore had occasion to animadvert upon the too frequent practice of withdrawing issues of fact from a jury where there is a substantial conflict in the evidence. *Slattery* v. *Donelly*, 1 N. D. 264, 47 N. W. Rep. 375; *Hazelton Boiler Co.* v. *Fargo Gas, etc. Co.*, 4. N. D. 365, 61 N. W. Rep. 151; *Vickery* v. *Burton*, (N. D.) 69 N. W. Rep. 193.

The order denying a new trial is reversed, and a new trial will be granted. All the judges concurring.

70 N. W. Rep. 813.

DANIEL PATTERSON *vs.* G. A. WARD, *et al.*

Opinion filed January 8th, 1897.

Appealable Orders—Receivers.

Where the account of a receiver covers the entire period for which he was originally appointed, and embraces all the transactions of the receiver during such period, an order passing upon such account, made by the District Court, is a determination in the nature of a final judgment of a special nature, and as such may be reviewed on appeal to this court. Motion to dismiss the appeal is accordingly denied.

Appeal from District Court, Traill County; *McConnell*, J.

Action by Daniel Patterson against G. A. Ward and others. From a judgment allowing part of the account of a receiver appointed in the action, plaintiff appeals. On motion to dismiss. Denied.

M. A. Hildreth, for appellant.

J. F. Selby, and *Carmody & Leslie*, for respondents.

WALLIN, J. In April, 1894, H. D. Hurley, by an order of the trial court made herein; was appointed as receiver of certain lands involved in this litigation, including a certain farm, and by the same order the receiver was directed to carry on and crop said farm for said year of 1894. Pursuant to an order so to do, the receiver presented his account as such receiver in November of that year. The account embraced all transactions by the receiver, as such, from the date of his appointment to the date of presenting said account. The receiver did not ask for his discharge, and in fact has never been discharged, but, on the contrary, has by a subsequent order been continued in his trust. After hearing the receiver and the parties upon the matter of said account, the District Court allowed a part of said account, and disallowed a part thereof. From said determination of the District Court the plaintiff has appealed to this court.

In this court the receiver moves to dismiss the appeal, and claims that the law does not allow an appeal in such a case. If we regarded the action of the District Court in passing upon the

receiver's account as an interlocutory order, and nothing more, we should be inclined to grant the motion to dismiss. Interlocutory orders are never appealable, unless made so expressly, or by necessary implication, by the terms of some statute enacted for the purpose. 2 Enc. Pl. & Prac. p. 16. Certainly the right of appeal from an adjudication passing upon a receiver's account is not conferred in terms by § 5626, Rev. Codes, nor is such right given by implication in that section, unless it is true, as claimed by appellant's counsel, that it is conferred by subsection 2 thereof, which reads: "A final order affecting a substantial right made in special proceedings, or upon a summary application after judgment." The action has never been tried; hence it is obvious that the adjudication in the District Court from which an appeal is taken was not made after the entry of judgment. Nor do we think the determination of the District Court passing upon the account of the receiver was made in a special proceeding. However, we need not discuss this somewhat delicate point at any length, as we are of the opinion that the motion must be denied in any event. As we view the matter, if an appeal does not lie from the action of the District Court as from an order made in a special proceeding, the case would then fall within a class of determinations which are final with respect to the subject matter involved, and hence may be reviewed in this court as final judgments of a special nature, made in an action for equitable relief. The account of the receiver, as has been noticed, embraced every transaction of the receiver in his trust relation during the entire period for which he was originally appointed. The account included the farming operations for the season of 1894, and as to that it was full and in all respects final. See Elliot, App. Proc. § 99; *Dufour* v. *Lang*, 54 Fed. Rep. 913; 2 Enc. Pl. & Prac. 70; *Heffron* v. *Rice*, (Ill. Sup.) 36 N. E. Rep. 562; *Hinkley* v. *Railroad Co.*, 94 U. S. 467; *Hovey* v. *McDonald*, 109 U. S. 150, 3 Sup. Ct. 136; High, Rec. 819a; Beach, Rec. § 774.

The motion to dismiss the appeal is denied. All concur.

71 N. W. Rep. 543.

ALEXANDER MCKENZIE *vs.* BISMARCK WATER COMPANY.

Opinion filed April 16th, 1897.

Time to Appeal from Order—When Begins to Run—Service upon Attorney.

An order of the District Court herein, granting a new trial, and vacating a judgment entered in that court in favor of the intervener, was made on October 10, 1896, and the same was served the same day upon counsel who appeared to oppose the motion for a new trial, such counsel not being the attorney of record for the intervener, and not being shown to have any authority to accept or receive service of papers for the attorney of record of the intervener. More than 60 days after such service of the order an appeal to this court was perfected by the intervener. A motion to dismiss the appeal, made in this court on the ground that it was taken too late, denied, and, *held*, that such service of the order as was shown in this case did not operate to limit the time within which an appeal could be taken. The service should have been made upon the attorney of record. The right of appeal is a highly valuable right, and where a party seeks to limit such right he is held to strict and technical exactness in practice.

Errors in Law Occurring at Trial—What Are.

The action was tried in the District Court without a jury, § 5630, Rev. Codes, being then in force. The District Court, upon findings of fact and law duly filed, entered judgment in favor of the intervener. No statement of the case was settled. Plaintiffs' counsel moved for a new trial, and assigned "error in law occurring at the trial, and excepted to," etc., as the legal basis of the motion. The only error claimed was set out in the notice of intention, and was, in substance, that the trial court erred in one of its conclusions of law embraced in its findings on file. On such motion the District Court made its order vacating the findings and judgment, and granting a new trial of the action, which order was appealed from by the intervener. *Held*, that there was no legal basis for the motion for a new trial, inasmuch as an erroneous conclusion of law deduced from findings of fact is not an "error in law occurring at the trial," within the meaning of subdivision 7 of § 5472, Rev. Codes. "Errors in law," within the meaning of said statute, are rulings, instructions, and the like which occur before the rendition of a verdict or decision.

Order of District Court Granting a New Trial of Case Tried by the Court is Void.

Held, further, that under section 5630 a motion for a new trial based on "errors in law occurring at the trial" will not lie for the reason that for such errors at least said section itself provides for a trial "anew" in another tribunal than the District Court. The order granting a new trial and vacating the judgment being made without any legal basis, and in the teeth of the statute, was void *ab initio*, and hence did not operate to grant a new trial, nor vacate the judgment. Such order is reversed. A District Court cannot vacate a judgment otherwise than in pursuance of statutory authority so to do. In this case the court below did not act pursuant to any statutory authority.

Motion to Dismiss Appeal From Void Order Denied.

Said judgment was appealed from to this court. In this court counsel moved to dismiss the appeal on the ground that prior to such appeal the judgment had been vacated by said order of the District Court. The motion is denied on the ground that, said order being void from the beginning, it did not operate to vacate the judgment.

First Mortgagee Entitled to Rents.

After a mortgage to secure an indebtedness was made by the Bismarck Water Company, and duly recorded, judgments were obtained against said company by the plaintiffs, and an action was instituted in the District Court by said judgment creditors in the nature of a creditors' bill, in which the Central Trust Company, as representing the mortgagees, was allowed to intervene as a party. In said action, and before the intervener became a party thereto, a receiver was appointed at the instance of the plaintiffs, and said receiver, in February, 1894, pursuant to the terms of his appointment, took possession of the plant of the water company, and ever since then said receiver has had the exclusive control and management of said company and its business, and has collected and received all of the rents, profits, and earnings of said company. Said mortgage, in terms, in addition to other property pledged the earnings and rents of the company to secure the payment of the debt, and was prior in time and superior in equity to the claims of the plaintiffs. *Held*, that all earnings and rents collected or received by the receiver are held subject to the superior lien of the mortgage, and the same must be paid over, after deducting the expenses of the receivership, to satisfy any deficiency which may exist after a sale of the property is made pursuant to the foreclosure judgment.

Judgment of Sale—Without Right of Redemption.

The court below, by its foreclosure judgment, directed that the entire plant of the Bismarck Water Company embraced within the mortgage, and consisting of real, personal, and mixed property, should be sold in its entirety, without separation, and sold without the right of redemption from such sale; and further directed that immediately upon such sale a deed of all of said property should be delivered to the purchaser, which deed would entitle the purchaser forthwith to take and keep possession of all of said property as absolute owner. *Held*, that this feature of the judgment entered below was entirely proper.

Appeal from District Court, Burleigh County, *Winchester*, J.

Action by Alexander McKenzie, for himself and others similarly situated, against the Bismarck Water Company, in the nature of a creditor's bill. George A. Hughes and Eber H. Bly, and the Central Trust Company of New York as trustee in a mortgage, intervened. There was a judgment declaring the mortgage a superior lien, and an order granting a new trial, and the trustee appeals.

Order reversed. Judgment modified.

S. L. Glaspell, and *S. E. Ellsworth*, (*J. S. T. Waters*, of counsel,) for appellants.

The doctrine of preferential liens upon which alone plaintiffs can rely in their attempt to displace the lien of the prior mortgage held by the Central Trust Company is confined to cases involving the operation of railroads and cannot be extended to the case of a water company which operates only in the place of its creation and under the eyes of its owners. *Wood* v. *Guarantee Trust Co.*, 128 U. S. 416, 421; *Bound* v. *Ry. Co.*, 50 Fed. Rep. 312; *Raht* v. *Attrill*, 106 N. Y. 423. It is well settled that debts for construction do not come within the class termed preferential. *Wood* v. *Guarantee Trust Co.*, 128 U. S. 416; *Galveston Ry. Co.* v. *Cowdrey*, 11 Wall. 459; *Dunham* v. *Ry. Co.*, 1 Wall. 254; *Porter* v. *Pittsburgh, etc. Co.*, 120 U. S. 649, 671, 122 U. S. 267; *Toledo & etc., Ry. Co.* v. *Hamilton*, 134 U. S. 296. Claims for money advanced to pay coupons can in no case take precedence of the mortgage debt. The coupons were extinguished by payment and the persons furnishing the money were not entitled to be subrogated to the rights of the holders. *Trust Co.* v. *Ry. Co.*, 63 N. Y. 313; *Haven* v. *Ry. Co.*, 109 Mass. 96; *Cameron* v. *Tonie*, 64 Md. 507; *Kennedy* v. *Chapin*, 67 Md. 454. Besides the persons who advanced the money and thus averted the interposition of the bondholders were the officers and managers of the mortgagor company, it would seem peculiarly inequitable to recognize any priority in their favor. *Morgan's Co.* v. *Texas C. Ry. Co.*, 137 U. S. 171-196; *Wood* v. *Guarantee Trust Co.*, 128 U. S. 416; *Ford* v. *Cent. Trust Co.*, 70 Fed. Rep. 144. Claims for services can not be preferred. *Wells* v. *So. Minn. Ry. Co.*, 1 Fed. Rep. 270; *Nat. Bank of Augusta* v. *Corolina, W. & W. Ry. Co.*, 63 Fed. Rep. 25. These claimants were the officers and not the employees of the water company. *Lewis* v. *Fischer*, 80 Md. 139. The judgments offered in evidence by plaintiff were insufficient as against the bondholders and their trustee to show that they were founded upon valid or existing demands. *Hassal* v. *Wilcox*, 130 U. S. 493, 503. The receiver was not entitled to a reference for exam-

ination and passage of his accounts, because he had not presented a full and definite statement, itemizing the various matters and verifying the account under oath. High on Receivers, § 801; *Peo.* v. *Columbia C. S. Co.*, 12 Hun. 585; *Heffron* v. *Rice*, 40 Ill. App. 244. Receivers accounts should be presented in such shape that interested parties may be fully informed thereby. *Hayden* v. *Chicago Title & Tr. Co.*, 55 Ill. App. 241; *Am. Tr. & S. Bank* v. *Frankenthal*, 55 Ill. App. 400. The person appointed receiver was ineligible because president and a stockholder of the defendant company. Section 5404, Rev. Codes; High on Receivers, § 72; *Atkins* v. *Wabash, etc. Ry. Co.*, 29 Fed. Rep. 161-173. *Finance Co.* v. *Charleston C. & C. Ry. Co.*, 45 Fed. Rep. 436; *Buck* v. *Life Ins. Co.*, 4 Fed. Rep. 849.

Newton & Patterson and *Ball, Watson & Maclay*, for respondents.

No statement of the case has been proposed or settled, so this appeal is based solely upon the judgment roll, § § 5462, 5630, Rev. Codes. Certain moneys and hydrant rentals are mortgaged to appelant, but such moneys and rentals are not to be the mortgagees, unless the water company should fail to operate the works so as to earn hydrant rentals and the trustee has taken possession under contract in the mortgage. *Sage* v. *M. & L. Ry. Co.*, 125 U. S. 361, 31 L. Ed. 694; *Dow* v. *Ry. Co.*, 124 U. S. 652; *Galveston, etc. Ry. Co.* v. *Cowdrey*, 11 Wall. 459; *Gilman* v. *Tel. Co.*, 1 Otto, 603; *Am. Bridge Co.* v. *Heidelbach*, 4 Otto, 798. The Central Trust Company intervened in hostility to the plaintiff. The receivership under a creditors bill is an equitable levy in favor of plaintiff and those who join him. *Sage* v. *Ry. Co.*, 125 U. S. 361. Plaintiff having obtained the appointment of a receiver is entitled to the benefits secured thereby and if appellant claims a better right he must have a receiver appointed for his benefit or the present one extended to cover its interest. *Ranney* v. *Peyser*, 83 N. Y. 1; *Howell* v. *Ripley*, 10 Paige, 43.

WALLIN, J. In the view we have taken of this case as dis-

closed by the record, we shall refer only to certain features of the case which, in our opinion, are decisive of the result in this court. The action was brought by Alexander McKenzie, a judgment creditor, for himself and others who might come in as co-plaintiffs later, to subject the assets of the Bismarck Water Company, including its franchises and earnings, to the payment of such judgments, and, incidentally, to have a receiver appointed of such assets, franchises, and earnings, and for the purpose of conducting the business of said Bismarck Water Company pending the litigation, and with the ulterior purpose of subjecting the assets, property, and earnings of said company to the payment of said judgments. Upon the summons and complaint, and upon motion of plaintiff's attorneys, an order to show cause why such receiver should not be appointed was served on the defendant, the Bismarck Water Company, on the 7th day of February, 1894, and said order was made returnable on the next day, and upon said return day said defendant made appearance by its attorneys in response to said order to show cause, whereupon the court, on the 8th day of February, 1894, appointed one Clarence B. Little, president and manager of the defendant, as receiver of the assets, franchises, earnings, and property of the defendant, and in its order of appointment clothed the said receiver with full power and authority to take possession of all of the defendant's property, earnings, and franchises; and said receiver did, under such order, take such possession, and has ever since been in such possession, and has in all respects carried on and administered the business and received the rents and earnings of the said defendant, and said defendant has, under the control of said receiver, ever since such appointment, been engaged in its business of furnishing a water supply to the City of Bismarck and its inhabitants. Subsequently, and before the trial of said action, George A. Hughes, and Eber H. Bly, who had obtained judgments against the Bismarck Water Company, were permitted to come in as interveners upon complaints setting out substantially the same facts as those contained in the complaint of Alexander

McKenzie. It further appears that long prior to the commencement of this action, and prior to the rendition of any of said judgments against the Bismarck Water Company, and on or about the 1st day of August, 1887, said company executed and delivered its mortgages to the Central Trust Company of New York upon its said premises, property, franchises, and earnings to secure the payment of 150 bonds of $1,000 each of even date with said mortgage, bearing interest at the rate of 6 per cent. per annum, and payable semi-annually on the 1st days of February and August of each year for 20 years, and to become due on the first day of August 1907, or upon default in the payment of any installment of interest for six months, or in the payment of taxes; that 115 of said bonds have been executed and delivered; that said Central Trust Company accepted said trust, and duly qualified as trustee, and has ever since been acting as such. The mortgage was properly filed for record, and recorded in the office of register of deeds of Burleigh county on the 14th day of June, 1887. It further appears that on petition to the District Court leave was granted to the Central Trust Company to come into said action as a party, and on the 2d day of March, 1894, said Central Trust Company filed its complaint in intervention. Upon the issues joined in the action a trial thereof was had in the month of April, 1896, in the District Court, Judge Willian B. McConnell presiding at said trial, he having been called in to try the case by W. H. Winchester, the judge of the District Court in which said action was pending. At the conclusion of said trial the District Court (having determined the issues in favor of the Central Trust Company) made and filed its findings of fact and conclusions of law, and thereupon entered its judgment upon the issues involved, whereby it was adjudged, among other things, that there was a total indebtedness of $136,000.92 due the bondholders, and secured by said mortgage, and the judgment directed that said mortgage be foreclosed, and said premises be sold to satisfy and pay said indebtedness, and further adjudged and held that the plaintiff's said judgments, and all of them, were

junior and inferior liens to the lien of said mortgage, and that said mortgage debt was prior in time and superior in equity to the said judgments, and all of them. The record also discloses the fact that prior to and at the time of the trial of said action certain motions had been noticed in the District Court, and were then pending therein, touching the receivership aforesaid; and the Central Trust Company, at or about the time of the trial of the action, sought to have said motions taken up and determined, but said William B. McConnell, the presiding judge, declined to take up said motions, or to hear the same, and did not do so for the reason assigned that, in his opinion, the judge of the district, said W. H. Winchester, had jurisdiction of such motions, and that he, the presiding judge, had been called into the case only to hear and determine the issues involved in the pleadings. In the month of September, 1896, attorneys representing all of said plaintiffs and judgment creditors served a notice of intention to move for a new trial, and for an order vacating the decision and the judgment of the trial court herein. Said notice of intention was served upon S. L. Glaspell, Esq., who was then, and at all times prior thereto, and long subsequent the sole and only attorney of record of the Central Trust Company. The notice stated that the notice for a new trial would be made "upon the ground of errors in law occurring at the trial" and duly excepted to by the parties making such application, and that such motion would be made upon all the records and proceedings had in the above entitled suit, including the findings of fact, conclusions of law, order for judgment, and decree heretofore entered herein."

The only error of law set out in the notice of intention or in the motion for a new trial as a ground or basis for the motion is couched in the following language, quoted from the notice of intention: "The court erred in making the first conclusion of law in the following language, as follows, to-wit: 'That the plaintiffs, Alexander McKenzie, George A. Hughes, and Eber H. Bly, are not, and neither of them is, entitled to the relief prayed by

them or him, and the complaints of each thereof should be dismissed.'" This motion was brought on to be heard before the District Court, Judge W. H. Winchester presiding, and after hearing counsel, and on October 10, 1896, the court made its order thereon, and, after reciting that the same was made on said notice of intention, and "upon all of the files, records, and proceedings heretofore had in said action," ordered "that the findings of fact, conclusions of law, and judgment and decree heretofore entered herein be, and each of them is hereby, and in all things vacated and set aside, and a new trial is hereby granted and ordered herein." The order further recited that at the hearing of the motion "S. L. Glaspell, Esq., and Ormsby McHarg, Esq., appeared in opposition thereto." An exception was taken by the Central Trust Company to the order. The original order granting the new trial, etc., as it appears in the record, bears upon its face margin the following indorsement: "Service is hereby admitted this 10th day of October, 1896. S. L. Glaspell, Ormsby McHarg." On the 16th day of December, 1896, a notice of appeal and undertaking was served by the attorneys of the Central Trust Company upon the attorneys for the plaintiff. The substance of the notice of appeal is as follows: "The Central Trust Company of New York appeals from the judgment and decree herein made on the 23rd day of May, A. D. 1896, and from the order herein made on the 10th day of October. A. D. 1896, and from each and every judgment, decree, and order made in the above entitled action, and from the whole and every part of each such judgment, decree, or order." We find in the record also a voluminous mass of what appear to be depositions taken in the case; also what appears to be oral evidence in the case in the form of typewritten matter. The oral evidence is authenticated by the affidavit of the stenographic reporter of the trial. The depositions are not identified by the certificate of the presiding Judge, nor at all as depositions used at the trial, and there was no attempt made to settle a statement or bill in the case. The only authentication of this mass of evidential documents, except the oath of the steno-

grapher to a part thereof, is contained in the certificate of the clerk of the District Court transmitting the record, the material part of which is as follows: The clerk certifies "that the above and foregoing is the original notice of appeal, with proof of service thereof, and the original undertaking given therein; also the original order and judgment appealed from; judgment roll, and all the papers used by each party in the above entitled action; and the same are transmitted to the Supreme Court pursuant to said appeal." When the case was reached in its order in this court, counsel for plaintiffs filed and presented a motion to strike out said testimony from the record and abstract, and also to strike out all matter in the record and abstract relating to said receivership; also to dismiss the appeal from the order granting a new trial, etc., and to dismiss the appeal from the judgment. Said motion was argued by counsel in connection with the argument of the case upon its merits, and the decision of the motion was reserved until the court should determine the whole case. The principal ground of the motion to dismiss the appeal from the order was the claim by respondents' counsel that it appeared that the appeal from the order was made more than 60 days after said order was "served upon appellant's attorney." The ground alleged for dismissing the appeal from the judgment was that said appeal was not taken until after the judgment had been vacated by said order, and hence that there was, when the appeal was taken, no judgment to appeal from. The ground relied on for dismissing the appeal from the other orders referred to vaguely in the notice of appeal was that said orders were non-appealable, and that, if appealable, the notice was too late with respect to the same. The ground of the motion to strike the evidence from the record was that the same had not been authenticated by a statement of the case or otherwise.

We shall first consider the motion to dismiss the appeal from the order granting a new trial and vacating or purporting to vacate the decision and judgment. That order was made and

signed by the trial court on the 10th day of October, 1896, and the indorsement on its margin, relied upon as an admission of written notice of such order, was made on the same day. If written notice of the order was in fact regularly served on the appellant's attorney (S. L. Glaspel) on October 10, 1896, then the motion to dismiss the appeal from the order must be granted, because the notice of appeal was not served until December 16th, which date is more than 60 days after October 10, 1896, the date of the order appealed from. The motion to dismiss the appeal is based wholly upon the record, except that an affidavit on information and belief is made by counsel that the order granting a new trial was "served upon appellant's attorney on the 10th day of October, 1896," but the affidavit refers in terms to the record, and makes it a part of the affidavit, and hence the affidavit can possess no other or further probative strength than the record itself. In other words, we construe the affidavit as resting upon the record, and there is no evidence that the affiant had knowledge of the service of the order upon Glaspell independently of the knowledge imparted by the record. Upon the argument it was asserted and not denied that S. L. Glaspell was not present at Bismarck upon the hearing of the motion for a new trial, nor present when the trial court made the order in question; nor is it claimed that Glaspell made the indorsement upon the margin of the order above referred to, nor that he affixed his name to said indorsement, nor is there a shadow of evidence in the record that Glaspell ever saw the order, or a copy thereof. It was further conceded that said Ormsby McHarg wrote the indorsement upon the margin of the order, and signed the same with the name of S. L. Glaspell and his own name. The order, it is true, recites that both Glaspell and McHarg were present in court, and opposed the motion, but, in view of the admission in this court, such language must be construed as meaning only that Glaspell was constructively present in court, being represented there by McHarg, so far as opposing the motion is concerned. To limit the right of appeal from an order, written notice thereof must be

served. Rev. Codes, § 5605. Upon the record, and upon the admissions made upon the argument in this court, the question is presented whether, as a matter of fact, written notice of the order sought to be appealed from was regularly served, or served at all, upon S. L. Glaspell, attorney for the appellant. We have no hesitation in stating, and so hold, that there is no proof of such service. No claim is made that service of the order or written notice of the order was made upon Glaspell at any time or place other than as above explained. The statute requires that service of papers in an action after a suitor has appeared by attorney therein must be made upon such attorney. Rev. Codes, § 5732. Such service must be made either by delivery to the attorney, personally, or, in cases where the attorney is absent from his office, the service may be made by delivering to his clerk; or other person in charge of the office, or in some one of the modes specifically pointed out in § 5724, Rev. Codes. Service may also be made by mail. Section 5725. But no claim is made that written notice of the order appealed from was made by either or any of the several ways prescribed in the statutes we have cited. The motion rests upon the indorsements made upon the order by McHarg, and nothing else whatever. It appears on the face of the order that McHarg appeared in court to oppose the motion for a new trial. Under such a state of facts we will assume that McHarg appeared with the knowledge and consent of the attorney of record who opposed the motion; but we are not at liberty to go further, and indulge the presumption that he (McHarg) had been expressly authorized to accept service of written notice of the order, or of any paper which, by the statute, is required to be served upon the attorney of record personally. We know of no authority warranting such a practice, and to tolerate it would, in our judgment, be a dangerous innovation upon the settled practice to the contrary. The right of appeal is in the highest degree valuable to the litigant, and there is abundance of authority holding that where a party seeks to restrict or limit such right by the service of notice or papers of

any description he will be held to strict and technical exactness of practice. This rule is recognized in *Richardson* v. *Roger*, 37 Minn. 461, 35 N. W. Rep. 270, wherein the court cites *Champion* v. *Society*, 42 Barb. 441, with approval, and states the rule as follows: "A party seeking to avail himself of the statutory limitation of his adversary's right to appeal should be held to strict practice." This rule is illustrated and applied in the following cases: In re New York C. & H. R. Ry. Co., 60 N. Y. 112; *Good* v. *Daland*, 119 N. Y. 153, 23 N. E. Rep. 474; *Corwith* v *Bank*, 18 Wis. 560. See, also, *Evans* v. *Backer*, 101 N. Y. 289, 4 N. E. Rep. 516, illustrating the extreme strictness of the practice required in limiting the right of appeal. The cases cited from New York clearly hold that to serve a paper upon the proper attorney by copy is not sufficient to limit the right of appeal, unless a notice is also served. In this case we are not required by the facts to go so far, as we hold that no service whatever of the order is shown to have been made upon appellant's attorney of record. We therefore hold that the appeal from the order is properly before us for determination.

Upon the merits we unanimously agreed that the order granting a new trial and vacating the decision and judgment was erroneously made, and was illegal from its inception. In the first place, we hold that the ground (there was but one) upon which the plaintiff applied for the order was not an "error in law occurring at the trial," within the meaning of that phrase as used in the statute, and as understood by the profession; nor did such alleged error occur during the trial of the action, nor was the alleged error ever embodied in an exception settled by the trial court. "Errors in law," within the meaning of the statute (Subd. 7, § 5472, Rev. Codes,) are such errors in rulings and in instructions and the like as may occur during the progress of the trial, and before the rendition of the verdict or decision. This is elementary. Haynes, New Trials & App. § 100, pp. 282-284. To designate an alleged error in a conclusion of law based upon a finding of fact as an "error in law occurring at the trial" is, therefore, a

misnomer, and wholly without authority in the law of procedure. Again, if the obnoxious conclusion of law which is put forward as the sole basis for the application for a new trial was erroneous in fact, it was practically harmless, because such conclusion was never embodied in the judgment, but, on the contrary, the opposite conclusion was incorporated in the judgment. The part of the conclusion which is objected to is not that the mortgage lien is held to be prior or superior to the judgment liens of the plaintiffs, for, as we understand counsel, this clause of the conclusion is acquiesced in by counsel, and the only feature objected to is that the court declared that the complaints of the plaintiffs should be dismissed. An inspection of the judgment as entered discloses that none of the complaints of the plaintiffs were in fact dismissed. Moreover, it is manifest that the plaintiffs are not sent out of court by the judgment, but, on the contrary, are still in court as parties, and may yet be heard for the ulterior purposes of the case. Moreover, if we turn to § 5630, Rev. Codes, it becomes transparently clear that upon the ground of errors in law—*i. e.* "rulings," etc., occurring at the trial—a motion for a new trial will not lie in the District Court. For such errors a trial anew could be had in this court, under the section above quoted, and which must govern this case.

It is unnecessary to reiterate the obvious conclusion that there never was any legal basis for the order appealed from, and hence that the order never had any legal inception or operation. It was made without authority of law, and in defiance of the statute. In this connection it is proper to add that, inasmuch as the motion for a new trial was leveled at a conclusion of law only, and did not relate to the facts, nor in any way involve the evidence, it will be unecessary to consider the evidence or pass upon respondents' motion to strike the evidence from the record in disposing of the appeal from the order. The appeal from the judgment, in our opinion, will lie, and the motion to dismiss as to the judgment must likewise be denied. As we have held that the order was made without any authority or power in the

District Court to make the same, or to consider the motion upon the papers presented as a basis for the motion, it follows that the order, in legal contemplation, was invalid in its inception, and never operated to vacate the judgment. The court in this case being without power to grant a new trial, its action in that direction had no effect. A District Court is without authority to vacate its own judgments upon the merits otherwise than in pursuance of statutory authority so to do, and such authority was not pursued in the case at bar. The record does not disclose a case of mere error in granting a new trial. It is a case where the court below had no authority to entertain or rule upon the application for a new trial. Turning to the assignments of error in appellant's brief in so far as they relate to the judgment, we find but two, viz.: First, that "the court erred in refusing to entertain the motion made by the Central Trust Company * * * affecting the receivership;" second, "the court erred in not allowing costs to the * * * Central Trust Company." As has been seen, a receiver was appointed in this action about the time of its commencement, to-wit, on the 8th day of February, 1894, and such receiver has ever since been in possession of the property of the Bismarck Water Company, and has been in the sole control of the business of said company. It has also been stated that certain motions in the District Court touching said receivership had been noticed and were pending when Judge McConnell came in to preside at the trial of the case, and that, on the request of the Central Trust Company so to do, Judge McConnell declined to take up the motions, and did not do so, but refused, and stated as a reason for so doing that in his judgment Judge Winchester had jurisdiction over such motions. Whether Judge McConnell's reasons for nonaction were valid or not cannot now be considered, inasmuch as the remedy for the nonaction of a court upon a motion is not by appeal to this court. Appeals can be made, under our statute, only from judgments and orders.

We think the assigment of error based upon the failure of the

trial court to award costs to the Central Trust Company is untenable. The action is purely equitable in its nature, and in such actions costs are discretionary with the District Court. Section 5580, Rev. Codes. It is true that the Central Trust Company, as the prevailing party, would be entitled to recover its disbursements in the District Court, under § 5578, *Id.*, but, so far as appears of record, no application has been made to the clerk of the District Court to tax such disbursements, and hence there can be no investigation instituted here relating thereto.

Under the somewhat anomalous circumstances of this case, we deem it unnecessary and unwise to rule upon respondent's preliminary motion to eliminate from the record and abstract the evidence and certain proceedings relating to the receivership. Our conclusions are based upon questions arising upon the statutory rule proper, and are in no degree influenced by the matter sought to be eliminated by the motion. Whether such matter is, or is not considered, our conclusions will be the same.

For the guidance of the clerk of the District Court in taxing the costs and disbursements in this court, we will here state that we hold that upon the appeal from the order the appellant will recover costs in this court, and in addition thereto disbursements for printing his brief and 83 pages of his abstract, and only 83 pages. On the appeal from the judgment the respondents will recover the usual costs and disbursements in this court.

We deem it proper to remark here that this case is one of unusual importance, in view of certain facts which are conceded in argument, or shown by the record to be true. It is conceded that the Bismarck Water Company is insolvent, nor does it join in this appeal. Its property, while of considerable value, is insufficient to pay the principal creditors, the bondholders, whose claims, as we construe the mortgage, are secured by a first lien upon its assets, including its earnings. The matter of the receivership presents an aspect of the case which is very serious. The receiver was, when appointed, a stockholder of the Bismarck Water Company, and one of its officers. Hence he was *prima*

facie, at least, a person not impartial as between the parties, and therefore not a proper person to act in the capacity of receiver. Rev. Codes, § 5404; High. Rec. § 72. The principal creditors are represented by the Central Trust Company, which company, by its attorneys, have frequently brought to the attention of the District Court the fact that they were dissatisfied with the appointment of the receiver, and that the receiver should be required to regularly account for his doings as such, and should then be discharged from his trust. These protests have proven to be unavailing. The receiver has never filed an account properly itemized and sworn to, nor has the trust company been accorded an opportunity to challenge any account of the receiver by a proper trial based upon a receiver's account duly itemized, sworn to, and filed. This condition of affairs has existed for over three years, during which period large revenues have come into the receiver's hands, and he has suffered the interest on the secured debt to accumulate without liquidating or offering to pay such interest, or any part thereof. Meanwhile the large revenues of the company derived from water rents have been paid out by the receiver in the discharge of diverse claims, the legitimacy of which is, at least in part; denied by the attorneys of the principle creditors, and the legality and propriety of which claims have never been properly considered, tried, or determined in the District Court. This alarming condition of affairs should be brought to a speedy termination, and we therefore desire here to outline to the trial court its further duties under the judgment with respect to this case. We have finally adjudged that the judgment of the District Court, which, among other things, directs a foreclosure of the mortgage, and sale of the property, should be affirmed, and said judgment as entered by the court below and herein modified and construed is therefore a final and nonappealable judgment. The directions of the judgment should, with all convenient dispatch, be carried out as follows, viz: By a regular sale of the mortgaged property in the manner pointed out in the judgment. Nor should such sale be

allowed to be impeded by the mere dilatory tactics of counsel. Second. If the amount realized by the foreclosure sale is inadequate to pay the amount of the debt secured by the mortgage, principal and interest, and there is left a deficiency thereof unpaid, then the earnings of the water company which have been collected, or shall before the sale be collected, by the receiver, shall and do constitute a fund to be first applied in payment of such deficiency to the extent of any surplus in the hands of the receiver after the payment of all the legitimate expenses of the receivership. Third. Should there still remain in the hands of the receiver any such surplus after paying the prior claims of the mortgagees, the same should be applied upon the junior and inferior claims of the plaintiffs whose claims as judgment creditors have been adjudged, and we hold properly adjudged, to be junior and inferior to those of the mortgagees. Fourth. If the property sold at the foreclosure sale does not bring an amount sufficient to liquidate the claims of the mortgagees, and a deficiency exists therein, the court below, on notice duly served, should allow and require at an early day a due and regular accounting to be made by the receiver upon a properly made out and verified receiver's account, consisting of items showing all details of receipts and expenditures connected with the receivership down to the day of sale, including a full showing of earnings, rents, and receipts of all kinds, as well as disbursements of every name and nature. An opportunity should be given to challenge said account, and, if any challenge thereof is made, a trial should be accorded thereon by the trial court, and the issues raised disposed of as speedily as is consistent with the due dispatch of business, to the end that any surplus in the hands of the receiver may be turned over and applied as hereinbefore directed; and the District Court should, by order, direct such surplus, if any, to be turned over and applied as we have heretofore indicated. To avoid being misunderstood, we desire to say, as we construe the mortgage and the judgment entered below based thereon, that the mortgagees, by virtue of express stipulation embraced in the

mortgage, have a lien upon all the property of the debtor, including the hydrant rents, profits, and earnings of the debtor, to secure the payment of the debt secured by the mortgage, which lien the judgment of the trial court, which we affirm and make the judgment of this court, holds to be prior and superior to the claims of the plaintiffs arising upon the judgments described in the complaint. It follows that the lien given by the mortgage is, therefore, a first lien upon all the net earnings, rents, and profits accruing to the Bismarck Water Company after the execution and delivery of the mortgage. In the case at bar, however, none of such earnings, rents, or profits are in any wise involved, save such as have come into the hands of the trial court through the medium of its receiver aforesaid, or shall before the foreclosure sale come into his hands; but as to such and so much thereof as has been collected and received, we hold that the same are covered and embraced within the lien of the mortgage, and are and have been impressed with such lien at all times since they came into the hands of the court below. Such earnings, therefore, must be applied to the liquidation of the debt, and the whole thereof must be so applied, if necessary, to discharge said debt, after deducting therefrom the legitimate expenses of the receivership. This case is readily distinguishable in principle from a numerous class of cases similar to it, but in which the rents, earnings, and profits of the debtor's business are not by any express stipulation pledged to secure the debt. Where such earnings and profits are not pledged in terms, no right to them can accrue to the mortgagee until he has obtained such right through a receiver appointed at his instance, or by extending an existing receivership to cover his claim. We also consider that this case is not governed by the principle which has controlled those decisions in which it has been held that a mortgage covering earnings does not create a lien upon gross earnings superior to the lien created by the seizure thereof by creditors as the property of the mortgagor, unless the mortgagee takes possession, or secures the appointment of a receiver, or the extension to his

claim of an existing receivership. Where the mortgage in terms permits the mortgagee to retain the possession, the lien of the instrument is necessarily confined to net earnings. The mortgagee agrees that the balance of the earnings shall go to pay current expenses. Of course, the mortgagee may not assert a lien on the gross earnings under such circumstances. It is only after the net earnings are separated from the gross receipts that the earnings embraced in the mortgage can be identified. Where they are susceptible of identification, the mortgagee secures an equitable lien thereon; and such lien, where it comes in collision with a subsequent lien of the same character (for the lien secured by the appointment of a receiver is an equitable, and not a legal lien,) is superior to it on the familiar principle that as between equal equities that which is prior in time will prevail. If, in this case, the mortgagee were claiming the right to gross earnings as against a creditor who had secured a legal lien thereon by attachment or garnishment, we would probably reach a different conclusion touching the respective rights of these parties to the fund. The order of the District Court appealed from, and purporting to vacate the judgment herein, and purporting to grant a new trial of the action, must be reversed, and held for naught from its inception. The judgment appealed from will be in all respects affirmed, except as herein modified, and as it is modified and construed in this opinion the court below is directed to proceed to carry out and enforce the same.

ON PETITION FOR REHEARING.

It is perhaps proper to state that our investigations, based upon a petition for a rehearing filed by the intervener, have led us to a conclusion upon a feature of the case not discussed by counsel upon the original argument, which is entirely at variance with our first impressions. We refer to that feature of the judgment entered below directing that the entire property described in the mortgage, embracing both real estate and personal property, should be sold in a lump, and possession thereof given to the purchaser at once, as in the case of personal property, and that

no redemption from such sale could be made. Our first impression was, and we so held in the original opinion, that a sale such as that directed by the judgment below could not, in view of the statutory right of redemption given in case of judicial sales of real estate, be upheld as a legal sale. Our first impressions upon this aspect of the case have been wholly changed and reversed after the consideration of authority which we regard as conclusive upon the point. See *Farmers' Loan & Trust Co.* v. *Iowa Water Co.*, 78 Fed. Rep. 881; *Hammock* v. *Trust Co.*, 105 U. S. 77; *Simmons* v. *Taylor*, 38 Fed. Rep. 682-694; *National Foundry & Pipe Works* v. *Oconto Water Co.*, 52 Fed. Rep. 43-45, affirmed in 7 C. C. A. 603, 59 Fed. Rep. 20; *Columbia Finance & Trust Co.* v. *Kentucky Union Ry. Co.*, 9 C. C. A. 264, 60 Fed. Rep. 794. A number of the cases cited arose in states where a statutory right of redemption upon sales of real estate on judicial process is given as clearly as it is given in this state, and yet the cases cited are unanimous in holding that property such as that embraced in the mortgage under consideration may and should be sold in a lump, as in the case of personal property, without the equity of redemption. The very cogent reasoning upon which this apparently anomalous ruling is based is well epitomized in an opinion by Judge Jenkins in one of the cases cited (see 52 Fed. Rep. 43,) which was a waterworks case. The learned judge said: "The plant must be treated as an entirety with respect to any sale under judicial process. The defendant is a *quasi* public corporation. The plant is an integer. Separation of the parts would destroy the efficiency of the whole, working destruction to all interests concerned. The structure here is of the class of which canals, street railways, railroads, telegraph, telephone, electric light, and gas plants are examples, and can only be dealt with as an entirety,"—citing a large number of authorities. The Bismarck Water Company is not merely a private enterprise. It is also a corporation of a *quasi* public character, and has peculiar relations and duties with respect to the public. The property and franchise described in the mortgage, while primarily consist-

ing of both real estate and personal property, is so blended together and reciprocal in its uses that to divide it and sell each part separately—one part with and one part without the right of redemption—would destroy or greatly impair the value of the same, to the serious detriment of both public and private interests. Such property is not exclusively real estate, and hence not within the scope of the statute giving an equity of redemption after its sale by judicial process. It must follow, therefore, from established principles of law, that upon a sale of the plant in question, and a delivery of a deed to the purchaser pursuant to the judgment as entered below, the purchaser at such sale will be entitled to the immediate possession of all the plant, as in cases of a judicial sale of personal property, and will, by virtue of such sale and deed, be and become the absolute owner of the plant, free and clear from any right of redemption Nor, after such deed is delivered, will any further assurance of title be necessary. All the judges concurring.

(71 N. W. Rep. 608.)

WALCOTT TOWNSHIP *vs.* ERICK SKAUGE.

Opinion filed April 23rd, 1897.

Public Lands—Grants for Highways.

In 1866 congress, by legal enactment, declared that "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." 14 Stat. 253. *Held*, that this was a grant in *præsenti*, and that, when accepted by the Territory of Dakota, it took effect as of the date of the grant.

Prescription.

After the passage of said act it was competent for the local authorities to establish highways over the public lands, and as a highway by prescription rests upon the legal fiction of original establishment, conclusively presumed by 20 years continuous user, it follows that a road used continuously by the public for more than 20 years after the summer of 1874 becomes a legal highway, although the government did not part with the legal title to a sectional subdivision over which said road passes until the year 1878. In such a case the principle which declares that time does not run against the government, and that no rights can be acquired by adverse possession of land the title to which is in the government, does not apply. The grant for highway purposes takes the case out of the operation of that principle.

Prescription Right Runs Against Railroad Company.

The *locus in quo* involved in this case is upon an even numbered section within the limits of the grant of odd numbered sections to the Northern Pacific Railroad Company made in 1864. *Held* that, if such prior grant removed the odd sections from the operation of the grant for highway purposes, still such grant would be effective as to the even numbered sections, and the prescription right would have run as against the railroad company and its grantees, and hence a highway by prescription would be acquired for the entire length of the road.

Statutes—Repeals by Implication.

Section 37 of Ch. 29 of the Political Code of 1877, of Dakota Territory declared that "all public highways which have been or may hereafter be used as such for twenty years or more shall be deemed public highways." Section 1 of Subch. 2 of Ch. 112 of the Session Laws of Dakota Territory for 1883 declared: "All public roads and highways within this territory which have been opened and in use as such and included in a road district in the town in which the same are respectively situated during twenty years next preceding the time when this act shall take effect, [January 1, 1884] are hereby declared to be public roads and highways and conformed and established as such whether the same have been lawfully laid out, established and opened or not." *Held*, that the latter section did not by implication, repeal the former.

Appeal from District Court, Richland County; *Lauder*, J.

Action by Walcott Township of Richland County against Erick Skauge. From a judgment for plaintiff, defendant appeals.

Affirmed.

W. E. Purcell, for appellant.

Neither prescription nor bankruptcy can run against the government. *Peo.* v. *Herkimer*, 4 Cow. 345; *Peo.* v. *Gilbert*, 19 Johns, 229; *Gibson* v. *Chonteau*, 13 Wall. 92; *Langdon* v. *Harris*, 21 Wall. 521; *Sparks* v. *Pierce*, 115 U. S. 408; *Jordan* v. *Barrett*, 4 How. 169; *Burgess* v. *Gray*, 16 How. 48; *Frisby* v. *Whitney*, 9 Wall. 187; *Oaksmith* v. *Johnson*, 92 U. S. 343; *Morrow* v. *Whitney*, 95 U. S. 551; *Anderson* v. *Carkins*, 135 U. S. 483; *Nebraska Mills* v. *Traver*, 33 N. W. Rep. 67; *Carroll* v. *Patrick*, 37 N. W. Rep. 671; *Nichols* v. *Council*, 9 S. W. Rep. 305; *Smith* v. *Smith*, 8 Pac. Rep. 385; *Auzar* v. *Miller*, 27 Pac. Rep. 299; *Wagner* v. *Fairbanks*, 17 So. Rep. 20. The statute begins to run *de novo* when the interest of the government is transferred to an individual. 13 A. and E. Enc. L. 716; *Smith* v. *Smith*, 8 Pac. Rep. 385; *Cunningham* v. *San Saba Co.*, 20 S. W. Rep. 941. There must be a definite, certain, fixed line of travel over the lands involved. This is not proven. *South Branch R. Co.* v. *Parker*, 5 At. Rep. 641; *Plimpton* v. *Covers*, 44 Vt. 165; *Turnbull* v. *Rivers*, 15 Am. Dec. 622; *Oliver* v. *Cook*, 47 Md. 485. So long as the use is licensed no rights by prescription could be acquired. 19 Am. and Eng. Enc. Law, 14. A license is a complete rebuttal of the presumption of adverse user. *Dunham* v. *New Britain*, 55 Conn. 378; *Crounse* v. *Wemple*, 29 N. Y. 540; *Parish* v. *Raspare*, 109 Ind. 586; *Thomas* v. *England*, 71 Cal. 456.

McCumber & Bogart, for respondent.

The right of way over public lands was granted by the government. Section 2477, Rev. Stat. of U. S.; *Wells* v. *Pennington Co.*, 48 N. W. Rep. 305. The acceptance of the grant by the acts of the legislature providing for public roads over the public domain

took effect by relation as of the date of the act. Sections 1, 2, 3, 37 and 43, Ch. 29, Political Code of 1877; *Wells* v. *Pennington Co.*, 2 S. D. 1, 48 N. W. Rep. 305; *Smith* v. *Pennington Co.*, 2 S. D. 14, 48 N. W. Rep. 309; 19 A. and E. Enc. L. 338, n. 1; *Winona, etc.* v. *Barney*, 113 U. S. 618; *Missouri, etc. R. Co.* v. *Kansas, etc. R. Co.*, 97 U. S. 491; *Leavenworth* v. *Ry Co.*, 92 U. S. 733; *Schulenberg* v. *Harriman*, 88 U. S. 44; *Wood* v. *Ry. Co.*, 104 U. S. 329; *Wisconsin R. Co.* v. *Pierce Co.*, 133 U. S. 498. The act of congress was a gift absolute of the right of way to the territory and no acceptance was necessary. *Kerman* v. *Griffith*, 27 Cal. 88; *Hastings* v. *McGoggin*, 27 Cal. 85; *DeNecochea* v. *Curtis*, 20 Pac. Rep. 563; *Wright* v. *Rosebery*, 121 U. S. 488; *Ringo* v. *Rotan*, 29 Ark. 56; *Railroad Co.* v. *Smith*, 76 U. S. 95; *French* v. *Fyan*, 93 U. S. 169; *McRose* v. *Bottyer*, 22 Pac. Rep. 393; *Bolger* v. *Foss*, 3 Pac. Rep. 871. It is the twenty years use that makes a road a public highway, and it is immaterial whether the use is with the consent or over the objections of the adjoining land owners. *Strong* v. *Makeener*, 1 N. E. Rep. 502; *Hanson* v. *Taylor*, 23 Wis. 547; *Blute* v. *Scribner*, 23 Wis. 359; *Hart* v. *Red Cedar*, 63 Wis. 637. Twenty years of unexplained use of an easement, raises a presumption that it is under a claim of right and adverse. *Miller* v. *Garlock*, 8 Barb. 153; *Williams* v. *Nelson*, 23 Pick. 141; *Blake* v. *Everett*, 1 Allen, 248; *Boliver, etc. Co.* v. *Nepouset*, 16 Pick. 241; *Coluin* v. *Burnett*, 17 Wend. 564; *Lehigh R. Co.* v. *McFarlan*, 43 N. J. L. 605. Dedication may be presumed from use notwithstanding the public travel may have deviated at points from the old route. Sacketts Inst. to Juries, 180; *Kelsey* v. *Furman*, 36 Ia. 614; *Howard* v. *State*, 2 S. W. Rep. 331; *Wyman* v. *State*, 13 Wis. 742. For acts of owner held not to interrupt running of the statutes, see *Toff* v. *Decater*, 19 Ill. App. 204; *Bolger* v. *Foss*, 3 Pac. Rep. 871; *Beatrich* v. *Block*, 44 N. W. Rep. 189; *Wagner* v. *Hipple*, 13 At. Rep. 81.

BARTHOLOMEW, J. This action was brought by the Civil Township of Walcott, in Richland County, for the purpose of abating a nuisance. The nuisance consisted of an obstruction erected by defendant across an alleged highway. The erection of the

obstruction is admitted, and the sole question at issue was as to the existence at the point where the obstruction was raised of a legal highway. The township claimed a highway by virtue of 20 years' continuous user. This user was denied by the defendant. As is usual in such cases, the testimony is exceedingly conflicting. It is very voluminous, and coming as it does from a very large number of witnesses, very few of whom could read or write the English language, and who spoke the same but indifferently, it has been matter of no small labor to obain an intelligent understanding of the facts. But, after an extended study of the testimony, we reach the conclusion that the findings of fact, as made by the trial court, are in all respects supported by a preponderance of the evidence. From the evidence it appears that the land whereon the road was lying and the obstruction was erected was settled upon by one Marteson about the year 1871. Marteson made homestead filing upon the tract, and subsequently made final proof thereon, and received a patent from the government in 1878. The year following he conveyed by warranty deed to the defendant Skauge, who has ever since resided thereon. The land is described as the S. W. ¼ of section 22, township 136, range 49, in said Walcott township. This quarter section lies on both sides of the Wild Rice river. The highway is claimed along the east bank of said river. The obstruction was erected on the line between the N. W. ¼ and the S. W. ¼ of said quarter section, and at a point a few rods west from the east end of said line. It is undisputed that from some time anterior to 1871 there was a traveled track, following substantially along the east bank of the Wild Rice river, from a point about 40 rods south from the N. W. corner of the N. W. ¼ of said section 22, running in a southerly direction to the south line of said section. This track extended north and south from the points where it entered this section in such a manner as to form a continuous road from Fargo to Ft. Abercrombie. About the year 1871 a fence was erected by Marteson across the S. W. ¼ of said S. W. ¼ of said section, and

by reason of said fence the line of travel was changed, and made to run east of the fence, and some distance east—perhaps as much as 25 rods in some places—from the original line of travel. Subsequently this fence was removed, and the travel returned to the old line. It was a vital point in this case to fix the date at which said fence was removed. Nor is it possible, under the evidence, to reach a positive conclusion. The trial court finds that such removal took place in the summer of 1874. We are satisfied that there is much evidence to sustain that finding. All of the witnesses appeared before the trial court. That court had facilities for judging as to the accuracy and truthfulness of their statements which we do not and cannot possess; and since our own minds, on the printed record, would be left in some uncertainty, we felt ourselves in duty bound to accept the findings of the trial court. If, then, it be taken as established that the travel returned to the old route in 1874, it had continued for more than 20 years from that date at the time this action was brought, and at the time the obstruction complained of was erected. There is in the record evidence which shows that, some time subsequently, proceedings were had to establish a highway upon the north and east lines of said quarter section, and turn the travel thereon. And while it appears that this last-mentioned route was used by the public, to some extent, for two or three years, yet it equally appears that a very material portion of the travel continued during those years to follow the track along or near the east bank of the river. The road on the quarter-section line was abandoned after two or three years by reason of the natural obstructions in the construction of a highway thereon. There is also evidence in the record that there were some variations in the line of the travel on the road following the river bank. The trial court, however, finds these variations so slight as to be immaterial, not being sufficient to destroy the identity of the line of travel. It may be stated that, at the particular point where defendant erected the obstruction across the highway, no change of line or travel occurred at any time subsequent to 1871, all the changes

being at a point south of the obstruction. Taking it, then, as established that the travel over the point in question had been continuous for more than 20 years, and that the alleged road was of such a nature and character as would, the travel having continued for a sufficient length of time, constitute a public highway, we are then led to a consideration of the law questions involved in the case. While these questions have been argued to us in a most exhaustive, able, and ingenious brief, yet, on full consideration, we are convinced that all questions material to a decision of the case may be ruled on somewhat elementary principles.

It is first urged that the locus in *quo* was a part of the public domain, and the title thereto in the general government, until the issue of the patent to Marteson in 1878. It is then claimed that adverse user cannot run against the general government. It is an old and well-established doctrine that time does not run against the king. Statutes of limitations are not effective as against the sovereign. We do not think, however, that this principle has any applicability to the case at bar. Highways by user are considered by the law to be based either upon original legal establishment or dedication, the continuous user for the period of 20 years being regarded as conclusive evidence either of an original legal establishment or of a dedication. *Reed* v. *Northfield*, 13 Pick. 94; *Com.* v. *Coupe*, 128 Mass. 63; *Railroad Co.* v. *Page*, 131 Mass. 391; *State* v. *Mitchell*, 58 Iowa, 567, 12 N. W. Rep. 598; *Summers* v. *State*, 51 Ind. 201; *Com.* v. *Cole*, 26 Pa. St. 187. Where dedication in fact is sought to be established, user for a much less period of time than 20 years may be shown as evidence of dedication; but when actual, continuous user for 20 years is shown, then both original establishment and dedication become mere legal fictions. The user establishes the highway. See above authorities. Nor is it material, under a statute like ours, whether the use is with the consent, or over the objections, of the owner. *Strong* v. *Makeever*, 102 Ind. 578, 1 N. E. Rep. 502, and 4 N. E. Rep. 11. In 1866 congress, by legal enactment, declared: "The right of way for the construction of highways over public lands not reserved

for public uses is hereby granted." Section 2477, Rev. St. U. S. This section, from its clear wording, conveys a present grant. When, therefore, the provision was acted upon and accepted by the territory, such acceptance related back, and became effective from the date of the grant. This has been held in many cases relating to railroad and swamp-land grants, and is expressly held to be true under this particular grant in the case of *Wells* v. *Pennington Co.*, (S. D.) 48 N. W. Rep. 305. Chapter 29 of the Political Code of 1877 of Dakota Territory was a clear acceptance of this grant by congress. Section 37 of that act reads: "All public highways which have been or may be hereafter used as such for twenty years or more shall be deemed public highways." It is apparent, then, that it would have been entirely competent for the local authorities to have legally established this highway, so far as the general government is concerned, at any time after 1866, so that the presumption of original legal establishment may well prevail in this case. Nor was the right granted by government in the nature merely of a license revocable at the pleasure of the grantor. Highways once established over the public domain under and by virtue of this act, the public at once became vested with an absolute right to the use thereof, which could not be revoked by the general government, and whoever thereafter took the title from the general government took it burdened with the highway so established. It seems clear to us, then, that there is in this case no ground upon which it can be held that the 20 years' term of user could not begin until the general government parted with the fee title to the land. We fully agree with the contention of counsel that adverse user cannot be predicated upon a user that is had by virtue of a license. But we do not understand that the user claimed in this case has ever been of that character for any time whatever.

It is urged, however, that, under the statutes of the late Territory of Dakota, it was not possible that a highway could be established by continuous user commencing no earlier than 1874. This contention is based upon the section found in chapter 112 of

the Session Laws of Dakota Territory for 1883. That section reads: "All public roads and highways in this territory which have been open and in use as such and included in a road district in the town in which the same are respectively situated during twenty years next preceding the time when this act shall take effect are hereby declared to be public roads or highways and confirmed and established as such whether the same have been lawfully laid out, established and opened or not." It is claimed that this section works a repeal of § 37, c. 29, Pol. Code 1877, heretofore quoted, and that under this section no highway by prescription could be declared after the date when such section went into effect, which was January 1, 1884. We are convinced that this contention is not well founded. The law of 1883 contains no repealing clause. If it repealed the former law, it was by implication only. This, under well-recognized authority, is not favored. Chapter 112 of the Laws of 1883, is entitled: "An act to provide for the organization of civil townships, and the government of the same." It is a very extensive statute, providing thoroughly for the purposes indicated in the title, and, among other things. for township roads and highways. It is when treating of this latter subject that the section quoted appears. We think there is no such inconsistency with the statute of 1877 as necessarily works a repeal. It simply declared what roads or highways should at that time be declared and held to be highways by prescription, but it contains no intimation that highways by prescription might not thereafter be established. That it has not generally been supposed to repeal the former law is evident from the fact that the former law appeared as § 1227 of the compilation of 1887. And it still further appears from § 1050 of the Revised Codes, which went into effect January 1, 1896, which reads: "All section lines are public highways as far as practicable and all existing highways shall continue as such until changed or vacated according to law, but no road traveled or used by one or more persons over another's land shall hereafter become a public highway by use." Under this section it is clear that no highway by prescrip-

tion can hereafter be claimed if the 20 years' use covers any time subsequent to the enactment of this statute. But, if highways by prescription could not be acquired prior thereto, the enactment of the statute was entirely superfluous. In a case where a repeal by implication is claimed, we deem it entirely proper to cite these repeated instances of legislative construction to the contrary.

The claim is also made by the appellant that this court must take judicial notice that the locus in *quo* is within the limits of the primary grant of land made by congress to the Northern Pacific Railroad Company in 1864. It is urged that since that grant was, as has been frequently held, a grant in *præsenti*, thereafter no grant could be made by the general government of a right to construct highways over the lands thus granted to the railroad company, and that consequently these lands were excepted from the operation of the congressional grant for highway purposes made in 1866. And it is urged that, as every even numbered section within the limits of the grant is and must be surrounded by odd-numbered sections which were included in the grant, therefore no highway, in the proper meaning of that term, could be established or used without going upon and occupying portions of the land granted to the railroad company. We may concede this proposition. If prior to 1871 the title to these odd-numbered sections was in the railroad company, that fact by no means presented an obstacle to the establishment of a highway thereon. Neither is the railroad company or any of its grantees claiming that this highway was not properly established, or has not been adversely used by the public for more than 20 years prior to its obstruction by the defendant. If parties owning title to the odd-numbered sections are content as to this highway, it is not in the power of the defendant to dispute the highway thus consented to and acquiesced in by them. We find no legal propositions advanced by the defendant that have not been sufficiently met by what has already been said. The judgment of the District Court of Richland County is made the judgment of this

court, and will be in all respects enforced by the said District Court.

Affirmed. All concur.

(71 N. W. Rep. 544.)

ERASMUS B. ANGELL *vs.* JOHN H. EGGER.

Opinion filed April 23rd, 1897.

Contract Title to Crops.

Whether an agreement constitutes a lease or a mere hiring of the person who is to work the land as a servant of the owner thereof, it is lawful for the parties to contract with reference to the title to the produce of the land, and such contract will be enforced according to its terms.

Construction of Contract—Replevin—Judgment.

Contract set forth in the opinion construed, and *held* to vest in the owner of the land the title to all crops grown thereon until a division thereof by the owner. Until such division, the owner may maintain replevin to recover possession of the same. The remedy of the other party to the agreement for an unjust refusal by the owner to make such division is in the courts; but he cannot sue for conversion, or replevy the crops, or any portion thereof. But if he is in possession, and the owner brings replevin, the judgment, while it should be for the full amount of the property, yet, as in replevin suits the issues are settled upon equitable principles, the judgment in the alternative for value should be not for the full value of the property, but for the sum that is justly due the owner under the contract for his share of the crops, and for advances due him, when he has a right under the contract to retain sufficient of the other party's share of the property to secure repayment of such advances.

Appeal from District Court, Richland County, *Lauder*, J.

Action by Erasmus B. Angell against John H. Egger. Judgment for defendant, and plaintiff appeals.

Reversed.

C. L. Bradley, for appellant.

By contract of the parties the title of all crops raised was in plaintiff. This was a lawful and binding stipulation. *Harkness* v. *Russell*, 118 U. S. 663; *Van Hoozer* v. *Cory*, 34 Barb. 9; *Lewis* v. *Lyman*, 22 Pick 437; *Smith* v. *Atkins*, 18 Vt. 461; *Edson* v. *Colburn*,

28 Vt. 631; *Griswold* v. *Cook*, 46 Conn. 198; *Andrews* v. *Newcomb*, 32 N. J. 413; *Wentworth* v. *Miller*, 53 Cal. 9; *Gray* v. *Robinson*, 33 Pac. Rep. 712; *Consolidated L. & I. Co.* v. *Hawley*, 63 N. W. Rep. 904; *Hammock* v. *Creekmore*, 3 S. W. Rep. 180; *Meachem* v. *Herndon*, 6 S. W. Rep. 741. The cases seemingly opposed are upon examination controlled by various facts. *McCaffrey* v. *Woodin*, 65 N. Y. 459; *Johnson* v. *Crofoot*, 53 Barb. 574; *Thomas* v. *Bacon*, 41 Hun. 88; *Betsinger* v. *Schuyler*, 46 Hun. 349; *Briggs* v. *Austin*, 8 N. Y. Supp. 786; *Hare* v. *Follett*, 17 N. Y. Supp 559.

S. H. Snyder, for respondent.

The recitals of lease operate to give Egger an interest in the land and in the crop raised. *Bowers* v. *Graves*, 66 N. W. Rep. 931; *Walker* v. *Files*, 24 Pick. 191; *Tyler* v. *Bradley*, 39 N. Y. 129. Such an agreement not having been filed as a chattel mortgage it was invalid against an execution creditor who had levied upon the undivided interest of the tenent. *Hare* v. *Follett*, 17 N. Y. Supp. 558; *Thomas* v. *Bacon*, 34 Hun. 88; *Smith* v. *Taber*, 46 Hun. 313; *Betsinger* v. *Schuyler*, 46 Hun. 349; *Moen* v. *Lillestal*, 65 N. W. Rep. 695, 5 N. D. 327. If the relation of landlord and tenent existed replevin will not lie on the part of Angell the lessor before division. Cobbey on Replevin 19. Because the parties are tenents in common until division. Cobbey on Replevin 230; *Barnes* v. *Bartlett*, 15 Pick, 71; *Bohlins* v. *Arthurs*, 115 U. S. 482. By division of the grain plaintiff divested himself of title. *Lloyd* v. *Powers*, 4 Dak. 62, 22 N. W. Rep. 492.

CORLISS, C. J. This litigation involves the ownership of a crop of flax. It was raised upon the plaintiff's farm in the year 1895. In 1893, plaintiff and defendant entered into the following agreement: "This agreement, made in duplicate this 10th day of September, A. D. 1893, by and between John H. Egger, of Abercrombie, N. D., party of the first part, and E. B. Angell, of Fargo, N. D., owner of the real estate hereinafter described, party of the second part, witnesseth: That the party of the first part hereby agrees to and with the party of the second part, for the consider-

ation hereinafter named, to well and faithfully till and farm during the season of farming during the years 1894, 1895, 1896, 1897, and 1898, in a good and husbandlike manner, and according to the usual course of husbandry, the following described premises and real estate, situate in the County of Richland and State of North Dakota, viz: The north one hundred (N. 100) acres of the southeast quarter (S. E. ¼) of section number twenty-one (21), in township number one hundred and thirty-four (134), of range number forty-eight (48); and the said party of the first part hereby further agrees to sow and plant the said land in such crops as the party of the second part shall direct. Said first party agrees to furnish all seed grain each year for said land, and said seed is to be free from all foul seeds, and first-class seed in every respect. The party of the first part also agrees to furnish at his own cost and expense all proper and convenient tools, utensils, farm implements, and machinery to carry on and cultivate said farm during said seasons, and to furnish and provide all proper assistance and hired help in and about the cultivation and management of said farm, and to farm and cultivate the said land to the best advantage and according to his best skill and judgment, and to maintain and keep up the fences so as to protect said crops from injury and waste, and to watch, care for, and protect the same, and to protect the fruit and shade trees thereon, and to cut no green trees, and to commit no waste or damage on said real estate, and to suffer none to be done, and to crop and cultivate said lands, and harvest, thresh, and secure the crops grown thereon in a farmerlike style, and in the best possible manner, during said seasons; and, after taking off the crops, to plow immediately in a good and proper manner so much and such parts of said farm suitable for a succeeding crop as shall be plowed at the time the party of the first part takes possession thereof, and to keep and maintain in good repair all structures, stables, cribs, fences, and improvements on said farm, and generally do and perform all proper and ordinary work, labor, care, and skill requisite, usual, or necessary to work and crop said

premises in a proper manner and style, and to the best interests of the party of the second part; and further agrees not to remove any straw or manure from said farm, and not to sell or remove, or suffer to be sold or removed, any of the produce of said farm or premises, of any kind, character or description, until the division thereof, without the written consent of the party of the second part; and until such division the title and possession of all grain, hay, crops, and produce raised, grown, or produced on said premises shall be and remain in the party of the second part, and said party of the second part has the right to take and hold enough of the crops that would, on the division of said crops, belong to the party of the first part to repay any and all advances made to him by the party of the second part, and interest at 12 per cent. per annum, and also to pay all indebtedness due said party of the second part by said party of the first part, if any there be. It is also agreed that, in case said party of the first part neglects or fails to perform any of the conditions and terms of this contract on his part to be done or performed, then said party of the second part is hereby authorized and empowered to enter upon the said premises, and take full and absolute possession of the same, and he may do and perform all things ageed to be done by party of the first part remaining undone, and to retain or sell sufficient of the crops raised on said premises that would otherwise belong to said first party, if he had performed the conditions hereof, to pay and satisfy all costs and expenses of every kind incurred in performing said contract, with interest at ——— per cent. per annum; and the residue remaining, if any, of said crops, shall belong to said party of the first part, after all conditions hereof are fulfilled. In consideration of the faithful and diligent performance of all the stipulations of this contract by the party of the first part, the party of the second part agrees, upon reasonable request thereafter made, to give and deliver on said farm the three-fourths (¾) of all grains, vegetables, so raised and secured upon said farm during said seasons to the party of the first part. Said party of the first part agrees to deliver to

said party of the second part one-fourth (¼) of all the grain raised each and every year during the life of this contract free of all expense, in the cars, and agrees to keep the said land free of all foul weeds, as mustard, wild oats, Russian thistle, etc. Should the party of the first part fail in any one of his agreements herewith made at any season, the party of the second part shall have the right to cancel and determine this lease at the end of the crop season of that year. This lease is made subject to a sale of the land at any time, but the first party may have the right to crop the land for that season should he have already put the crop in before he was notified that the land is sold. He shall also be paid for any plowing he may have done for the succeeding year."

The property in question constitutes the entire crop of flax raised upon the land in 1895. Defendant sold to his father his interest in this crop, and we will assume, for the purposes of this decision, that his father was a purchaser in good faith, for value, and without notice of the terms of the agreement between plaintiff and defendant. Defendant justifies his possession as agent for his father, claiming that his father obtained by the purchase a good title to three-fourths of the flax. The father has offered to deliver and has delivered to plaintiff one-fourth of such crop. It appears that the defendant was indebted to the plaintiff at the time of this sale, and still is indebted to him, in several sums of money for advances made to defendant, for lumber purchased for him by plaintiff, and for seed furnished him by plaintiff for the crop of 1895. The defendant's father has offered to pay the indebtedness for the seed, but refuses to pay the other claims. The plaintiff insists upon his right, under the agreement, to hold the possession of and title to the flax until division of the same. His real object, doubtless, is ultimately to retain only enough to make good his share, and secure repayment of the advances made by him to the defendant; but he claims a right under the contract to the title to and the possession of the whole crop until division thereof. The trial court construed the agreement as constituting a chattel mortgage with respect to the three-fourths of the crop,

which would come to the defendant were there no advances to be repaid by him; and therefore charged the jury that, if the father of the defendant was a purchaser of defendant's interest for value, in good faith, and without notice, the instrument, so far as it gave the plaintiff a lien upon defendant's share of the crop to secure a division, was void as to him, the father. To this instruction plaintiff excepted, and it is the assignment of error based upon this ruling of the court which presents the point on which we will dispose of the case. Whether the agreement between plaintiff and defendant created the relation of landlord and tenant is not material. We may safely assume it to be a lease, and certain provisions of it seem to be inconsistent with any other interpretation of it. But while it is true that one who has an interest as lessee in real proporty is *prima facie* entitled to the crops raised thereon during the life of the lease, yet the parties may, by express agreement, provide that the title to certain crops, or to a certain share of all crops, or to all crops until a certain period, or to all crops absolutely, shall vest in the lessor from the time they come into existence. He who owns the land may certainly reserve to himself any interest therein, or in the produce thereof, he sees fit to reserve, provided the other party to the contract assents to such reservation. There is nothing in the law to prevent a lessee from agreeing that he shall own none of the crops. He may even make an improvident agreement, and give the lessor the title to everything raised on the land as a consideration for the right to occupy it. So he may agree that the title to all crops shall remain in the lessor until the happening of a certain event. Such contracts are not opposed to any principle of law, and should be enforced according to their terms. The agreement here involved provides that "in consideration of the faithful and diligent performance of all the stipulations of this contract by the party of the first part, the party of the second part agrees, upon reasonable request thereafter made, to give and deliver on said farm the three-fourths (¾) of all grains, vegetables, so raised and secured upon said farm during said seasons to the party of

the first part," and also that until the division of the crops "the title and possession of all grain, hay, crops and produce raised, grown, or produced on said premises shall be and remain in the party of the second part" (the plaintiff). Until such time as the plaintiff should turn over to the defendant the share of the crops coming to him under the contract, the legal title would remain in the plaintiff. It may be true that the defendant would have an equitable interest therein, and could enforce his rights by a suit in equity. But he could not maintain replevin, or sue for conversion. The lessee has agreed that his title to his share of the crop should not vest in him until the act of a division was performed by the lessor. The unjust refusal of the lessor to perform this act would not make the lessee the owner of the legal title, but would only give him a cause of action to enforce his rights under the agreement. True it is that, when the contract is silent touching the title to the product of the land, it becomes necessary to ascertain the exact character of the agreement so far as the land is concerned; for upon the answer to this inquiry depends, in such a case, the issue of title to the crops. If the contract constitutes a lease, or, in other words, a transfer of an interest in the land for a specific period, it follows that the title to all crops is in the lessee, for a grant carries with it as an incident the right to the full enjoyment of the thing granted. One who buys the right to use real property for a certain term secures all the rights of the owner to make profit out of it by its reasonable use. If, on the other hand, the agreement does not vest any interest in the land in the one who is to farm it, but he is a mere servant of the owner, the title to all crops is, in the absence of an agreement to the contrary, in the owner. The other party to the contract, not being invested with any interest in the real property, cannot, without express agreement to that effect, have any interest in the produce thereof. But whether the contract is a lease, or constitues a mere hiring of the person who works the land, it is lawful for the parties to agree touching the title to those things which issue from the land. The character of the contract becomes

important only when it is silent on the subject of title. Of course, it may be an important factor in solving the problem of the true construction of the agreement on the subject of title to the annual crops. But, when once that question is settled, it is immaterial whether an interest in the land has or has not been transferred to the one whose duty it is, under the contract, to farm the land. On the undisputed facts we think that the plaintiff should have had a verdict. Not only did the court err in its instructions to the jury, but it was its duty under the law to direct a verdict for the plaintiff. Numerous authorities support our ruling in this case. *Smith* v. *Aikins*, 18 Vt. 461; *Esdon* v. *Colburn*, 28 Vt. 632; *Andrew* v. *Newcomb*, 32 N. Y. 417; *Irrigation Co.* v. *Hawley*, 63 N. W. Rep. 904; *Moulton* v. *Robinson*, 27 N. H. 550; *Lewis* v. *Lyman*, 22 Pick. 437; *Howell* v. *Foster*, 65 Cal. 169, 3 Pac. Rep. 647; *Griswold* v. *Cook*, 46 Conn. 198; *Taylor* v. *Bradley*, 39 N. Y. 129; *Lloyd* v. *Powers*, 4 Dak. 62, 22 N. W. Rep. 492. See, also, *Meacham* v. *Herndon*, 6 S. W. Rep. 741. As in replevin suits the issues are adjusted upon equitable principles, the plaintiff, while entitled to a judgment that he recover possession of all the property in controversy, should not have an alternative judgment for its full value, but only for the amount due him for advances, the one-fourth of the crop having been delivered to and accepted by him pending the action. *Lovejoy* v. *Bank*, 5 N. D. 623, 67 N. W. Rep. 956. But, in view of the peculiar facts in this case, the appellant will recover no costs in this court. Without going into detail, we are clear that under the circumstances of the case it would be inequitable for appellant to ask the defendant to pay the costs of this appeal. As the costs are discretionary when a new trial is ordered (§ 5581, Rev. Codes), we deem it our duty to hold that appellant cannot recover costs on this appeal.

The judgment is reversed and a new trial ordered. All concur.

WALLIN, J., (concurring). Previous to the institution of this action there had been no attempt to divide the crop in controversy, and therefore, under the contract, the plaintiff was the owner of the crop, and had an absolute right to the possession of

the same, and the whole thereof. The decision of the case must turn upon the state of facts existing when the action was commenced. Had the division of the crop been made prior to the institution of the action, and if the action had been brought for the share of the crop belonging to the defendant for the purpose of holding such share as security for advances, and for no other purpose, I should have held that the plaintiff could not recover, in view of the assumption made in the opinion that the defendant's father was a good-faith purchaser of such share, — the contract not having been filed for record as a mortgage. I am authorized to state that my associates fully agree with me in these views.

(71 N. W. Rep. 547.)

NICHOLS SHEPARD CO. *vs.* JOHN E. PAULSON & BRO.

Opinion filed April 23rd, 1897.

Executory Contract of Sale—Title Passes on Delivery.

Under an executory contract by which a vendor agrees to sell and deliver to the vendee certain personal property, and the vendee agrees, as a part consideration therefor, to deliver to the vendor certain personal property then owned by him, no title to property passes either way until the acceptance by the vendee of the property specified in the contract.

Refusal to Accept Property Mere Breach of Contract.

Where, in such a case, the vendee, when such property is subsequently tendered, wrongfully refuses to accept the same, such refusal may constitute a breach of the contract, but it gives the vendor no title to the property that was to be delivered in part payment of the property refused.

Unauthorized Delivery by Agent.

Where an agent of the vendor makes a conditional delivery of property to the vendee, when, to the knowledge of the vendee, he had no authority so to do, the vendor may immediately retake the property; but he cannot convert such unauthorized conditional delivery into an unconditional delivery, so as to pass the title to the vendee.

Estoppel.

Where the vendee of personal property, who has received the same conditionally, returns said property, as not complying with the conditions, and the vendor subsequently sells such property to a third person, he cannot claim that there was such a delivery to and acceptance by the first vendee as passed the title to him.

Appeal from District Court, Traill County; *McConnell*, J.

Action by the Nichols & Shepard Co., against John E. Paulson, and A. E. Paulson, co-partners as John E. Paulson & Bro. Judgment for defendants, and plaintiff appeals.

Affirmed.

William C. Resser (*Arthur B. Wright* of counsel), for appellant.

Carmody & Leslie, for respondents.

BARTHOLOMEW, J. This action was in claim and delivery, and involved the possession of a certain steam threshing engine. The case was tried to the court; judgment for defendants; and plaintiff appeals. The case is here for trial *de novo*. The facts as we

find them, so far as may be necessary to a decision of the case, are as follows: One Spearing contracted with plaintiff for the purchase of a steam threshing outfit. As a part of the consideration therefor, Spearing was to deliver to plaintiff the engine in controversy. The first question in the case is whether or not the said engine was in fact delivered by Spearing to plaintiff or its agents. There was a dispute between Spearing and the plaintiff as to the terms and conditions upon which Spearing was to receive the threshing outfit from the plaintiff, the same controversy that is mentioned in the case of *This Plaintiff v. First Nat. Bank of Hillsboro*, (decided at this term) 71 N. W. Rep. 135, and which we restate briefly. Spearing and one Downer, the general agent of plaintiff, negotiated for such sale at Fargo. At that time, which was in May, 1895, one of the printed contracts of the character generally used by machine companies, and embracing an order for the machine, with the amount and terms of payment and the usual conditional warranty of the machinery, was filled out and signed by Spearing, and left with the general agent. The plaintiff claims that this contract at once became effective, and that the machinery was subsequently forwarded in pursuance thereof. Spearing, on the other hand, claims that it was expressly agreed between himself and the general agent that the contract should not be considered as delivered, but that it should be placed in the First National Bank of Hillsboro, and, when the machinery arrived, Spearing should take the same, and try it for 10 days, and, if on such trial it proved satisfactory, then the contract should be delivered, and the machinery paid for in accordance with its terms. If the trial was unsatisfactory, Spearing should return the outfit. The local agents for plaintiff at Hillsboro were Henry & Murphy, and these local agents first talked with Spearing about the purchase. Mr. Murphy was also running a shop, in connection with his brother, for repairing machinery. Prior to the arrival at Hillsboro of the threshing rig sent by plaintiff, Spearing brought the engine in controversy to town, and

delivered it at Murphy's shop. It was claimed by plaintiff that this constituted a delivery to them, Murphy being one of their agents. Henry testifies that, prior to the time the engine was so left, he stated to Spearing that he was going to send out for the engine, and Spearing replied that he need not do so, as he (Spearing) would bring it in for a consideration. Subsequently, as Henry testifies, the engine was delivered by Spearing at Murphy's shop, Henry & Murphy having no particular place of business. No other or different delivery of the engine to plaintiff is claimed. Spearing testifies that he did not deliver the engine to plaintiff, or have any intention so to do; that he delivered it to Murphy, for the purpose of having certain repairs made thereon, in order to have it ready for use for himself in case the engine that he had contracted for from plaintiff should prove unsatisfactory. Mr. Murphy, who was one of plaintiff's agents, also testifies that Spearing delivered the same to him for the purpose of having it repaired; that he did so repair it, and charge the repairs to Spearing. It is proper to add that Spearing directly contradicts the statements of Henry as to any conversation about delivering the machine to plaintiff. In this condition of the evidence, it seems clear to us that the finding of the trial court that the engine in controversy never was delivered to plaintiff has full support in the evidence.

When the machinery forwarded by plaintiff for Spearing reached Hillsboro, Spearing refused to receive the same, except conditionally upon trial, in accordance with what he swears was the oral contract with the general agent. Plaintiff claims that the general agent had no authority to make such contract, as Spearing well knew, by direction to agents printed upon the contract which he had signed. We may grant that to be true. Nevertheless, the fact remains that Spearing refused to receive the outfit upon any other terms than upon trial. If the contract that he had signed and left with the general agent had been in fact delivered, so as to become operative, then this refusal was a direct breach of such contract. Such contract was executory,

and no title to the property passed until the buyer accepted it. Rev. Codes, § 3553. The refusal to accept may have given plaintiff a right to recover damages, but the property remained the property of the seller, and the title to the second hand engine that was to be given in part payment remained in the buyer. These conditions existing, the local agents delivered the outfit to Spearing upon trial, in accordance with what he insisted was the contract. Such delivery was, of course, conditional, and passed no title. Plaintiff insists that the local agents were, to the knowledge of Spearing, unauthorized to make such conditional delivery. This may be granted. It may be true that plaintiff might have retaken the outfit immediately upon such delivery. But that fact could not convert the conditional delivery which was made into an unconditional delivery that was not made. It could not cast upon the buyer title to property that he refused to accept. The title both to the threshing outfit and the second hand engine remained just as it was prior to such conditional delivery. The second hand engine still belonged to Spearing. The machinery proved unsatisfactory, and Spearing returned it to the local agents after a trial of four or five days. He then purchased another outfit from the defendants, John E. Paulson & Bro., and, as part payment therefor, delivered to them the second hand engine. It was his property, and his sale and delivery to said defendants gave them the legal title thereto. Plaintiff had no title to the engine, and no right to disturb the possession of the defendants. As we read the record, plaintiff must have understood its rights to be as above stated, and not otherwise, because it appears that subsequently plaintiff sold the machinery, or a part of it, returned by Spearing, to a third party. This it had a right to do, on the the theory that Spearing had wrongfully refused to accept the same. But if Spearing had accepted, so as to vest the title in him, it had no such right; and it is only on the theory that he had so accepted the machinery that plaintiff can claim any right to the second hand engine.

The judgment of the District Court is made the judgment of this court, and will be enforced accordingly.

Affirmed. All concur.

(71 N. W. Rep. 136).

NICHOLS & SHEPARD CO. *vs.* FIRST NATIONAL BANK OF HILLSBORO.

Opinion filed April 23rd, 1897.

Escrow—What Constitutes—Title to Notes.

Where promissory notes were placed by the parties thereto in the hands of a third party, with instructions not to deliver the same until the maker so directed, the transaction did not constitute an escrow. The notes still remained in the control of the maker. There was no delivery in law, and no title to the notes vested in the payee.

Replevin Will Not Lie Against Depositary—When.

The maker of the notes having directed such third party not to deliver the notes, replevin therefor by the payee named therein against such third party would not lie.

Appeal from District Court, Traill County; *McConnell*, J.

Petition by the Nichols & Shepard Company against the First National Bank of Hillsboro. Judgment for defendant, and plaintiff appeals.

Affirmed.

William C. Resser, (*Arthur B. Wright*, of counsel), for appellant.

Carmody & Leslie, for respondent.

BARTHOLOMEW, J. This action was in claim and delivery for the possession of three certain promissory notes that were in the hands of the defendant bank, and the title to which is claimed by the plaintiff. The case was tried to the court without a jury. The defendant prevailed. The case is brought here for trial *de novo*. We do not find it necessary, in the decision of the case, to follow the wide line of argument made by counsel. The facts, as

we find them, necessary for an understanding of the case, are as follows: Some time in the month of May, 1895, the plaintiff, through its agent at Fargo, one Downer, entered into an arrangement with one Spearing, for the purchase by Spearing from the plaintiff of a steam threshing outfit. At that time a contract embracing an order for the machine, with the usual extended contract of warranty on the part of the plaintiff, was signed by Spearing and delivered to the general agent. Spearing claimed, as he now swears, that, while the contract was placed in the possession of the general agent, it was with the express understanding that it should not be held or understood as a delivery, but that the contract was to be placed with the defendant bank, and not to be delivered until after the receipt and trial by Spearing of the threshing outfit. This agreement, it is claimed by plaintiff, was beyond the authority of the general agent, as clearly appeared by the terms of the instrument Spearing had signed. The consideration for the purchase of the threshing machine was the delivery by Spearing to plaintiff of a certain second-hand threshing engine then owned by Spearing, and three several notes, aggregating about $2,200, to be executed by Spearing. Subsequently, and in July, 1895, the threshing rig mentioned in the contract was forwarded by the plaintiff to Hillsboro, N. D., that being the residence of Spearing. When the property was tendered by the local agents of the plaintiff to Spearing, he refused to execute and deliver his notes for the purchase price until he should have tried the machine, in accordance with what he declared to be the understanding with the general agent. An agreement was reached between plaintiff's local agents and Spearing whereby Spearing, with one of the local agents, went to the defendant bank, where the three notes were filled out and signed by Spearing, and, in the presence of the local agent, delivered to the cashier of the bank, with instructions that the notes were not to be delivered until both parties so directed. The trial of the threshing rig by Spearing proving unsatisfactory to him, he returned the rig, and notified the cashier not to deliver

said notes. Plaintiff demanded the notes of the bank, and, upon a refusal to deliver them to the plaintiff, this action was brought.

We shall not, in this opinion, enter into any discussion whatever as to the respective rights of plaintiff and Spearing. As we view it, the case stands in this condition: At the time of the delivery of the threshing rig, Spearing refused—whether rightly or not, we do not say—to execute and deliver his notes; and, as we have seen, the notes, after being signed, were placed in the hands of the bank. Counsel for appellant designate this as placing the notes in escrow. We do not so understand the transaction. Where documents are placed in escrow, the grantor or maker loses all control over them. They are simply left to await the happening of some event, or the fulfillment of some condition, the performance of which rests entirely with the other party. The grantor or maker cannot recall the escrow, nor can he in any manner control the document. 6 Am. & Eng. Enc. Law, p. 863; *James* v. *Vanderheyden*, 1 Paige, Ch. 385; *Campbell* v. *Thomas*, 42 Wis. 437; *Fitch* v. *Bunch*, 30 Cal. 209; *State* v. *Thatcher*, 41 N. J. Law, 403; *Stinson* v. *Anderson*, 96 Ill. 373; *Wellborn* v. *Weaver*, 63 Am. Dec. 235. The undisputed evidence shows that such was not the case in this instance. The notes, as both parties swear, were not to be delivered unless Spearing so directed. Practically, then, the notes remained in Spearing's control, to the same extent that they would have been had he signed them and kept them in his own personal possession. There was no delivery of the notes, no passage of title thereto. This refusal of Spearing may have been unwarranted, and he may have subjected himself to an action for damages by said refusal. But the fact that plaintiff had a legal claim upon Spearing for the notes was not of itself sufficient to vest the title to the notes in the plaintiff. It is one of the plainest and most elementary principles of law that there can exist, as between the parties, no valid promissory note without execution and delivery. It follows, therefore, that as plaintiff had no title to the notes, and the same were in the possession of the defendant as agent for the party

who signed them, with positive instructions not to deliver, that defendant's possession was entirely lawful, and could in no manner be disturbed by the plaintiff. The judgment of the District Court is made the judgment of this court, and will be carried into execution accordingly.

Affirmed. All concur.

(71 N. W. Rep. 135.)

NEW ENGLAND MORTGAGE SECURITY CO. *vs.* GREAT WESTERN ELEVATOR CO.

Opinion filed April 23rd, 1897.

Estoppel—Motion for Directed Verdict.

Where, in a jury trial, counsel on both sides request the court to direct a verdict, and a verdict is directed, counsel thereby consent to a withdrawal of the case from the jury, and consequently are estopped from predicating error upon such withdrawal.

Consent to Sale of Mortgaged Property—Waiver of Lien.

Where the mortgagee authorized the mortgagor to sell the property described in the mortgage at private sale, and, with the proceeds, pay the debt secured by the mortgage, and the sale was accordingly made by the mortgagor, but he failed to pay the debt, *held* that, by authorizing such sale, the mortgagee waived the lien of the mortgage, and could not thereafter recover the property, nor its value, from the purchaser.

Directed Verdict—Error.

Upon the facts stated, the trial court directed a verdict in favor of the mortgagee against such purchaser, at private sale. *Held*, that such ruling was error.

Appeal from District Court, Barnes County; *Rose*, J.

Action by the New England Mortgage Security Company against the Great Western Elevator Company. Judgment for plaintiff, and defendant appeals.

Reversed.

P. H. Rourke, and *Winterer & Winterer*, for appellant.

Young & Burke, for respondent.

WALLIN, J. This is an action brought by the owner of a chattel mortgage upon a crop of wheat against an elevator company, for the value of such wheat. The action was tried to a jury, and, at the close of the case, the defendant, by its counsel, requested the trial court to direct the jury to find for the defendant. This request was refused, and, at the request of plaintiff's counsel, the trial court directed a verdict for plaintiff. These rulings are assigned as error in this court. Both sides, having requested a directed verdict, are in the attitude of consenting to the withdrawal of all questions of fact from the jury, and are also in the attitude of claiming that there are no disputed questions of fact in the case. In such cases, where, as in this case, there is no conflict in the evidence, the question is whether the court erred in its conclusion of law in directing a verdict. In other words, did the court, in directing a verdict, put a proper legal construction upon undisputed facts?

For the purpose of this decision, we shall concede certain facts to be established by the evidence, which defendant's counsel insists are not established. We shall assume that the undisputed evidence shows that plaintiff's chattel mortgage was duly filed, and covered certain wheat, which was raised and owned by the mortgagor; that, after such wheat was threshed, the mortgagor sold and delivered the same to the defendant; and that the debt is still unpaid. We further assume that the defendant converted the wheat to his own use, and refused, on proper demand therefor, either to pay the debt secured by the mortgage, or to deliver the wheat to plaintiff. Nevertheless, it is our opinion, and we shall so rule, that the plaintiff has, through its authorized agent, debarred itself from asserting or claiming a lien on the wheat. The evidence shows clearly that the agent knew of and authorized the sale of wheat to the defendant. The attorney for the plaintiff, who represented plaintiff in procuring the note and mortgage, and has at all times since their execution and delivery to him had the same in his hands, testified in plaintiffs behalf as follows: "I have had the note in my possession from the time of

its execution until now. I have authority to do anything with it that they have." Upon the trial, one Thurber, a witness for the plaintiff, testified as to a conversation had at Valley City, between the mortgagor (Vold) and the plaintiff's said agent, as follows: "I was at Valley City with him once, the day he paid the $10 on the note. I was with him at Mr. Young's office when he paid the money. Q. Anything said that day between Mr. Young and him about the wheat? A. Well, he told Mr. Young that he was taking the grain to Oriska, because he could get better prices than at Valley City. Q. Can you state any clearer just what Mr. Young said to Mr. Vold about the hauling and selling of the wheat, and to pay him? Get it in just as near the language of Mr. Young as you can. A. I can't give it any clearer. I didn't pay any attention to the conversation. It was not interesting to me. Q. What were they talking about when Mr. Young wanted him to hurry and haul off the wheat? (Question read.) A. In that conversation Mr. Young stated to Mr. Vold to hurry up, and haul in the grain that he raised. Q. What did Mr. Young want him to hurry for? A. I don't know. Q. What did Young say? A. I don't remember exactly. He told Ole, he says, 'I would hurry up, and haul the grain;' and Ole says, 'I can't until Thurber hauls it for me, because he is doing the work.' Q. What did he tell him to do with it when it was hauled? A. To pay him. Q. What did he say? What did he want him to do, if anything? A. Well, just hurry and haul off the grain. That is about all I know. Q. Was there anything said about paying the rent on the land? A. Well, not as I remember of anything about pay or rent. Q. Was there anything said about the note or chattel mortgage? A. Not as I remember of. Q. You don't remember what led up to the conversation? A. No, sir; I don't remember. Q. But they were talking about the wheat that was grown on section six? A. Yes, sir. Q. You were hauling it, and had hauled one load to the N. P. elevator, and had sold it? A. Yes, sir. Q. Of which this $10 was paid on the note, that day as part — A. I couldn't say as particularly of that load. Q. Who col-

lected the money? A. Ole Vold. Q. You knew that Ole Vold talked that over at Mr. Young's office? A. Yes, sir. Q. Did they talk about this load of wheat? A. No, sir. Q. They were talking about wheat that was to be sold? A. Yes, sir. Q. Mr. Vold said he was hauling it there, because he was getting a better price at Oriska than he could get at Valley City? A. Yes, sir. Q. That is the fact? A. Yes, sir. Q. And Mr. Young said he wanted him to hurry up, and get it hauled? A. Yes, sir." On his redirect examination, the witness stated to Mr. Young, the agent who tried the case for plaintiff: "I do remember of him talking to you, but don't pay such terrible strong attention, but I hear him talking to you. I can recollect what he said that day. He told you he was hauling off the grain."

The evidence we have quoted is not disputed, and to our minds it is significant that the agent Young, who tried the case for the plaintiff, and who testified as a witness in plaintiff's behalf upon other features of the case, does not attempt to deny the evidence we are here discussing. In his brief in this court, appellant's counsel says: "There is absolutely no evidence that respondent's agent, Young, even if he had the power, which is not shown, authorized the sale of the grain, or authorized the mortgagor to receive the price therefor. A suggestion by a collection agent to haul grain (and deliver storage tickets) cannot be warped into an authority to sell and convert the proceeds." The trouble with this proposition of counsel is that the statements of fact contained therein are not only without support in the record, but they are clearly refuted by the record. As has been seen from the testimony,—and the fact otherwise clearly appears from the record,—the agent of plaintiff had plenary authority from his principal. He was authorized to pursue his own course, and adopt any lawful means to collect the claim which the plaintiff might adopt. He therefore might, if his judgment dictated that policy, direct the debtor to sell the mortgaged property, and with the proceeds discharge the debt. This, we think, is what the agent did do in effect. There is not a suggestion in the evidence

that the agent directed the debtor to haul the grain to the elevator, and there store the same; nor a suggestion that storage tickets be obtained by the debtor, and brought to the agent. The evidence educed will bear no such construction. On the contrary, it shows unmistakably that, after one load of the grain had been sold at Valley City, the debtor went into the office of the agent, and paid an installment on the note, and, while there, he informed the agent that the rest of the grain which was then not hauled from the debtor's premises would be taken to Oriska, because better prices could be had there than could be obtained at Valley City. This can mean nothing else than an announcement by the debtor of a purpose to sell the residue of the grain, and was wholly inconsistent with a purpose to store the grain. Moreover, the witness was asked, the pointed question, "What did he tell him to do with it when it was hauled?" and he answered, "To pay him." This testimony shows a plain direction by the agent to sell the grain, and out of the proceeds to pay the plaintiff's claim in the agent's hands. The other parts of the testimony are precisely to the same effect. After being told that the mortgagor contemplated taking the grain to Oriska to procure a better price, the agent responded, "Hurry up and haul the grain." This can mean nothing less than full consent to the proposed sale of the wheat by the debtor, and, as we have said, there was not a suggestion in the interview looking like an instruction to the mortgagor to store the grain or to bring a storage ticket to the agent. It is therefore clear that the agent made his election, and permitted the mortgagor to sell the property covered by the mortgage at private sale. The agent was in a position to have asserted his rights under the mortgage; but, instead of pursuing that course, the plaintiff's agent saw fit to make the mortgagor his agent, by directing him to sell the property at private sale, where the best price could be had, and out of the proceeds of the private sale to pay the claim of the plaintiff. This course was wholly inconsistent with any subsequent assertion of the lien of the mortgage. After the sale at private sale

was made, pursuant to plaintiff's directions, the mortgage lien no longer existed. It was extinguished by the sale as effectually as it would have been by a payment of the debt. The sale at Oriska, having been made with the full consent of the mortgagee, through its agent, became the act of the mortgagee; and, in its legal aspect, the sale has the same operation as it would have had if made by the plaintiff through any other agent, or by the plaintiff itself. The fact that the agent who made the sale failed to apply the proceeds to the extinguishment of the debt is plaintiff's misfortune, but it cannot alter the legal effect of the sale transaction. That there is a waiver of the lien of the mortgage as a result of the mortgagee's consent to the sale is entirely elementary. See Jones, Chat. Mortg. (3rd Ed.) § 465.

The record is silent as to whether, before the sale of the grain was made, the defendant was informed that the plaintiff had consented to such sale. But this is immaterial. If, as a matter of fact, the sale had been consented to in advance, such consent could be pleaded as a defense to any action predicated upon the lien of the mortgage. The lien had been waived by the mortgagor's consent, followed by the sale pursuant to the consent. It follows that the trial court erred in directing a verdict for the plaintiff.

For such error, the verdict and judgment are vacated, and a new trial ordered. All the judges concurring.

(71 N. W. Rep. 130.)

JOHN F. HENRY *vs.* JOHN W. MAHER.

Opinion filed April 23rd, 1897.

Sufficiency of the Evidence—How Challenged.

A party who desires to challenge the sufficiency of evidence to support a verdict must either request that a verdict be directed in his favor, or except to the charge of the court submitting questions of fact to the jury. In either of which cases he may review the rulings of the court as errors in law. Or he may move for a new trial on the ground of the insufficiency of the evidence. No other mode of raising the question of sufficiency of evidence is provided by law.

Motion on Court's Minutes—What Notice of Intention Must Specify.

Where a motion for a new trial on the ground of insufficiency of the evidence is made upon the minutes of the court, the notice of intention must specify the particulars wherein the evidence is alleged to be insufficient, or the motion must be denied.

Specification in Statement of Case.

If such motion is made on a statement of the case, the specification must be embodied in the statement, or the motion must be denied. In either case this court on appeal is not permitted to look into the evidence unless the statute in this respect is obeyed.

Errors Not Specified, Not Considered.

No errors in law will be considered by this court unless they are specified in the statement of the case.

Waiver of Objection to Entry in Justice's Docket.

This action was commenced before a justice of the peace. On application of the defendant, it was transferred to the next nearest justice in the same county. The defendant appeared before such justice without objection, and the case was tried before him upon the merits. *Held*, that such justice had jurisdiction of both the subject-matter and the person of the defendant, and that defendant could not for the first time raise in the District Court the point that the record did not affirmatively show that the parties had not agreed upon a justice to whom the case should be transferred.

Appeal from District Court, Ramsey County; *Morgan*, J.

Action by John F. Henry, against John W. Maher. Judgment for plaintiff, and defendant appeals.

Affirmed.

John W. Maher, and *Cowan & McClory*, for appellant.

John F. Henry, and *Siver Serumgard*, for respondent.

CORLISS, C. J. The merits of this case are not before us. The points touching the insufficiency of evidence discussed in the brief of counsel for appellant were not raised by a motion to direct a verdict, nor was the charge of the court to the jury excepted to; and, so far as the abstract shows, the appellant failed to specify, either in his notice of intention to move for a new trial, or in the statement of the case, the particulars wherein he claims that the evidence is insufficient to support the verdict. Where a party desires to take the position on appeal that the evidence is insufficient to justify the submission of a question of fact to the jury, he may at the proper time request the court to exclude such questions from the consideration of the jury; and the refusal of the court so to do will, if the party is right in his view of the evidence, constitute an error in law occurring at the trial. Or he may except to that portion of the court's charge to the jury which submits such issue to them, and, if the court is wrong in its view of the evidence, this also will constitute an error in law occurring at the trial. Failing to adopt either one of these two courses, he has left him only the right to move for a new trial on the ground that the evidence is insufficient to justify the verdict. If such motion is made, the moving party must, if the motion is made upon the minutes of the court, specify in his notice of intention the particulars in which the evidence is alleged to be insufficient, or the motion must be denied. Rev. Codes, § 5474. And, if the motion is made on a statement of the case, such specification must be embodied in the statement, or the statement must be disregarded on the motion and on appeal. *Id.* § 5467. The District Court and this court must proceed as though, for this purpose, there was no statement in the record. Whether the motion for a new trial in this case on the ground of insufficiency of the evidence was based upon the minutes of the court, or upon the statement of the case, is immaterial; for the appellant has failed, so far as the abstract shows, to insert either in his notice of intention or in the statement, the particulars wherein the evidence is alleged to be insufficient. This question

is by no means new in this court. If counsel will only regard and obey clear statutory provisions regulating practice, they will encounter no difficulty in having their cases disposed of on the merits in this court. See *Hostetter* v. *Elevator Co.*, 4 N. D. 357, 61 N. W. Rep. 49.

Certain errors in law are discussed in the brief, but they are not specified in the statement as it appears in the abstract, nor have counsel for appellant assigned the errors in the brief as required by the rules of this court. See rule 15, 61 N. W. Rep. ix. The errors not being specified in the statement, the statute is mandatory that they shall not be regarded on appeal. Rev. Codes, § 5467; *Hostetter* v. *Elevator Co.*, 4 N. D. 357, 61 N. W. Rep. 49. Moreover, the abstract does not disclose that any statement of the case has ever been settled. The evidence and proceedings set forth in the abstract have, so far as the abstract shows, never been embodied in any statement, and therefore are not properly before us for consideration. We will add, however, that we have looked into the case on the merits sufficiently to be satisfied that there were no prejudicial errors occurring at the trial, and that the verdict is sustained by the evidence.

Only one question remains. It is urged that the District Court did not have jurisdiction of the subject-matter of the action. This contention rests upon the following facts: The suit was originally commenced before McGahan, a justice of the peace. On the return day of the summons an application for change of venue was made. The motion was granted, and the case was sent to Duell, another justice; the justice by whom the summons was issued entering in his docket that on the defendant's application the case was transferred to the "next nearest justice of the peace" in and for that county. It is contended that the justice who transferred the case had no power to transfer it to Duell, because it does not affirmatively appear from the record that the parties had not agreed upon a justice to whom the case should be sent; the statute (§ 6749, Rev. Codes, 1895), in terms, providing that only in the event of the failure of the parties so to agree

has the justice power to send the case to the next nearest justice. It is claimed that Justice Duell never had jurisdiction of the subject-matter, and hence that the District Court had no such jurisdiction. But the defendant is not in a position to raise this point of jurisdiction. It is not a question of the jurisdiction of the subject-matter. The justice to whom the case was sent had jurisdiction of the subject-matter, and the defendant, by appearing voluntarily before him, and offering to allow judgment to be entered against him for a particular amount, and thereafter joining issues without making any objection to the jurisdiction of the court over his person, waived all questions of personal jurisdiction as effectually as if he had voluntarily appeared without service of process, or had made such an appearance in response to a defective or void summons, or one irregularly served. If appellant's contention be sound, then the judgment appealed from is void, and might be collatterally attacked. The whole argument is built upon a false basis, *i. e.* that Justice Duell never had jurisdiction of the subject-matter. He had such jurisdiction when the parties appeared before him, and the only remaining element necessary to give him complete jurisdiction in the case was furnished by the voluntary action of the defendant himself. It is said that Justice Duell could not have jurisdiction over the subject-matter because Justice McGahan had not, for the reason stated, lost jurisdiction over the subject-matter. But it is no answer to the power of one court to proceed with a case that another action is pending in another court between the same parties for the same cause. The only way to raise this point is by an answer in the nature of a plea in abatement, if it does not appear upon the face of the complaint, or by demurrer if it does. If the point is not in this manner brought to the attention of the court, its judgment will be as valid as though no other action had then been pending. The defendant can never urge in the second case that the pendency of the former action is fatal to the jurisdiction of the court in which the second suit is pending, over the subject-matter.

The judgment is affirmed. All concur.

(71 N. W. Rep. 127.)

DAVID W. KNOWLTON *vs.* HELMUTH SCHULTZ, *et al.*

Opinion filed April 24th, 1897.

Action on Note—Bona Fide Purchaser—Burden of Proof.

When fraud in the inception of a negotiable instrument is proved, the burden is shifted to the indorsee to prove that he is a purchaser for value, before maturity, without notice, and in good faith. *Held*, under the facts of this case, that such indorsee had not sustained such burden, but that the trial court was justified in finding that he was not a purchaser in good faith.

Appeal from District Court, Ransom County; *Lauder*, J.

Action by David W. Knowlton against Helmuth Schultz and Martha Schultz. Judgment for defendants, and plaintiff appeals. Modified.

P. H. Rourke, for appellant.

J. E. Robinson, for respondents.

CORLISS, C. J. The object of this action was to foreclose two mortgages on personal property. One mortgage was given to secure a note for $225, and the other to secure this note and another note for $71.75. It is undisputed that the notes and mortgages were in fact signed and delivered by defendants to one Austin, he being the payee named in such notes, and the person described in the mortgages as mortgagee. The plaintiff is a purchaser of such notes and mortgages. The defense interposed with respect to the $225 note is that Austin obtained it from the defendants through fraudulent representations. He had been retained to defend for them an ejectment suit, and the case having been tried, and the trial having resulted in a decision favorable to the defendants herein, he presented to them his bill for services. It is undisputed that he was to have from $200 to $300 for his services, and more, not exceeding $400, if he succeeded in getting for them a clear title, as it is expressed by one of the defendants in his testimony. The case shows that, to obtain from them the $225 note, he assured them that their title was per-

fect; that there was going to be no more of the case. Certain payments have been made to Austin by the defendants, but whether they are sufficient to fully liquidate their obligation to him, on the theory that he has not secured for them a clear title, is not very material. It is apparent from the evidence that Austin had been paid $165 on account of his bill for services in the ejectment case, when he presented to defendants the account for which the $225 note was given. The defendant Helmuth Schultz so testifies, and plaintiff offers no rebutting evidence on the point. Austin could easily have explained for what this $165 was paid if it was not paid for services in the ejectment suit. That this sum was paid on account of such services would seem clear from the fact that the item in the bill presented when the $225 note was given is for $235, just the sum necessary to make up the $400 that Austin was to have if he obtained a perfect title for defendants. The fact that Austin had in this bill charged such a sum as he would have been entitled to receive, in addition to the amount already paid, only in the event of his having obtained a clear title for defendants, tends to confirm their evidence that he made the false statement to which we have referred. The item of $235 was larger by $100 than Austin was entitled to charge, unless he obtained such a clear title for them. All this he must have known they were well aware of. As said before, it appears to be uncontroverted that, when Austin presented his bill, the defendants promptly said that it was too much. It is evident that Austin regarded their statement as true from the standpoint of his not having secured for them such a decision in the case as would preclude further litigation of the question of their title, for he replied, in answer to their claim that the charge was excessive, that the judgment which he had obtained for them was just as good as a warranty deed. When defendants stated to him that they had heard that there was going to be a new trial, he answered that that was not true; that there was not going to be a new trial, and there was not going to be anything more of it. When confronted with the claim that the bill was excessive, there

remained for Austin only one of two courses to pursue,—either to reduce it $100, or state that the facts warranted him in making the larger claim. Not having reduced the bill, it is a fair inference that he must have made just such a statement as is testified to by defendants, and the fact that they then signed the note tends to confirm their evidence in this respect. It is by no means clear that defendants are liable to Austin or to plaintiff, assuming that the purchase of the note carried to him Austin's claim against defendants for any sum whatever aside from the amount of the $71 note to be hereinafter referred to. Austin, under the contract, had an absolute right to charge only $200, he not having secured a perfect title. Whether he could collect more than $200 up to the amount of $300 would depend on the question of the reasonableness of the charge, the amount between $200 and $300 not being distinctly agreed upon. That Austin has been paid $200 is shown by the evidence. It may be that in another action the liability of the defendants for a sum not exceeding in all $300 can be established. There is no evidence here warranting a finding that defendants are liable for more than $200. Nor is this the action in which to litigate that question. The note having been obtained by fraud, the fraud tainted the whole instrument, and destroyed it entirely. Whatever cause of action may have existed prior to the execution of the note is, of course, unaffected by it. But such cause of action, if any, is not within the issues of this case. That the statement of Austin to the defendants was false cannot admit of doubt. However much confidence he may have had that the defeated litigants would go no further with the case, he was bound to know as a lawyer that the judgment was not final. As a lawyer, he knew that no judgment is final as soon as it is entered. The action was still pending and the defeated suitor had a legal right to move for a new trial, and to challenge the judgment on appeal. Austin made a positive statement that the case was ended, knowing that he had no positive knowledge on the subject. This, under our statute, is as much a fraud as a statement of fact, knowing it to be false. Rev.

Codes, § 3848. Indeed, he knew it to be false in law. He certainly must have known that there was a possibility of future litigation, however sanguine he may have been that the case would end then and there. The defendants trusted to his knowledge as a lawyer on the question whether the suit was disposed of so as to preclude all possibility of further action in the case. In this regard they were deceived; and, whatever justification Austin may have had in morals, the law is clear that he committed a legal fraud upon the defendants by his false statement. It is perhaps not wholly irrelevant to this case to state that, as a matter of fact, a new trial has been granted in the action of ejectment, and that on the second trial the defendants therein (who are the defendants here) were defeated. Just such a possible result Austin, as a lawyer, must have anticipated when he assured the defendants that the judgment was just as good as a warranty deed, and that there was going to be no more of the case. If ever the utmost good faith should be exacted, it is when the relation of attorney and client exists. The defendants relied implicitly upon the statement of their attorney, and he deceived them in a manner that enabled him to perpetrate a fraud upon them. It is true that Austin was not sworn upon the trial, and that the evidence comes from the defendants alone. But the plaintiff was informed by the answer that this defense would be relied on, and the failure of Austin to testify on this point, although his deposition was taken on another feature of the case, is strong evidence that the charges of fraud in the answer are true. Moreover, Austin's attempt to place the note in the hands of a *bona fide* purchaser only four days before it fell due, to cut off all defense, is significant of his consciousness that he himself would be defeated in an attempt to enforce the same. But it is urged that the plaintiff is a *bona fide* purchaser of the note. When proof of the fraud referred to had been made, the burden immediately shifted to the plaintiff to establish that he bought the note for value, before maturity, without notice of any defense, and in good faith. *Vickery* v. *Burton*, 6 N. D. 245, 69 N. W. Rep. 193;

Jordan v. *Grover*, (Cal.) 33 Pac. Rep. 889; *American Exch. Nat. Bank* v. *New York B. & P. Co.*, (N. Y.) 43 N. E. Rep. 168; *Grant* v. *Walsh*, (N. Y.) 40 N. E. Rep. 209; *Commissioners* v. *Clark*, 94 U. S. 278; 2 Rand. Com. Paper, § 1020; *Schmueckle* v. *Waters*, 125 Ind. 269, 25 N. E. Rep. 281. The only evidence on these points is contained in the depositions of the plaintiff and of Austin. The plaintiff testified: "My name is David W. Knowlton; age thirty-one years; resident of the City of Minneapolis; and am a lawyer. I am the plaintiff in this action. I am aquainted with Mr. Austin, of the City of Minneapolis and State of Minnesota. I had some business with Mr. Austin in December, 1893." Two promisory notes (Exhibits A and B) handed to and identified by witness. "These are the promissory notes sued on in this action. I am the owner of these notes. I purchased them from Mr. Austin before their maturity. I purchased them on the 27th day of November, 1893. The notes were transferred to me at that time. I paid for them two hundred dollars ($200). I had not notice at the time of purchase of them of any defense, payments, or offsets that might be against them." Austin testified: "Am resident of Minneapolis, Hennepin county, Minnesota; age, thirty-eight; occupation, lawyer. Before moving to Minneapolis, I resided at Lisbon, North Dakota. I am the Austin mentioned in Exhibits A and B. I sold them to David W. Knowlton previous to their maturity, and on the 27th day of November, 1893. I received for the transfer two hundred dollars ($200) in cash, paid by Mr. Knowlton, the plaintiff."

So far as relates to the questions whether plaintiff purchased the note before maturity and for value, and without notice of any defense thereto, the evidence is explicit. But it is to be noted that nowhere does the plaintiff say anything about his good faith in the transaction. He was informed by the answer that upon the trial of the action the defendants would offer evidence which would impose upon him the burden of proving that he acted in good faith in making the purchase. Only one person can possibly have any positive knowledge on the

subject of the good faith of the purchaser of negotiable paper, and that person is the purchaser himself. Considering how peculiarly that knowledge is within the breast of such purchaser, how easy it is for him to state the fact if it exists, how almost entirely the maker of the paper is at his mercy on the question of good faith, and what opportunities for resorting to fictitious transfers to cut off defenses are afforded to the holders of paper, which they could not themselves enforce, it is certainly not too much to require the purchaser, at least where he is a person, and not a corporation, to state in so many words that he bought in good faith. It may be true in this case that the plaintiff bought before maturity, for value, and without notice of any defense; and yet he may not be a purchaser in good faith. He may, when he bought, have had knowledge of facts which excited in his mind such suspicions as to the paper that he feared to make an investigation, lest it would disclose a defense, and therefore he carefully shut his eyes, and bought in the dark. In such a case he would not be a purchaser in good faith. *Bowman* v. *Metzger*, (Or.) 39 Pac. Rep. 3; *Schmueckle* v. *Waters*, 125 Ind. 269, 25 N. E. Rep. 281; *Bank* v. *Bennett*, (Ind. App.) 36 N. E. Rep. 551; *Tourtelot* v. *Reed*, (Minn.) 64 N. W. Rep. 928. In this case the plaintiff is careful not to state that he bought in good faith, nor does he offer any explanation of the circumstances surrounding the purchase. He and Austin were both attorneys whose offices were adjoining, and, four days before the maturity of the note, he buys it at a discount of over 33⅓ per cent. he paying $200 for the two notes, upon which there was then due over $300. While it is true that one may be a purchaser for value who buys at a discount, and that he is not limited to the amount paid in enforcing the instrument, but may recover the full amount due, according to its terms, yet the fact that, to the knowledge of the purchaser, a party who has only four days to wait before the maturity of the note, which he has already held over six months, is willing to discount it so heavily, although it appears to be amply secured by a chattel mortgage, is of itself a circumstance to be considered by

the trial court in passing on the issue of good faith. The plaintiff, having the burden of proof, has failed to sustain it by positive evidence. The inference of his good faith to be drawn from the other facts sworn to by him is by no means strong; and the case discloses several circumstances which cast grave doubt upon the fact of his good faith in the transaction. There is a significant silence on the subject why Austin was impelled to make the sacrifice, or what explanation he made to the plaintiff as his reason for throwing away over $100, when in four days the debt would have been payable. We think that the learned trial judge was fully justified in his conclusion that the plaintiff was not a purchaser in good faith. That the fact that a negotiable instrument was sold at a heavy discount is a circumstance to be considered in determining the issue of good faith is recognized by many authorities. *Watkins* v. *Goessler*, (Minn.) 67 N. W. Rep. 796; *Tod* v. *Wick*, 36 Ohio St. 370–392; *Jordan* v. *Grover*, (Cal.) 33 Pac. Rep. 889; 2 Rand. Com. Paper, § 992; *Murray* v. *Beckwith*, 48 Ill, 391; *Auten* v. *Gruner*, 90 Ill. 300.

We hold that the $225 note is void for fraud, and that the chattel mortgage given to secure it is consequently without any debt to support it. The judgment of the trial court was therefore right in so far as it adjudged these instruments to be void, and directed that they be canceled. But it is undisputed that the note for $71.75 was voluntarily executed, and delivered by the defendants to Austin, and there is nothing to impeach its validity. No fraud in connection with the execution of this note is pretended. The plaintiff is therefore entitled to a judgment against the defendants thereon. But the evidence is clear that this note was not described in the second mortgage given by the defendants, but that some one inserted in such mortgage, without the consent or knowledge of the defendants, the statement now appearing in such mortgage that it secures such note. This mortgage is void so far as it relates to this note, and, of course, it is a nullity in so far as it assumes to secure the $225 note, which we hold to be void for fraud. The District Court will enter a new

judgment, which will embrace all the provisions of the judgment appealed from, except those which relate to costs and to the note for $71.75. For this note a judgment will be rendered against defendants in favor of the plaintiff for the full amount due thereon for principal and interest, being $71.75, with interest thereon from May 16, 1893, to the date of such new judgment. Because this is an equity case, also because the judgment is here modified, it becomes necessary for us to pass on the question of costs. As the plaintiff has prevailed in this court, and should have prevailed in the lower court to the extent of recovering judgment on one of the notes, we think he should have the usual costs and disbursements in the District Court, and also in this court. All concur.

(71 N. W. Rep. 550.)

WILLIAM H. FIELD *et al.* *vs.* GREAT WESTERN ELEVATOR CO.

Opinion filed April 26th, 1897.

Waiver of Appeal.

By appealing from a judgment of a county court to the District Court, the appellant waives his right to appeal from such judgment to the Supreme Court, and such waiver is irrevocable.

Appeal from Ransom County Court; *Allen*, J.

Action by William H. Field and Clarence B. Wisner against the Great Western Elevator Company. Judgment for defendant and plaintiff's appeal.

Dismissed.

Edward Engerud, for appellants.

P. H. Rourke, for respondent.

CORLISS, C. J. The motion to dismiss this appeal must be granted. The case was originally tried in the county court of Ransom county. The plaintiff in the action having been defeated

in that court, he had before him, under the statute, either of two courses to pursue: he could appeal to the District Court, or he could appeal to the Supreme Court. Rev. Codes, § 6591. But both of these remedies were not open to him. They are inconsistent. It is one of the very elements of the law that, when a suitor reaches the parting of the ways in the pursuit of inconsistent remedies, he must elect which road he will follow. The first step taken is an election, and the election, when made, is irrevocable. Elliott, App. Proc. § 149; 2 Enc. Pl. & Prac. 179, 180; 7 Enc. Pl. & Prac. 364; *Wilson* v. *Roberts*, 38 Neb. 206, 56 N. W. Rep. 787; *Harvey* v. *Fink*, 111 Ind. 249, 12 N. E. Rep. 396; *Insurance Co.* v. *Routledge*, 7 Ind. 25; *Insurance Co.* v *Carpenter*, 85 Ind. 350, and cases cited. The plaintiff made his election to have his case reviewed by the District Court by appealing to that court. After perfecting his appeal, he had it dismissed on his own motion. Whether he could thereafter have appealed again to the District Court, if that dismissal had been without prejudice to his right to take a second appeal, it is unnecessary to decide. When he made his election to appeal to the District Court, he took all the risks incident to an appeal to a higher tribunal; and if, because he discovered through some mistake in practice he was not in a position to derive any benefit from the appeal, he voluntarily dismissed it, that can have no bearing on the question of election. After he had taken his appeal to the District Court, he was in the same position that he would have occupied had there existed no statute whatever authorizing an appeal to the Supreme Court. When the former appeal in this case was dismissed on the ground stated in the opinion of the court, 5 N. D. 400 (67 N. W. Rep. 147), we refrained from expressing any view on the question we have been considering in this opinion. That decision did not settle the question of election of remedies, for the reason that it was unnecessary at that time to pass on that point in order to decide the motion to dismiss then presented. We have assumed in this decision that the amount in controversy in the county court was at least $250. If it was

less than that sum, no question of election would arise. No right of appeal to the Supreme Court exists where the amount in controversy is less than $250. Rev. Codes, §6591. Whether, therefore, the amount was $250 or less than that sum, it is clear that the motion to dismiss should be granted. All concur.

(71 N. W. Rep. 135.)

JOSEPH THOMPSON *vs.* D. C. CUNNINGHAM.

Opinion filed April 26th, 1897.

Specifications of Error—Review on Appeal.

Where a motion for a new trial is based upon a statement, errors, (whether in the verdict, decision, or in the rulings of the court below) will de disregarded in this court unless the same are specified in the statement.

Appeal from District Court, Grand Forks County; *Templeton*, J.

Action by Joseph Thompson against D. C. Cunningham. Judgment for plaintiff. Defendant appeals.

Affirmed.

J. H. Bosard, for appellant.

Cochrane & Feetham, for respondent.

WALLIN, J. This is an action to recover damages for certain grain which the plaintiff claims was willfully destroyed by the defendant. There was a verdict for the plaintiff, awarding damages in the sum of $250. A statement of the case was settled, embracing three specifications of error, which may be summarized as follows: First, that there was no evidence showing that the grain destroyed was of any value, and the evidence showed that the grain was of no value; second, that the damages were excessive, and appeared to have been awarded by the jury under the influence of passion and prejudice, in this: that there was no evidence showing that the plaintiff was damaged in the sum of $250, or in any amount; third, misconduct of the jury. The

learned trial court, in its certificate settling the statement of the case, states: "It is hereby certified that the foregoing statement of the case contains all the evidence adduced at the trial, and all the proceedings had therein necessary to present the questions and exceptions relied on by the parties to this action." Upon the statement of the case the defendant moved in the trial court to vacate the verdict, and for a new trial of the action. The motion was denied, and from the order denying the motion the defendant has appealed to this court.

The case was submitted to this court upon briefs, and without oral argument. Appellant has made no assignments of error in this court, as required by rule 15 of the rules of this court. 61 N. W. Rep. ix. In appellant's original brief there is an entire absence of any assignments of error upon either of the three specifications of error embodied in the statement, and already referred to. Appellant's original brief contains a very able argument, and one apparently well fortified by authority, upon a feature of the case which we shall hereafter notice, but no allusion is made in appellant's said brief to either of the points suggested by the specifications of error. On the contrary, such points are neither assigned as error nor alluded to in that brief. The errors specified in the statement having been thus completely ignored by the appellant, and neither assigned, discussed, nor referred to in this court by counsel, we are not at liberty, under established rules of practice, to consider or determine the questions arising upon the statement of the case. It is in fact perfectly obvious that the appellant's counsel in his original brief intentionally abandoned all of his specifications of error, and did not desire or expect this court to pass upon the same, or either of the same. Under the circumstances, we shall be compelled, under the established practice, without reference to the merits of the points raised by the specification contained in the statement, to rule the same adversely to the appellant. In this case however, we can say that we have carefully read the record, and find that, while the evidence which bears upon the question of the

value of the grain destroyed is very conflicting, there is competent evidence in the record tending to show that the grain which defendant admits he destroyed was of the value found by the jury, and, therefore, that there is no evidence that the verdict was rendered under the influence of passion and prejudice. We find no evidence in the record tending to show that the jury were guilty of "misconduct." The affidavit upon which this feature of the motion for a new trial was originally founded has not been preserved in the abstract, and we are therefore unadvised as to its contents. Besides, as has been said, no error is assigned in this court upon this feature of the case, nor is it mentioned in either of appellant's briefs. An inspection of the record transmitted to this court discloses the fact that the record does not embrace any of the instructions given to the jury by the trial court, nor can we find that any ruling made during the trial was challenged by an exception. If the District Court was requested at the trial to give an instruction to the jury of any character, the fact of such request does not appear of record, nor does it appear that either side moved for a directed verdict. In this court counsel does not, in the original brief, complain of any ruling made by the court below, nor that the verdict is without support in the evidence with respect to any feature pointed out in the statement. Appellant argues in his original brief that the case should be reversed in this court because, as he contends, the evidence shows that the plaintiff, at the time the defendant destroyed the property, was not the owner of the same. Whether this contention was or was not developed at the trial, it is certainly true that no trace of it can be found in the record. The statement embraces only so much of the evidence as, in the opinion of the trial court is deemed "necessary to present the questions and exceptions relied on by the parties to this action." The questions "relied on" by the appellant can embrace only those specified in the statement of the case. With respect to any and all other questions which may have arisen at the trial, there is nothing to show that all the evidence concerning them is embraced in the state-

ment. On the contrary, the plain inference from the language of the statement is that the evidence upon uncontroverted points is excluded from the record, as it should be in all cases. Nothing in the notice of intention to move for a new trial, or the statement prepared by appellant, advised counsel for respondent, or the court below, that the appellant intended to raise the point touching the title to the property now so strenuously urged in this court; nor does the record before us give countenance to the idea that the contention of counsel in this court upon the question of title was ever heard of by the District Court, either at the trial or on the motion for a new trial. The question whether the plaintiff owned the grain at the time of its destruction could have been presented to the trial court either by a request for a directed verdict in favor of the defendant, or by an exception to instructions. The same question could likewise have been raised by a proper specification in the statement, setting out the deficiency in the evidence upon the feature of plaintiff's ownership of the property destroyed. So far as appears of record, the appellant's contention here was never raised in the District Court as we have indicated, or at all. It is therefore manifest that we are not permitted, under the statute or rules of court, to decide the question of title now pressed upon us for determination. A decision of the question would be in the teeth of the statute, and in defiance of our own rules of practice. See § 5467, Rev. Codes, and rules 13 and 15 of the rules of the Supreme Court, 61 N. W. Rep. ix. Both the statute and rules of court require us to "disregard" errors, whether in rulings or in the verdict, where the errors upon which we are requested to rule are not "specified" in the statement, in cases where, as in this case, the motion for a new trial is based upon a statement. Neither the statute nor the rules of court we have cited are of recent origin, as both have substantially come down to the state courts by inheritance from the Territory of Dakota, and we have had frequent occasion to apply them to cases decided in this court. Experience has demonstrated the great utility of the statute and rules in ques-

tion in facilitating the solution of the problems involved in litigation; but their highly beneficial uses would, of course, be lost and wasted if we failed to enforce them according to their letter and spirit. Nor can we relax the clear mandatory requirements of the statute in any case, even if by so doing we might, in an isolated case, promote the ends of justice. See *Henry* v. *Maher*, 6 N. D. 413, 71 N. W. Rep. 127; *First Nat. Bank* v. *Merchants' Nat. Bank*, 5 N. D. 161, 64 N. W. Rep. 941; *Smith* v. *Heger*, 5 N. D. 165, 64 N. W. Rep. 943; *Hostetter* v. *Elevator Co.*, 4 N. D. 357, 61 N. W. Rep. 49; *O'Brien* v. *Miller*, 4 N. D. 308, 60 N. W. Rep. 841.

We should add, perhaps, that since this case was submitted to this court in behalf of the respondent, which submission was made when the case was reached in its order in this court, and after the brief of the respondent's counsel and the original brief of the appellant's counsel had been placed on file, we have received a copy of an "additional" brief in the case made by appellant's counsel. In the additional brief, counsel for appellant states that, "appellant having omitted to subjoin to former brief assignments of error objected to and relied upon in this appeal, this amended or supplemental brief is prepared and furnished for the purpose of rectifying this omission." The only assignment of error contained in the additional brief of appellant's counsel is as follows: "The evidence was insufficient to justify the verdict." It is clear that this court cannot regard this attempt to assign error as adequate to meet the requirements of rule 15 of the rules of this court, for two reasons: First. The rule of this court requires assignments of error to be served with the appellant's brief upon counsel for respondent prior to the first day of the term. This was not done, nor is there any claim that this requirement has been waived by the respondent's counsel. Second. The attempted assignment of errors in the additional brief is wholly insufficient, under rule 15, Sup. Ct. Rules. On its face it fails to point out any particular error, nor does it refer to any specification of error in the abstract as explan-

atory of such attempted assignment. It is impossible to gather from the attempted assignment of error what specific error it is which counsel now desires this court to pass upon. True, counsel in his additional brief has discussed certain points, including the point of value, which he deems it important for the court to consider; but it is needless to say that what counsel may see fit to advance by way of argument does not constitute an assignment of errors, within the meaning of the rule which requires an assignment of errors. We are therefore compelled to dispose of the case without reference to the attempted assignment of errors in appellant's additional brief, but in so doing we reiterate what was said in a former part of this opinion. This court, and every member of it, has carefully read and considered the evidence upon the question of the value of the property involved in litigation; and we are of the opinion that, in view of the substantial conflict in the evidence, we ought not to disturb the verdict. Perhaps the evidence preponderates against the view taken by the jury, but the trial court, after time for deliberation, and with all the light before it, refused a new trial; and upon a mere question of value, based as it is upon the conflicting opinions of witnesses, we do not feel justified in overruling the views of both the jury and the trial court.

Finding no error in the record, the order appealed from will be affirmed. All the judges concurring.

(71 N. W. Rep. 128.)

J. J. HOWE & CO. *vs.* W. G. SMITH, ET AL.

Opinion filed April 26th, 1897.

Mechanic's Lien—Description of Property—Sufficiency.

The affidavit filed by appellants for a mechanic's lien on real property described it as lot 5, in block 32, of Keeny & Devitt's addition to Fargo. The property sought to be charged with the lien was lot 5, in block 32, of Keeny & Devitt's Second addition to Fargo. There were two additions made by Keeny & Devitt to the City of Fargo, one being designated on the plat thereof as Keeney & Devitt's addition, and the other as Keeny & Devitt's Second addition. In Keeny & Devitt's original addition there was no block 32, the blocks therein being numbered from 1 to 16, both inclusive. In Keeny & Devitt's Second addition the blocks were numbered from 17 to 41, both inclusive. The respondent owned lot 5, block 32, in Keeny & Devitt's Second addition, and owned no other property in either addition, or in the City of Fargo. *Held*, that the description was sufficient under the statute requiring the affidavit to contain "a correct description" of the property sought to be charged with the lien.

Description Sufficient Between the Parties.

Any description in an affidavit or notice for a lien which will enable a party familiar with the locality to identify the property with reasonable certainty is sufficient as between parties.

Sufficiency of Description as to Purchasers.

Whether, in all cases, such a description would be sufficient as against subsequent purchasers and mortgagees, not decided.

Appeal from District Court, Cass County; *McConnell*, J.

Action by J. J. Howe and A. B. Barton, copartners as J. J. Howe & Co., against W. G. Smith and N. M. Stimmel. Judgment for defendants, and plaintiffs appeal.

Reversed.

John E. Greene, for appellants.

Smith Stimmel, and *Pollock & Scott*, for respondents.

CORLISS, C. J. Upon this appeal a single problem presents itself for solution. The action was instituted to foreclose a mechanic's lien on real property. The sole defense is that the affidavit for lien is fatally defective, in that it does not contain "a correct description" of the property to be charged with the lien, as required by the statute. Rev. Codes, § 4791. The land involved

is situated in the City of Fargo, in this state. Its accurate description is "lot 5, block 32, Keeny & Devitt's Second addition to the City of Fargo." It is described this way in the lien with the exception of the word "Second." That is omitted from the description. It appears that there are two Keeny & Devitt's additions to the City of Fargo, one being described as Keeny & Devitt's addition, and the other as Keeny & Devitt's Second addition. In Keeny & Devitt's addition there is found no block 32. The numbers of the blocks in that addition stop at No. 16. In Keeny & Devitt's Second addition the numbering of the blocks begins at 17, Nos. 1 to 16, both inclusive, being not found in that addition at all; and the numbers run from 17 to 41, both inclusive. It is apparent, therefore, that unless the description contained in the affidavit for a lien relates to lot 5, in block 32, Keeny & Devitt's Second addition, it describes no land whatever. The case before us is not a case in which the description which does not accurately describe the land sought to be charged with the lien does in fact describe another piece of real property with technical exactness. In such a case there is no ambiguity to be cleared up by a resort to extrinsic facts. It is a case where the lienor has precluded all possibility of his claim that he intended to describe the land he is seeking to subject to a lien, because he has explicitly described another parcel of real estate, and because no reformation of the description is in such cases permitted. When one lot is designated in the lien in terms which point it out with absolute precision, no room is left to inquire whether another lot was intended. If, in this case, it appeared that there was in fact in Keeny & Devitt's original addition a block numbering 32, containing a lot numbered 5, we would be compelled to adjudge the description insufficient. This is the utmost scope of the decision of the court in *Lumber Co.* v. *Davie*, (Mont.) 32 Pac. Rep. 282, so much relied on by counsel for respondent. In that case lot numbered 14 was described in the lien, and the property sought to be charged with the lien was lot 13.

It has for many years been laid up among the elementary principles of the law relating to mechanics' liens that technical accuracy of description in the instrument filed to perfect the lien is not required. Such instruments are often prepared by persons possessing no legal skill, and the courts, out of indulgence to their want of the requisite knowledge, have adopted the rule that no amount of looseness in the description of the premises intended to be affected will vitiate the lien, provided the property is so designated therein that one familiar with the locality can identify the land with reasonable certainty. Phillips in his work on Mechanic's Liens, states, in § 379, the rule in the following language: "That if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others, it will be sufficient. There is great reluctance to set aside a mechanic's claim merely for loose description, as the acts generally contemplate that the claimants should prepare their papers; and it is not necessary that the description should be either full or precise. It is enough that the description points out and indicates the premises, so that, by applying it to the land, it can be found and identified." In *Tulloch* v. *Rogers*, (Minn.) 53 N. W. Rep. 1063, the court said: "It has been held by this court, following the well-settled rule elsewhere, that, if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of other premises, it will be sufficient, and that it is enough that the description as found in the statement points out and indicates the premises so that, by applying it to the land, it can be found and identified; and also that less certainty of description is required in the case of affidavits for liens than in deeds of conveyance." In *Bassett* v. *Menage*, *Id.* 1064, the court observed that "the lien statement is a notice merely of the claim of the material man or mechanic, and while, in substance, it must comply with the requirements of the statute, the same fullness or precision is not required as in the

case of a conveyance or judgment. If there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others, it will be sufficient." In *Northwestern C. & C. P. Co.*, v. *Norwegian, etc., Seminary*, (Minn.) 45 N. W. Rep. 868, the court said: "The affidavit for a lien is neither a process, pleading, judgment, nor conveyance, but merely a notice of the claim of the mechanic or material man; and while it must undoubtedly, in substance, comply with the requirements of the statute, yet the same fullness or preciseness is not required as in the case of a conveyance or judgment. The general rule as to the sufficiency of such notices is that, if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others, it will be sufficient. It is enough that the description points out and indicates the premises so that, by applying it to the land, it can be found and identified." In *De Witt* v. *Smith*, 63 Mo. 263, the court states the same rule in the following language: "As to what will be regarded as a sufficient description to sustain a mechanic's lien, the general rule seems now to be that, if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others, it will be sufficient. There is great reluctance to set aside a mechanic's claim merely for loose description, as the acts generally contemplate that the claimants should prepare their own papers; and it is not necessary that the description should be either full or precise. It is enough that the description points out and indicates the premises so that, by applying it to the land, it can be found and identified." Tested by the doctrine of these cases,—a doctrine universally recognized,—it is evident that the property was described with sufficient accuracy to make such description a "correct description," within the meaning of the statute. No one familiar with the locality and with all the facts—as the owner

must be deemed to be—could possibly misunderstand what property was meant. There was only one lot upon which the respondent Stimmel was erecting a building in the city of Fargo, and only one lot in the entire city owned by her. The description of this lot answered perfectly to the description contained in the affidavit for lien, so far as that description went. It was palpable that lot 5, in block 32, of Keeny & Devitt's original addition, was not meant, for there was no such lot to be found therein. It was also evident that the appellants intended to describe property owned by the respondents. They so declare in their affidavit. They assert that their purpose is to file a lien on lot 5, of block 32, Keeny & Devitt's addition to the City of Fargo, owned by the respondents. It is found that the respondents did in fact own lot 5, in block 32, of a Keeny & Devitt's addition to Fargo, but this addition is described in the plat on file as their Second addition. The appellants did not state that the property was in the first or original addition, but merely that it was in Keeny & Devitt's addition to the City of Fargo. Now, there was just such an addition to the city containing the lot in question, and it was in this addition alone that any such lot could be found. All necessity for discriminating sharply between these additions in describing property within them respectively was obviated by the mode of numbering the blocks therein. The same numbered block is not in a single instance to be found within both. Block 15 can be found only in the original addition. Block 32 can be found only in the Second addition. The number of the blocks would invariably demonstrate which one of the additions made by Keeny & Devitt the lot was in, whatever mode of describing the addition might be adopted. We regard this as a plain case. The mass of authority in support of our ruling is simply overwhelming. *Evans* v. *Sanford*, (Minn.) 68 N. W. Rep. 21; *Northwestern C. & C. P. Co.* v. *Norwegian, etc., Seminary*, (Minn.) 45 N. W. Rep. 868; *Nystrom* v. *Mortgage Co.*, 47 Minn. 31, 49 N. W. Rep. 394; *Tulloch* v. *Rogers*, 52 Minn. 114, 53 N. W. Rep. 1063; *Bassett* v. *Menage*, 52 Minn. 121, 53 N. W. Rep. 1064; *Russell* v. *Hayden*,

(Minn.) 41 N. W. Rep. 456; *De Witt* v. *Smith*, 63 Mo. 263; *Martin* v. *Simmons*, (Colo. Sup.) 18 Pac. Rep. 535; *Laird-Norton Co.* v. *Hopkins*, (S. D.) 60 N. W. Rep. 857; *McNamee* v. *Rauch*, (Ind. Sup.) 27 N. E. Rep. 423; *Newcomer* v. *Hutchings*, 96 Ind. 119; *McHugh* v. *Slack*, (Wash.) 39 Pac. Rep. 674; *Steam Mills Co.* v. *Kremer*, (Cal.) 29 Pac. Rep. 633; *Kennedy* v. *House*, 41 Pa. St. 39; *Springer* v. *Kroeschell*, (Ill. Sup.) 43 N. E. Rep. 1084; *Cleverly* v. *Moseley*, (Mass.) 19 N. E. Rep. 394; *Brown* v. *Coke Co.*, 16 Wis. 556; *Bambrick* v. *King*, 59 Mo. App. 284. Nothing was said by this court in *Lavin* v. *Bradley*, 1 N. D. 291, 47 N. W. Rep. 384; which in any manner conflicts with our ruling in this case. In that case the party claiming the lien had, in attempting to describe the land on which the grain on which the seed lien was claimed was grown, described another parcel of land. The section on which it was grown was not described, but an entirely different section of land was described, in a manner to designate it with technical exactness. The case falls within the principle underlying the decision in *Lumber Co.* v. *Davie*, (Mont.) 32 Pac. Rep. 282. What was said in that case we reiterate and indorse, both with respect to the sufficiency of the description and the impossibility of reforming such instruments to correct errors therein. We have been unable to discover a single decision which would warrant a ruling in this case adverse to the appellants. We do not attempt to decide whether this description would be good as against third persons. Many of the cases intimate that a description good as between the parties may not be good as to subsequent purchasers or incumbrancers. In *Laird-Norton Co.* v. *Hopkins*, (S. D.) 60 N. W. Rep. 857, this distinction is clearly recognized. But in the case at bar the strife is only between the owner of the property and the parties claiming the lien.

The judgment of the District Court is reversed, and that court is directed to enter the usual judgment of foreclosure of a mechanic's lien for the sum of $536.18, with legal interest from August 17, 1893. The appellants will recover costs and disbursements in both courts. All concur.

(71 N. W. Rep. 552.)

WILLIAM MCARTHUR *vs.* W. S. DRYDEN.

Opinion filed April 27th, 1897.

Verdict—Contrary to Evidence.

A verdict that must be either without support in the testimony or contrary to the instructions of the court cannot stand.

Contract for Benefit of Third Person—Consideration.

Section 3840, Rev. Codes, which declares that "a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it," presupposes a valid contract between the parties that rests upon sufficient consideration.

Appeal from District Court, Walsh County, *Sauter*, J.

Action by William McArthur against W. S. Dryden and the Monarch Elevator Company. Dismissed as to the elevator company. On appeal to the District Court, judgment rendered for plaintiff, and defendant appeals.

Reversed.

John H. Fraine and *Cochrane & Feetham*, for appellant.

Phelps & Phelps, for respondent.

BARTHOLOMEW, J. This action was commenced in justice court. It was originally brought by plaintiff against the defendant Dryden and the Monarch Elevator Company. On trial in justice's court the action was dismissed as to the elevator company. Plaintiff obtained judgment against the defendant Dryden. Dryden appealed to the District Court, where the case was again tried to the court and a jury, resulted in a verdict for plaintiff. Motion for a new trial was overruled, and this appeal is taken from the order of the court denying a new trial. There is a large assignment of errors, of which we shall consider but two: First, that the verdict was contrary to law; and, second, that the testimony was insufficient to sustain the verdict.

The action arose out of the following facts: During the fall of 1895, plaintiff, McArthur, was operating a threshing machine, and

threshed grain for one William Henry, amounting to the sum of $286.52. For this sum plaintiff claimed and filed, as he alleges in his complaint, a thresher's lien on the grain so threshed. This lien was perfected on the 22d day of October, 1895. The defendant Dryden was at that time the agent of the Monarch Elevator Company, a corporation, and engaged in operating the elevator of said corporation at the village of Cashel, in Walsh county. That portion of the complaint that seeks to fasten liability upon Dryden is in the following language: "That on or about the 15th day of November, 1895, there was still due and owing to the plaintiff herein, upon said threshing account, by said William Henry, the sum of ninety-three ($93) dollars. That prior thereto, and after said threshing was completed, the said William Henry had delivered to the defendant W. S. Dryden a large part of said grain, and said Dryden had placed the same in the elevator of the defendant Monarch Elevator Company, at Cashel, North Dakota, for the purpose of selling the same to said Monarch Elevator Company. That the defendant W. S. Dryden during all the times herein mentioned was, and still is, the agent, at said town of Cashel, for said Monarch Elevator Company, for the purpose of transacting its business there, and that he personally and individually claimed an interest in said grain in the nature of a seed lien upon the same for certain wheat and barley which he had personally and individually sold and delivered to said Henry in the spring of 1895, for the purpose of sowing the same on said land for the crop of 1895, and the same was so sown by said Henry. That on or about said 15th day of November, 1895, and while said sum of ninety-three ($93) dollars was still owing by said Henry to the plaintiff herein upon said threshing account, the plaintiff herein was at said town of Cashel with said William Henry, and was endeavoring to obtain from him payment of said balance. They together went to said W. S. Dryden, to have the same adjusted, and paid from the proceeds of said grain. That said Dryden then had due knowledge, notice, and information of the existence of said lien claimed by plaintiff for threshing said

grain, and at the joint request of the plaintiff and said Henry he then and there promised, agreed, and undertook, both in his own behalf and on behalf of said Monarch Elevator Company, to pay to the plaintiff the said sum of ninety-three ($93) dollars from the proceeds of said grain and more of the same grain which was thereafter to be delivered to said Dryden by said Henry; and that said Dryden did receive personally and individually the proceeds of said grain." It further alleges that Henry thereafter delivered grain to Dryden to the amount of more than 600 bushels, and that the said defendant failed to pay for said grain, or any part thereof, except the sum $25. It will be noticed that the action is based upon the alleged promise of Dryden to pay the debt of Henry. Confessedly, this promise was not in writing. In charging the jury, the court said: "Now, gentlemen of the jury, in actions of this kind the statute provides that a promise to answer the obligation of another in any of the following cases is deemed an original obligation of the promisor: First, when the promise is either by one who has received property of another upon an undertaking to apply it pursuant to such promise, or by one who has received a discharge from an obligation in whole or in part in consideration of such promise." The court then gave the jury also the second and third subdivisions of § 4629, Rev. Codes, which need not be quoted here. The court then proceeded: "When a promise is made for the obligation of another by one who has received property of another upon an undertaking to apply it pursuant to such promise, it need not be in writing. But the property must be received by the individual sought to be recovered against. If Mr. Dryden received property as an individual in his own behalf, and agreed from that property to pay the debt of Mr. McArthur, then he can be held." Further on in the charge the court said: "You will notice, gentlemen of the jury, that in the making of the promise it is necessary that the property should have been received prior to the making of the promise by Mr. Dryden, in the event you find for plaintiff." The instructions also covered the thought that, if Mr. Dryden held

money belonging to Henry in his capacity as an individual, then he would be liable in the action, provided he made the promise in his individual capacity. The correctness of these instructions upon these points is not before us. They announce the law of the case, which the jury was bound to follow.

Whether or not there was any wheat in the elevator belonging to Henry at the time the plaintiff and Henry had their conversation with defendant Dryden is a matter in dispute in the testimony. It depends upon the date of this conversation. If held on the 28th of October, as Dryden testifies, it is clear that there was no such grain in the elevator. If, on the other hand, the conversation took place about the 15th of November, as plaintiff and Henry testify, then there was quite an amount of grain in the elevator belonging to Henry. But it is clear that any grain so in the elevator had been delivered by Henry to the elevator company, and not to Dryden as an individual. This is true, notwithstanding the fact that Henry testifies in a general way that Dryden was the party he was dealing with. For all grain delivered at the elevator, storage checks were issued, and delivered to Henry. These storage checks were all signed by the elevator company, by Dryden as agent. These checks were all introduced in evidence, and cover all grain delivered by Henry at said elevator after October 31, 1895, and the evidence is undisputed that for all grain delivered prior to that time Henry was paid in cash at the time of delivery. It follows, then, that if, in reaching their verdict, the jury held that the grain so delivered by Henry was delivered to Dryden as an individual, and not to the elevator company, their holding had no support whatever in the evidence, and should have been set aside. If, on the other hand, they reached the conclusion that the grain had been delivered to the elevator company, but nevertheless returned a verdict against the defendant Dryden, then such verdict was directly contrary to the instructions of the court, by which the jury had been told that Dryden would not be responsible to plaintiff unless such grain had been delivered to and received by him as an indi-

vidual. If such was their verdict, the verdict should have been set aside, as contrary to the instructions of the court. In this court respondent makes the claim that this action could be maintained, and the verdict can be supported, under § 3840, Rev. Codes, which reads: "A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it." This well-established principle of law voiced by our Code cannot, we think, be brought to plaintiff's aid in this case for several well-defined reasons: First, We deem it clear that if Dryden made any promise or agreement to pay Henry's bills to plaintiff, he did so in his capacity of an agent, meaning and intending to pay the same out of the money belonging to the elevator company which might become due from the elevator company to Henry by reason of the delivery already made by Henry of wheat to the elevator company. It is clear to us that none of the parties entertained the belief at the time the arrangement was made that Dryden had any thought of binding himself individually. Dryden himself denies any such promise, either as an individual or as an agent, and McArthur swears that at the time the arrangement was made Dryden stated that he was just out of money; but, if they would wait until the train came in, he would pay them the money. This McArthur declined to do, stating that he had not time to wait; whereupon he says Dryden told him that he had some money of his own, and would pay him with that, if he (McArthur) would wait until Dryden had time to go for it. This evidence of McArthur clearly shows that it was understood that the money that was to be paid was the money of the elevator company, and that Dryden's offer to substitute his own money was only made for McArthur's convenience, and not because Dryden was liable as an individual. Of course, if Dryden made the promise only in the capacity of an agent, the action cannot be maintained against him as an individual. But if it be held that Dryden entered into the contract in his individual capacity, then the contract must fail for want of consideration. Section 3840, above quoted, contemplates a con-

tract resting upon a present consideration passing between the two contracting parties, and with which the third party has no connection. One of the most common instances of such a contract arises when a mortgagor of real property sells the same, and the grantee, as a part of the consideration, promises and agrees with the mortgagor that he will pay the mortgage debt. Here the conveyance of the property furnishes the consideration for the grantee's promise, and the mortgagee may maintain an action against him. He becomes the principal debtor, and, while the mortgagor is not released, yet, as to the grantee, he stands in the position of a surety. *Moore* v. *Booker*, 4 N. D. 543, 62 N. W. Rep. 607. In the case at bar, as we have seen, Dryden never received any consideration to support an individual promise. He had not then or afterwards any wheat belonging to Henry in his possession in his individual capacity. Nor was the arrangement a novation, for the manifest reason that Dryden owed no obligation to Henry that could be extinguished by assuming an obligation to McArthur. But it is said that when the wheat was sold the money came into Dryden's hands for Henry, and he was bound to pay McArthur out of such money. The answer to this position is the fact that the money was the money of the elevator company, and came into the hands of Dryden as the agent of such company. With it he was bound to extinguish the obligation of the elevator company to Henry, and could not divert it to the extinguisment of his individual obligation to McArthur. On no theory within the record can we sustain this verdict. There must be a new trial.

Reversed. All concur.

(71 N. W. Rep. 125.)

FRANK A. SEYMOUR *et al vs.* THE CARGILL ELEVATOR COMPANY.

Opinion filed April 28th, 1897.

Conversion—Sufficiency of Demand.

Where plaintiffs, claiming certain grain under a chattel mortgage, demanded the delivery to them of the grain before suit was brought for converting the grain, such demand being made of defendant's agent in charge of one of its elevators located within this state in which the grain was stored at the time of such demand, *held*, that such demand was sufficient, as against the elevator company.

Appeal from District Court, Cass County; *McConnell*, J.

Action by Frank A. Seymour and others against the Cargill Elevator Company. Judgment for plaintiffs, and defendant appeals.

Affirmed.

John D. Benton, for appellant.

Ball, Watson & Maclay, for respondents.

WALLIN, J. This action was brought for damages for the conversion of a quantity of wheat. On plaintiffs' motion, a verdict was directed for plaintiffs. The facts which must control the decision of the case are, briefly stated, as follows: The Walter A. Wood Harvester Company, which is represented in this action by the plaintiffs, to secure two promisory notes given by one Englund to said company, took and filed for record a chattel mortgage from said Englund, covering a crop of grain raised by Englund in the year 1895. Englund did not own all of said crop, as a part thereof was to be applied as a crop payment for the land. It appears that the crop in question was divided, and that Englund deposited his share (some 300 bushels) in his own granary on the land. Subsequently, and when the chattel mortgage was of record and unpaid in whole or in part, Englund sold the grain to the defendant, and said grain was delivered by him to the defendant, and was placed in its elevator at Page, in this state. The grain was received into the elevator, and paid for by

one Huff, who at all times in question was the agent in charge of the elevator into which the grain was received. There is no evidence in the case tending to show that the defendant actually converted the wheat, by mixing it with other wheat, or by removing it out of the state, or otherwise. After the grain had been sold and delivered to the elevator company, and prior to the commencement of the action, to-wit, on October 10, 1895, an agent of the harvester company went to the office of the elevator company in said elevator, at Page, where the grain then was, and then and there demanded a delivery of said wheat to the plaintiff, under said chattel mortgage. Said demand was made of said Huff, who was then in charge of the elevator at Page. The demand was not complied with, but was refused. One F. H. Dickinson testified in plaintiff's behalf, in substance as follows: "I was the general agent of the owners of the land on which the crop of grain was raised. There was a certain payment to be made on the land, and the balance of the crop was to go to Englund. The crop was divided. After the division, Englund had authority to dispose of it. I was also at the time of these transactions engaged in handling machinery for the Walter A. Wood Harvester Company, by whom I was employed. I took the notes in question for payment on binders, and the mortgage to secure the notes. I was the agent of the Wood Company at the time the mortgage sale was made of said binders. I had no knowledge that Englund intended to sell the grain to the elevator company." On this evidence, the claim is made in this court by counsel for the appellant that the Wood Harvester Company (through their agent, Dickinson) waived and lost the lien of their mortgage. We think this claim is without merit. It is quite true, and we have recently so held (see *New England Mortgage Security Co.* v. *Great Western Elevator Co.*, 6 N. D. 407, 71 N. W. Rep. 130,) that where a mortgagee of chattels especially authorizes the mortgagor to sell the property described in the mortgage, and out of the proceeds to pay the debt to the mortgagee, such authorization, if followed by such sale, will operate to waive the lien, and that in such case the

fact that the mortgagor failed to pay the debt secured by the mortgage, out of the proceeds of such sale or otherwise, will not reinstate the lien of the mortgage. But we can discover no such state of facts, nor any equivalent facts, in the case at bar. It nowhere appears that the mortgagee, or any of its agents thereunto authorized, ever authorized Englund to sell the grain, or knew that Englund contemplated a sale to the defendant, or at all. Nor is there a scintilla of evidence that Dickinson ever had the notes in his hands for collection. It does appear that Dickinson took the notes originally in payment for machinery, and that he was still the agent of the harvester company when there was a foreclosure sale of such machinery, under the mortgage; but it does not appear that Dickinson was the agent who supervised such sale, and, if it did so appear, it would not follow that he had any authority to collect the debt, as against the defendant. The fact that Dickinson states that Englund had authority, after the grain was divided, to sell his own share, is not important. That fact is a mere conclusion of law. Nor does the fact that Englund had a right to sell his own property militate against the validity of the mortgage lien, or tend to show that Dickinson waived the lien of the mortgage, or had authority to do so from the mortgagee.

Appellant's counsel makes the further point that a demand and refusal to deliver must appear to have been made in cases like this, where no actual conversion is shown, and that the evidence fails to show that any sufficient legal demand was ever made upon the elevator company for the wheat in question. Appellant's counsel says in his brief: "That the sole authority actually conferred was the right to purchase grain for the defendant, receive it into the elevator, and give to the seller or depositor some evidence of the sale or deposit. There is no evidence that Huff had any actual authority to dispose of the wheat purchased by him, or to surrender it upon the demand of third persons claiming to be the owners of it, without referring the matter to his principal." The result of the evidence touching the demand

is thus fairly stated by counsel, and upon it the question is presented whether the demand upon the agent in charge of the elevator where the wheat was sold and received, and where, under the evidence, it must be presumed to have been at the time of the demand, is a sufficient demand upon the owner of the grain, the Cargill Elevator Company. In holding the demand sufficient, we might rest the ruling upon express authority. *Deeter* v. *Sellers*, 102 Ind. 459; *Lundberg* v. *Elevator Co.* (Minn.) 43 N. W. Rep. 685. In the latter case a quantity of grain was deposited with the elevator company, as bailee thereof, and, before suit brought, the plaintiff, who claimed under a chattel mortgage, demanded the possession of the grain of the agent in charge of the elevator where the grain was deposited. In deciding the case, the learned court used the following language: "The demand of the possession of the wheat in controversy before suit brought was properly made by plaintiff or his attorney upon the agent in charge of the elevator, and with whom the arrangement for its deposit therein was made." It does not appear that the evidence in the Minnesota case showed that the elevator agent had any authority other than the authority to receive the wheat on deposit, and is therefore in this respect like the case at bar. In the Indiana case (opinion by Judge Elliott) the court held that no demand was necessary, because the taking was tortious, but further said: "Where a demand is necessary, it is sufficient to make it of the agent in possession of the property."

There seems to be no little conflict of authority upon the question of the sufficiency of demands made upon agents for the possession of property belonging to their principals in their possession, where a demand is held to be necessary before bringing replevin or suing for the conversion of such property. In the confusion which prevails in the cases, we do not deem it necessary or wise in this case to lay down any inflexible rule for the government of all cases hereafter arising. Under some well-considered authorities, each case seems to depend upon its own peculiar facts, and a demand will be held sufficient or otherwise,

depending upon the relation held by the agent to the subject-matter of the property demanded, and the nature of the agent's business. Applying this rule to the case in hand, we find that the agent of the defendant had the usual authority and powers conferred upon elevator agents in this state in charge of the elevators of non-resident corporations. They are a very numerous class of agents, and their relations to the farmers and business-men of the communities where they are stationed is of a vitally important nature. The great bulk of the grain raised in the state passes out of the state, through the instrumentality of these agents and the elevators, which, as a rule, are in their sole care and keeping. Speaking in general terms, the public sees no representative of the owners of the elevator lines except the agent in charge of the elevator. From him the market price of grain can always be ascertained, and sales are made directly through his agency to the non-resident owner of the elevator, and the sale of the grain by the producer is made only through the agent, and is rarely made to any other representative of the owner. It is a matter of common knowledge (of which courts are chargeable with notice) that the great majority of the elevators located within this state, as is true of the defendant's elevator in question, are owned by non-resident corporations, who have never estalished a general office or managing agency within this state, and the officers of which are not generally known, and, in the nature of things, cannot be generally known, to the people of this state. As a rule, these non-resident corporate bodies do all their business with the people of this state through agents in charge of local elevators, situated usually at railroad stations. Such agents are something more and different from a mere servant, who may be temporarily in custody of property belonging to his principal, but who has no responsibility with respect to the same other than that of a mere custodian. The agent in charge of an elevator must, in view of the responsible trust devolving upon him, be a man of intelligence and fair business judgment. Such a man, upon a demand being made upon him by a

stranger for grain in an elevator in his charge, would, unless his previous instructions covered such a case, immediately communicate with his non-resident principal, and thereby afford an opportunity to his principal to investigate the case, and give the agent final instructions in the premises. Communications between principal and agents are easy, rapid, and of constant occurrence; while, on the other hand, there is usually no communication between the depositor of grain in an elevator and the managing official of the corporation owning the elevator. If the party demanding grain in a local elevator should be compelled to make his demand of some non-resident official of the corporation, he would first be obliged to ascertain where the managing office is situated, and, learning that, he would then be bound at his peril to search for and find that particular officer, clothed by the corporation with authority to surrender grain to an outsider who might claim it. Nor do we think it very probable that any agent or officer would be readily found who had general authority to make such delivery in all cases. In view of these considerations, we should deem it not only a rule of intolerable harshness to require the demand to be made of a non-resident official, but such a rule, in many cases, would, in our judgment, amount to a practical denial of justice. We should therefore, in the absence of authority, hold that a demand, when made of the agent in charge of an elevator where the grain is stored at the time, is sufficient, as against the elevator company. We think the question of the sufficiency of the demand in such a case cannot be governed by mere instructions given by the principal to his agent, but must be controlled by general principles of law and public policy. It will not be necessary, therefore, to determine the question whether evidence of usage tending to show that elevator agents have no authority to deliver grain to any one, without instructions from headquarters, was improperly excluded from the jury in this case. Such usage or such instructions, if any were given, do not control the public, nor determine the rights of the public.

Finding no error in the record, the judgment will be affirmed. All the judges concurring.

(71 N. W. Rep. 132.)

BJORN S. BRYNJOLFSON *vs.* NORTHWESTERN ELEVATOR COMPANY.

Opinion filed April 29th, 1897.

Chattel Mortgage—Proof of Execution—Evidence.

The execution of a chattel mortgage being put in issue, plaintiff, to prove the same, testified himself to the execution thereof by the mortgagor; but he did not call the subscribing witnesses, or prove that they were dead or resided out of the state, or that any effort had been made to secure their testimony. *Held*, under the common-law rule relating to proof of instruments to which there are subscribing witnesses, and our statutes applicable to such a case, the plaintiff has failed to prove the execution of the chattel mortgage by the best evidence, and that, therefore, it was error to receive it in evidence over defendant's objection.

Appeal from District Court, Pembina County; *Sauter*, J.

Action by Bjorn S. Brynjolfson against the Northwestern Elevator Company. Judgment for plaintiff. Defendant appeals.

Reversed.

Ball, Watson & Maclay, for appellant.

The complaint neither alleged that the mortgage had been properly filed or that defendant had actual notice of its existence. The attachment of the copy of the mortgage to the complaint did not constitute it a part of the pleading. *Mayor* v. *Signoret*, 50 Cal. 298; *Miller* v. *Miller*, 19 N. W. Rep. 251; *Sprague* v. *Wells*, 50 N. W. Rep. 535; *Aultman* v. *Siglinger*, 2 S. D. 442; *Johnson* v. *Ins. Co.*, 6 Pac. Rep. 729; *Penrose* v. *Ins. Co.*, 66 Fed. Rep. 253. It was error to receive the mortgage in evidence over objection because not proved by either of the attesting witnesses thereto. Stephen's Dig. Ev. Art. 69, n. xxx; Best on Ev. § 215 n.; Cobbey Chat. Morts. § 402; Abbotts Tr. Ev. 505.

W. J. Kneeshaw, and *M. Brynjolfson*, for respondent.

The practice of pleading to the merits and then at the trial raising an objection in the nature of a demurrer is not favored by the courts. *Beauman* v. *Bean*, 23 N. W. Rep. 451; *Ry. Co.* v. *Crockett*, 24 N. W. Rep. 219. Objections should be taken by demurrer and if delayed until trial all intendments are against the party making them. *Barton* v. *Gray*, 12 N. W. Rep. 30; *State* v. *School District*, 8 Pac. Rep. 208; *Potter* v. *Taggart*, 11 N. W. Rep. 678; *Pefley* v. *Johnson*, 46 N. W. Rep. 710; *Peasley* v. *McFaddin*, 10 Pac. Rep. 179; §§ 5283–5300, Rev. Codes. Where a pleading has attached to it an exhibit, all facts appearing in the exhibit are a part of the petition. *Wells* v. *Wilcox*, 28 N. W. Rep. 29; *Savings Bank* v. *Burns*, 38 Pac. Rep. 102, 104 Cal. 473, 102 Cal. 473; *Ins. Co.* v. *Stewart*, 42 N. E. Rep. 290; *Dunlop* v. *Eden*, 44 N. E. Rep. 560; *Grimes* v. *Cullison*, 41 Pac. Rep. 355; *Coldham* v. *American C. Co.*, 8 Ohio Cir. Ct. Rep. 620; *Caspary* v. *City*, 24 Pac. Rep. 1036; *U. S. Mortgage Co.* v. *Henderson*, 12 N. E. Rep. 88; *Loeb* v. *Barris*, 13 At. Rep. 602; *Emeric* v. *James*, 6 Cal. 155. By proper reference to them the exhibits and their contents become a part of the complaint. *Hays* v. *Dinnis*, 39 Pac. Rep. 658; *Murphy* v. *Harris*, 57 Ill. App. 351. The mortgage was proved by a person present who saw it executed by the mortgagor and attesting witnesses. This was sufficient proof. *Krom* v. *Vermillion*, 41 N. E. Rep. 539, 143 Ind. 75; *Thompson* v. *Lenth*, 62 N. W. Rep. 842; Abbotts Tr. Ev. 505.

CORLISS, C. J. We are compelled to reverse the judgment in this case for error of the court in receiving in evidence an instrument purporting to be a chattel mortgage, without calling the subscribing witnesses thereto, or either of them, or in any manner accounting for the failure to produce them, or either of them, on the trial. They were not shown to be dead or out of the jurisdiction of the court; nor was an effort to secure their presence on the trial shown. At the time the instrument referred to was offered in evidence, there was nothing in the case to show that these witnesses were not within reach. They may have been in the court room during the trial, so far as this record throws any light

on the subject. The action being instituted by a chattel mortgagee for the conversion of mortgaged property, it is manifest that due proof of the mortgage was indispensable, the answer having put in issue the allegation of the complaint relating to the execution of such mortgage. It is true that the plaintiff himself testified that he was present, and saw the alleged mortgagor sign the instrument. But the rule at common law was well settled that no amount of proof would establish the execution of an instrument to which there were subscribing witnesses, unless it was shown that they were dead, or were beyond the jurisdiction of the court, or their evidence could not, for some reason, be obtained. Their evidence was regarded as the best evidence; and therefore such evidence must, at common law, be produced, or the inability of the party to produce it be shown, before resort to other evidence would be permitted. While the reason for this rule has long since ceased to exist, the rule itself has been almost universally recognized, as being too firmly imbedded in the law of evidence to be wrenched therefrom by judicial decisions. Some of the courts which have most powerfully reasoned against its perpetuation as a rule of evidence have felt constrained to yield to its binding force in the absence of statutory change. If there is any case in which such rule should be applied, it is in a case involving the proof of an instrument required by law to be attested by subscribing witnesses. This is true with respect to a chattel mortgage. Rev. Codes, § 4738. See, as sustaining the rule, the following authorities: 1 Greenl. Ev. § 569; *Fox* v. *Reil*, 3 Johns. 477; *Brigham* v. *Palmer*, 3 Allen, 450; *Barber v. Terrell*, 54 Ga. 146; *Warner* v. *Railroad Co.*, 31 Ohio St. 265; *Rex* v. *Inhabitants of Harringworth*, 4 Maule & S. 353; *Doe* v. *Durnford*, 2 Maule & S. 62; *Heckert* v. *Haine*, 6 Binn. 16; *Wishart* v *Downey*, 15 Serg. & R. 77; *McMahan* v. *McGrady*, 5 Serg. & R. 314; *Whyman* v. *Garth*, 8 Exch. 803; *Fletcher* v. *Perry* (Ga.) 23 S. E. Rep. 824; *McVicker* v. *Conkle*, (Ga.) 24 S. E. Rep. 23; *Lapowski* v. *Taylor*, (Tex. Civ. App.) 35 S. W. 934; *Barry* v. *Ryan*, 4 Gray, 523; *Glasgow* v. *Ridgeley*, 11 Mo. 34; *Hollenback* v. *Fleming*, 6 Hill, 306, Abb. Tr. Ev. 505.

The common-law rule appears to have embodied it in modified form in our statutes. Section 3579, Rev. Codes, provides that "proof of the execution of an instrument, when not acknowledged, may be made either: (1) By the party executing it, or either of them; or (2) by a subscribing witness; or (3) by other witnesses in cases mentioned in §§ 3581 and 3582." Section 3581, Rev. Codes, declares that "the execution of an instrument may be established by proof of the handwriting of the party and of the subscribing witness, if there is one, in the following cases: (1) When the parties and all the subscribing witnesses are dead; or (2) when the parties and all the subscribing witnesses are non-residents of the state; or (3) when the place of their residence is unknown to the party desiring the proof, and cannot be ascertained by the exercise of due dilligence; or (4) when the subscribing witness conceals himself, or cannot be found by the officer by the exercise of due dilligence in attempting to serve a subpœna or an attachment; or (5) in case of the continued failure or refusal of the witness to testify for the space of one hour after his appearance." In the case at bar none of the provisions of these statutes were complied with. The party alleged to have executed the chattel mortgage was not examined as a witness. The subscribing witnesses were not called. There was no proof that they were dead or resided beyond the limits of the state, or that the place of their residence was unknown to the plaintiff, and could not be ascertained by the exercise of due dilligence, or that they concealed themselves, or could not be found by the exercise of due diligence in attempting to serve a subpœna or attachment upon them. Nor did it appear that they had refused to testify for the space of one hour after being called as witnesses. It is perhaps not entirely clear whether the sections cited relate to the proofs of instruments upon the trial of cases, or whether their utmost scope is not to regulate the mode of proving instruments for the purpose of entitling such of them to record as require proof as a condition precedent to the recording therereof. We need not settle that point in this case, for the common-law

rule had not, when this case was tried, been abrogated in this state. With respect to future trials, this decision will not long be important, for the legislature has, at the suggestion of this court, entirely swept away the common-law rule, which for many years had been an anomaly in the law of evidence. Laws 1897, c. 79. It is immaterial that the chattel mortgage was acknowledged. This did not entitle it to be read in evidence without further proof. The statute permitting instruments which have been duly acknowledged to be received in evidence without additional proof relates to instruments affecting real property. Rev. Codes, § 5696.

All concur.

(71 N. W. Rep. 555.)

FRED GORDON *vs.* VERMONT LOAN AND TRUST COMPANY.

Opinion filed April 29th, 1897.

Agency—Evidence—Ratification.

Under the evidence in this case the court erred in submitting the case to the jury. Agency cannot be established by the statement or act of the pretended agent, nor will the ratification of an act that the principal was bound to perform or of an act that could only inure to its benefit, have any tendency whatever to establish an agency to act generally concerning the matter for such principal.

Appeal from District Court, Grand Forks County; *Templeton*, J.

Action by Fred Gordon against the Vermont Loan and Trust Company. There was a judgment for plaintiff, and defendant appeals.

Reversed.

Burke Corbet, for appellant.

Standish & Barry, for respondents.

BARTHOLOMEW, J. This action was brought to recover for certain labor performed by plaintiff in the summer of 1894 in plowing and dragging on the N. E. ¼ of section 4, township 152, range 56. Whether or not plaintiff can recover in this action

depends upon the question of whether or not the person who employed him to perform such services was the agent of the defendant, the Vermont Loan and Trust Company, for such purposes. The decision of this question will only require a consideration of the ruling of the trial court in refusing to direct a verdict for defendant. At the close of plaintiff's testimony, and again after the testimony was all offered, defendant requested the court to direct the jury to return a verdict for defendant on the ground that there was no competent evidence whatever in the case tending to establish such agency. This the court refused to do. In view of such refusal, and of the further fact that the jury returned a verdict for plaintiff, which necessarily involved finding that such agency did exist, we have given the evidence in the case careful and painstaking study. The facts are so far involved, and the circumstances of the case so peculiar, that it becomes necessary for us to state the facts in *extenso*. In the spring of 1894 one Adare was the owner of the quarter section above described and three other quarter sections of land. He was without means necessary to procure seed for seeding his land. He was also indebted to the defendant in the sum of about $1,500, which was entirely unsecured. Just what interest he had in the lands does not appear, but it is stated by both parties that these lands were incumbered. In view of his financial stress, Adare made the following proposition to the defendant: He would transfer all of said lands to the defendant, and would procure tenants for the same, the defendant to furnish the seed necessary to seed the land, and all the share of the crops belonged to the landlord under the leases, and should be the property of the defendant, and when defendant should receive sufficient amount to extinguish Adare's indebtedness to the defendant the lands should be reconveyed to Adare. This proposition the defendant accepted, and the tract of land on which the work was performed was so transferred to the defendant. Subsequently Adare negotiated with one Arne Anderson to lease said land for the season of 1894. As a result of such negotiations a lease was drawn and

signed by the defendant, by F. W. Wilder, as its treasurer and manager, and by the said Anderson. This lease provided that Anderson should plow all the land in such quarter section not already plowed, and that he should properly cultivate and crop the entire tract; the defendant to furnish the seed, and pay one-half the twine bill and one-half the threshing bill; the title to the entire crop to be in defendant until division; when divided, each party to have one-half. Soon after the execution of the lease, Adare went out to the land, and was informed by Anderson that there was not the amount of plowed land on said quarter section that Adare had represented. At that time the plaintiff, Gordon, was with Adare. Anderson stated, and it is not disputed, that Adare had represented that 110 acres of said tract was plowed, while in truth only about 55 acres had been plowed. It seems from the evidence that the tenant who had occupied the land the previous year was under obligation to plow back 110 acres, but he had not done so. Adare stated that he would see the former tenant, and have him plow the remainder. Subsequently he informed Anderson that the former tenant would do nothing about it, but that he would have plaintiff, Gordon, plow the 55 acres that was short, and he would settle with Gordon for it. He did employ Gordon to do the plowing, and Gordon did it, and this furnishes a part of the claim sued upon. It seems also that there were yet 50 acres more of unplowed land on the tract, which, under the terms of the lease, Anderson was to plow. Anderson suggested to Adare that he could not plow the land, and could not hire any one to do it, whereupon Adare stated that he would get Gordon to plow that also, and also do certain dragging for Anderson, and he would settle with Gordon, and take a mortgage on Anderson's share of the crop to secure the payment. Gordon was accordingly employed to do this work, and he did it, and that also forms a portion of the claim sued upon. The case turns upon Adare's authority to so employ Gordon. It is uncontroverted that the defendant knew nothing of such employment until the fall following, after Adare had absconded, when plaintiff's bill for said

work was presented to defendant. Defendant promptly repudiated any liability for the claim. It is urged that, as Adare, in negotiating the lease, had represented that there was a certain amount already plowed as an inducement to Anderson to make the lease, and as the lease was entered into by Anderson relying upon such statement, it became the duty of defendant to make that representation good, although the lease was silent as to the amount plowed, and although defendant knew nothing of such representations. This may be true, yet defendant had the legal right to refuse to make the representations good, and take the consequences. Plaintiff could not voluntarily make such representations good, and then ask to be paid for so doing. He must show a valid contract by some one authorized to bind defendant.

Over defendant's objection, plaintiff introduced in evidence many things that Adare said and did, the court taking the position that such evidence was competent for the purpose of showing the contract between Gordon and Adare. The elementary principles that the authority of the agent cannot be established by the statement or acts of the agent dispose of all those portions of respondent's brief when particular effects is claimed from language used. The claim is made, however, that when the acts of the agent or of the party assuming to act as agent are ratified or acted upon by the principal to its benefit, thereafter the principal cannot be heard to deny the agency. This, of course, is a sound proposition of law, so far as the act thus ratified or acted upon is concerned. And it may be that, where repeated acts concerning one matter have been thus ratified or acted upon, a jury might be warranted in finding therefrom an athority to act generally concerning such matter. Mechem, Ag. §§ 83, 821; Rev. Codes, § 4308. It becomes necessary to inquire what acts, if any, were performed by Adare, or what contracts, if any, were made by him, concerning the raising or disposition of this crop. It seems that Gordon knew, before he performed any of the work, that the title to the land had been conveyed to defendant, and that Anderson held the same under a lease from the defendant.

The evidence also shows that Adare procured the seed with which Anderson seeded the land. This, under the lease, the defendant was bound to furnish, and it must be admitted that in so doing Adare acted as the agent of defendant. There is no proof, however, that Gordon had knowledge of this fact. It seems that Adare took from Anderson a note and chattel mortgage securing the same for the sum of $100, which included the cost of plowing the 50 acres which Anderson should have plowed under the lease, and which was plowed by Gordon, and included also the price for the dragging done by Gordon, and an amount of money which Adare advanced to Anderson. This note and the mortgage ran directly to the defendant. Plaintiff, Gordon, was one of the witnesses to said mortgage. It also appears that Adare took from Anderson a subsequent note and mortgage for $30 for money advanced, also running direct to the defendant. Whether or not Gordon had any notice of this last mortgage does not appear. It is also in evidence that in the fall Adare purchased from Anderson his share of the crop, and the entire crop was shipped by Adare in the name of the defendant, and the defendant received the proceeds thereof, Adare settling with the tenant, and deducting the amounts of such notes and mortgages; also the amounts that he had paid Gordon for doing certain work in harvesting said crop, and paid Anderson the balance coming from his share of the crop out of his (Adare's) own money. It is undisputed that the notes and chattel mortgages mentioned were delivered by Adare to the defendant, and one of the notes—the smaller—was in the fall, after its payment, delivered by the defendant to Anderson. From these facts it is claimed that a general agency on the part of Adare is established, and that Adare must be held to have been authorized by the defendant to have full supervision for defendant in raising and disposing of said crop.

Our next inquiry is to determine which, if any, of these acts of Adare were ratified by the defendant, or beneficially acted upon. As to the securing of the seed grain by Adare, it nowhere appears that the defendant ever paid for the same, but, as it was under

contract obligation so to do, we may assume that it did, and to that extent Adare must be held to have been authorized to act. This act, however, being one which defendant was bound by its contract to perform, its ratification cannot, under any principle of law, be held to create an agency on the part of Adare to do any act for the defendant relating to the farming of said land that it was not under contract to perform. We have said that the notes and chattel mortgages were taken in defendant's name, and delivered to it. While this is true, it is equally true, and entirely undisputed, that when received by defendant, defendant did not know, or have any reason to believe, that any consideration had passed from it to Anderson to support the notes. The undisputed evidence is that the notes were delivered by Adare to defendant as collateral security for the debt owing by Adare to defendant. In other words, defendant received them supposing that they were in fact the property of Adare which he had taken in defendant's name for his own convenience. This being true, the receipt of the notes by defendant cannot be regarded as a ratification of any of the acts which constituted a consideration for said notes. It is fundamental that ratification cannot be had without knowledge of the facts connected with the transaction. The entire crop, as we have seen, was shipped in defendant's name. This was done by Adare's direction. Defendant received the proceeds of the crop. This was, of course, a ratification of that particular act, and confirmed Adare's authority to ship the grain. But in no legal sense could this establish the fact that Adare was the agent of the defendant months before, and for purposes of an entirely different character. Mechem, Ag. § 85, and cases cited. These acts that were ratified by the defendant were acts that the defendant was either bound to perform, or that inured directly to defendant's advantage, without subjecting it to any liability whatever. Nor were they of a character to furnish any competent proof of a general agency, either actual or ostensible, on the part of Adare to act for defendant in the management of said tract of land. As already stated, there was no competent

evidence in the record tending to establish an agency, unless it was the acceptance and ratification of Adare's acts; and these we hold, on examination, were not sufficient for the purpose. On plaintiff's testimony alone, uncontradicted in any particular, there was not, in our judgment, any competent evidence to establish Adare's agency. And this, to our minds, becomes doubly sure when we consider the circumstances under which the acts were performed. As we have seen, Adare was the party really beneficially interested in the crop. Whatever crop was raised was raised for his benefit, and he alone was to reap the advantage therefrom. It was his debt that was to be paid by the proceeds of the crop. The defendant was simply in the attitude of a mortgagee in possession. It was to Adare's interest to see to it that all of said land was cropped, and cropped in the most advantageous manner. The hiring of plaintiff inured directly to his personal advantage. There is nothing in the record that would warrant us in believing that the defendant anticipated or would have accepted the hiring of plaintiff had it known that such hiring was at its own expense. The general manager testified that for the purpose of securing the payment of Adare's unsecured debts the defendant was willing to incur the further obligation of procuring seed for the land, and in some instances—as in this—of paying a portion of the twine and threshing bills. But from this we are not to presume that the defendant would have been willing to incur the further burden of plowing the land, or putting in the crop. When, then, the acts of Adare are considered in the light of the surrounding facts and circumstances, they furnish no evidence whatever upon which a jury was warranted in finding the existence of an agency, or upon which a court was warranted in submitting that question to the jury.

Reversed, and a new trial ordered. All concur.

(71 N. W. Rep. 556.)

JACOB KOLKA *vs.* ANDY JONES.

Opinion filed April 29th, 1897.

Malicious Prosecution—Civil Suit.

An action will lie in this state 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.

Attorney's Fees as Damages.

In such an action the plaintiff may recover, as part of his damages, all fees paid his attorney in the defense of the original action, if such fees are shown to be reasonable. But that they were reasonable must be proved.

Prima Facie Evidence—Want of Probable Cause.

The voluntary dismissal of a civil action by the party controlling the same is *prima facie* evidence of want of probable cause.

Malice Alone Insufficient.

No amount of malice, however great, will sustain the action, if want of probable cause is not shown.

Probable Cause—Question of Law.

Probable cause is a question of law, when the facts are undisputed.

When a Question for Jury.

But whether, even if the facts show probable cause, the plaintiff in the action believed that he had probable cause, is a question of fact for a jury, if the evidence is not conclusive in his favor on that point.

Conclusive Evidence of Want of Probable Cause.

The commencement by a party in his own name of an action upon a claim which he holds only for collection, and which he knows he has no title to, the suit having been instituted after he had received reliable information that the claim had been paid to the owner thereof by the debtor, is, as a matter of law, conclusive evidence of want of probable cause for the institution of such action.

Malice May be Inferred.

Malice may ordinarily be inferred by a jury from want of probable cause.

Motion to Strike Out Evidence Not Proper Practice.

Where evidence has been improperly received, the correct practice is for the litigant against whom it was offered to request the court to instruct the jury to disregard it, and not to ask that it be stricken out, although subsequent developments in the case demonstrate its incompetency.

Motion for Instructions or for Directed Verdict.

Where evidence is competent so far as it goes, but is not sufficient to establish a case, or a right to certain damages, it is not error to refuse to strike out such evidence. The party should ask for a directed verdict, or move the court to charge the jury that the plaintiff has failed to make out a case or to establish a right to recover the particular damages, as the case may be.

Objection Must Point Out Grounds Relied Upon.

In stating an objection to evidence or the ground of a motion, the particular objection or ground relied on must be specified, unless it is one which could not possibly be obviated. If it is not so specified, the point will not be considered in this court, if it could possibly have been obviated on the trial.

Appeal from District Court, Walsh County; *Sauter*, J.

Action by Jacob Kolka against Andy Jones. Judgment for plaintiff, and defendant appeals.

Affirmed.

John A. Sorley, (*George A. Bangs*, of counsel,) for appellant.

No action will lie for the prosecution of a civil action with malice and without probable cause when there has been no arrest or seizure of the property of the defendant, and no special injury sustained. *Potts* v. *Imlay*, 4 N. J. L. 377, 7 Am. Dec. 603; *Meyers* v. *Waller*, 64 Pa. St. 289; *Kramer* v. *Stack*, 10 Watts, 115; *Eberly* v. *Rupp*, 90 Pa. St. 259; *MacNamee* v. *Minke*, 49 Md. 122; *Wetmore* v. *Mellinger*, 18 N. W. Rep. 870; *Mitchell* v. *Ry. Co.*, 75 Ga. 398; *Ely* v. *Davis*, 15 S. E. Rep. 878; *Terry* v. *Davis*, 18 S. E. Rep. 493; *Bishop* v. *Am. P. Co.*, 51 Fed. Rep. 272; *Rice* v. *Day*, 51 N. N. Rep. 464; *Gorton* v. *Brown*, 27 Ill. 489; *Lucy* v. *Ins. Co.*, 31 Ohio L. J. 22; Cooley on Torts 189; Addison on Torts § 863. To sustain the action there must be both a malicious motive and want of probable cause. *C. C. Live Stock, etc. Co.* v. *Butchers' Union*, 120 U. S. 141, 30 L. Ed. 614. Before attorneys fees can be allowed as damages there must be proof that they were actually incurred and their value must be shown. *Mitchell* v. *Davies*, 53 N. W. Rep. 363.

DePuy & DePuy, for respondent.

An action lies for the malicious prosecution of a civil action where neither the property nor personal rights of the defendant have been interfered with. *Lipscomb* v. *Shofner*, 33 S. W. Rep. 818; *McCardle* v. *McLinley*, 86 Ind. 538, 44 Am. Dec. 343; *Lochenour* v. *Sides*, 57 Ind. 360, 26 Am. Rep. 58; *McPherson* v. *Runyon*, 43 N. W. Rep. 329; *Closson* v. *Staples*, 42 Vt. 209, 1 Am. Rep. 316; *Whipple* v. *Fuller*, 11 Conn. 582, 29 Am. Dec. 330; *Marburg* v. *Smith*, 11 Kan. 554; *Cox* v. *Taylor's Adm'r.*, 10 B. Monroe 17; *Pangburn* v. *Bull*, 1 Wend. 345; *Easton* v. *Bank*, 66 Cal. 123; *Woods* v. *Finnell*, 13 Bush. 629; *Allen* v. *Cadman*, 139 Mass. 136; *Page* v. *Cushing*, 38 Mo. 523; *Frowman* v. *Smith*, 12 Am. Dec. 265 n; *Smith* v. *Burris*, 106 Mo. 94; *Vanduzor* v. *Linderman*, 10 Johns 106; *Hoyt* v. *Macon*, 2 Colo. 113; *Hall* v. *Laming*, 31 N. J. L. 321, 86 Am. Dec. 213; *Autcliff* v. *June*, 45 N. W. Rep. 1019; *Pope* v. *Pollock*, 46 Ohio St. 367; *Brand* v. *Hinchman*, 36 N. W. Rep. 664; *O'Neill* v. *Johnson*, 55 N. W. Rep 601; *Brown* v. *Cope*, 90 Mo. 377. Malice does not mean hatred or ill will, but includes ulterior or improper motive. *Spear* v. *Hill*, 30 N. W. Rep. 506; *Johnson* v. *Ebberts*, 11 Fed. Rep. 129. It may be inferred from want of probable cause. *Louisville, etc. R. Co.* v. *Hendricks*, 40 N. E. Rep. 82; *Betting* v. *Ten Eyck*, 82 Ind. 421; *Heap* v. *Parish*, 3 N. E. Rep. 549; *Edgeworth* v. *Carson*, 5 N. W. Rep. 282; *Wertheim* v. *Altschuler*, 12 N. W. Rep. 107; *Murphy* v. *Hobbs*, 5 Pac. Rep. 119. Appellant's motion to strike out all evidence in regard to attorneys fees as not proper, incompetent, irrelevant and immaterial was too general. It does not suggest any opposition to the quality of the evidence, and the assignment of error based upon this objection cannot be considered. *Springer L. Co.* v. *Falk*, 59 Fed. Rep. 707; *Bright* v. *Ecker*, 69 N. W. Rep. 824; *Levine* v. *Ins. Co.*, 68 N. W. Rep. 855; *Hauver* v. *Bell*, 36 N. E. Rep. 6; *Ladd* v. *Sears*, 9 Oreg. 244; *Hooper* v. *Ry. Co.*, 33 N. W. Rep. 314; *Taylor* v. *Wendling*, 24 N. W. Rep. 40; *Mfg. Co.* v. *Pinch*, 66 N. W. Rep. 340; *Caledonia G. M.* v. *Noonan*, 3 Dak. 189, 14 N. W. Rep. 426; *Lungerhausen* v. *Crittenden*, 61 N. W. Rep. 270; *Perkins* v *Buaas*, 32 S. W. Rep. 240; *Krolik* v. *Graham*, 31 N. W. Rep. 307.

CORLISS, C. J. The plaintiff has recovered judgment against the defendant in an action for malicious prosecution of a civil suit. At the threshold of the case we are met with the contention that for the malicious institution and prosecution of a civil action without probable cause there is no remedy, unless the person of the defendant in such action has been arrested or his property seized therein, or unless there exists special circumstances removing the case from the category to which belong ordinary civil actions. On this very interesting question we find the decisions in hopeless conflict. In this jurisdiction it is an open question, and we shall therefore settle it upon principle and in accordance with the weight of argument, without reference to the number of authorities which can be arrayed upon the opposite sides, respectively, of this controversy. It may not be amiss, however, to remark that in our opinion the scales in which are balanced the relative weight of authority on this point have turned, and that now it is no longer true, as erstwhile it was, that the adjudications preponderate in favor of the English rule, that in the absence of the arrest of the person or of the seizure of property, or of other special circumstances, the successful defendant has no remedy, despite the fact that his antagonist proceeded against him maliciously and without probable cause. Favoring the English doctrine, we find the following authorities: *Potts* v. *Imlay*, 4 N. J. Law, 377; *Mayer* v. *Walter*, 64 Pa. St. 289; *Eberly* v. *Rupp*, 90 P. St. 259; *McNamee* v. *Minke*, 49 Md. 122; *Wetmore* v. *Mellinger*, (Iowa) 18 N. W. Rep. 870; *Mitchell* v. *Railroad*, 75 Ga. 398; *Ely* v. *Davis*, (N. C.) 15 S. E. Rep. 878; *Terry* v. *Davis*, (N. C.) 18 S. E. Rep. 943; *Rice* v. *Day*, (Neb.) 51 N. W. Rep. 464; *Gorton* v. *Brown*, 27 Ill. 489. Opposed to the English rule, we marshal decisions from the States of Connecticut, New York, Minnesota, Kansas, Kentucky, Missouri, Colorado, Ohio, Louisiana, Michigan, Tennessee, Indiana, Vermont, Massachusetts, and California: *Lipscomb* v. *Shofner*, (Tenn. Sup.) 33 S. W. Rep. 818; *McCardle* v. *McGinley*, 86 Ind. 538; *Lockenour* v. *Sides*, 57 Ind. 360; *McPherson* v. *Runyon*, (Minn.) 43 N. W. Rep. 392; *Closson* v.

Staples, 42 Vt. 209; *Whipple* v. *Fuller*, 11 Conn. 582; *Marbourg* v. *Smith*, 11 Kan. 554; *Cox* v. *Taylor's Adm'r.*, 10 B. Mon. 17; *Pangburn* v. *Bull*, 1 Wend. 345; *Eastin* v. *Bank*, 66 Cal. 123, 4 Pac. Rep. 1106; *Woods* v. *Finnell*, 13 Bush. 629; *Allen* v. *Codman*, 139 Mass. 136, 29 N. E. Rep. 537; *Smith* v. *Burrus*, 106 Mo. 94, 16 S. W. Rep. 881; *Johnson* v. *Meyer*, 36 La. Ann. 333; *Hoyt* v. *Macon*, 2 Colo. 113; *Brady* v. *Erwin*, 48 Mo. 533; *Antcliff* v. *June*, (Mich.) 45 N. W. Rep. 1019; *Pope* v. *Pollock*, 46 Ohio St. 367, 21 N. E. Rep. 356; *Brand* v. *Hinchman*, (Mich.) 36 N. W. Rep. 664; *O'Neil* v. *Johnson*, (Minn.) 55 N. W. Rep. 601; *Dolan* v. *Thompson*, 129 Mass. 205; *Sartwell* v. *Parker*, 141 Mass. 405, 5 N. E. Rep. 807.

In the case at bar it appears that the defendant in the civil actions alleged to have been prosecuted maliciously and without probable cause was not arrested, and that his property rights were not in any manner interfered with. The suits complained of consisted of three successive actions instituted in justice's court upon the same claim, each case being voluntarily dismissed by the defendant herein when the day for trial arrived. Without at this point adverting more particularly to the facts, we will dispose of the question whether the action will lie, assuming the suit to have been maliciously brought without probable cause. We wish to settle the law in this state, not upon the peculiar features of this case, but upon the broad basis that the malicious prosecution of a civil action without probable cause is a legal wrong, for which the law will afford redress, without reference to any inquiry touching the seizure of property, the arrest of the person, or other special circumstances. Before the statute of Marlbridge (52 Hen. III.) an action for the malicious prosecution without probable cause of a mere civil action would lie. *Closson* v. *Staples*, 42 Vt. 209–214, *Lockenour* v. *Sides*, 57 Ind. 364; *Lipscomb* v. *Shofner*, (Tenn. Sup.) 33 S. W. Rep. 818; *Pope* v. *Pollock*, 46 Ohio St. 367, 21 N. E. Rep. 356; 14 Am. & Eng. Enc. Law, 32. Why this rule should have been departed from after the act of 52 Hen. III. had been passed, is apparent from the language of

that act. It gave to the defendant who had prevailed in the cause, not merely his costs, but also his damages, and, to make apparent the purpose of parliament to substitute this remedy for the action for malicious prosecution, these costs and damages were given only in actions which were malicious, and not in all actions generally. *Railroad Co.* v. *McFarland*, 44 N. J. Law, 674-676. Subsequent legislation in England shows that the statute of Marlbridge was enacted, not as a general law regulating costs, but to afford a summary remedy to the successful defendant in place of the existing right of action to recover his damages on account of the malicious prosecution of a civil action against him. The statute of Gloucester (6 Edw. I. c. 1) gave the defendant costs where he recovered damages, and finally, by the act of 23 Hen. VIII. c. 15. the defendant was given costs in all cases in which he was successful, whether he recovered damages or not, provided the case was one in which the plaintiff could have recovered costs had he been the prevailing party. *Railroad Co.* v. *McFarland*, 44 N. J. Law, 674–676. The act of the British parliament which was held to take away the existing cause of action for damages for the malicious prosecution of a civil suit was an act which in terms was limited to cases of that kind; and when it is remembered that it gave the defendant, not merely his costs, but also his damages, it is obvious that the statute was framed to give the successful defendant his remedy in the very case in which he was maliciously prosecuted, instead of compelling him to seek redress in an independent action. Between such legislation and the statutory enactments of this country on the subject of costs there is the widest possible difference. The statute of Marlbridge was limited to civil actions maliciously prosecuted, and gave the defendant the damages he had suffered because of such perversion of the forms and remedies of the law, whereas the statutes regulating costs on this side of the water are not restricted to actions in which the motive prompting the litigation was unjustifiable, but are intended to apply to all cases, to the end that some indemnity to the other suitor may be afforded

in every case, independently of the state of mind of the person bringing the suit, on the question whether he had reasonable ground for believing that the action could be maintained; leaving the remedy for a perversion of legal machinery to the common-law maxim that for every wrong the law will give legal redress. General statutes regulating costs make no discrimination between the honest suitor, who, having a valid claim, may yet fail, for some reason, to establish it in court, and the malignant persecutor and harasser of a citizen, who, by his abuse of legal forms, causes heavy damage to such citizen, in property, reputation, and business prospects, by the unfounded suit, which he who institutes it knows full well he cannot maintain. Each must pay the statutory costs, and the same rule measures the liability of each for such costs. That our meagre bill of costs was intended to recompense the victim of the malicious prosecution of a civil suit is, to our minds, unthinkable. It is true that our statute gives the successful suitor a right to recover some trifling items of costs, and certain specified disbursements, as indemnity; but it is indemnity for the defense (in the case of a defendant) of an action, without reference to the question whether there has been a malicious perversion of legal remedies. If it was enacted to cover cases of an abuse of legal machinery, then it is evident that all remedy for such an abuse was intended to be withheld; for, in such a view of the statute, he who lawfully uses and he who maliciously perverts the right to sue would stand upon precisely the same footing with respect to the question of liability for their respective acts. Even when the plaintiff has acted in the utmost good faith the defendant will often suffer, on account of the suit, damages which taxable costs will not even approximately compensate. But it is the policy of the law not to throw around the right of the citizen to appeal to the courts for redress such risks that fear of the possible consequences will deter him from asserting a claim he honestly deems himself entitled to enforce. In ordinary cases the injury a defendant suffers, beyond the slight indemnity which statutory costs afford him, is one of the

many inevitable burdens which men must sustain under civil government. He is forced to bear it for the public good. A wise policy requires that the honest claimant should not be frightened from invoking the aid of the law by the statutory threat of a heavy bill of costs against him in case of defeat. But certainly no such policy demands that malice should, by the assurance of protection in advance, be encouraged to vex, damage, and even ruin a peaceful citizen by the illegal prosecution of an action upon an unfounded claim.

We will briefly notice the arguments adduced by courts in this country to support here the English rule. Ignoring the differences between the phraselogy and manifest purpose of the statute regulating costs in this country, and the letter and obvious spirit of the statute of Marlbridge, the assertion is not infrequently made that costs afford full indemnity, though the suit be instituted without probable cause, and prosecuted in a spirit of malice. To our minds, this argument does not rise to the dignity of sophistry. The claim that the payment of statutory costs will in all cases, or even in any case, make amends for the damage inflicted by the malicious prosecution of a civil suit, is palpably false. To hold that, because the dishonest suitor has been required to give his successful antagonist some trifling measure of indemnity, therefore it follows that the purpose is disclosed to withhold a remedy for a grievous wrong, which on a fundamental maxim of British jurisprudence, should not be withheld, is, to our minds, a violent stretch of imagination. When the argument of expediency is advanced, it suffices to reply to it by pointing to those states in which it has long been the rule that an action will lie for the malicious prosecution of a civil action without probable cause. There we find no legislative change of this rule. Nor have the courts in those states made haste, because they have discovered its impolicy, to overrule a doctrine which, it has been predicted by other courts that have refused to adopt it, would clog and choke the channels of litigation with a multiplicity of suits springing up as each case was decided in favor of the

plaintiff or the defendant. These forebodings have not been realized. Nor, in our judgment, had they ever any foundation in reason or a knowledge of human nature. The suitor who has sustained the burden of one action will not assume the expense of a second suit unless he has a strong guaranty that he can convince a jury that the original action was instituted maliciously and without probable cause. In an experience of 10 years as student and practicing lawyer in the State of New York, where the English doctrine is not followed, the writer of this opinion never during that time heard of an action in that state for the malicious prosecution of a civil suit. Doubtless such suits have been brought there, but they have been very infrequent. It is safe to say that in that state not one civil suit in a thousand has been followed by an action for the malicious prosecution thereof.

Counsel for appellant, in his able and learned brief, argues that a defendant should not be accorded a remedy for the malicious prosecution of a civil action, for the reason that a plaintiff is given no remedy when he is delayed and harassed in his efforts to secure a judgment upon a valid claim by a fictitious defense maliciously interposed. Should we concede that there was no liability on the part of the defendant in the case supposed, it would by no means follow that this defect in the law should be be allowed to destroy a right of action which from time immemorial has existed, save when it has been taken away by express statute, as in the case of the statute of 52 Hen. III. But we do not concede the postulate of counsel for appellant. Legal science has not yet attained its full development. It is constantly undergoing changes. New doctrines are being established. Old rules are receiving modifications. Under altered social or economical conditions, it will often appear that the continued denial of a remedy for what was once not a serious, but which has finally become a grevious, wrong, can no longer be maintained. Moreover, a right may have lain dormant because never asserted. This affords no argument against the enforcement of such right for the first time. It is not safe to infer that because no one has

thought of seeking indemnity for the injury he has sustained by reason of the interposition, by the defendant from unjustifiable motives, of a false defense or a spurious counterclaim, therefore no remedy will in such a case be allowed by the law. On the contrary, we are strongly of the opinion that, if a defendant should force upon the plaintiff the litigation of an alleged counterclaim known by defendant to be without foundation, he would be liable for the damages caused thereby,—the liability to be enforced in a suit in the nature of an action for malicious prosecution.

Passing now from the main question of liability, it becomes necessary to refer with greater particularity to the facts. The plaintiff in this case, Kolka, employed his nephew, named Gresczykowski, to work for him upon his farm. After having labored there upwards of two years, Gresczykowski appeared at the office of the defendant, Jones, who was a collector, and placed with him for collection a claim against Kolka for his services as a farm hand. In our discussion of the facts, we shall state those which uphold the plaintiff's case; for, the jury having rendered a verdict sustaining his claim for damages, we must assume that every controverted issue was determined in his favor, so far as it is necessary to so assume in support of such verdict. This claim of Gresczykowski against Kolka appears from the testimony of Gresczykowski to have been $12, and no more. The jury were warranted in finding that Jones knew that the claim did not exceed $12, but, on the other hand, that Jones was justified in believing that Gresczykowski had some claim against Kolka; and that he did so believe, does not, in view of the evidence in the case, admit of doubt. Gresczykowski left this claim with Jones for collection. Subsequently Jones sued Kolka upon it, in the name of Gresczykowski as plaintiff; the suit being brought before a justice of the peace at Minto, Walsh County, in this state, whose name was McQuatt. On the return day of the summons the case was dismissed at the request of Jones, and at the same time he procured a new summons to be issued by the

same justice on the same claim, the second suit being likewise brought in the name of Gresczykowski. On the return day of this summons the second action was also dismissed by Jones, and subsequently a third action was brought against Kolka before a justice named Nichols, at Conway, about 20 miles further away. This third action was, like the other two, voluntarily discontinued by Jones. Without at this conjuncture adverting further to the facts, we may pause and inquire whether the first two actions were instituted by Jones in the name of Gresczykowski without probable cause. However maliciously they may have been carried on is immaterial, unless Jones was in law without probable cause for believing that they could be maintained. Jag. Torts, 625; Cooley, Torts, 208; *Crescent City Live-Stock Co.* v. *Butcher's Union Slaughterhouse Co.*, 120 U. S. 141, 7 Sup. Ct. 472; *Lacey* v. *Porter*, (Cal.) 37 Pac. Rep. 635. Probable cause is, on undisputed facts, a question of law. Of course, 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. Rep. 937. But whether, on conceded or established facts, the party had reasonable ground for assuming that an action would lie, is, as a general rule, a question of law. Cooley, Torts, p. 209, and cases cited; *Sartwell* v. *Parker*, 141 Mass. 405, 5 N. E. Rep. 807; 1 Jag. Torts, 626; *Stone* v. *Crocker*, 24 Pick. 84; *Lancaster* v. *Langston*, (Ky.) 36 S. W. Rep. 521; *Smith* v. *Munch*, (Minn.) 68 N. W. Rep. 19; *Bell* v. *Railway Co.* (N. J. Sup.) 33 Atl. Rep. 211. In this case we have no doubt that Jones was, as a matter of law, justified in believing that Gresczykowski had a valid claim against Kolka. Gresczykowski so informed him, and there was nothing about the circumstances to excite his suspicions to the contrary. Indeed, we are strongly of the opinion that Gresczykowski did have a good cause of action against Kolka. Kolka, in his testimony, says: "I owed him (Gresczykowski) nothing outside of the $12." (This is the amount that Gresczykowski claimed to Jones was owing to him.) And it appears that Kolka, subse-

quently to the commencement of the first action against him, settled with Gresczykowski, paying him this very sum of $12. We consider, too, that while the question whether a person actually believes that there is probable cause for commencing a suit is a question of fact, yet that under the evidence in this case the jury were not warranted in finding that Jones did not believe that Gresczykowski had a good claim against Kolka. The evidence satisfies us that Jones did honestly think that Kolka owed Gresczykowski something. It is apparent, therefore, that, when Jones brought the first two suits in the name of Gresczykowski, he had probable cause for so doing, and that, therefore, no action for malicious prosecution can be predicated upon the commencement and dismissal of those two actions. *Wills* v. *Noyes*, 12 Pick. 324–327. But there is ample evidence in the case to show that, before the third action was brought, Jones knew that Kolka had settled in full with Gresczykowski; and there is also sufficient evidence to prove that Jones knew that he had no title to the claim held by Gresczykowski against Kolka, but that despite this fact he caused the third action to be brought in his own name. Unlike the first two actions, the third one was commenced in the name of Jones himself, his object in so doing being very apparent. When he was informed that Kolka and Gresczykowski had settled their differences, he replied that they could not settle, because he (Jones) had an assignment of the claim. The evidence fully warranted the jury in finding that Jones, knowing that he had no right to the claim (his own testimony shows this clearly,) brought the third suit in his own name for the purpose of taking the position that he owned the claim, and that, therefore, the settlement referred to was no defense. Whether the jury found, as they were warranted in doing, that Jones sued in his own name, knowing that he had no title to the claim, or found, as they might well have found under the evidence, that Jones brought suit after he had heard that the owner of the demand had settled with the debtor, Kolka, a conclusive case of want of probable cause was made out. The attack on the verdict on the ground of

the insufficiency of the evidence to show want of probable cause is therefore unwarranted, and must be overruled. On the question of malice, the evidence is full and satisfactory. Indeed, malice may be inferred by a jury from want of probable cause. Cooley, Torts, 214; cases in note to *Ross* v. *Hixon*, (Kan. Sup.) 26 Am. St. Rep., on pp. 151, 152 (s. c., 26 Pac. Rep. 955; 1 Jag. Torts, 624; *Railroad Co.* v. *Henricks*, (Ind. App.) 40 N. E. Rep. 82. The malice necessary to sustain the action for malicious prosecution need not be ill will towards the plaintiff. Legal malice will support the action, and any unjustifiably motive constitutes legal malice. If a person knowing that a claim has been satisfied, and knowing that he never had any title thereto, brings a suit thereon in his own name, it is impossible for him to justify his conduct in law. In such a case—and the jury found that that is this case—the defendant is deemed to have been actuated by legal malice. Certainly there is ample proof of malice in this case to warrant the verdict that the prosecution was malicious. 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, side page 185. Chief Justice Shaw, in *Wills* v. *Noyes*, 12 Pick. 328, speaking of the malice necessary to be established in the action for malicious prosecution, says: "The malice necessary to be shown in order to maintain this action is not necessarily revenge, or other base and malignant passion. Whatever is done willfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is, in legal contemplation, malicious. That which is done contrary to one's own conviction of duty, or with a willful disregard of the rights of others, whether it be to compass some unlawful end, or some lawful end by unlawful means, or, in the language of the charge, to do a wrong and unlawful act, knowing it to be such, constitutes legal malice. See, also, Newell, Mal. Pros. p. 247, § § 13, 14; 1 Jag. Torts, 614, 615; *Pace* v. *Awbrey*, (La.) 10 South. 381; *Bartlett* v. *Hawley*, (Minn.) 37 N. W. Rep.

582; *Grinnell* v. *Stewart*, 32 Barb. 550. If no presumption of malice could be deduced from the want of probable cause, yet, the commencement by Jones of an action in his own name, on a claim to which he knew he had no title, after he knew that the claim had been in law extinguished by settlement between the parties, must be deemed to have had for its object no other purpose than to so harass Kolka as to force him to pay Jones an additional sum not owing by him to Gresczykowski. This theory is much confirmed by the fact that the third suit was brought before another justice, about 20 miles away.

The following portion of the charge was excepted to: "The court instructs the jury that the bringing and dismissal of the suits in the manner which they were brought and dismissed is *prima facie* evidence of the want of probable cause, but is not conclusive evidence of the want of probable cause; and if the jury believe from all the evidence and circumstances as they exist, and, as shown by the evidence, excuse the bringing and dismissal of the cases, and there was in the defendant's mind a well-grounded belief, and that he had probable cause to believe the facts as testified to by him, then the plaintiff is not entitled to recover." We find no error in this. 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. Rep. 722; *Burhans* v. *Sanford*, 19 Wend. 417; *Nicholson* v. *Coghill*, 4 Barn. & C. 21; *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. Rep. 106; *Barhight* v. *Tammany*, (Pa.) 28 Atl. 135; *Brown* v. *Vittur*, (La.) 17 South. 193; *Smith* v. *Association*, (N. C.) 20 S. E. Rep. 963; Newell, Mal. Pros. p. 283. But it is

urged that the statute law in this case gives the plaintiff in an action an absolute right to dimiss it at any time before it is finally disposed of, and that, therefore, such a dismissal cannot be held to constitute even *prima facie* evidence of want of probable cause. Counsel for appellant asserts that such a rule of evidence would take away the plaintiff's absolute right to dismiss his action. But the most superficial consideration of the matter will suffice to show the unsoundness of this reasoning. The rule of evidence which we uphold and apply in this case is one which creates a mere presumption. It does not purport to render illegal that which, both under the statute and at common law, is strictly lawful. If the plaintiff has probable cause for commencing his suit, the dismissal thereof will not render actionable the institution of such suit. It will merely call upon him to show that there was in fact probable cause for bringing the action. And it is entirely reasonable that the voluntary discontinuance by a party of an action which he absolutely controls should, in an action of this character, shift the burden of proof. To establish want of probable cause is to prove a negative, and it is elementary that to prove a negative requires only slight evidence. See Newell, Mal. Pros. p. 282 § 17. This principle must be kept in mind in testing the correctness of the rule we enunciate. It does not admit of doubt that evidence that one who controls an action has of his own free will discontinued it has a tendency to show that he never had faith in his action, from its inception. True it is that actions honestly commenced are often dismissed for various reasons, but it does not necessarily follow that such is the case in every instance. It is quite possible that the plaintiff abandoned his suit because he knew from the beginning that he had no case. If this is not so in a particular instance, it is peculiarly within the plaintiff's power to show the contrary. That is a fact exclusively within his own knowledge, and one which it is easy for him to prove. The other party is powerless to establish the plaintiff's motive for dismissing the case, unless he incurs all the hazzard of calling the plaintiff himself as a witness in the action. In *Nichol-*

son v. *Coghill*, 4 Barn. & C. 21, Judge Holroyd says: "In order to support actions of this nature, two ingredients are necessary,—malice, and the want of probable cause; and evidence must be given on the part of the plaintiff from which they may be inferred. Here I think that there was some evidence to be left to the jury, and that, in the absence of any answer to it, they were justified in finding for the plaintiff. The ground of the discontinuance was peculiarly within the knowledge of the plaintiff in the former action, and he might have proved it. In actions for a malicious prosecution it has been held that evidence of the bill having been thrown out by a grand jury is sufficient to warrant an inference of the absence of probable cause. So in this case I think that malice and the absence of probable cause may be inferred from the discontinuance; that being the act of the present defendant, and not having been explained by him." In view of the fact that in actions for malicious prosecution only slight evidence is required to make out a *prima facie* case as to want of probable cause, and of the further fact that the voluntary discontinuance of the case has some tendency to show that the plaintiff never had any faith in his action, we deem it a just and reasonable rule that proof of such voluntary discontinuance, unexplained, is sufficient to carry the case to the jury, when the ease with which the plaintiff can explain his conduct is considered in connection with the difficulty the defendant will encounter when he tries to show that the plaintiff's motive in dismissing the case was his conviction from the beginning that the action would not lie. Most of the decisions cited by counsel for the appellant on this branch of the case are not in point. In *Asevado* v. *Orr*, 100 Cal. 293, 34 Pac. Rep. 777, the court decided that the voluntary dismissal of an action by the plaintiff is not an admission of want of probable cause. No one ever supposed it was. By discontinuing his suit the plaintiff therein does not forever concede that he had no probable cause for commencing it. But this is entirely different from the question whether it is a reasonable rule to so shift the burden of the proof as to require the party who alone has knowledge

of the facts to explain his conduct, in view of the fact that such conduct does have some tendency to prove that he did not originally believe he could succeed in the case. The only adjudication we can find which is opposed to our ruling is *Smith* v. *Burrus*, (Mo. Sup.) 16 S. W. Rep. 881. All that the court in the case at bar, in substance, said, was that the voluntary dismissal of the case raised the presumption of want of probable cause. It distinctly stated in the same connection that the jury might nevertheless find that the defendant did in fact have probable cause for bringing the actions. It is true that the language of the court in charging that a *prima facie*, case had been made out by the fact of dismissal is not altogether free from criticism. But the criticism arises from the fact that the District Judge qualified the rule, and seemed to consider that other conditions must combine with the mere fact of voluntary dismissal to warrant the inference of want of probable cause. In this the court erred. But the error was not prejudicial to the defendant. If the voluntary dismissals of the cases raised the presumption of want of probable cause, it certainly was not to defendant's prejudice that the court told the jury that, in the absence of explanation by the plaintiff in the former suit, this inference arose in the case at bar, not, however, from the mere fact of voluntary dismissals alone, but from that fact when coupled with other circumstances.

During the progress of the trial the plaintiff testified that, in the defense of the actions instituted against him by Jones, he had paid $35 for attorneys' fees. This evidence was objected to on the ground that it was incompetent, irrelevant, and immaterial. The evidence having been received over objection, the defendant, after both parties had rested, moved to strike it out on the grounds that it was not proper evidence, and was incompetent, irrelevant, and immaterial. This motion was denied. It is now urged that the evidence should not have been received, for the reason that it was not shown that the fees paid by plaintiff to his attorneys were reasonable for the services rendered. It is apparent that no such point was intended to be raised by the

objection made by counsel for defendant, or by his motion to strike out the evidence. These successive attacks upon this evidence were leveled against the right of plaintiff to prove as a portion of his damages payments made by him for attorneys' services in defense of the actions referred to. That such expenditures, to the extent that they are reasonable and necessary, may be recovered in an action for malicious prosecution, is well settled. *Mitchell* v. *Davies*, (Minn.) 53 N. W. Rep. 363; *Marshall* v. *Betner*, 17 Ala. 832; *Ziegler* v. *Powell*, 54 Ind. 173; *Gregory* v. *Chambers*, 78 Mo. 294; *Krug* v. *Ward*, 77 Ill. 603; *Walker* v. *Pittman*, 108 Ind. 341, 9 N. E. Rep. 175; *Landa* v. *Obert*, 45 Tex. 539. It is true that in the case at bar the plaintiff did not go far enough to entitle him to recover the sums paid by him for attorneys' fees. There is no evidence that the charges of his attorneys were reasonable. *Mitchell* v. *Davies*, (Minn.) 53 N. W. Rep. 363. But in proving this element of damages the plaintiff was compelled to proceed in the usual way, by establishing one fact at a time. It was entirely competent for him to prove the fact that he had paid $35 for attorneys' fees; but, to make this $35 an element in the damages which he could recover, it was necessary for him to go further, and establish the additional fact that the services of his attorneys were reasonably worth that sum. This he could not do by his own evidence, he not being qualified to testify on that subject. All he could swear to was the bare fact of payment, and his testimony in this regard was both competent and within the issues. While it is true that the plaintiff failed to supplement this evidence with the necessary proof of the reasonableness of the charges of the attorneys for the services rendered, yet this oversight on his part did not destroy either the competency or relevancy of the evidence already received. It is not a case in which there has been incompetent evidence received touching an item of damages. It is merely a case of insufficient evidence. The remedy of the suitor, under such circumstances, is to move the court to direct the jury to disregard the matter not proven. This is precisely the course pursued by the defendant's counsel

in the case of *Mitchell* v. *Davies*, (Minn.) 53 N. W. Rep. 363, cited and relied on by defendant's counsel in this case. The sufficiency of competent evidence to prove a fact cannot be challenged by a motion to strike out the evidence properly received. Neither by objecting to the admission of such evidence, nor by moving to expunge it from the record in the case, can the point be raised that it should have been supplemented by additional proof. 1 Thomp. Trials, § 717. "But, where the judge admits evidence which is in the character of a link in a chain of facts necessary to make out the case of the proponent, the mere fact that the other links are not supplied will not support an exception to its admission, since, if it were otherwise, it would result in the principle that evidence is erroneously admitted because ultimately insufficient." In any case, if evidence is properly received the party against whom it is offered has no absolute right to have it stricken out. His proper remedy is to request the court to instruct the jury to disregard it. 1 Thomp. Trials, § 716; *Gawtry* v. *Doane*, 51 N. Y. 84–90. This is true even when it appears from subsequent proof that the evidence is competent. Much more should this be the rule in cases where the subsequent developments on the trial do not establish the incompetency, but only the insufficiency, of the evidence properly received. In such a case it was competent when offered, and is still competent so far as it goes, and an attack upon it as incompetent is misconceived. It is to the interests of the party complaining that this practice should be adopted. After he has been successful in his motion that evidence be stricken out, he has no guaranty that the jury will understand that they are not to consider it in deciding the case. To secure all the protection possible under the circumstances, he is interested in having the jury told in express terms that they must not take such evidence into account in making up their verdict. Had the trial court specifically charged the jury that they might allow the item of $35 paid as attorney's fees, and had the defendant preserved an exception to such portion of the charge,

he would be in a position to insist on the point he makes. Failing to raise the point that the evidence was insufficient to warrant the jury in considering the item of $35 in fixing the plaintiff's damages, either by request to take that item from the jury, or by exception to the portion of the charge submitting it (there being no portion of the charge which relates to such item enucleated from other items of actual damage for the defendant to except to,) and no point having been made on the motion for a new trial that the evidence was insufficient to justify the verdict as to this item of damages (even assuming that it appears that the jury have allowed such item,) it follows that no question relating to the attorney's fees is before us for consideration. We have had occasion before to consider the importance of the rule of practice that a mere general objection is not sufficient to raise any question which could have been obviated had it been specifically pointed out, but no case has hitherto arisen in this state calling for its enforcement. We shall in all cases strictly enforce this highly just rule. A suitor should be fairly appraised by the language of the objection or the motion, as the case may be, just what point is made against his evidence, or what defect in proof is claimed by his antagonist, to the end that he may then and there, if possible, save himself from the consequences of error. *Lithographing Co.* v. *Falk*, 8 C. C. A. 224, 59 Fed. Rep. 707; *Bright* v. *Ecker*, (S. D.) 69 N. W. Rep. 824; *Levine* v. *Insurance Co.*, (Minn.) 68 N. W. Rep. 855; *Hawver* v. *Bell*, (N. Y. App.) 36 N. E. Rep. 6; *Ladd* v. *Sears*, 9 Or. 244; *Reab* v. *McAllister*, 8 Wend. 109; *Hooper* v. *Railway Co.* (Minn.) 33 N. W. Rep. 314; *Taylor* v. *Wendling*, (Iowa,) 24 N. W. Rep. 40; *Homestead Co.* v. *Duncombe*, (Iowa) 1 N. W. Rep. 725; *Krolik* v. *Graham*, (Mich.) 31 N. W. Rep. 307; *Warren* v. *Warren*, (Va.) 24 S. E. Rep. 913; *Manufacturing Co.* v. *Pinch*, (Mich.) 66 N. W. Rep. 340, reversing 64 N. W. Rep. 729; *Ives* v. *Leonard*, (Mich.) 15 N. W. Rep. 463; *Perkins* v. *Buaas*, (Tex. Civ. App.) 32 S. W. Rep. 240; *Ayrault* v. *Bank*, 47 N. Y. 576; *Camden* v. *Doremus*, 3 How. 530; *Stevens* v. *Hope*, (Mich.) 17 N. W. Rep. 698; *Wheaton* v. *Beecher*, (Mich.) 13 N. W. Rep.

769; *Daly* v. *Byrne*, 77 N. Y. 182; *Rodgers* v. *Wells*, (Mich.) 6 N. W. Rep. 860; *Lungerhausen* v. *Crittenden*, (Mich.) 61 N. W. Rep. 270; *Mining Co.* v. *Nooman*, (Dak.) 14 N. W. Rep. 426. See, also, *Bank* v. *Laughlin*, 4 N. D., 391-402, 61 N. W. Rep. 473. Had the defendant, even in his motion to strike out the evidence, or in his objection thereto, stated the ground relied on, we have no doubt but that plaintiff would have offered some evidence to show that the sum paid was reasonable, or just what portion thereof was a reasonable charge under the circumstances. We have examined the other parts of the charge to which an exception was taken, but are unable to find that there was any error therein. It is possible that in arriving at their verdict in this case the jury have allowed damages for the first two actions which we hold were lawfully commenced. But nowhere in the case does it appear that defendant sought on the trial to discriminate between his liability for the first two actions and his liability for the third. His attitude was that, if liable at all, he was liable for all. The only way in which it was possible for him to present the question he now seeks to have reviewed was by exception to the charge of the court, or by request that the court instruct the jury that there was no liability for the prosecution of the first two actions. Nothing of this kind was done by him. Had the court in express terms charged the jury that the plaintiff could recover damages for the first two actions as well as for the third, and had defendant failed to except to this charge, he could not now for the first time have raised the point. It is in practically this position that the defendant finds himself by reason of his failure to request an instruction and to except to the charge of the court on this point. We have less regret that the defendant is not in position to urge that the jury have considered the first two suits in fixing the amount of damages, in view of the comparatively small verdict which the jury rendered in this case. The malicious prostitution of legal remedies to subserve unworthy personal ends is not only an injury to the victim of the particular persecution, but also to

society at large, if it is suffered to go unwhipped of justice. If the law will not punish such conduct, public confidence in the merits of our system of jurisprudence must inevitably be shaken, and the courts themselves will seem to have forsaken their high function as protectors and vindicators of invaded rights, and to have become, instead, the accomplices of evil men.

The judgment of the District Court is affirmed. All concur.

(71. N. W. Rep. 558.)

KATE MCCANNA *vs.* CHARLES ANDERSON, *et al.*

Opinion filed May 14th, 1897.

Homestead—Rights of Unmarried Man.

Under the statutes of Dakota Territory as they existed in 1888, a single man, who never had wife or child, was not entitled to the homestead exemption specified in the territorial laws.

Appeal from District Court, Grand Forks County; *Templeton*, J.

Action by Kate McCanna against Charles Anderson and others. Judgment for plaintiff, and defendants appeal.

Reversed.

W. H. Standish, for appellants.

Bangs & Fisk and *George A. Bangs*, for respondent.

BARTHOLOMEW, J. In this case a demurrer to the complaint was overruled, and, the defendants declining to plead further, judgment was entered in conformity to the prayer of the complaint, and the defendants appeal. It is conceded by both parties that but a single question is involved in the case: Could a single man who never had wife or child, and who had no one living with him, dependent upon him for support, claim the benefit of a homestead exemption under the laws of Dakota Territory as they existed in 1888? An affirmative answer to this question affirms the judgment below, while a negative answer must reverse it.

The answer must be based entirely on the territorial laws. The federal homestead law is in no manner involved. The point has never been ruled in this jurisdiction, and its decision requires the construction of Ch. 37 of the Territorial Session Laws of 1875. This statute continued in force until 1891. It appears in the Comp. Laws of 1887 as § § 2449 to 2468, inclusive. We cite from the Comp. Laws such sections as bear upon the point under discussion:

Section 2449: "The homestead of every family resident in this territory, as hereinafter defined, whether such homestead be owned by the husband or wife, so long as it continues to possess the character of a homestead, shall be exempt from judicial sale, from judgment lien, and from all mesne or final process issued from any court."

Section 2450: "A widow or widower, though without children, shall be deemed a family while continuing to occupy the house used as such at the time of the death of the husband or wife."

Section 2451: "A conveyance or incumbrance by the owner of such homestead shall be of no validity unless the husband and wife, if the owner is married and both husband and wife are residents of the territory, concur in and sign the same joint instrument."

Section 2458: "The owner or the husband or wife may select the homestead, and cause it to be marked out and platted and recorded as provided in the next section."

Section 2463: "Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law; and upon the death of both husband and wife the children may continue to possess and occupy the whole homestead until the youngest child becomes of age."

Section 2467: "Every family, whether consisting of one or more persons, in actual occupancy of a homestead as defined in this chapter, shall be deemed and held to be a family within the meaning of this chapter."

Before discussing these sections, it will be advantageous to determine just what is meant by the word "homestead." The statute is careful to fix its area, whether in country or town, but is not specific in stating what shall be necessary to stamp this area with the homestead character. The Supreme Court of New Hampshire, in *Hoitt* v. *Webb*, 36 N. H. 166, thus defines the word: "It is the home, the house and adjoining land, where the head of the family dwells; the home farm." Black's Law Dictionary further defines it to be "the fixed residence of the head of a family, with the land and buildings surrounding the main house." 9 Am. and Eng. Enc. Law, p. 424, reads: "Homestead is the house and land constituting a family residence. In law it is such family residence exempt from forced sale." The reasons why the homestead, thus defined, has been exempted from forced sale, have been repeatedly stated by courts. "It was an enlightened policy, looking to the general welfare as well as to that of the individual citizen, which dictated the passage of the homestead act; and the obvious intent of the act is to secure to every householder or head of a family a home, a place of residence, which he may improve and make comfortable, and where the family may he sheltered, and live beyond the result of those financial misfortunes which even the most prudent and sagacious cannot always avoid." *Wassell* v. *Tunnah*, 25 Ark. 103. Similar language is used in *Charless* v. *Lamberson*, 1 Iowa, 441; *Cook* v. *McChristian*, 4 Cal. 26; *Franklin* v. *Coffee*, 18 Tex. 415. And this court said in *Fore* v. *Fore*, 2 N. D. 267, 50 N. W. Rep. 714: "Ample provision for the establishment of the home and maintenance of the family has ever been the fixed policy in this jurisdiction." And, after citing the homestead provisions, we further stated: "It is too plain for question that these various provisions were intended not for the benefit of the husband and father, but for that of the family." It will be readily conceded that in some states, by express statutes, the benefits of the homestead provisions have been extended beyond the lines indicated in the above definitions and citations. But when the legislature

intends to depart from the established meaning of the word "homestead," when it intends to depart from the original objects and purposes of the homestead provisions, when it intends to entirely divorce the homestead exemption from the family relation, when it intends to extend that exemption to every person—man or woman, married or unmarried, adult or infant—who owns and resides upon not to exceed 160 acres of land, let its value be what it may, we are at least warranted in requiring the legislature to use reasonably clear and unequivocal language expressing such intent. But it is claimed that § 2467, Comp. Laws, manifests such intent. We quote it again: "Every family, whether consisting of one or more persons, in actual occupancy of a homestead as defined in this chapter, shall be deemed and held to be a family within the meaning of this chapter." Under this section it is argued, in support of the judgment below, that any person—no distinction or limitation whatever—owning and occupying a tract of land would be entitled to the benefits of a homestead exemption therein. The argument is this: If the one person mentioned in said section only includes those who come within the conditions and circumstances in which one person could claim the homestead under preceding sections of the act, then such section is useless, as the preceding sections sufficiently provide for such cases. This argument has force. If the section stood alone, its force would be greater; but even then the particularly inappropriate language used to express the thought that it is claimed to express would leave the matter in doubt. If, as is urged, the legislature intended to extend the homestead exemption to any and every owner of land who lived on the same, why did it not say "every owner in actual occupancy of a homestead," etc.? This would have been clear and convincing. But, further, if such was the legislative intent, what conceivable necessity existed for defining the word "family" any where in that chapter? We say unhesitatingly that, if the contention of respondent be sound, then the work "family" has no legitimate place in that chapter from first to last. Its use is

confusing, and utterly misleading. The first section (2449, Comp. Laws,) instead of saying "the homestead of every family resident in this territory as hereinafter defined," etc., should have declared "the homestead of every person resident in this territory," etc. That language would have brought the statute within the ruling in *Myers* v. *Ford*, 22 Wis. 139, cited by respondent. There the statute gave the homestead exemption where the land was "owned and occupied by any resident of the state." There could be no doubt under such language. But, again, if respondent's contention be correct, then it was useless to define a widow or widower as a family, in § 2450, because no family relation was necessary in order to stamp the homestead character on the land. The thought of that section would have been properly expressed by declaring that the surviving husband or wife, where the title to the homestead had been in the deceased, might continue to occupy, etc. Perhaps the first portion of § 2463 would have covered the thought fully, but the latter portion of that section could not stand, under respondent's contention, without modification. On the death of both parents, the fee would descend to the children, or, if but one, to such child. Under § 2463 such child might hold the homestead as such until he reached majority; but at that time, under the clear words of the section, the homestead character of the property would cease. This, of course, could not be if the homestead right depended upon ownership alone. Section 2467 must be construed in the light of the other sections in the same chapter. The statute must be construed as a whole. We find respondent's construction makes the section inconsistent with other sections of the chapter, and, while his construction strikes down at once and forever all necessity for the existence at any time of any family, as the word is generally understood, in order to give the land its homestead character, yet almost every section in the chapter, including § 2467 itself, is pregnant with suggestions that the family and the family relations must exist as the very basis of any homestead exemption rights. The respondent, recognizing this fact, seeks to avoid it

by claiming that the statute makes every man, women, or child who owns and occupies a tract of land a "family." This at once makes the statute a mass of useless fiction that would impugn the intelligence of the legislature that passed it.

We must notice the claim that other portions of the statute support respondent's contention. It is urged that the provision in § 2451, which declares that a conveyance of the homestead by the owner shall be of no validity unless both husband and wife, "if the owner is married," concur in and sign the same joint instrument, clearly contemplates that an unmarried person may own a homestead. Certainly, this is correct. The preceding section had specified an exceptional case where a surviving husband or wife might own a homestead. Had not § 2451 contained that limitation, it would have been clearly and palpably inconsistent with the preceding section. Again, § 2458 says, "The owner or the husband or wife may select the homestead," etc. This language is construed to mean that the owner need not be either the husband or wife. It will not admit of this construction. How could a husband or wife select a homestead unless one or the other were the owner? . The statute simply means that the owner, or the husband or wife of such owner, may select, etc. Where the husband owns the land, and fails to select the homestead, the wife may do so, or in reversed positions, the husband may select. Any other construction makes the section an aggregation of meaningless words. We have the same thought in § 5133, Comp. Laws, in reference to exemptions of personal property. We find nothing in the statute that will sustain the construction placed upon it by the trial court. That court based its ruling upon certain language used by the learned Supreme Court of South Dakota in discussing the same statute in *Hesnard* v. *Plunkett*, 6 S. D. 73, 60 N. W. Rep. 159. That case was decided upon another point.

We concede that, as we construe the statute, there existed no clear necessity for the enactment of § 2467. But the legislature, departing from the original purposes of the homestead exemp-

tion, had specified certain instances where the family, in the usual acceptation of the word, being reduced to one person, such person should still be regarded as a family, and enjoy the benefits of the homestead exemption which was originally brought into existence by, and inured to the benefit of, the family proper. And to make its purpose and intention clear, the legislature *ex abundanti cautela*, enacted § 2467. The District Court will set aside its judgment herein, and enter an order sustaining the demurrer to the complaint.

Reversed. All concur.

(71 N. W. Rep. 769.)

STATE *ex rel vs.* SCHOOL DISTRICT NO. 21.

Opinion filed May 27th, 1897.

Special School Districts—Equalization of Interests.

Where a school district is divided, by the organization of a city or incorporated town or village situated within said district, into a special school district, under the provisions of Chapter 62 of the Laws of 1890, the board of arbitration provided for by said chapter to equalize the interest of said districts must take into consideration the school building owned by the original district, and adjust the rights of the respective districts concerning the same.

Appeal from District Court, Grand Forks County; *Templeton*, J.

Action by the State, on the relation of the Reynolds Special School District, against School District No. 21, Grand Forks county, and others. A demurrer to the complaint was sustained, and plaintiff appeals.

Reversed.

W. H. Standish, for appellant.

Bangs & Fisk, and *George A. Bangs*, for respondents.

BARTHOLOMEW, J. Prior to 1893 there existed a school district in Grand Forks county known as "School District No. 21." Within the territorial limits of such school district was the incor-

porated town of Reynolds, containing a population of more than 300. In 1891 the legislature passed an extended act relating to common schools of the state. The act is Chapter 62 of the Laws of 1890, and comprises 19 articles. Section 169, being the first section in article 19, declares that "any city or incorporated town or village having a population of more than three hundred inhabitants may be constituted a special school district in the manner hereinafter prescribed, and shall then be governed by the provisions of this article." Section 173 provides for the organization of such special school district. It requires that a petition signed by one-third of the voters in such city or incorporated town or village be presented to the council or board of trustees thereof, asking for the organization of such special district, and thereupon it becomes the duty of such council or board of trustees to call a special election, and submit the question of such organization to the voters of the municipality. Section 174 provides that, if a majority of the votes cast at such special election be in favor of such organization, then another election shall be called for the purpose of electing a board of education for such special district. It will be noticed that in these proceedings that portion of the original district lying outside the limits of the city or incorporated town or village is not consulted in any manner. It has no voice in the matter. In 1893 the incorporated town of Reynolds organized itself into a special school district under the provisions above stated. Section 190 of said Chapter 62 reads as follows: "When any board of education shall be organized under the provisions of this article, it shall after the equalization hereinafter provided for assume control of the schools of the city, town or village, and shall be entitled to the possession of all property of the former district or districts or parts thereof lying within such city, town or village, for the use of schools; such board shall also be entitled to its due proportion of all monies on hand and taxes already levied but not collected, and shall be liable for a proper amount of the debts and liabilities of such former district, to be determined in the same manner as provided

in this act for the equalization, determination and division of the debts, property and assets of school districts consolidated or divided." Prior sections in the act had declared what territory should constitute a school township, and how the boundary lines of school districts might be changed, and how districts might be consolidated or divided. Section 111 reads as follows: "After the boundaries of the school district have been established as provided for in this act, all school districts, or parts of school districts, that existed as school corporations before the taking effect of this act, and that are now included in one school district, shall effect an equalization of property, funds on hand and debts. To effect this, each school board of such corporation as shall constitute a school district under the operation of this act shall select one arbitrator, and the several arbitrators, so selected, together with the county superintendent, shall constitute a board of arbitration to effect such equalization. If in any case the number of arbitrators, including the county superintendent, should be an even number, the county treasurer shall be included and be a member of said board. The county superintendent shall fix the time and place of said meeting." Section 112 reads: "Said board shall take account of the assets, funds on hand, the debts properly and justly belonging to or chargeable to each corporation or part of corporation, as it or they existed heretofore, and levy such a tax against each such corporation or part of corporation as will in their judgment, justly and fairly equalize their several interests." After the organization of Reynolds special school district, an effort was made to effect an equalization as contemplated by § 190. To that end, said special district appointed an arbitrator, and that portion of the old school district No. 21 outside the special district, and which, of course, still constituted school district No. 21, appointed another, to-wit, the defendant Ole Severinson, and the county superintendent, to-wit, the defendant E. J. Taylor, acted as a third arbitrator. The school house that had originally belonged to and been used by school district No. 21 remained in that district, being situated outside the limits of

the incorporated town. The arbitrators proceeded to apportion the money on hand, and the uncollected taxes, and the outstanding indebtedness of the original district. This apportionment, as we understand the record, was on the basis of the taxable property in the respective districts,—52 per cent. being apportioned to district No. 21, and 48 per cent. to the special school district; but the abitrators, Severinson and Taylor, refused to in any manner consider the school house and furniture, claiming that the same did not come within their jurisdiction as arbitrators under the statute. This action would of course, leave the school house and furniture as the exclusive property of school district No. 21. Thereupon an action was brought by the special district against the original district No. 21, and against the arbitrators, Severinson and Taylor, to compel an adjustment of the rights and claims of the respective districts to the said school house and furniture. The facts hereinbefore stated were pleaded as the ground for the relief prayed. A demurrer to the complaint was sustained. Under a stipulation in the case, we do not understand that any question was raised in the court below, or can be raised in this court, as to the form of action, or as to the technical sufficiency of the complaint. The sole question sought to be determined by this litigation is whether or not the arbitrators should have treated the said schoolhouse and furniture as assets within their jurisdiction, to be apportioned and adjusted by them. In other words, was the defendant district the exclusive owner of said school house and furniture, and relieved of all liability to reimburse the plaintiff district, either in whole or in part, for the means contributed by the taxpayers therein in procuring such property?

Whatever may be the law upon this point, it must be uniform. The statute cannot receive a flexible construction that would exactly meet the equities of each particular case. If the arbitrators have no jurisdiction to consider or take into account the school house in one case of the character of the case at bar, then they would have no jurisdiction to consider such

property in any such case. No distinction can be read into the law, nor could it make any difference whether the school house fell within the limits of the newly organized special district, or within the limits of the remnant of the original district. The statute can create but the one rule of law. Otherwise it would be unconstitutional, as not being uniform in its operation. We are not to give it a construction that will force that result, if it be reasonably susceptible of another construction. Respondents place great reliance upon that portion of said § 190 which reads, "Such board shall also be entitled to its due proportion of all monies on hand and taxes already levied but not collected." It is urged that, under this language, it is only moneys on hand and uncollected taxes that are to be treated as assets subject to the division by the arbitrators. This argument ignores the preceding portion of the section. The very language quoted, "Such board shall also be entitled," clearly shows that something has preceded to which such board was entitled. And the whole section makes it plain: "When any board of education shall be organized under the provisions of this article, it shall, after the equalization hereinafter provided for, assume control of the schools of the city, town or village, and shall be entitled to the possession of all property of the former district or districts or parts thereof lying within such city, town or village, for the use of schools; such board shall also be entitled," etc. It is only after the equalization that the new board can take possession of the school property of the old district lying within the limits of the new. This indicates plainly that the equalization is to be of such a character as equitably entitles the new district to this property, and this certainly cannot be done unless the property is considered by the arbitrators. We cannot assent to the proposition that the old district still holds the title to the property under the statute, and the new has simply the right of possession. An unlimited right of possession for school purposes is given the new district, and it is not possible that the old district, which held it only for school purposes, should retain any beneficial interest

therein. That beneficial interest is, by the equalization of the arbitrators, transferred to the new district.

Another view of the case will, we think, make it still plainer that the arbitrators should consider the existing school building. Suppose the school house fell within the limits of the special district. In that case the taxpayers in the remnant of the old district, after having contributed their share to the construction of a school building, would find themselves, without their consent —probably against their wishes,—deprived of the same. Another corporation would be enjoying the full and exclusive use thereof. It would certainly be most unjust to those taxpayers to say to them that, unaided, and of their own means, they must proceed to build another house, and it would be but cold comfort to assure them that they still had title to the old building. Under such circumstances, we think this defendant district would be before the courts clamoring to have the arbitrators take the building into consideration in making their equalization. And certainly the courts could not disregard such a demand, and, as we have said, the law must have a uniform operation.

But it is urged that the special district withdrew from the old of its own volition, and for its own advantage, and that, if it suffers a pecuniary loss, it must have contemplated the same, and has no ground of complaint; while, on the other hand, the remnant of the old district may find itself with a school building of far greater capacity and value than its needs require, and to compel it to pay for this useless property, by refunding to the new district the share contributed by it, would be most inequitable and burdensome. This argument before the board of arbitrators would be unanswerable, and we think that is the forum where it should be presented. True, this case has been argued to some extent by both parties upon the theory that, if the plaintiff district was entitled to anything on account of the school building, it would be entitled to a percentage of its value to correspond with the percentage of taxable property in the special district. This is a misapprehension. It deprives the arbitrators

of their principal function, which is to "justly and fairly equalize their several interests." If everything is to be divided in proportion to the percentage of taxable property in the respective districts, then an accountant is needed, rather than a board of arbitrators. But the law does not contemplate anything of that kind. It may be that upon the organization of the special district the remnant of the old district will find itself in possession of school property far in excess of its necessities. In such a case it might be inequitable to compel it to refund to the special district the entire portion of the value originally contributed by the taxpayers in the special district. It might be that the amounts paid by the taxpayers in the remnant of the original district towards the construction of such building would have been sufficient to construct a building ample for their own necessities. In such a case it might be inequitable to require them to refund anything whatever on account of said building. The arbitrators must consider all the circumstances surrounding each case, and the pecuniary benefits and detriment necessarily accruing to each district; and, when either district is necessarily benefited at the expense of the other, compensation should be awarded for such benefits. Where the old district was largely indebted, this equalization of their respective interests could readily be accomplished by fixing the proportion of such indebtedness to be borne by each of such districts. But on this record, as it stands, nothing of that kind was done in this case.

We have ignored certain technical points raised in respondent's brief, as in our judgment, they could not be considered under the stipulation of counsel found in the abstract. The district Court will set aside its order sustaining the demurrer, and enter an order overruling the same. If respondents decline to plead further, we think judgment on the complaint should be entered requiring said arbitrators to reconvene and complete their duties under the statute, as pointed out in this opinion. As such judgment must necessarily include an order upon the arbitrator appointed by the plaintiff district as well as the other arbitrators, we suggest that,

before further proceedings are had in the trial court, said arbitrator be brought in as a party defendant.

Reversed. All concur.

(71 N. W. Rep. 772.)

WILLIAM COLBY *vs.* F. H. MCDERMONT.

Opinion filed June 1st, 1897.

Appeal—Waiver of Objections.

Where defendant, after his motion to direct a verdict is overruled, introduces evidence in the case, and then fails to renew his motion at the close of the case, he is not in a position to claim that the court erred in denying his motion.

Error Cannot be Predicated on Charge to Which no Exception Was Taken.

No portion of the charge having been excepted to, the defendant cannot predicate error upon instructions to the jury.

Specification of Particulars Wherein Evidence Fails to Sustain Verdict.

The question of the insufficiency of the evidence not having been raised in this court by a proper assignment of error, such question will not be considered.

Appeal from District Court, Grand Forks County; *Templeton*, J.

Action by William Colby against F. H. McDermont. Judgment for plaintiff. Defendant appeals.

Affirmed.

F. H. McDermont, in pro per.

W. J. Anderson and *George A. Bangs*, for respondent.

CORLISS, C. J. This is an appeal from an order denying a motion for a new trial, and from a judgment based upon a verdict. The appellant is not in position to claim that the court erred in refusing to direct a verdict in his favor. Such motion was made at the close of the plaintiff's case. After it was overruled, the defendant introduced evidence to support his defense. Having failed to renew his motion at the close of the case, he waived the error, if any, committed by the court in overruling his motion at

the end of plaintiff's case. *Bowman* v. *Eppinger*, 1 N. D. 21, 44 N. W. Rep. 1000. The appellant is not in position to complain of the charge of the court, he not having taken any exception to any portion thereof. So far as he essays to raise the question that the evidence is insufficient to support the verdict, the answer to his contention in this respect is that his assignments of error in this court do not relate to any such point. On the contrary, in the only assignment of errors which can possibly be held to raise the question of the sufficiency of the evidence, the appellant studiously excludes the idea that he desires to challenge the sufficiency thereof, by asserting that the court erred in overruling the motion for a new trial, for the reasons and on the grounds specifically set forth in the preceding assignments of error, all of which assignments relate to errors in law occurring at the trial, and not to the insufficiency of the evidence. We deem it in the interests of justice not to relax in this case our rules relating to assignments of error in this court. Finding that the appellant is not in position to raise the questions discussed by him in his brief, the order and judgment are affirmed. All concur.

(71 N. W. Rep. 772.)

ALEXANDER ANDERSON *vs.* FIRST NATIONAL BANK OF GRAND FORKS.

Opinion filed October 4th, 1897.

Objections to Depositions—When Taken.

All objections to depositions, except for incompetency or irrelevancy, must be taken before the trial is commenced or they are forever waived.

Construction of Written Contract is for the Court.

The construction of a written agreement is a question of law for the court, and therefore ordinarily it is incompetent to prove what either party to a written contract considered its meaning or its legal effect.

Former Opinions Adhered to.

Questions decided on the former appeals in this case re-affirmed.

Proof of Value of Promissory Note—How Made.

The promissory notes of individuals have no market value, and evidence of their market value is therefore incompetent. Witnesses are not permitted to testify generally as to the value of such paper, but must confine their evidence to facts which bear upon the question of value. The insolvency of the maker, the fact that the paper is not secured or that the security is inadequate, the existence of a defense to the paper, and other facts of a like nature affecting the value of such paper, may be proved. But mere opinions as to value are not competent. This is the rule not only in actions for conversion of such paper but also in actions in which the party injured waives the tort and sues in assumpsit for the value of such paper on the theory of a sale.

Presumptive Value of Chose in Action.

Prima facie a chose in action is worth what appears to be due upon it, and unless the presumption is rebutted by legal evidence it is conclusive.

Appeal from judgment of the District Court of the First Judicial District; *Fisk*, J.

Action by Alexander Anderson against the First National Bank of Grand Forks, N. D. Judgment for plaintiff and defendant appeals.

Affirmed.

Burke Corbet, for appellant.

Defendant's exceptions and motion to suppress the deposition

of Anderson were taken in time, defendant not having appeared at the time the same was taken §§ 5682, 5687 and 5688, Rev. Codes. *Holt* v. *Van Eps*, 1 Dak. 209, was decided under § 1875 Civil Code of 1866, which differed materially from § 5012 Rev. Codes. Such rule conflicts with the provisions of §§ 5014 and 5015 Rev. Codes; and is contrary to the rule in *Lovejoy* v. *Merchants State Bank*, 5 N. D. 623, 67 N. W. Rep. 956. There is no presumption that in actions on contract the amount of the notes is the amount of the recovery. *Barrington* v. *Bank of Washington*, 14 Sarg. and Rawle 405. It is not within the powers of national banks to sell mortgage notes on commission, nor is it within the implied powers of a cashier to contract that his bank shall engage in such business. *Farmers' and M. Nat. Bank* v. *Smith*, 77 Fed. Rep. 129.

Phelps & Phelps, for respondent.

No objections having been filed to the deposition of Anderson previous to the first trial of this action, they come too late. 5 Am. & Eng. Enc. L. 610–616. The statute contemplates exceptions to the deposition as a whole. § 5687 Rev. Codes. The objection to a particular interrogatory must be taken at the time the interrogatory is put to the witness. *Ward* v. *Whitney*, 3 Sandf. 399; *Love* v. *Tomlinson*, 29 Pac. Rep. 666. This rule is in line with the holding that objections by their language must indicate clearly the point made against evidence to the end that the adverse party may then and there if possible save himself from the consequences of error. *Kolka* v. *Jones*, 6 N. D. 461, 71 N. W. Rep. 558. For the purpose of estimating damages, the value of a thing in action is presumed to be equal to that of the property to which it entitles its owner. *Holt v. Van Eps*, 1 Dak 208, 46 N. W. Rep. 689. *First Nat. Bank* v. *Dickson*, 5 Dak. 286, 40 N. W. Rep. 351; *Griggs* v. *Day*, 70 N. W. Rep. 881; *Cosand* v. *Bunker*, 2 S. D. 294, 50 N. W. Rep. 84; *Booth* v. *Powers*, 56 N. Y. 22; *Potter* v. *Bank*, 28 N. Y. 654; *Griggs* v. *Day*, 136 N. Y. 152; *Thayer* v. *Manley*, 73 N. Y. 305; *Western R. Co.* v. *Bayne*, 75 N. Y 1; *Ingalls* v. *Lord*, 1

Cow. 240; *Latham* v. *Brown*, 16 Iowa, 118. The general rule that the value of property must be ascertained by answers to direct questions as to its value, cannot apply to a chose in action. A chose in action has no intrinsic value. Its value depends on the pecuniary condition of the parties liable thereon. *Potter* v. *Bank*, 28 N. Y. 655. In the absence of evidence of want of ability to pay, the presumption of law is that the maker of a note is solvent and able to pay. *Potter* v. *Bank*, 28 N. Y. 655, 86 Am. Dec. 273 and n.; *Kelsey* v. *Welch*, 66 N. W. Rep. 390; *Thayer* v. *Manley*, 8 Hun. 551; *Walrood* v. *Ball*, 9 Barb. 271.

CORLISS, C. J. This cause having been tried four times in the District Court is before us a fourth time on appeal. On the last trial the trial court directed a verdict for plaintiff for the amount due upon the notes at the time of their conversion by defendant, less the sum which had been paid by defendant to plaintiff by a remittance to plaintiff on the theory that it was remitting the proceeds of a sale thereof by defendant as agent for plaintiff. In its main features the case is practically the same as on the last appeal. There is only a slight difference in the facts, none calling for any change of decision on the points already disposed of. The answer as before puts in issue the question of agency. But the undisputed facts conclusively establish such agency. It is true that the offer by plaintiff of one of the telegrams which had been repeatedly received in evidence on the former trials was strenuously objected to, and it is here urged that such telegram was not proved by competent evidence. This is the telegram from defendant to plaintiff, dated October 3rd. We may strike this from the record and yet there remains unanswerable proof of agency. Defendant's letter of September 14th contains an offer by defendant to act as agent for plaintiff in the sale of the notes in question. This letter embodies the following statement: "If I had a basis to work on I might find some one who would take the paper. You offered it at a $350 discount; we offered you a trade at a $1,000 discount. Now if you will make it $700 or $800 and allow us a small commission I will try and place the paper for

you." Defendant's letter to plaintiff of October 7th reports a sale of the notes by defendant as agent for plaintiff, the sale purporting to have been made by defendant in answer to a telegram from plaintiff to defendant offering to sell at a certain discount. This telegram was in answer to defendant's proposition to sell the paper as agent for plaintiff for a small commission. In this letter of October 7th, defendant charged plaintiff a commission of $35 for making the sale. In view of these uncontroverted facts it becomes unnecessary for us to determine whether there was error in receiving in evidence the telegram of October 3rd. Eliminating it from the case does not in the least affect the question of agency.

Some new questions are presented to us for consideration. Among them is the question of the admissability of certain evidence offered by defendant to prove the value of the notes in question. This evidence was the opinion of experts. *Prima facie* the value of these notes, both at common law and under our statute, was the full amount due thereon at the time of the conversion thereof by defendant. Sec. 5012, Rev. Codes, and 4615, Comp. Laws. Several witnesses were called by the defendant and defendant offered to prove by their testimony what the value of such notes was, and that the value thereof did not exceed the sum of $6,000. This evidence being objected to by plaintiff was excluded, and it is here urged that in so doing the District Court committed error. It is to be noted that no attempt was made to show the insolvency of the makers of these notes, or that there was any defense to them, or that any portion thereof had been paid. Indeed, it was established on the trial, and does not appear to be disputed, that the land on which these notes were secured by a mortgage was of greater value than such notes. No evidence tending to show that the security was insufficient was offiered by defendant, despite the fact that the witnesses who testified on its behalf swore that they knew the value of the land. The case before us, therefore, is the case of notes executed by solvent makers, amply secured, subject to no defense, and on which the

full amount of principal was due, together with some accrued interest. These notes bear a good rate of interest even for North Dakota, the rate being 9 per cent. To allow witnesses to conjecture about the future solvency of the parties, to speculate about the possible decline in the value of the security, and on such a basis express an opinion, a mere guess, as to the value of the paper would be a dangerous doctrine. Paper of this character, unlike chattels and municipal, state and national bonds, and corporate stock, is not geneally bought and sold in the market, and cannot be said to have a market value. There may at times be local dealings in such securities of considerable magnitude, but we must establish the rule to apply to all communities in the state and under all circumstances. We do not think that the fact that there was at the time of the conversion of this paper a large amount of individual notes bought and sold in commercial circles in Grand Forks city, furnishes any reason why we should establish a rule that such paper has a market value, when we well know that, taking the state at large and considering the general trend of business, there is a wide distinction between chattels and such securities as marketable property. The chief dealing in paper of this kind is at the banks and loaning institutions where money is borrowed by debtors upon their notes secured or unsecured. Such paper is not sold in open market as wheat or municipal securities, or other like property. There is, therefore, no standard of value to apply to it except that which each witness creates in his own mind, basing his opinion, perhaps, upon what he would give for the property or on a conjecture as to the future solvency of the maker. In this particular case the foundation of the opinion of the experts as to the value of these notes would seem to be the risk of the future insolvency of the makers thereof. Defendant offered to prove by one of its witnesses "that the risks of the insolvency of the makers of negotiable instruments which are to become due in one, two, three, four and five years is a material element in depreciating the value of the paper, notwithstanding the fact that the parties may be perfectly solvent at the

time of making or at any particular time thereafter; that the risk of insolvency itself is an element which does actually depreciate the value of the paper." Had this witness been permitted to express his opinion as to the value of these notes, we know that it would have rested largely upon the remote possibility of the future insolvency of the makers, although as a matter of fact the notes were adequately secured and were therefore good without reference to the solvency of such makers. Extreme cases can be imagined where the rule which we follow in this case may work some slight measure of hardship; but in the great majority of instances, indeed, in practically every case it is the only rule which will not result in placing the owner of choses in action at the mercy of every wrong doer and the surmises and guesses of persons who really know nothing about the market value of such property, because as a rule it has no market value. Would-be wrong doers can protect themselves against this rule if they deem its operation harsh by keeping their hands off from the property of others. Persons who buy such property can protect themselves by an agreement as to the price to be paid. The cases fully support our decision on this point. In fact, no ruling to the contrary can be found. *Holt* v. *Van Eps*, 1 Dak. 208; *Booth* v. *Powers*, 56 N. Y. 22; *Atkinson* v. *Rochester Printing Co.*, 43 Hun. 167; *Potter* v. *Bank*, 28 N. Y. 654. In *Potter* v. *Bank*, the court said: "It was insisted on the trial that the proper question to put to the witness in order to arrive at the measure of damages was, "what was the value of the note?" And the ground on which the right to put the question is, that such is the inquiry in all of the cases where the value of property is sought to be recovered. The general rule is that the value of property must be ascertained by answers to the direct questions as to its value. And the reason is that persons are examined who know its value and can speak from their own personal knowledge in relation thereto. But this rule cannot apply to choses in action that have no intrinsic value as a horse or an acre of land has. Their value depends on the pecuniary condition of the parties liable thereon.

And hence in such case the direct and proper inquiry would be, are the parties to the bill or note, or other chose in action, solvent and able to pay their debts. But as the law presumes that fact in favor of the plaintiff it is not necessary that he prove it, and the burden is therefore cast upon the defendant to disprove it." Nor do we think that there is any reason for applying a different rule to this case because of the fact that plaintiff has elected to waive the tort and sue in *assumpsit* on the theory of an executed contract of sale complete in all its terms save with respect to the purchase price to be paid. It is the defendant's duty to pay the full value of these notes as much in this form of action as it would be in an action for conversion. The reason for the rule that in actions for conversion the market value cannot be proved is, that generally speaking such property has no market value. This reason exists precisely the same in an action to recover the value of such property on the theory of a sale without an agreement as to the purchase price. Nor was anything to the contrary decided in *Barrington* v. *Bank*, 14 Serg. & Rawle, 405. The danger of permitting opinion evidence as to value in this class of cases is illustrated by the facts of this case. Here is paper of perfectly solvent makers, amply secured, bearing a large rate of interest, and the full amount due thereon at the time of the conversion by the defendant was $7,630. And yet defendant offered to prove by its experts that these notes were then worth only $6,000, and this, too, in the very teeth of the fact that five of the seven notes, together with the interest thereon, had at that time been fully paid to the defendant. It is hard enough for plaintiff to lose the difference between 9 and 7 per cent. interest, (he being entitled to only 7 per cent. interest since the day of the conversion of the notes, although the defendant has collected and will continue to collect interest at the rate of 9 per cent.) without being required by law to throw away $1,630 on the bare conjecture of witnesses.

Certain objections were made to the deposition of plaintiff. They came too late. That deposition was read without objection on the first and second trials of this case. After the first trial had

been entered upon without any objections being made, all objections other than for incompetency or irrelevancy were waived. Section 5299, Comp. Laws, § 5687, Rev. Codes. The evidence of the plaintiff contained in this deposition was objected to on the last trial on the ground that it was incompetent and irrelevant. Much of the testimony was clearly relevant and all of it was competent, except that which related to the value of the notes. If we should strike this testimony out of the case we would still have left the statutory and common law presumption that the notes were worth their face, and unless this was rebutted by legal evidence, or unless there was an offer of legal evidence to overthrow it, the trial court was justified, on the basis of this presumption, unaided by plaintiff's testimony as to value, in directing a verdict for plaintiff for the face value of such notes. Some of the facts to which plaintiff testified were undisputed. Others were admitted by defendant's cashier on the witness stand; and plaintiff's testimony as to value merely corroborated the presumption of the law that the notes were worth their face. If competent evidence as to value tending to reduce their value below the amount due thereon had been received or offered, the question must have been submitted to the jury and the case would have to be reversed for error in refusing so to do without reference to the question whether plaintiff's evidence as to value was competent or not. If, on the other hand, defendant offered no legal evidence tending to overthrow the presumption of the law then, without plaintiff's evidence as to value, the state of the evidence on that point called for the direction of a verdict in favor of the plaintiff for the full sum due upon the paper at the time of the conversion thereof. As we will demonstrate later, the court in effect struck out the plaintiff's testimony as to value so that defendant's objection was in fact sustained. It is not practicable to discuss in detail all the objections made to the plaintiff's evidence in the deposition referred to. We will merely state our conclusion that no prejudicial error appears to have been committed by the court in over-ruling such objections.

It is urged that by the change in the issues resulting from plaintiff's amendment to his complaint after the deposition was taken defendant has been deprived of its right to cross-examine the plaintiff, the importance of his evidence under the present issues not being in some respects manifest as the issues then stood. But defendant has not applied for an order to be allowed to cross-examine, or that in default thereof the deposition be suppressed. In the exceptions filed to the deposition, defendant did not ask that the privilege of cross-examination be accorded it. It merely insisted that the whole deposition should be suppressed. This was the motion it made on the basis of its exceptions before the trial commenced. The whole deposition cannot be suppressed merely because by reason of some change in the issues a party ought to be permitted to cross-examine on some point or object to a portion of the evidence. Only one new question was brought into the case by the amendment to the complaint which would make it important to cross-examine the plaintiff on one point to which he testified. In the original complaint the question of agency was involved as the very basis of the action. The suit was to recover from the defendant the proceeds of a sale by it of the notes in question to a third person as agent for the plaintiff. The defendant admitted the agency and interposed the defense that it had made the sale for the sum specified in the instructions of the plaintiff to it, and had fully accounted for the proceeds thereof. So far as the question of agency is concerned the complaint stands unchanged. But the question of value was not of any importance under the complaint as it originally stood and it is vital now. If, however, we expunge from the record the plaintiff's evidence in this respect, there remains the *prima facie* case calling for the direction of a verdict for the face value of the paper, there being no countervailing evidence in the record. And, as we shall see, the court did in effect strike out the plaintiff's testimony as to value. But it may be urged that a cross-examination of the plaintiff on the question of value would have forced from him testimony that the paper was worth less than its

face, and that therefore the defendant has been denied a right for which the expunging of the evidence from the case will not compensate it. It may be claimed that by such cross-examination the defendant might have overthrown the *prima facie* case made by the papers themselves. But the evidence of plaintiff in which he stated his opinion of the value of the paper was incompetent, and, as we shall see, was in effect stricken from the case. Any cross-examination along the same line must of course have fallen with the direct examination on which it rested. Had the defendant cross-examined the plaintiff in this respect the court must have stricken out the cross-examination containing his expression of opinion as to value as well as his direct examination on that point. So far as plaintiff's deposition contains testimony as to the value of the land the error, if any, in not permitting the defendant to cross-examine as to this item of evidence, or object to it, is without prejudice for the reason that defendant does not claim, but on the other hand practically admits that the security was adequate; and even if it were inadequate the value of the notes would not in law be thereby affected, the makers being solvent. On the trial the defendant offered to prove that plaintiff's attorney knew that defendant was the owner of the notes before this action was commenced. But this was not an offer to prove that plaintiff or his attorney then knew that the defendant had, in violation of its duty to plaintiff, sold the notes to itself. The fact offered to be proved was entirely consistent with the subsequent purchase of the notes by the defendant. And this was the most natural inference to be drawn by the plaintiff because he would not have readily concluded that defendant had not stated the truth in its letter of October 7th, in which it reported and charged a commission for a sale of the paper to a third person. Had the defendant offered to show that plaintiff or his attorney knew before commencing the action that defendant had sold the notes to itself, such offer would have disclosed a defense to the action for it is undisputed that plaintiff originally sued on the theory of a sale of the notes by defendant, his action

being to recover the proceeds of such sale. If with knowledge of the breach of duty by defendant and consequently that the plaintiff might at his option repudiate the transaction and hold the defendant responsible for the value of the paper or recover the paper itself, the plaintiff had elected to treat the conduct of the defendant as legal and ratify the sale by essaying to recover the proceeds thereof, he would have been forever debarred of the right to hold the defendant liable on any other theory and especially on a theory bottomed on the illegality of the defendant's conduct. This principle was recognized in our decision of this case on the second appeal. See 5 N. D., 80–88. But the offer was not to show that plaintiff or his attorney knew before bringing suit that the defendant had sold to itself, but merely that at a time subsequent to the sale of the paper by defendant, plaintiff knew that defendant was the owner thereof. Nor did defendant offer to prove this fact as tending to show that plaintiff knew that the defendant sold to itself, but solely for the purpose of establishing the fact that plaintiff knew before suing that defendant did in fact own the paper. In making the offer, counsel for defendant said: "We offer this for the purpose of showing that plaintiff, through his counsel, Mr. Phelps, had knowledge at the time the action was brought, and knew that the defendant owned the paper and claimed to own it." The defendant offered to prove by its cashier that he had a conversation with plaintiff in December, 1895, which was subsequent to the third trial of this case; and "that plaintiff in such conversation admitted to the witness that he had never considered either Titus or the bank as his agent; that he had always denied such agency, and refused to allow $35 commission, and had never written authorizing Titus or the bank to act as his agent in the matter in any manner." It is obvious that this offer is merely to prove what plaintiff's construction of the correspondence between him and defendant was. That correspondence constituted a contract which we have held, as a matter of law, created the relation of principal and agent. It is well settled that the construction of a

written agreement is for the courts, and that neither party thereto can be permitted to control the meaning of such a contract by an expression of his understanding of it. Had the defendant sold the notes to a third person and sued plaintiff for the small commission or deducted the amount thereof from the proceeds of the sale, plaintiff would not have been permitted to insist that he did not understand that defendant was acting as his agent. The writing would have controlled. It is a matter of no moment that the contract is contained in several letters and telegrams instead of in a single paper. When all are taken together they constitute the written agreement of the parties precisely the same as if they were all embodied in one instrument. All the defendant offered to prove was that the plaintiff stated his view of the legal effect of the arrangement between himself and defendant. His alleged admission is not equivalent to a consent that defendant should purchase the paper. By bringing the action, or rather, by amending his complaint as soon as he discovered the facts, he evinced a purpose not to permit the defendant to purchase the paper, but to treat his attemped purchase thereof as unlawful. Undoubtedly the plaintiff might, despite the agency, have consented that the agent should buy at a specified figure. And if defendant after making the purchase had informed plaintiff of that fact, the latter could have elected to ratify the transaction. But the offer was not to prove such facts, but merely that plaintiff's view of the agreement was that it did not establish the relation which it actually did establish. Plaintiff would not have been permitted to prove his understanding of the legal effect of the correspondence to defeat defendant's right to commissions. Neither can defendant prove it to escape the duties which the law casts upon it because of such relation. What the contract was and what consequences flow from it, are both matters of law, and therefore beyond the control of the opinion of witnesses or parties. The offer did not point to any agreement being made different from that embraced in the letters and telegrams between the parties. There was no attempt to contradict or vary the

terms of this agreement, but only an effort to govern its legal effect by the statement of a party. Whatever plaintiff may have thought, the law declares that defendant was plaintiff's agent, and as such was powerless to sell to itself. The law does not concern itself with any question of injury to the principal, but makes the sweeping assertion that, under no circumstances, can the agent, without the consent of the principal, buy the property itself? The power vested in him to sell is limited to third persons. The law writes into the instrument conferring such an authority a positive prohibition against the purchase of the property by the agent himself unless the principal assents thereto. See the opinion in this case in 5 N. D. 80, and cases cited at page 83. Even though the agent pays more for the property than anyone else is willing to pay, or more than it is worth, the purchase by him is without right and may be repudiated by the principal on discovering the fact. The inquiry is never whether the principal has been prejudiced or the agent has made profit out of the purchase of the property. Without regard to either of these questions the transaction is void because unauthorized by the principal. It does not differ from any other act of an agent in excess of his authority. It therefore matters not the least whether the plaintiff was governed by the representations of the defendant as to the short crop or the tight money market in fixing the price at which he was willing to sell. The law says upon undisputed facts that the defendant was his agent in making the sale, and that therefore it could not sell to itself.

The question of *ultra vires* has been already discussed in a previous opinion. See 5 N. D. 451, 67 N. W. Rep. 821. We have nothing to add on that point. The recent decision of the Federal Supreme Court cited by counsel for appellant (*Bank* v. *Kennedy*, 17 S. C. Rep. 831) does not appear to us to call for any change of our former ruling on this question. What we said in our opinion on the third appeal on the subject of the authority of the cashier to bind the defendant by creating the relation of principal and agent between plaintiff and defendant is still applicable to the case on

the record now before us. In its answer and the brief of its counsel the defendant admits that the writing of the letters referred to was its act and not the act of an unauthorized agent. By its own pleading and admissions it has precluded itself from raising the point that the cashier had no power to bind it by agreeing that the bank would act as agent for the plaintiff.

It is urged that inasmuch as the trial court admitted over objection the evidence of the plaintiff as to the value of these notes, the plaintiff is estopped to insist that similar evidence on the part of the defendant is incompetent. Had the trial court permitted the defendant to introduce such evidence and had the defendant been successful in the case, we are inclined to agree with counsel for defendant that plaintiff would not be heard to claim that evidence of the same class which he successfully contended, against objection, was competent when offered by himself, was incompetent when offered by his adversary. But the learned trial judge by refusing to receive defendant's evidence of the same character in effect ruled that all such evidence was incompetent, and he must be deemed to have changed his former ruling and to have stricken out the plaintiff's evidence on this point, for the verdict directed by him was for the amount of the presumed value of the notes with interest, less what had been paid the plaintiff by defendant. The testimony of the plaintiff was ignored by the court. Without it a conclusive case as to value had been established, no legal evidence to overthrow the statutory presumption as to value having been offered. By ruling that evidence of the same kind offered by defendant was incompetent, and by basing his direction of the verdict upon the statutory presumption as to value, so far as the element of value was concerned, the Disrict Judge clearly decided that plaintiff's evidence as to value was incompetent and it is palpable that he disregarded it. While a party may waive his right to object to incompetent evidence by offering and insisting on the reception of incompetent evidence of the same class despite his antagonist's objection to it, yet the trial court may at any time change its rul-

ing admitting such evidence and direct that it be stricken out. That is what was done by the District Court in the case at bar.

We have carefully examined all the other questions presented by counsel for appellant. The length of this opinion forbids a more specific reference to them in view of the fact that they appear to us to be of little importance and to involve no difficult problems.

We are satisfied that there is no prejudicial error in the case, and the judgment is therefore affirmed.

(72 N. W. Rep. 916.)

JOHN BIRKHOLZ *vs.* JOHN DINNIE, *et al.*

Opinion filed October 4th, 1897.

Constitutional Debt Limit.

Under § 183 of the Constitution the indebtedness of a city cannot be increased beyond the limit therein specified, even though such debt is incurred by the issue of bonds, for the purpose of refunding the indebtedness of such city. In such a case the debt is temporarily increased beyond the constitutional limit, and such increase may be permanent, owing to the loss or diversion of the fund created by the sale of such refunding bonds.

Appeal from the judgment of the District Court of Grand Forks County; *Fisk*, J.

Action by John Birkholz against John Dinnie, Frank A. Brown, and Martin L. Gorden, mayor, auditor, and treasurer respectively of the City of Grand Forks, N. D., to enjoin the making, signing, and registering of certain refunding bonds. Defendant demurred to the complaint. The demurrer was overruled and defendants electing to stand upon their demurrer, final judgment was entered in favor of plaintiff enjoining the defendants as prayed for in the complaint. Defendants appeal from the judgment.

Affirmed.

Burke Corbett, for appellants.

Refunding bonds do not fall within the constitutional or statu-

tory prohibition against debt exceeding a certain per cent. of the assessed value of the property within the city limits. *City* v. *Quintard*, 136 N. Y. 275, 32 N. E. Rep. 764; *Powell* v. *City*, 107 Ind. 106, 8 N. E. Rep. 31; *Board of Com'ers.* v. *Same*, 26 Kan. 181. Opinion of Justices, 81 Me. 602, 18 At. Rep. 291. *Hotchkiss* v. *Marion*, 12 Mont. 218, 29 Pac. Rep. 821, *Los Angeles* v. *Teed*, 112 Cal. 319, 44 Pac. Rep. 580; *Miller* v. *School District*, 39 Pac. Rep. 879; *Palmer* v. *City*, 47 Pac. Rep. 209; *Board of Com'ers.* v. *Platt Co.*, 79 Fed. Rep. 567.

J. B. Wineman, for respondent.

The issue of the proposed bonds would be the creation of a new and independent debt and an increase of the city debt, the full amount of the bonds without regard to the purpose for which issued, and notwithstanding the subsequent decrease of the debt by the payment of existing bonds. *Township of Doon* v. *Cummings*, 142 U. S. 366, 12 S. E. Rep. 220; *Shaw* v. *Ind. Dist. of Riverside*, 77 Fed. Rep. 277. Any prohibition of indebtedness beyond a specified limit will apply in all cases, no matter what form the debt may assume or for what purpose incurred. Tiedman on Municipal Corporations 189 a; *Litchfield* v. *Ballon*, 114 U. S 190; *Davenport* v. *Klienschmidt*, 6 Mont. 502; *Council Bluffs* v. *Stewart*, 51 Ia. 385; *Lake* v. *Rollins*, 130 U. S. 662.

CORLISS, C. J. The object of this action is to obtain an injunction restraining the defendants, as officers of the City of Grand Forks, from issuing and selling the negotiable bonds of such city to the amount of $45,000. The purpose for which these bonds are about to be issued is to refund with the proceeds thereof certain municipal bonds of such city of the par value of $45,000, issued in 1882 and falling due August 1st, 1897. It is not proposed to issue these new bonds in place of the old bonds, the holders of the latter surrendering their obligations in exchange for the new bonds; but the plan is to sell these new bonds and apply the proceeds in satisfaction of the matured debt. It is urged by the plaintiff, who is a resident and tax payer of the City

of Grand Forks, that the proposed issue of these bonds will be illegal for two reasons. Only the first need be discussed, as we agree with him in his contention on that point. The first ground on which he attacks their issue is that the debt of the city will thereby be increased beyond the constitutional limit. Section 183 of the State Constitution provides as follows: "The debt of any county, township, city, town, school district or any other political subdivision, shall never exceed five (5) per centum upon the assessed value of the taxable property therein; provided, that any incorporated city may, by a two-thirds vote, increase such indebtedness three per centum on such assessed value beyond said five per cent. limit. In estimating the indebtedness which a city, county, township, school district, or any other political subdivision may incur, the entire amount of existing indebtedness, whether contracted prior or subsequent to the adoption of this constitution shall be included; provided, further, that any incorporated city may become indebted in any amount not exceeding four per centum on such assessed value without regard to the existing indebtedness of such city, for the purpose of constructing or purchasing water works for furnishing a supply of water to the inhabitants of such city, or for the purpose of constructing sewers, and for no other purpose whatever. All bonds or obligations in excess of the amount of indebtedness permitted by this constitution, given by any city, county, township, town, school district, or any other political subdivision, shall be void." The language is explicit. The debt shall never exceed a specified percentage of the assessed valuation. It is undisputed that if the bonds were not to be issued for the ultimate purpose of extinguishing an equal amount of city indebtedness their issue would violate this section of the constitution, the debt of such city already exceeding the maximum permitted by that section. But it is urged that in as much as their issue will result in only a temporary and not in a permanent increase of the city indebtedness the prohibition of the constitution does not apply. We do not so

construe the fundamental law. The language is that the debt shall never exceed the specified percentage of the assessed valuation. One day's continuation of such excess is as much within the condemnation, both of the letter and of the spirit of the constitution, as a year's continuation thereof. And what guaranty is there that the proceeds of the sale of these bonds will be used to wipe out the matured obligations? Many causes will readily suggest themselves to the mind which will lead to the diversion of such funds from the purpose for which they were procured. The people have seen fit to protect public interests against their own improvidence and extravagance. Aware of the ingenuity with which restrictions upon power are circumvented in great exigencies the framers of our organic law employed the most sweeping language to prevent such devices being successful. That instrument declares that never shall the debt exceed the specified percentage of the assessed value. No matter for what purpose it is created, or under what circumstances, or how pressing the emergency, or how short the indebtedness is to continue, if it will in fact increase the obligations of the municipality beyond the constitutional limit it falls within the letter and the spirit of the constitution. To give to § 183 so lax a construction that the debt limit may be passed by the sale of refunding bonds, is both dangerous and unwarrantable. Everyone must concede that if such bonds are not held to be within the scope of the prohibition the dishonesty of officials causing the loss of the proceeds of such bonds, or the loss of the money after it has been paid to the municipality, or the diversion of it to some other public purpose, may leave the old bonds unpaid and thus the constitutional inhibition will be violated and yet the new bonds be valid. The case of *Doon Township* v. *Cummings*, 142 U. S. 366, furnishes a practical illustration of the danger of such an interpretation of such a provision. In that case less than $6,000 of the proceeds of refunding bonds of the par value of $25,000 were applied in extinguishment of the old debt of the corporation. To have held the bonds valid in that case because they were issued to refund an existing indebt-

ednesss would have been to render nugatory the constitutional declaration that the debt should not exceed a specified percentage of the assessed valuation. We fully agree with the reasoning of Mr. Justice Gray in that case. We regard his argument as unanswerable. He says: "There is a wide difference in the two alternatives which this statute undertakes to authorize. The second alternative of exchanging bonds issued under the statute for outstanding bonds, by which the new bonds, as soon as issued to the holders of the old ones, would be a substitute for and extinguishment of them, so that the aggregate outstanding indebtedness of the corporation would not be increased, might be consistent with the constitution. But under the first alternative by which the treasurer is authorized to sell the new bonds and to apply the proceeds of the sale to the payment of the outstanding ones, it is evident that if (as in the case at bar) new bonds are issued without a cancellation or surrender of the old ones, the aggregate debt outstanding, and on which the corporation is liable to be sued, is at once and necessarily increased, and, if new bonds equal in amount to the old ones are so issued at one time, is doubled; and that it will remain at the increased amount until the proceeds of the new bonds are applied to the payment of the old ones, or until some of the obligations are otherwise discharged. It is true if the proceeds of the sale are used by the municipal officers, as directed by the statute, in paying off the old debt, the aggregate indebtedness will ultimately be reduced to the former limit. But it is none the less true that it has been increased in the interval, and that unless those officers do their duty, the increase will be permanent. It would be inconsistent alike with the words and with the object of the constitutional provision, framed to protect municipal corporations from being loaded with debt beyond a certain limit, to make the liability to be charged with debts contracted beyond that limit depend solely upon the discretion or the honesty of their officers." We are unable to discover any sound basis for the view which, in the teeth of a declaration that the indebtedness shall never, *i. e.* shall not for a

day or an hour, exceed a certain percentage of assessed valuation, considers a temporary excess as not within the prohibition. The fact that other debts equal in amount are subsequently paid with the money does not destroy the fact that the debt has been for a season increased beyond the constitutional limit. We do not wish to be understood as holding that refunding bonds cannot be issued to take the place of the old bonds which have matured. An exchange of bond for bond would not even temporarily increase the indebtedness of the city one dollar. It would be merely the substitution of one obligation for another. It would be analoguous to the giving of a renewal note at a bank. If the action which the city officials proposed to take was a mere exchange of new city bonds for old city bonds we would hold such action to be legal upon the facts in this record. Nor do we consider it necessary that an exchange of bond for bond should be made. We think that the mere execution of refunding bonds may be authorized even beyond the debt limit and that they may then be put on the market and sold on the condition that they are not to be delivered until an equal amount of the old bonds are surrendered. The resolution might provide that simultaneously with the delivery of the refunding bonds and the payment of the cash therefor there should be at hand an equal amount of the old bonds to be then and there extinguished by the use of the cash so received and delivered up to the city as part of the same transaction. But the purpose of the city officials is something radically different from an exchange or a sale guarded in the manner specified. Their plan is to sell the bonds of the city, thus increasing the indebtedness thereof against the prohibitions of the constitution and leaving uncertain the question whether the old debt will be fully extinguished or whether a dollar of it will be paid. The scheme is to pay the old debt with the proceeds of the new; but there is no absolute certainty, although there may be a probability, that this will be done. Nothing short of a certainty that the debt will not be increased permanently will suffice; and even that will not suffice if it is temporarily augmented

beyond the constitutional limit. We admit that there appear to be some decisions opposed to our ruling. It can probably be said that the weight of authority is against our view. See *City of Poughkeepsie* v. *Quintard*, 136 N. Y. 275, 32 N. E. Rep. 764; *Powel* v. *City of Madison*, 107 Ind. 106, 8 N. E. Rep. 31; *Board of Commissioners* v. *Same*, 26 Kan. 181, 201; Op. of Justices, 81 Me. 602, 18 At. Rep. 291; *Hotchkiss* v. *Marion*, 12 Mont. 218, 29 Pac. Rep. 821; *Los Angeles* v. *Teed*, 112 Cal. 319, 44 Pac. Rep. 580; *Miller* v. *School District No. 3*, (Wyo.) 39 Pac. Rep. 879; *Palmer* v *City of Helena*, (Mont.) 47 Pac. Rep. 209. But in one of these cases no question of constitutional prohibition was involved. *City of Poughkeepsie* v. *Quintard*, 135 N. Y. 275. In none of the cases was the inhibition of the fundamental law so sweeping in terms as ours. And nowhere do we find any attempt to answer the argument of Mr. Justice Gray in *Doon Township* v. *Cummings*, 142 U. S. 366. The assertion is made in these cases that to change the form of a debt is not within the condemnation of such a provision. But that temporarily something more than a mere change in the form of a debt is made when refunding bonds are sold and not exchanged, and that this condition may be permanent never seems to have occurred to the tribunals which have enunciated what we deem a dangerous and unsound interpretation of such constitutional prahibitions. It is an argument of some force that in § 182 of the Constitution, the state is expressly authorized to issue refunding bonds although the debt limit is thereby temporarily exceeded; whereas no such power is given by § 183 to the municipalities therein named.

The judgment of the District Court is affirmed. All concur.

(72 N. W. Rep. 931.)

MARK A. FRYER *vs.* ANDRO CETNOR, *et al.*

Opinion filed October 18th, 1897.

Mortgage—Consideration—Compromise.

Evidence in this case examined, and *held* sufficient to support the defense of total want of consideration for the notes and mortgage sued upon. While the settlement of a good-faith difference between parties, when voluntarily made, and without any material mistake of fact, will furnish a sufficient consideration for any promise based upon such settlement, yet, where one of the parties knew or had good reason to believe that his claim had no just foundation in fact, the compromise of such claim will furnish no consideration for the promise of the other party based thereon.

Appeal from District Court, Walsh County; *Sauter*, J.

Action by Mark A. Fryer against Andro Cetnor and Sofia Cetnor. Judgment for the defendants, and plaintiff appeals.

Affirmed.

Phelps & Phelps, for appellant.

Spencer & Sinkler, for respondents.

BARTHOLOMEW, J. This was an action in equity to foreclose a mortgage upon real estate. The defense was total want of consideration for the notes secured by the mortgage, and undue influence in their execution. The judgment was in favor of defendants, and plaintiff appeals.

The case stands for trial *de novo* in this court. We find no legal proposition in this case that merits extensive discussion. The case turns principally upon questions of fact. Certain matters are undisputed. On and prior to November 1, 1892, the defendant Andro Cetnor was the owner of a certain quarter section of land in Walsh county, upon which there was a mortgage of $1,200, in favor of one Plodzinski. The note secured by said mortgage matured March 6, 1894. The defendant Sofia Cetnor is the wife of her co-defendant. On March 21, 1892, one Frank Leshnoch, a brother of Mrs. Cetnor, purchased from the plaintiff a certain tract of land in said Walsh county, for the agreed price of $4,000. There was a mortgage on said land for $900, and the sale was

subject to such mortgage, the same being treated as a part of the purchase price. Leschnoch also made a small cash payment; and the remainder of the purchase price, being $2,923, was represented by three promisory notes executed by Leshnoch to plaintiff,—one for $823, due October 1, 1892; one for $1,000, due October 1, 1893, and one for $1,100, due October 1, 1894. These notes were secured by a second mortgage upon the land, and the first note was further secured by a chattel mortgage upon the crop to be grown upon the land in the year 1892. Leshnoch failed to pay this note at its maturity. This failure, under the terms of the mortgage, rendered the entire indebtedness due, and plaintiff threatened a foreclosure unless the matter was adjusted. Under these circumstances, plaintiff and Leshnoch, accompanied by an interpreter, went to Cetnor, who is a Polander, and speaks little or no English. Their object was to induce Cetnor to give to plaintiff notes, secured by a second mortgage upon his own farm, to the amount of Leshnoch's overdue note. After considerable hesitation on the part of Cetnor this was done. Cetnor executed five notes, dated November 1, 1892, and running from one to five years from date. Cetnor and his wife executed a second mortgage on their farm to secure these notes. The notes were also indorsed by Leshnoch, and further secured by chattel mortgage given by him upon the crops to be grown upon his farm during all the years until the maturity of the last note. The note first maturing was for the sum of $300. There is a dispute between the parties as to the real purpose in giving and taking these notes. Plaintiff claims that it was a case of novation, and that the notes were given in extinguishment of Leshnoch's overdue note for $823. Cetnor claims that they were simply collateral to such note. In our view of the case, the point is immaterial. The case must hinge upon the next transaction between the parties. In the fall of 1893, Leshnoch, without making any further payments, moved out of the state. The parties agree that thereafter plaintiff desired Cetnor to procure a deed from Leshnoch to plaintiff of the Leshnoch lands. They agree also that Cetnor procured

such deed, and delivered it to plaintiff in March, 1894. But they disagree entirely as to the contract under which such deed was procured. Cetnor testifies that after Leshnoch left the state, and about the last of October or first of November, 1893, he entered into a contract with plaintiff, by which he agreed to pay the note for $300, maturing November 1, 1893, and procure from Leshnoch a deed for the Leshnoch land free from all incumbrances except the original mortgage thereon, and that, in consideration therefor, plaintiff agreed to deliver up the four remaining notes given by defendant Cetnor, and cancel and discharge the mortgage on defendant's farm securing the same. In this Cetnor is fully corroberated by the interpreter through whom the contract was made; and Plodzinski, the holder of the first mortgage on the Cetnor farm, testifies that plaintiff told him that such was the contract. Plaintiff, on the other hand, denies that such was the contract; and in this he is supported by the presumption that arises from the giving of the notes to be hereinafter mentioned. Plaintiff testifies that he simply agreed to give defendant five dollars if he would procure such deed, and that this agreement was made directly with Cetnor without the aid of an interpreter. That the $300 note was paid, and the deed procured, are undisputed facts. The trial court found the contract to be as claimed by defendant and his witnesses. We are entirely satisfied that this conclusion of the trial court was correct. Not only is it supported by the decided preponderance of the evidence, but the probabilities are all in that direction. By such an arrangement, plaintiff recovered back the land in exactly the same situation as when he transferred it. The interest on the first mortgage had been paid by Leshnoch or Cetnor. There was no added burden. Plaintiff also received the $300 paid in the fall of 1893, and the cash payment made by Leshnoch at the time of the purchase, for the use of the land during the years of 1892 and 1893. Such an arrangement would seem to be just and fair to all parties. Leshnoch, for the purpose of relieving his brother-in-law from an amount of indebtedness incurred solely for Leshnoch's benefit,

would naturally be willing to give the deed, and thus yield possession and title to plaintiff a year earlier than they could be obtained by foreclosure. Plaintiff's version of the contract goes upon the theory that Leshnoch would, without any consideration whatever, surrender to plaintiff a right of possession confessedly worth several hundred dollars, and at the same time leave his brother-in-law bound to pay to plaintiff a large indebtedness incurred solely for Leshnoch's benefit. It is entirely clear to us that the contract was as defendant claims.

It is urged here, and authorities cited to show, that the payment of a portion of a liquidated obligation is no consideration for the cancellation of the remainder. But that is not this case. In addition to the partial payment, a certain act was to be performed, and the parties might place such valuation upon the performance of that act as they saw proper. A point is made also as to the manner in which the $300 note was paid. It is claimed that it was not paid by Cetnor. This is technically true. It was paid from the proceeds of certain crops that Leshnoch left on his farm. We are satisfied that this was all that plaintiff required or expected. It never occurred to him to require Cetnor to pay the note with his own money, and permit him (plaintiff) to hold the Leshnoch crop to apply on indebtedness not yet due. This is clear from the fact that plaintiff himself hauled or caused to be hauled nearly all the grain that went to pay the note; and, when a sufficient amount of grain had been delivered to pay the note, plaintiff turned it over to defendant with the statement that it had been paid. It follows, then, in our view, that, when said note was paid and the deed delivered, all of defendant's indebtedness to plaintiff was extinguished, and it at once became plaintiff's duty to cancel and satisfy the mortgage given to secure the same. This he failed to do. In the spring of 1894, the indebtedness secured by the first mortgage on defendant's farm became due, and the holder insisted upon payment or foreclosure. Defendant could not pay it unless he could procure the money by a loan on his land. This he arranged to do, but could no

consummate it by reason of plaintiff's unsatisfied mortgage on the records. Finally an arrangement was made by which defendant gave plaintiff a new mortgage for $800, and plaintiff satisfied his old mortgage, and withheld the new from record until the loan to pay off the Plodzinski mortgage was consummated and the mortgage securing the same placed of record. Then plaintiff put his new mortgage for $800 on record. It was to foreclose this latter mortgage that this action was brought. As we have seen, there was no consideration whatever for the notes secured by such mortgage. But plaintiff contends that such notes were the result of a compromise of a *bona fide* difference between the parties, and the law so far favors such adjustments that it will recognize the settlement of the dispute as a sufficient consideration to support any promise made by one party to the other, even where there was no enforceable claim against the promisor in favor of the promisee. This is undoubtedly correct where the dispute is *bona fide*, and the parties stand on equal footing and the promise is voluntarily made. But, before the settlement or compromise of a disputed matter can of itself constitute a consideration for a promise, it must clearly appear that the dispute was *bona fide*. If a party knows or ought to know that his claim is unfounded, then its settlement will furnish no consideration for a promise made by the other party. *Kercheval* v. *Doty*, 31 Wis. 479; *Pitkin* v. *Noyes*, 48 N. H. 294; *McKinley* v. *Watkins*, 13 Ill. 140; *Headley* v. *Hackley*, 50 Mich. 43, 14 N. W. Rep. 693; *Ormsbee* v. *Howe*, 54 Vt. 182; *Feeter* v. *Weber*, 78 N. Y. 334; *McGlynn* v. *Scott*, 4 N. D. 18, 58 N. W. Rep. 460. If the facts in this case are as we have stated,—and we have no doubt as to the correctness of our conclusions,—it is not possible to conceive that plaintiff believed that he had any just claim upon defendants at the time the notes and mortgage in suit were executed. It follows, then, that the notes were not based upon any property consideration, or upon any consideration growing out of the adjustment of a good-faith dispute.

The judgment and decree of the trial court must be in all things affirmed. All concur.

(72 N. W. Rep. 909.)

GEORGE L. SEVERN *vs.* RICHARD E. GIESE.

Opinion filed October 18th, 1897.

Attachment—Grounds—Affidavit.

In this action an attachment issued, based upon an affidavit which stated as the sole ground of the attachment "that the defendant, Richard E. Giese, has left the State of North Dakota, with intent to cheat and defraud his creditors." *Held*, construing § 5352, Rev. Codes, that said affidavit is insufficient in substance to authorize an attachment under said section.

Appeal from District Court, Stutsman County; *Fisk*, J.

Action by George L. Severn against Richard E. Giese. From a judgment discharging an attachment, plaintiff appeals.

Affirmed.

Fredrus Baldwin, for appellant.

James A. Murphy, for respondent.

WALLIN, J. The record discloses that a writ of attachment issued in this action, under which a levy was made upon certain goods and chattels of the defendant. On motion of the defendant the District Court discharged the attachment, and this appeal is from the order discharging the same. The sole question presented for determination in this court is whether the affidavit which is the foundation upon which the writ issued is legally sufficient. The language used in the affidavit, upon which appellant entirely depends, is as follows: "That the defendant, Richard E. Giese, has left the state of North Dakota, with intent to cheat and defraud his creditors." Appellant's counsel contends that the affidavit is sufficient, under § 5352 of the Rev. Codes, and argues that it is a substantial compliance with subdivision 1, and also with subdivision 2, of that section. Subdivision 1 reads: "When the defendant is not a resident of this state or is a foreign corporation." We find no language in the affidavit which states or suggests that the defendant is not a resident of this state, nor that the defendant resides in any particular state or country. It is very clear, therefore, that the affidavit fails to set forth a suffi-

cient ground for issuing the attachment under subdivision 1 of the section. Subdivision 2 reads: "When the defendant has absconded or concealed himself." The affidavit does not in terms allege that the defendant has either absconded or concealed himself. It is well settled that an affidavit framed under either of said subdivisions is sufficient if it sets out the very words of the statute. In setting out grounds of attachment under subdivisions 1 or 2 of the section, it would be superfluous and improper to plead evidential or explanatory facts in support of the general ground as embodied in the words of the statute itself. This being the case, authorities cited from New York by counsel, which are based upon statutes which require such evidential facts to be set out, are not in point in this state. The crucial question is whether the affidavit states a ground of attachment under the statute in this state when it was made. As has been seen, the language does not in terms embrace the words of either subdivision 1 or 2. Conceding, without deciding, that words in an affidavit which are precisely the same in their import and meaning as those used in the statute are sufficient to sustain the process, we are yet compelled to hold that the words used in the affidavit in question are not precisely or at all the same in meaning as the words in the statute. The affidavit states that the defendant "left the state." But it does not disclose whether, in leaving the state, he did so with a purpose of remaining away permanently, or whether he left with a purpose of returning to the state after a brief absence; nor does it aver that the defendant was out of the state at the time when the affidavit was made. We think that the allegation that the defendant had left the state some time in the past not stated is not in effect an allegation that defendant was at the time not within the state. But if the affidavit had, as it did not do, in terms negatived the fact of the defendant's return to the state, and of his presence within the state at the time the affidavit was made, and had distinctly charged that the defendant not only left the state with the fraudulent purpose alleged, but that he continued to remain out of the state, while harboring the fraudulent

purpose with which he departed, it would still, in our opinion, have been clearly insufficient in matter of substance as a foundation for an attachment under § 5352, *supra*. The defects in the affidavit are radical. Not only does it fail to contain the very words of the statute under which it is sought to be upheld,—which would have been sufficient,—but it omits to employ other words of the same meaning. The affidavit fails to show that defendant had absconded. *i. e.* left the state to go into hiding; nor does it aver that the defendant had concealed himself by leaving the state, or in any manner. The incurable infirmity of the affidavit consists in the fact that at the time it was made there was no statute in force which authorized an attachment process to issue upon any grounds stated in the affidavit. This being true, it can serve no useful purpose to speculate upon the question propounded by counsel, whether or not another statute, not then in force, would have authorized the process of attachment.

The order discharging the attachment was, in our judgment, clearly proper, and must therefore be affirmed. All the judges concurring.

(72 N. W. Rep. 922.)

JOHN P. BRAY *vs.* L. E. BOOKER, *et al.*

Opinion filed October 18th, 1897.

Vendor's Lien in Seller Only.

Only the seller of real property has a vendor's lien thereon for the unpaid purchase price. One to whom, with the vendor's assent, the vendee has agreed to pay a portion of the purchase money, cannot claim such a lien.

Right of Intervention.

To entitle a party to intervene in an action, he must have such a direct and immediate interest in the matter in litigation that he will either lose or gain by the direct legal operation and effect of the judgment.

Third Party Cannot Intervene Upon Promise of Vendor.

The vendee agreed to pay a portion of the purchase price to a national bank, a creditor of the vendor. *Held*, that in an action by the vendor to enforce a vendor's lien for the unpaid purchase price, the receiver of such bank cannot intervene, because the bank has no lien itself on the property, and no interest in the vendor's lien thereon, and it will not be affected by any personal judgment which may be rendered against the vendee for the purchase price. The receiver of the bank, if he has a right to enforce against the vendee his promise to pay a portion of the purchase money to the bank, can still enforce such promise, whatever the decision in the present action may be. The only right which he has, if any, is an action at law upon the promise of the vendee to pay a portion of the purchase money to the bank.

Appeal from District Court, Grand Forks County; *Fisk*, J.

Action by John P. Bray against L. E. Booker and others. From an order denying him leave to intervene, E. C. Tourtelot, receiver of the Grand Forks National Bank, appeals.

Affirmed.

Burke Corbet, for appellant.

Where the debt is assigned as collateral security or while the vendor continues to have an interest in the payment, the lien continues and can be enforced by the assignee. *Hallock* v. *Smith*, 3 Barb. 267; *White* v. *Williams*, 1 Paige 502; *Crawley* v. *Riggs*, 24 Ark. 563; *Carlton* v. *Buckner*, 28 Ark. 66; *Zwingle* v. *Wilkinson*, 28 S. W. Rep. 1096; *Moore* v. *Stovall*, 2 Lea 543; *Thompson* v. *Thompson*, 3 Lea 126; *Hamilton* v. *Gilbert*, 2 Heisk 682. The assignment of a note for purchase money without recourse but as collateral

security carries the lien in Alabama though an absolute transfer without recourse would not. *Plowman* v. *Riddel*, 48 Am. Dec. 92. So if a third person furnish the purchase money he is entitled by subrogation to a vendor's lien and can enforce it. *Carey* v. *Boyle*, 56 Wis. 145, 11 N. W. Rep. 47, 14 N. W. Rep. 32; *Bemis* v. *First Nat. Bank*, 40 S. W. Rep 127. The lien exists in favor of a third person to whom the vendee at vendor's request has agreed to pay a portion of the purchase money. Jones on Mort's. § 214: *Francis* v. *Wells*, 2 Colo. 660, 28 Am. & Eng. Enc. L. 169 n. 3; *Woodall* v. *Kelley*, 7 Am. St. Rep. 57, 5 So. Rep. 164; *Whitzel* v. *Roberts*, 31 Ohio St. 503; *Tyson* v. *Wabash R. R. Co.*, 15 Fed. Rep. 763; Jones on Liens, § 1094; Story's Eq. § 1244. It is conceded in this case that part of the purchase price was agreed to be paid to the Grand Forks National Bank, therefore its receiver is entitled to intervene. *Plowman* v. *Riddel*, 14 Ala. 169, 48 Am. Dec. 92.

Cochrane & Feetham, for Booker filed no brief.

Charles F. Templeton and *Tracy R. Bangs*, for respondent.

The weight of authority is to the effect that the right to an implied lien is personal to the vendor. Pom. Eq. Jur. § 1254. The vendor does not claim a contract lien. *Gessner* v. *Palmater*, 26 Pac. Rep. 789; *Mitchell* v. *Butt*, 45 Ga. 162; *Latham* v. *Staples*, 46 Ala. 462. In this state only the seller of real property is entitled to an implied vendor's lien, § 4830 Rev. Codes. *Avery* v. *Clark*, 25 Pac. Rep. 919. Intervenor holds the obligation of Mr. Bray for his whole indebtedness. The buyer of the real property was Kate E. Booker. No one is entitled to a lien who holds the obligation of any person other than the buyer for the same debt. Section 4830 Rev. Codes; *Maroney* v. *Boyle*, 36 N. E. Rep. 511. The facts set forth in the complaint of intervention do not show the intention of Bray and Booker to secure to the bank any special benefit by this agreement. *Nat. Bank* v. *Grand Lodge*, 98 U. S. 123; *Sayward* v. *Dexter*, 72 Fed. Rep. 758; *Am. Exc. Nat. Bank* v. *N. P. Ry. Co.*, 76 Fed. Rep. 130; *Austin* v. *Seligman*, 18 Fed. Rep. 519; *Kountz* v. *Holthouse*, 85 Pa. St. 235; *Crandall* v.

Payne, 39 N. E. Rep. 601; *Greenwood* v. *Sheldon*, 31 Minn. 254; *Simson* v. *Brown*, 68 N. Y. 355; *Ætna Nat. Bank* v. *Bank*, 46 N. Y. 82; *Garnsey* v. *Rogers*, 47 N. Y. 233; *Hoffman* v. *Schwabe*, 33 Barb. 194. Section 1559 Civil Code, California, is the same as § 3840 Rev. Codes, and is construed *Chung Kee* v. *Davidson*, 15 Pac. Rep. 100, in harmony with this contention. *Railroad Co.* v. *Curtiss*, 80 N. Y. 222. Even though appellant could have brought an action against Booker he cannot intervene. Section 5239, Rev. Codes, does not authorize an intervention under the facts of this case. *Horn* v. *Volcom Water Co.*, 13 Cal. 62; *Gale* v. *Shillock*, 30 N. W. Rep. 138, 4 Dak. 182; *Smith* v. *Gale*, 144 U. S. 509; *Netzer* v. *Young*, 52 N. W. Rep. 1054; *McClurg* v. *State Bindery Co.*, 53 N. W. Rep. 428. The order appealed from was discretionary and not reviewable. *Gale* v. *Shillock*, 4 Dak. 182; *Smith* v. *Gale*, 144 U. S. 509.

CORLISS, C. J. This is a suit in equity to foreclose a vendor's lien for the purchase price of a house and lot conveyed by the plaintiff to the defendant Kate E. Booker. The purchase price was $8,000. A portion of this was to be paid by the defendant L. E. Booker, husband of Kate E. Booker, not to Bray himself, but to his creditor, the Grand Forks National Bank. Just what portion is in dispute. The plaintiff admits that $3,000 of the sum was to be paid in this way, and claims that the balance was to be paid to himself. Neither the purchaser nor her husband has paid any part of the purchase money. Tourtelot, as receiver of the Grand Forks National Bank, attempted to intervene in the case, basing his right to do so upon the claim that he, as such receiver, is equitably entitled to enforce such vendor's lien to the extent of the sum agreed to be paid to the bank by the purchaser, or rather by her husband. While the title to the property was taken in the name of his wife, the defendant Booker himself is the one who agreed to pay the purchase price therefor. The District Court refused to permit the complaint in intervention to be filed, and from the order denying the application to file the same the appeal before us is taken.

The plaintiff in the attempted intervention avers that more than $6,000 of the purchase price was to be paid to the bank, while the plaintiff in the action concedes that $3,000 thereof was to be so paid. Whether the plaintiff will ultimately succeed in establishing a vendor's lien is, of course, immaterial on this appeal. He is attempting to do so, and the plaintiff in the intervention complaint has a right to intervene, and join with him in this effort to establish a lien, provided the facts show that he is entitled to a portion thereof. On his own showing he is not entitled to enforce the lien for the full amount. At most he can claim the right to only a portion thereof. Fortunately we are not compelled, in deciding this case, to wander bewildered through the labyrinth of adjudication on the subject of vendor's liens. The matter is regulated in this state by statute. Our statutes purport to cover the whole field. Rights which they do not confer do not exist. In the first place, it is settled by our legislation that a vendor has a lien for the unpaid purchase money. In some states this right is not recognized. Section 4830, Rev. Codes, says: "One who sells real property has a special or vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer." It is apparent from the language of this statute that it restricts the right to the one who sells. Therefore we are not called upon to express any opinion whether it is a sound doctrine of law that one to whom the vendee has agreed to pay a portion of the purchase price can enforce such lien. See *Tysen* v. *Railway Co.*, 15 Fed. Rep. 763; *Thompson* v. *Thompson*, 3 Lea, 126; *Zwingle* v. *Wilkinson*, 94 Tenn. 246, 28 S. W. Rep. 1096; *Francis* v. *Wells*, 2 Colo. 660; Jones, Mortg. § 214; 28 Am. & Eng. Enc. Law, 169, note 3. He cannot, under our statute, because its plain language is that the lien is given to the one who sells, and the implication is that no one else is entitled to such a lien. Our statutes were intended to clear up the law on the subject of vendor's liens in this state, and cover the whole ground. They

settle the mooted questions whether a lien exists in such a case, when it is waived, whether it can be assigned, and the person who may claim it. That person is the seller himself, and no one else. Even if we should hold that the assignee of the claim for the purchase money in a case where there was no written contract given by the seller in payment of the property could enforce the lien, the plaintiff in the intervention complaint would not be entitled to any portion of the lien in this case, for the simple reason that he is not the assignee of the claim for the purchase money, or any part thereof. Bray has never transferred to him or to the bank he represents the right to receive any portion of the purchase money. He is not an assignee of a portion thereof, in any sense. His rights are those of the bank, and all the bank can claim is the right to enforce the contract made between Booker and Bray, under which Booker was to pay a portion of the purchase money to the bank instead of to Bray. Rev. Codes, § 3840. If the receiver has any rights, it is not as assignee, but under the contract by which Booker promised Bray that he would pay a portion of the purchase price to the bank. This is an original promise. The right is not a right which the bank has purchased. It springs out of a promise which the bank or its receiver may be entitled to enforce, although not made to it, but only to another for its benefit. It is not the right of an assignee, and cannot be assimilated thereto. If we assume that the receiver can enforce this promise, still he is not entitled to any portion of the vendor's lien. The promise is to pay the bank a certain sum of money. This is the only promise which can be enforced. Booker did not, by this promise, agree to give the bank a lien. He merely contracted to pay the bank a portion of the purchase money. Moreover, our statute settles the question. It is only the seller who has the lien. A third person, to whom the purchaser has agreed to pay a portion of the purchase money, is not within the language of the statute, and we have no power to legislate. Our conclusion that the receiver has no interest in the alleged lien of the plaintiff is fatal to the receiver's right to

intervene. The action is to foreclose this lien. If the plaintiff fails, he cannot, in this form of action, have a personal judgment against the defendant for the amount of the purchase price. *Burroughs* v. *Tostevan*, 75 N. Y. 567; *Dudley* v. *St. Francis Congregation*, (N. Y. App.) 34 N. E. Rep. 281. Whether he would be allowed to amend, changing entirely the character of the action, we need not now decide. There can, therefore, be no recovery in this case, in its present form, of a judgment against the defendant for the purchase money, and it is only in the purchase money that the receiver can pretend to have any interest, he having no right to the lien itself. At most he can claim that, as between him and Bray, a portion of the purchase money should be paid to him as receiver; but, even if it were the law that plaintiff, although failing to establish his lien, could have a general judgment against the defendant, we still would be clear that the receiver could not intervene. He has no possible interest in the result of this action. If Booker has, by the promise to pay the purchase money to the bank, rendered himself liable to the bank and to the receiver thereof, he will be none the less liable after Bray has recovered a judgment against him for the full amount of the purchase price. If Bray has agreed to take in part payment the promise of Booker to pay the debt of Bray to the bank under circumstances such that Booker has thereby rendered himself liable to the bank, then Bray cannot recover of Booker a personal judgment for this sum as purchase money, although Booker would, by his failure to pay the money, followed by Bray's payment thereof, subject himself to an action for damages for breach of his contract. In a case of that kind the vendor expressly agrees that he is not himself to receive a portion of the purchase price, but accepts the promise of the vendee to pay it to the verdor's debtor. If that promise renders the promisor liable to the third person, then it would seem that the promisee must have intended to accept it in payment of the purchase money to that extent. He cannot be regarded as having intended that the purchaser should become liable to a third person for a portion of the

purchase money, and yet remain liable to him for the same portion thereof. Of course, if the purchaser violates his agreement, and the vendor actually pays to the third person the sum the purchaser agreed to pay, the latter is liable for the damage he has caused the vendor by breaking his contract. We are now speaking only of a case where the promise to pay the third person subjects the vendee to liability to him, and not of a case where his promise creates no such liability. But the receiver in this case has no interest in the question how large a personal judgment Bray shall recover from Booker. If Booker does not see fit to protect himself by insisting on his rights, but allows Bray to recover the full purchase price, although he, Bray, has not paid the debt to the bank which Booker agreed to pay, this will furnish no defense to an action by the receiver upon the promise of Booker to Bray to pay the bank a portion of the purchase money. As the receiver has no lien, and no interest in the plaintiff's vendor's lien, and as he is not in the least interested in the amount of the personal judgment which plaintiff may recover against defendant, and can claim no portion thereof (his right, if any, being that of a person for whose benefit a promise has been made to a third person; a right which will not be in any manner affected by the amount of the personal judgment recovered by Bray against Booker,) it follows that the receiver has no such direct and immediate interest in the matter in litigation as entitles him to intervene under our statute. Rev. Codes, § 5239. The receiver will not loose any right by the direct legal operation and effect of the judgment in this case. Nor has he any interest in the plaintiff's lien or plaintiff's claim for money against Booker. His rights are entirely distinct from the plaintiff's. They rest solely upon the promise of Booker. Whether Bray establishes his lien or not, whether he recover judgment against Booker for the whole or only a portion of the purchase money, Booker will still be liable on his promise to the bank if he is in fact liable on it at all, and the receiver of the bank can, without reference to the result in this case, enforce such liability. This is all the right

which the bank has ever had against Booker in this transaction on the view of the case most favorable to it. What business, then, has it or its receiver to intermeddle with the plaintiff in a suit in which such plaintiff can secure only those rights which are distinctly his. That the receiver has no right to intervene under our statute is settled by an abundance of authority. *Horn* v. *Water Co.*, 13 Cal. 62; *Harlan* v. *Mining Co.*, 10 Nev. 92; *Gale* v. *Shillock*, 4 Dak. 196, 30 N. W. Rep. 138; *Smith* v. *Gale*, 144 U. S. 509, 12 Sup. Ct. 674; *Yetzer* v. *Young*, 3 S. D. 263, 52 N. W. Rep. 1054; *McClurg* v. *Bindery Co.*, 3 S. D. 362, 53 N. W. Rep. 428; *Bennett* v. *Whitcomb*, 25 Minn. 148; *Lewis* v. *Harwood*, 28 Minn. 428, 10 N. W. Rep. 586; *Dennis* v. *Spencer*, 51 Minn. 259, 53 N. W. Rep. 631; *Steenerson* v. *Railway Co.*, 60 Minn. 461, 62 N. W. Rep. 826.

The order refusing to allow the receiver to intervene is affirmed. All concur.

(72 N. W. Rep. 933.)

McCORMICK HARVESTING MACHINE CO. *vs.* T. H. LARSON.

Opinion filed October 19th, 1897.

Directing Verdict. Amendment to Conform to Proof.

When a conclusive defense is proved without objection on the ground that it is not set up in the answer, and the court, on motion, amends the answer to conform to the proof, it is the duty of the court to direct a verdict for the defendant.

Specifications of Error.

Specifications of error held sufficient.

Appeal from District Court, Grand Forks County; *Templeton*, J.

Action by the McCormick Harvesting Machine Company against T. H. Larson. Verdict directed for plaintiff. From an order granting a new trial, plaintiff appeals.

Affirmed.

Burke Corbet, for appellant.

F. H. McDermont, for respondent.

CORLISS, C. J. In its ultimate analysis, this appeal brings before us a question whether the defendant's answer was so amended on the trial as to entitle him to the benefit of evidence in the case establishing a defense. The suit was for the recovery of the possession of wheat claimed by the plaintiff under a chattel mortgage alleged to have been executed by the defendant. The answer contained what may be designated as a qualified general denial. Coupled with this qualified general denial was a specific defense resting upon the alleged invalidity of the chattel mortgage for fraud. Defendant also averred that the debt secured thereby had been paid. On the trial it appeared that defendant was not in possession of the property at the time the action was commenced. Thereupon he was allowed to amend his answer by striking therefrom his prayer for the return of the property, and the value thereof, the plaintiff having taken it in claim and delivery proceedings at the commencement of the action. Having failed in his defense as to fraud and payment, and the plaintiff having established a right to the possession as against defendant on the theory that he, the defendant, was in fact the owner thereof at the time the mortgage was given, the District Court directed a verdict for the plaintiff. A motion for a new trial having been made upon the ground of the error of the court in directing such verdict, the motion was granted. From the order granting such motion the appeal here involved was taken. The case is not one where a trial judge, in the exercise of judicial discretion, orders a new trial. The basis of the order in question was the one alleged error of law in dirccting a verdict for the plaintiff. It is very doubtful whether, under the pleadings as they stood at the time the evidence was received showing that the defendant was not in possession of the property when the action was commenced, such evidence could have legally been received in the face of an objection from the plaintiff's counsel. Defendant had so qualified his general denial that he was not in a position to defeat the action by showing that he was not in pos-

session when the suit was commenced. But the evidence appears to have been received without objection. This evidence, being uncontradicted, established a complete defense to the plaintiff's case. All that remained was a question of amendment of the answer to conform to the proof. Had no amendment been asked for, and had the District Court denied the motion for a new trial, it might be that this court would not amend the answer to conform to the proof for the purpose of reversing the judgment. But, as soon as the evidence showing that defendant was not in possession of the property was received, defendant asked permission to amend his answer by striking therefrom the prayer for a return of the property, or the value thereof; thereby clearly indicating that he wished to so amend it as to put in issue the single question of his possession at the time the suit was brought. No other construction can be placed upon his motion. As the case then stood, there was evidence before the court and jury showing that the plaintiff had sued the wrong person, and there was a pleading behind it. This evidence was undisputed. It was, therefore, error for the District Judge to direct a verdict for the plaintiff. The verdict should have been in defendant's favor. It follows that the court did err in granting the plaintiff's motion for a directed verdict, and hence that it was its duty to grant, as it did, a new trial on the defendant's motion therefor. There is no force in the point that the defendant failed to specify in his notice of intention the particular error of law relied on. The error complained of was the action of the court in directing a verdict against the defendant. That this was an error of law is too plain to necessitate the citation of authorities.

The order appealed from is affirmed.

BARTHOLOMEW, J., concurs.

WALLIN, J. (concurring). Without committing myself to an indorsement of all the reasoning contained in the opinion of the Chief Justice, I concur fully in the result upon the ground that the evidence admitted without objection showed that the plaintiff

sued the wrong person. This evidence was uncontroverted, and hence, in my opinion, it was error in the court below to direct a verdict in plaintiff's favor.

(72 N. W. Rep. 921.)

LYMAN C. STANFORD *vs.* SAMUEL G. McGILL.

Opinion filed November 1st, 1897.

Repudiation of Contract—Effect.

The repudiation of a contract before the time for performance arrives does not constitute a breach thereof. The only effect of such repudiation is to dispense with an offer to perform by the other party; if such refusal to stand by the agreement is not withdrawn before the performance is due under the terms thereof.

Delivery of Goods of Like Description—When Sufficient.

The vendor in a contract to sell property of a certain description, no particular articles being agreed upon, can, after he has made, before the day of delivery, an *ex parte* selection of the property he intends to deliver under such contract, sell such property to another without being guilty of breach of agreement. All that the law requires of him is, that he make delivery of property of the description mentioned in the contract at the time delivery is due.

Offer to Sell to Another Not a Breach of Prior Executory Contract of Sale.

Whether the sale, by the vendor is an executory contract for the sale of specific property, of the very property to which such contract relates before the day for delivery thereunder has arrived, is a breach of agreement on the ground that the vendor has thereby put it out of his power to perform the agreement, not decided. But the mere making of a second executory contract to sell the same property is not of itself a breach of the prior executory contract. The vendor does not thereby incapacitate himself from carrying out his contract.

Waiver of Offer to Perform.

Where a party has an option to deliver property, under a contract, at any time between certain dates, he must, if he intends to treat the time of performance as having arrived and therefore to hold a repudiation of the agreement by the vendee before the last day for performance has arrived as a breach thereof, notify the vendee that he has exercised his option to call for an earlier delivery. But no offer to perform is necessary, as that is waived by the vendee's refusal to perform.

Measure of Damage for Breach of Executory Contract of Sale.

The measure of damages in an action by a vendor to recover damages for breach by a vendee of an executory contract of purchase and sale, is fixed by §§ 4988 and 5009, Rev. Codes, where the vendor does not elect to proceed under § 4833, Rev. Codes.

Motion for Directed Verdict—When Waived.

Where a suitor moves the court to direct a verdict in his favor and his motion is over-ruled, he must thereafter specifically request that the question he desires to have submitted to the jury be so submitted or he is deemed to have agreed that all controverted questions of fact be decided by the court. If he makes no such request he cannot complain of a directed verdict if the evidence is conflicting. But the rule will not apply if the verdict would be held to be unsupported by evidence, although voluntarily tendered by the jury.

Measure of Damage Where Property Resold.

It is only when property has been re-sold by the vendor in the manner prescribed by § 4833 that he can recover the damages mentioned in subdivision 1, of § 4988; and if it is not so sold, the measure of damages is governed by subdivision 2, of § § 4988 and 5009. An abortive attempt to proceed under § 4833 will not preclude a recovery of damages under subdivision 2, of § § 4988 and 5009.

Appeal from District Court, Cass County; *McConnell*, J.

Action by Lyman C. Stanford against Samuel G. McGill and others. Judgment for plaintiff. Defendants appeal.

Reversed.

Ball, Watson & Maclay, for appellants.

William C. Resser, and *Arthur B. Wright*, for respondent.

CORLISS, C. J. On the 3d of August, 1895, plaintiff and defendants entered into an executory contract for the sale by plaintiff to defendants of 5,000 bushels of No. 1 flax, at $1 a bushel, to be delivered at Kelso, in Traill County, in this state, during the month of September of that year. On the 7th of September following, the defendants notified the plaintiff by letter that they did not recognize the binding force of the agreement, and therefore refused to carry it out on their part. This letter was received by him September 8th. At that time the plaintiff had not exercised his option to make delivery at any time during that month, as was his right under the contract. The action was to recover damages for breach of this agreement, and on the trial of the case the court directed a verdict for the plaintiff. The defendants on this appeal urge certain reasons why they should not be held liable. They insist that the crop of flax raised by plaintiff on his farm was mortgaged, and that, therefore, he could

not give them an unincumbered title. But whether he could deliver the flax, according to his contract, free from all liens, could not be determined in advance of the actual delivery thereof. In the meantime the mortgage might be paid, or the mortgagee might release the 5,000 bushels from the lien of his mortgage. Had the plaintiff tendered the defendants 5,000 bushels with a lien thereon, they would have been justified in refusing to receive the same; and had he not, in proper time, delivered to them the flax free from all incumbrances, they could have held him responsible for breach of contract. But they had no right to settle for the plaintiff, in advance of the time when he was required by the terms of the contract to make delivery, the question whether he could and would deliver unincumbered flax. Moreover, the specific property to be delivered was not designated in the contract. It was not necessary that the plaintiff should deliver any of the flax raised upon his own farm. Delivery of any 5,000 bushels of flax, of the quality and grade specified in the agreement, would have constituted compliance with the contract on the part of the plaintiff. It is further urged that plaintiff was not able to deliver the flax for the reason that up to the end of the month of September he had threshed only 642 bushels. If it should be conceded that plaintiff had not, and could not have, threshed a bushel during the month of September, this would not establish any inability on his part to comply with the terms of his agreement. A person may agree to sell property which he does not even own, and the purchaser cannot on that account insist, as an excuse for violating his agreement, that it is not in the power of the vendor to make good his promise. This fact cannot be ascertained until the day for delivery has come and passed without any delivery being made. It is claimed that plaintiff rescinded the contract by selling the 5,000 bushels in Duluth on the 9th of September, two days after the defendants had written plaintiff that they would not fulfill their agreement. The question whether the contract was rescinded is so related to the question whether it was violated by the defendants, and the fur-

ther question when it was broken by them, if at all, that it will conduce to clearness of discussion to treat these questions together.

On receiving from defendants their letter of the 7th of September, repudiating the contract, the plaintiff wrote them that he expected them to carry out the agreement, and that he would give them further time for consideration. In this letter, which was written September 9th, he says, among other things: "Altogether, I am inclined to defer my conclusions until you have taken time to review the transaction, and see the unfavorable light your letter of the 7th puts you in. I certainly shall expect you to take flax as per agreement. Please let me hear from you again by return mail." On the same day he sold on the Board of Trade in Duluth 5,000 bushels of flax, through brokers in that city. In his testimony he speaks of this flax as being the same flax which he had agreed to sell to defendants. He says: "When I received this letter [referring to the one dated September 7th], I sold the 5,000 bushels of flax in Duluth. I sold it to Wheeler, Carter & Co. On September 9th I telegraphed Wheeler, Carter & Co., of Duluth, relative to the sale of this 5,000 bushels of flax, as follows: "Sell five October flax. Answer." Wheeler, Carter & Co. answered by wire that they had sold the flax; and the same day they confirmed their telegram by a letter, in which they explained in detail the circumstances and terms of the sale. But it is undisputed that the title to the flax sold in Duluth did not pass to the vendees in such sale, nor was possession thereof delivered at any time during the month of September. The contract was merely an executory contract for the sale of 5,000 bushels of flax, to be delivered in October. On the 11th of September the plaintiff, not having received from the defendants any answer to his letter of the 9th, again wrote them; and on the 13th they sent him a reply, in which they reiterated their purpose to treat the alleged contract as possessing no binding force. In this letter they said: "We expressly deny that any contract exists which obligates you to deliver to us, or we to receive from

you, flax, at any time, or at any price." This closed the correspondence between the parties. The plaintiff did not thereafter inform the defendants that he elected to treat their second refusal to recognize the contract as a breach thereof; nor did he advise them, after their last refusal, that he had decided to exercise his option to insist upon the fulfillment of the agreement before September 30th. The contract gave him the option to call for performance at any time during the month of September. This action was not commenced until after the 30th of that month.

We will first consider the case as though there was a fixed time for performance of the agreement, and that that time was September 30th. Under the English doctrine, which has apparently met with much favor in this country, the plaintiff, even assuming that the day for delivery of the flax was September 30th, and that he had no right to call for an earlier performance of the agreement, might have elected to treat the defendants' premature refusal to carry out the contract as an immediate breach thereof. *Hochster* v. *De La Tour*, 2 El. & Bl. 678. But he did not so elect. On the contrary, he wrote the defendants that he would give them time to reflect and then determine what they would do, but that in any event, no matter what their decision might be, he would hold them to the contract. His words were: "I shall expect you to take flax as per agreement." Although the English courts have, in our judgment, departed from sound principles, in holding that mere talk is a breach of a contract, despite the fact that the time for performance thereof has not arrived, yet they have not violated justice as well as legal principles by putting it in the power of the party to an agreement, who does not wish to fulfill it, to force a breach upon the other party before the day for performance has arrived, and thus escape the perhaps more serious consequences which might flow from a breach at the time of performance, by selecting such a season for a premature breach thereof as would make the damages comparatively light. In England the innocent party may treat a premature refusal to perform as a present breach, but he is not bound to do so. If he

elects to ignore such refusal, the agreement, so far as the question of the violation of it is concerned, stands precisely the same as though no word had been uttered by the other party. If anything occurs which would have released that party from the obligation of the agreement had he remained silent, he is released notwithstanding his premature repudiation thereof. It follows, too, that if then the then innocent party thereafter violates the contract the other party may take advantage of such violation of the agreement, just as he could have taken advantage of it had he not himself prematurely refused to respect the binding force of such agreement. All the adjudications which follow what may, for convenience, be denominated the "English doctrine," indorse this qualification of that doctrine, and it is repeatedly recognized by the English tribunals themselves. *Frost* v. *Knight*, L. R. 7 Exch. 111; *Roebling's Sons' Co.* v. *Lock-Stitch Fence Co.*, 130 Ill. 660, 22 N. E. Rep. 518; *Kadish* v. *Young*, 108 Ill. 170; Lawson, Cont. § 440; *Zuch* v. *McClure*, 98 Pa. St. 541; *Avery* v. *Bowden*, 5 El. & Bl. 714; *Reid* v. *Hoskins*, Id. 729. In *Frost* v. *Knight*, Lord Chief Justice Cockburn said: "The law with reference to a contract to be performed at a future time, where the party bound to perform announces, prior to the time, his intention not to perform it, as established by the cases of *Hochster* v. *De La Tour* and *Harbour Co.* v. *Xenos*, [13 C. B. (N. S.) 825], on the one side, and *Avery* v. *Bowden*, *Reid* v. *Hoskins*, and *Barnick* v. *Bulba*, on the other side, may be thus stated: The promisee, if he pleases, may treat the notice of intention as inoperative, and wait the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance. But in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party, not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any circumstance which would justify him in declining to complete it." We are therefore clear that, if plaintiff's letter of September

9th is to control, the contract was not broken September 7th. The plaintiff in and by that letter elected to treat the contract as unaffected by the letter of September 7th written him by the defendants. But it may be urged that other circumstances show that the plaintiff had elected on September 9th to treat the contract as broken by the defendants by their first letter, dated September 7th. In his complaint the plaintiff alleges that he made the sale of the 5,000 bushels of flax in Duluth for the purpose of fixing at that time the amount of defendants' liability for damages, the price of the flax being at that time daily on the decline. The averment of the pleading on this point is as follows: "That immediately after the defendants had so repudiated the said agreement, and refused to accept the delivery of the said flax, and refused to pay for the same, as provided by and in the said agreement, and on or about the 7th day of September, A. D. 1895, the plaintiff, in order to protect the defendants against loss, as much as possible, in view of the facts and circumstances incident to the said agreement and the said breach thereof, the market price of flax being then daily on the decline, sold the said 5,000 bushels of flax at the best market price obtainable, and which he could obtain for the same." Taking plaintiff's allegation in connection with this testimony, there is much to show that he had elected to proceed on the theory of a breach of the contract on September 7th, the day when the defendant's wrote their first repudiation of the agreement. But the sale of the 5,000 bushels of flax in Duluth on September 9th does not purport to be a sale of the particular flax which plaintiff had contracted to sell the defendants, nor is there anything to indicate that plaintiff's purpose in selling it was to fix the defendants' damages, on the theory of a then breach of the contract, aside from his allegation in the complaint. He never at any time disclosed to the defendants any such purpose, nor did he ever advise them at all that he had sold their flax. On the contrary, he distinctly informed them in his letter of September 9th that he did not consider their letter of September 7th as a breach of the agreement, but that he certainly would expect them

to take the flax according to the contract. His election to ignore their premature refusal, and to treat the agreement as unaffected by anything they had said, is conclusively shown by his letter of September 9th; and thereafter the defendants might have recalled their refusal, and have proceeded with the performance of the agreement, despite anything the plaintiff might in the meantime have done. His undisclosed sale of the flax in Duluth could in no manner affect their right to hold him to his avowed purpose to regard the agreement as continuing in unimpaired force. Moreover, we should reach no different conclusions even if we should find that plaintiff had not in express terms asserted that he would not treat the contract as broken. We are confident in the soundness of our view that the English doctrine, that a refusal to perform a contract before the period of performance by either party has arrived constitutes a breach thereof, is violative of legal principles, and leads to most incongruous results. This point, however, we will discuss in a later portion of the opinion.

But it is strenuously urged that plaintiff cannot recover, because he has rescinded the contract, and also because he had himself broken it, while it remained unbroken by the defendants. The sale in Duluth is relied upon as establishing the rescission by him of the agreement. We are concerned in this case with only the question of rescission based on mutual consent. It is not a case where one party has the right to rescind an agreement for the fraud of the other, or for other legal reasons of like character. When one party to an agreement has violated its obligations in a particular that goes to the root of the agreement, then it is true that the other party may treat his conduct as an offer to rescind, and may acquiesce in the desire so manifested to abandon the contract. In such a case the parties unite in a mutual release of the obligations which reciprocally bind them. So, too, when one party to an agreement expresses, even before the time for performance has arrived, his desire to escape the burdens of the agreement, he thereby offers to discharge the other party from the obligations thereunder resting upon him; and such party may

treat such conduct as an overture for rescission, and assent thereto. Doubtless, the plaintiff, after receiving from the defendants their letter of September 7th, might have written them that he considered the contract as canceled, and thereafter it would have been forever extinguished for all purposes. Possibly he might have rescinded without performing any overt act, or making any statement to manifest his purpose. But that he never intended to rescind the agreement is too clear to admit of doubt. His letter of September 9th shows that he had no thought of rescinding, and thereby releasing defendants from liability. So do the allegations of his complaint. Although his letter is inconsistent with the averments of his pleading that he sold the flax on a theory of a present breach of the contract, yet it is to be noticed that nowhere does he assent to a rescission thereof. His attitude is at all times that he will rigidly hold the defendants to the obligations of their agreement. In his letter he tells them that he will hold them to it, by his statement that he will insist upon performance on their part. In his pleading he alleges that he intended to hold them to it when he sold the flax in Duluth, for he sold it with the express purpose of fixing their damages for a breach thereof. However much he may have been mistaken as to his legal right to sell at that time, and in the manner in which the sale was made, for the purpose of fixing the measure of damages, he clearly never meant to acquiesce in the repudiation of the contract by the defendants, and thus assent to a rescission thereof. But if, while the agreement remained in full force, the plaintiff himself violated its terms, then it is obvious that the defendants may take advantage of this breach as a perfect defense. They may elect to treat his breach of contract as warranting a rescission thereof by them, or they may consider it as a breach, rendering him liable for damages. In either event they would have a perfect defense to this action. It is therefore necessary to determine whether, by the sale of the flax in Duluth on the 9th of September, the plaintiff himself violated his agreement to deliver the flax to the defendants. It is not pretended that he

violated it in any other manner. The plaintiff did not agree to deliver any particular 5,000 bushels of flax to the defendants. All that he was called upon to do, to fulfill his obligation, was to deliver the specified number of bushels of flax, of the quality and grade designated in the contract, without reference to the place where it was raised, or the question whether it was owned by the plaintiff at the time the agreement was entered into. But it is said that it appears from the plaintiff's testimony that he segregated 5,000 bushels of flax from the common mass of the flax raised by him on his farm, and then sold that particular flax in Duluth, as being the identical property he had agreed to sell the defendants. It is true that he speaks of selling the same flax that he had agreed to deliver to the defendants, and the allegations of his complaint are to the same effect. But it is evident that the segregation of this flax was purely mental. He did not in fact set apart any particular 5,000 bushels as the property he had obligated himself to deliver to the defendants, and then agree to sell the same property in Duluth. At that time none of his flax had even been threshed. But even if we should assume that plaintiff had actually set apart a particular 5,000 bushels as the flax he was subsequently to deliver, and that thereafter he had sold and delivered it to a third person, this would not of itself constitute a breach of his contract. The selection by the vendor of the property he intends ultimately to deliver under a contract is not irrevocable, where he has the choice, and the vendee does not unite with him in such selection. Despite the fact that the vendor has set apart the property as the particular property he will finally deliver, he may change his mind before the time for delivery arrives, and substitute other property in place of that which he had tentatively selected. The vendee acquires by such an *ex parte* selection no vested right to insist that that is the particular property which must be delivered to him by the vendor to fulfill the conditions of the contract. All he can demand is that, when the time for performance arrives, property of the descrip-

tion and quality specified in the agreement shall be delivered to him. The implied understanding of the parties is that the verdor shall have until the day for performance to determine what spe cific property he will deliver. Any selection made by him before that time is revocable by him. The rights of the vendee are in no manner affected by such selection, or by the vendor's change of mind. He has no cause for complaint, provided, at the time prescribed in the agreement, property of the kind and quality of the property therein specified is delivered to him in strict accordance with the provisions thereof, whatever vacillations of purpose may have characterized the conduct of the vendor in the meantime. Should a grocer, receiving from a customer an order for a barrel of flour of a particular brand, to be delivered the following day, select, in the absence of such customer, a barrel from a number of barrels in stock, and direct that that barrel be taken to the customer's house the next day, it certainly would not be a breach of the contract for him subsequently to sell it and substitute another barrel in its place; the sale and substitution both taking place before the time for delivery according to the agreement had arrived. Indeed, it is questionable whether a sale and delivery of property by the vendor before the day for delivery under an executory contract has been reached is a breach of such contract, even in cases where the specific thing to which the contract relates is agreed upon by the parties. If A. agrees to sell and deliver to B. at the end of 30 days, a particular horse, for a price named in the contract, can it be said that A. has put it out of his power to perform the agreement by selling and delivering to C. the same animal 20 days before B. can call for the performance of the contract by A.? How can B. say, without possibility of error, that A. will not be able to perform his agreement when the time for performance arrives? May not A. repurchase the horse in time to fulfiill his compact with B.? See opinion of Denman, C. J., in *Lovelock* v. *Franklyn*, 8 Q. B. 371; 2 Pars. Cont. 666, 667. But see *Heard* v. *Bowers*, 23 Pick. 460. Besides, on what principle can be based the doctrine that the certainty that a party

will not be able to perform his agreement when performance by him is due is equivalent to a present breach of the contract, although, as a matter of fact, he has not violated, and cannot violate, the contract until the future day for fulfillment has been reached? It is by no means certain that the fact that a party has put it out of his power to perform a contract when the day of performance has arrived is a breach thereof, or whether the utmost effect of such an act is merely to make inevitable a future breach of the agreement. Neither can it be said in every case that the bare fact that the vendor in an executory contract of sale has, before performance is due, sold the very property to which the executory contract relates, demonstrates the certain inability of the vendor thereafter to make delivery in the future in accordance with the terms of his promise.

But in the case at bar it does not even appear that the plaintiff had sold the flax he had agreed to sell to the defendants. The second contract, like the first, was executory. It was an agreement which by its very terms was not to be performed until after the time for performance of the contract with the defendants had passed. The Duluth contract provided for delivery in October. It is therefore clear that plaintiff had not divested himself of the title to the flax, or agreed to deliver possession thereof to the Duluth parties at any time prior to the time for delivery to defendants under his contract with them. And it is an undisputed fact that he did not deliver any of such flax to the Duluth parties until long after the day for delivery to the defendants had passed. Indeed, all the flax called for by the Duluth contract had not been delivered at the time this case was tried. It is therefore apparent that, during the entire period between the making of the contract with the defendants and the time for performance thereof according to its terms, the plaintiff had not parted with the title to or possession of the 5,000 bushels of flax, even assuming that the contract with defendants related to a particular 5,000 bushels. Conceding that the two contracts both related to the same property, yet it is obvious that it cannot be said that the mere fact

that plaintiff could not fulfill his agreement with defendants without being guilty of a breach of contract with the Duluth parties establishes the proposition that he had placed it beyond his power to carry out his agreement with the defendants. He was absolutely master of the situation. He could break either contract he saw fit to break, and perform either contract he saw fit to perform,—subject, of course, to legal liability for such breach. But it was not even necessary for him to violate his agreement with the defendants in order to fulfill his contract with the Duluth parties, even assuming that he had agreed to sell a particular 5,000 bushels to the defendants, and had in mind the same flax when he made the Duluth contract. In that contract he did not bind himself to deliver any particular 5,000 bushels of flax, but, on the contrary, to deliver any 5,000 bushels, of a certain grade, which he might tender in fulfillment of the contract. He may have considered that he was selling the 5,000 bushels he had agreed to sell the defendants, and yet he did not bind himself to sell only this flax to the parties in Duluth. At no time, therefore, did he divest himself of the title to the particular flax he had agreed to sell to defendants, assuming the specific flax to have been pointed out, or the possession thereof, or bind himself to sell it at all to the parties in Duluth.

When plaintiff wrote to defendants, on September 9th, stating that he would give them further time to consider their refusal to recognize the contract, his attitude was that he did not elect to treat their first letter, to which his letter was in answer, as constituting a breach of the contract. But he did not thereby bind himself not to consider any subsequent repudiation by them of the agreement as a violation thereof. Accordingly we would be compelled to hold that, on the receipt of their second letter, plaintiff was in a position to insist that defendants had broken the contract, if we should adopt the English rule. As before indicated, we deem it indefensible on principle, nor are we able to discover how it subserves business convenience, or in what respect it is more just than the contrary doctrine. In the country in

which it had its origin, it was not at first recognized as the correct rule of law. In *Phillpotts* v. *Evans*, 5 Mees. & W. 475, Parke, B., said: "The notice that he will not receive the wheat amounts to nothing, until the time when the buyer ought to receive the goods, unless the seller acts on it in the meantime, and rescinds the contract." "I think no action would have then lain for the breach of the contract, but that the plaintiffs were bound to wait until the time arrived for the delivery of the wheat, to see whether the defendants would then receive it." In *Leigh* v. *Paterson*, 8 Taunt. 540, the defendant had until December 31st in which to deliver the goods contracted for. On October 1st he notified plaintiff that he would not carry out his contract. The question was whether the market value of the goods on October 1st or December 31st should be taken into consideration in fixing the plaintiff's damages. The court ruled that the value on December 31st was the value to be ascertained in determining the damages, and the decision was placed on the ground that, despite the premature repudiation of the contract by the defendant, he might thereafter have delivered the property, at any time up to December 31st. Dallas, C. J., said: "The defendant had a right to deliver the tallow at any time before 12 o'clock at night on the 31st of December." Parke, J., said: "The defendant might have delivered the tallow any moment up to the 31st of December, and the price on that day should have regulated the verdict of the jury." In *Ripley* v. *McClure*, 4 Exc. 359, the court said, in reference to the contention of counsel for defendants that the refusal on the part of the defendants to accept the goods, the refusal being made before the time for performance had arrived, was no more than an expression of intention, which could be retracted: "And we think that, if the jury had been told that a refusal before the arrival of the cars was a breach, that would have been incorrect. We consider that point rightly decided in *Phillpotts* v. *Evans*, 5 Mees. & W. 475." Mr. Benjamin, in his work on Sales, declares that "the date at which the contract is considered to have been broken is that at which the goods were to have been

delivered, not that at which the buyer may give notice that he intends to break the contract and to refuse accepting the goods." Volume 2, § 1118. In the very case in which the modern English doctrine was first promulgated (*Hochster* v. *De La Tour*, 2 El. & Bl. 678), Lord Campbell clearly recognizes the general rule that until the time for performance has arrived there can be no breach, by the assertion that it is not the universal rule, and by proceeding to point out the exceptions to it. He seems to have treated the case before him as an exception to the general rule. And in *Frost* v. *Knight*, L. R. 7 Exch. 111, 114, Lord Chief Justice Cockburn declares, in so many words, "that there can be no actual breach of the contract, by reason of non-performance, so long as the time for performance has not yet arrived." In *Roper* v. *Johnson*, L. R. 8. C. P. 167, the doctrine laid down in *Hochster* v. *De La Tour*, is spoken of as a novel doctrine. While the court in *Frost* v. *Knight*, L. R. 7 Exch. 111, treats the rule enunciated in *Hochster* v. *De La Tour*, as settled law, yet when *Frost* v. *Knight* was before the court of exchequer the majority of that court (Kelly, C. B., and Channall, B.) vigorously assailed the anomalous doctrine which was applied in the Hochster case. See L. R. 5 Exch. 322. It is so obvious that, unless some obligation is violated by a party, he cannot be said to have broken his contract, that Lord Chief Justice Cockburn in *Frost* v. *Knight*, was obliged to assume, in order to support his reasoning in that case, that there was an implied understanding that neither party should sever the contractual relation, and that the premature refusal to perform was a violation of this implied understanding. The lord chief justice says: "The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for peformance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage. Of all such advantage the repudiation of the contract by the

other party, and the announcement that it will never be fulfilled, must, of course, deprive him. It is therefore quite right to hold that such announcement amounts to a violation of the contract in omnibus, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly." But that is a strange mode of reasoning which assumes a breach for the purpose of establishing a breach. Lord Cockburn asserted that the contractual tie was severed, for the purpose of proving that the contract had been violated. Unless the contract calls for a continuance of the willingness of a party to perform it during all the time between the execution thereof and the day of performance, his mere expression of a purpose not to fulfill its obligation is not a breach of such contract. But what interest has a vendor in a contract for the sale of property in the unchanged purpose of the vendee to carry out the agreement? The only matter which concerns him is the willingness of the vendee at the time specified in the contract to accept and pay for the property. There is always the possibility that either party to an agreement may violate it when performance by him is due. This possibility is not converted into a certainty by his premature refusal to fulfill its obligations. He may repent of his hasty decision. After such an anticipatory disavowal of the contract, there still remains, as before, the possibility both of ultimate performance and of ultimate violation of the agreement by the one who has threatened, but only threatened, to ignore it. By a premature repudiation the rights of the other party are not in any degree affected. He still has a right to insist upon the performance of the agreement at the appointed time, or that the other party shall pay damages for the breach of the contract. This was the extent of his right before the other party had spoken a word inimical to the agreement, and he continues to enjoy this right despite such premature repudiation.

How it can be asserted, as Lord Chief Justice Cockburn asserted in *Frost* v. *Knight*, that the premature repudiation of a contract deprives the other party of all advantage under it, is

inexplicable. He, in the very same opinion, declared that the innocent party, so far from being deprived of any advantage, could elect to treat the agreement as unimpaired. The warning, which leaves the agreement unaffected, is a positive benefit, and not a detriment, to the other party. Should the would-be violator of the agreement keep his purpose to himself, the other party would be in a situation not so favorable. Suppose, for instance, that the vendor had agreed to sell property, fluctuating in value, at a specified time. He may discover subsequently to the making of such contract that the vendee has become insolvent and does not intend to perform the agreement; yet so long as such vendee keeps silent the vendor is obliged to stand to the agreement, taking all the risk that, if the market should turn against him at the time for delivery, he must lose, and yet knowing that, if the market should prove favorable to him, the vendee will break the contract, and leave him (the vendor) only a worthless cause of action for damages against a bankrupt. Under such circumstances a statement by the vendee that he will not carry out the contract would place the vendor in a more favorable position, for it would enable him, at his option, to rescind the contract, thus escaping the risk of loss in a case where he could not hope to reap any benefit from the agreement should the market be favorable to him at the time for performance. The fundamental inquiry is, of course, in every case, whether any essential provision of the contract, either express or implied, has been violated. If the agreement is for the sale of property at a fixed time in the future, the intermediate expression by either party of a purpose not to stand by the contract is not a breach thereof, because he has not thereby done anything in violation of his promise, to the detriment of the other party. But, if the contract is to marry at a future date, a different case is presented. The agreement to marry connotes the further agreement to remain affianced until the performance of the contract has established the still closer relation of husband and wife. Such an agreement establishes a distinctive relation, known as "betrothment." He who destroys

this relation—though it be done before the period of marriage has, under the terms of the contract, arrived—violated the contract in a vital element; and the violation is none the less actionable because the promise to remain engaged in the meantime is implied, and not expressed. The contract is an entirety, and, when broken, is broken in its entirety. It is on this ground that the decision in *Frost* v. *Knight*, L. R. 7 Exch. 111, 114, is placed by the lord chief justice. He says: "It is next to be observed that the law, as settled by *Hochster* v. *De La Tour*, and *Harbor Co.* v. *Xenos*, is obviously quite as applicable to a contract in which personal status or personal rights are involved as the one relating to commercial or pecuniary interests. Indeed, the contract of marriage appears to afford a striking illustration of the expediency of holding that an action may be maintained on the repudiation of a contract to be performed *in futuro*. On such a contract being entered into, not only does a right to its completion arise, with reference to domestic relations, and possibly pecuniary advantages, as also to the social status accruing on marriage, but a new status—that of betrothment—at once arises between the parties. This relation, it is true, has not, by the law of England, the same important consequences which attach to it by the canon law, and the law of any other country. Nevertheless, it carries with it consequences of the utmost importance to the parties. Each becomes bound to the other. Neither can, consistently with such a relation, enter into a similar engagement with another person. Each has an implied right to have this relation continued until the contract is finally accomplished by marriage." And Byles, J., concurs in the judgment of the court on the ground that the implied agreement to remain betrothed until marriage had been violated. He says: "An express precontract of marriage, as already suggested by the lord chief justice, places the man and woman in the condition or status of betrothment. In this state there are certain mutual duties. The woman, for example, may not, without a breach, marry another man, although it is possible that he may die before the future day

appointed for the first intended marriage, whether already fixed, or whether contingent on a future event. So, I conceive, the man cannot, during the stipulated period of betrothment, without a breach of contract, marry another woman, though she may die in the meantime. So for one of the parties to break off the mutual engagement, by an express refusal to perform it, though before the day, seems to me to be equally a breach of the contract; for it puts an end to the condition of betrothment, which, according to the contract, was to continue. In each of these three cases there is a repudiation of the duties springing from the new relation involved in the contract."

A review of the English decisions will disclose the fact that only in a single case has this modern English doctrine been applied where the enforcement of a contrary rule would have led to a different decision. This is *Hochster* v. *De La Tour* (decided in 1853) 2 El. & Bl. 678. In that case it appeared that the plaintiff and defendant, in April, 1852, had entered into a contract of service. The plaintiff was to serve the defendant, as a courier in his travels on the continent, for a period of three months, commencing June 1, 1852. On the 11th day of May, 1852, defendant notified plaintiff that he would not perform the agreement, and on the 22d of the same year the action to recover damages for breach of the contract was commenced. The question was squarely raised, by the contention of counsel for the defence, whether what had been said by the defendant constituted a present breach of the agreement. The court of queen's bench held that it did. Lord Campbell says: "The defendant's counsel very powerfully contended that, if the plaintiff was not contented to dissolve the contract, and to abandon all remedy upon it, he was bound to remain ready and willing to perform it until the day when the actual employment as courier in the service of the defendant was to begin, and that there could be no breach of the agreement before that day, to give a right of action. But it cannot be laid down as a universal rule that where, by agreement, an act is to be done on a future day, no action can be brought for a breach of

the agreement until the day for the doing of the act has arrived." "If a man promises to marry a woman on a future day, and before that day marries another woman, he is instantly liable for an action for breach of promise of marriage. *Short* v. *Stone*, 8 Q. B. 358. If a man contracts to execute a lease on and from a future day, for a certain term, and before that day executes a lease to another for the same term, he may be immediately sued for breaking the contract. *Ford* v. *Tiley*, 6 Barn. & C. 325. So, if a man contracts to sell and deliver specific goods on a future day, and before the day he sells and delivers them to another, he is immediately liable to an action, at the suit of the person with whom he contracted first to sell and deliver them. *Bowdell* v. *Parsons*, 10 East, 359. One reason alleged in support of such an action is that the defendant has before the day rendered it impossible for him to perform the contract at the day. But this does not necessarily follow, for prior to the day fixed for doing the act the first wife may have died, a surrender of the lease executed might be obtained, and the defendant might have repurchased the goods, so as to be in a situation to sell and deliver them to plaintiff. Another reason may be that, where there is a contract to do an act on a future day, there is a relation constituted between the parties that in the meantime neither will do anything to the prejudice of the other inconsistent with that relation. As an example, a man and woman engaged to marry are affianced to one another during the period between the time of the engagement and the celebration of the marriage. In this very case of traveler and courier, from the day of the hiring until the day when the employment was begun they were engaged to each other, and it seems to be a breach of an implied contract if either of them renounced the engagement." "The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait until the time when the act was to be

done,—still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer." So far as the lord chief justice could perceive an analogy between the engagement between the plaintiff and defendant in that case and an engagement between a man and a woman who are betrothed, his faculty for discovering similitudes is certainly phenomenal. The balance of his reasoning is that the rule that is there laid down is more convenient than the other rule, which squares with legal principle. There is a tacit confession through this entire discussion of the question that the decision is at war with settled principle. And in *Frost* v. *Knight*, also, the argument of convenience appears to have had a great weight with Lord Chief Justice Cockburn. In *Dugan* v. *Anderson*, 36 Md. 567, the court, while not deciding the question, seems to have been governed in the utterance of its dictum on the subject by considerations of convenience. We agree with the Massachusetts Supreme Court that the argument of convenience should have no weight as against the demands of legal principle. In *Daniels* v. *Newton*, 114 Mass. 530, the court said: "Much argument is expended in both cases upon the ground of convenience and mutual advantage to the parties from the rule sought to be established. But before that argument can properly have weight, the point to be reached must be first shown to be consistent with logical deductions from the strictly legal aspects of the case. The legal remedy must be founded on some principle, and must conform to the nature of that right. Until the plaintiff has either suffered loss or wrong in respect of that which has already vested in him in right, or has been deprived of, or prevented from acquiring, that which he is entitled to have or demand, he has no ground on which to seek a remedy by way of reparation. The conduct of the defendant is no wrong to the plaintiff until it actually invades some right of his. Actual injury, and not anticipated injury, is the ground of legal recovery. The plaintiff's rights are invaded by repudiation of the contract only when it produces the effect of non-performance, or prevents him

from entering upon or complying with performance on his part at a time when, and in the manner in which, he is entitled to perform it, or have it performed." And in *Frost* v. *Knight*, L. R. 7 Exch. 111, Lord Cockburn declared that the argument founded on convenience should not control, but should be considered only in connection with arguments founded on settled doctrines of the law. He, however, was able to discover, as we have already pointed out, a basis for the English rule in elementary principles; but we are unable to agree with him in this respect, and, such being the case, we have his authority for rejecting the argument of convenience when it stands alone as the supporter of this novel rule. Moreover, we are unable to see wherein business convenience is subserved by the English doctrine. It is subserved thereby only on the theory that to establish a rule for the special advantage of the party who does not proclaim his purpose to violate the contract is to advance the convenience of the business world. The option, under such doctrine, is with such party to treat the premature declaration as a breach of the agreement, or to refuse to so treat it. He may decline to consider it a breach, and hold the other party to the contract, the same as though no word inimical thereto had been spoken. Under the guise of furthering business interests, the English rule unfairly discriminates against the party who speaks, and in favor of the one who is silent. The latter may secretly intend not to carry out the agreement. The former may be actuated—indeed, he often is prompted—by the laudable motive of giving the other party timely warning of what he deems at the time his inevitable inability to perform the agreement. On what principle of justice, then, should the law thus discriminate between the parties? If this rule be adopted, then it will not infrequently happen that a party has been held liable for a breach for merely admonishing the other party that a breach is inevitable, when, had he remained silent, no liability could have been enforced against him, because the contract would have been extinguished before the day for performance could arrive, by reason of the death of one of the

parties thereto,—the contract being for personal services,—or because of the destruction before that day, without the fault of anyone, of the subject-matter of the agreement. By being allowed to treat the agreement as broken, the party can enforce a liability for substantial, and perhaps very heavy, damages, whereas, if he had been forced to wait until it should be ascertained whether the other party would in fact perform his agreement, the damages then would have been merely nominal, or the latter might have escaped all liability, by reason of the extinguishment of the contract before the day of performance arrived, for the reasons already mentioned. Indeed, the party who sues might himself have been unable to perform when the time for performance was reached, and might have been put in default by demand of the other party that the agreement be carried out. If the doctrine of the Hochster case be sound, then one who has agreed to enter the service of another two years in the future may elect to treat as a breach of the contract an immediate refusal by the employer to fulfill the same, and he may then sue, and the case may be tried before the period for entering upon the discharge of his duties under the contract has arrived. In such a case he would recover full wages, it being impossible to show what he had earned or could have earned during the time he was to have worked for the defendant. And yet subsequent developments may reveal the fact that, so far from being damaged, he was positively benefitted, by the fact that he did not enter the defendant's employ. He may during that period earn double the wages he was to have received under the contract, and this, too, in addition to that which he has already collected without doing a stroke of work therefor. Nay, the death of the employer before the day for commencing the performance of the agreement arrives, working an extinguishment thereof, may show that but for his statement the plaintiff could never have collected a dollar. Undoubtedly the party to whom the refusal is communicated may treat it as an overture for a consent by him to rescission, and rescind the contract. But he has no right to construe as a present

breach words which only disclose the probability of a future breach.

Many of the cases which appear to support the doctrine of the Hochster case are distinguishable on this ground of rescission. It will be found on an analysis of them that all that the party to the contract was seeking to do by his action was to recover on a *quantum meruit*, on the theory that he had rescinded the contract on being informed by the other party that he did not intend to carry it out. The court did not in these cases hold that the contract was broken, but merely that, it having been rescinded by mutual consent, the party who had parted with anything of value in the performance of the agreement could recover the value thereof, on an implied promise to pay the same. In *Planche* v. *Colburn*, 8 Bing. 14, the plaintiff had a contract with the publishers of a periodical to write a series of articles therefor. The publishers having discontinued the publication, he treated their conduct as justifying a rescission, and rescinded the contract. The action was to recover the value of work already performed by him, at defendant's request, in writing a portion of the articles. It was on this theory that a recovery was sustained. In some of the cases, the party to whom the notice of refusal was given had the option to call for a performance at any time; and, of course, he could elect to regard the time of performance as having arrived, and then treat the refusal as a waiver of tender of performance, and in this way hold the party as for a present breach of the agreement. This element existed in the following cases: *Lovelock* v. *Franklyn*, 8 Q. B. 371; *Bowdell* v. *Parsons*, 10 East, 359; *Newcomb* v. *Brackett*, 16 Mass. 161; *Windmuller* v *Pope*, 107 N. Y. 674, 14 N. E. Rep. 436; *Short* v. *Stone*, 8 Q. B. 358. Of the English cases, we have seen that *Phillpotts* v. *Evans*, 5 Mees. & W. 475; *Ripley* v. *McClure*, 4 Exch. 345; and *Leigh* v. *Paterson*, 8 Taunt, 540; are opposed to the Hochster case. Mr. Benjamin, also, in his work on Sales (an English work), states the rule the other way, as we have already seen. 2 Benj. Sales, § 1118. In *Lovelock* v. *Franklyn*, 8 Q. B. 371, Lord Denman intimated that,

where the time of performance is fixed, the fact that a party has in the meantime incapacitated himself from performing the contract will not constitute a breach thereof. *Frost* v. *Knight*, L. R. 7 Exch. 111, was an action for breach of promise to marry, and stands, as we have seen, on peculiar grounds, not applicable to actions for breach of contract generally. And in the court of exchequer the doctrine in the Hochster case was powerfully assailed by the majority of the court. L. R. 5 Exch. 322. *Short* v. *Stone*, 8 Q. B. 358; was also such an action. In this case the defendant had not only broken the engagement, but had actually married another person. *Planche* v. *Colburn*, 8 Bing. 14, was not an action for breach of contract, but to recover on the theory of a rescission. In *Harbour Co.* v *Xenos*, 13 C. B. (N. S.) 825, the action was not brought until after the time for performance had arrived. The defendant never retracted his premature refusal. Therefore, all the court was called upon to decide in that case was that when the day for fulfillment of the agreement was reached the unwithdrawn refusal was a waiver of tender of performance by the plaintiff, and enabled it to sue for breach of contract, the same as though such tender had then been made and refused. There was no occasion for alluding in this case to the doctrine laid down in the Hochster case. In *Avery* v. *Bowden*, 5 El. & Bl. 714, and *Reid* v. *Hoskins*, Id. 729, the court held that the plaintiff could not recover, because he had declined to treat the premature refusal of the other party as a breach. The same result was reached in these cases that would have been reached if the doctrine we believe to be sound had been applied. In *Roper* v. *Johnson*, L. R. 8 C. P. 167; and *Brown* v. *Muller*, L. R. 7 Fxch. 319, we observe the practical working of the rule promulgated by the Hochster case. Having violated legal principles once, in deciding that case, the courts were forced to violate them a second time, in laying down the rule relating to the measure of damages in such cases. Instead of fixing the value at the time of the premature breach as the element to be considered, the court held that the value at the time for performance, as fixed by the

agreement, must be considered. In *Roper* v. *Johnson*, the court, after speaking of the doctrine of the Hochster case as a novel doctrine, says: "The difficulty which presents itself here is introduced by the comparatively recent case of *Hochster* v. *De La Tour*, the first case which decided that in the case of an executory contract the refusal of one party to perform the contract would justify the other in at once treating such refusal as a breach and suing for damages. That case has been distinctly recognized on subsequent occasions, and we must now assume it to be the law. It has undoubtedly introduced a difficulty in the assessment of damages in similar cases." Judge Keating, after referring to the rule the court would adopt in that case as to the proper measure of damages, said: "I think it is the better and the safer rule, though I am free to confess that the matter is by no means divested of difficulty,—a difficulty occasioned by the novel doctrine introduced by the case of *Hochster* v. *De La Tour*." It must be admitted that the case of *Ford* v. *Tiley*, 6 Barn. & C. 325, strongly supports the decision in the Hochster case.

In this country there appears, from a superficial view of the decisions, to be a great mass of authority in favor of the English doctrine. But a review of adjudications on this side of the water will reveal the fact that there is very little in the way of express authority in America upholding the English rule. The case of *Burtis* v. *Thompson*, 42 N. Y. 246, may be dismissed with the observation that it was an action for breach of promise to marry. In *Howard* v. *Daly*, 61 N. Y. 362, there is a dictum by Commissioner Dwight that the doctrine ia the Hochster case is sound. But the facts did not call for any decision on this point, as the defendant had refused to alllow the plaintiff to enter upon the performance of her contract of service after the time for performance had arrived. The other members of the court expressly refused to state their views whether the English rule could be sustained in principle. See page 378. In *Bunge* v. *Koop*, 48 N. Y. 225, all the court decided was that a premature refusal, unre-

tracted, constitutes a waiver of tender of performance, when the time to fulfill the contract arrives, and that thereafter the plaintiff may sue for breach without showing an offer to perform. In *Freer* v. *Denton*, 61 N. Y. 496, and *Shaw* v. *Insurance Co.*, 69 N. Y. 293, the court expressly refused to determine whether the English rule should be followed. In *Ferris* v. *Spooner*, 102 N. Y. 10, 5 N. E. Rep. 773, the defendant had broken his contract after he had entered upon the performance thereof. The court said: "When, therefore, he repudiated the further performance of the contract, the plaintiff was discharged from all obligation to either, and set at liberty to enforce his securities for the money already advanced. Obviously, demand of payment was not essential to a cause of action." In *Windmuller* v. *Pope*, 107 N. Y. 674, 14 N. E. Rep. 436, the court appears to have recognized the English rule but the case does not show whether the suit was brought before or after the day for performance had arrived. Moreover, the time for the vendors to commence delivery by shipment of the property agreed to be sold had arrived at the time the vendees had declared their purpose not to accept the property under the contract. The vendors appeared to have had an option to deliver at any time between certain dates. When the vendees repudiated the agreement, the time when the vendors might have insisted upon delivery had arrived, although they could, at their option, have made delivery at a later date. The vendors having a right to begin performance at the time the vendees refused to receive the property, the former might, of course, treat the repudiation as a breach. It was not a premature repudiation of the contract, but one which occurred after the time had arrived when the vendors had a right to insist on performance thereof. All that the court held in *Crist* v. *Armour*, 34 Barb. 378, was that a premature refusal, unwithdrawn at the time for performance, was a waiver of an offer of performance at that time. In *Donovan* v. *Sheridan*, (Super. N. Y.) 24 N. Y. Supp. 116, it appeared that the point that a premature repudiation was not a breach was not made at the trial, and the court declared that therefore it would not be

considered. But the court did utter a dictum in favor of the English rule. However, it was based on New York decisions which had not at that time, at least, settled the law in that state in favor of such rule. In *Gray* v. *Green*, 9 Hun. 334, the court said: "The effect of a mere refusal has been stated to be that if, before the time arrives at which a party is bound to perform a contract, he expresses an intention to break it, this of itself does not amount to a breach thereof; but, if such expression of intention remains unretracted when the time arrives for the other party to perform his part of the contract, this fact will dispense with such performance." In *Crabtree* v. *Messersmith*, 19 Iowa, 179, the defendant broke the contract of sale after the time for performance had arrived, by returning the property, after possession thereof had been delivered to him. While the English rule is referred to, it is obvious that no question of premature breach was involved. In *Holloway* v. *Griffith*, 32 Iowa, 409, the action was for breach of promise to marry, and the case therefore belongs to the class of cases in which a premature refusal operates as a breach of the implied agreement to continue betrothed until marriage. In *Roebling Sons Co.* v. *Lock-Stitch Fence Co.*, 130 Ill. 660, 22 N. E. Rep. 518, the defendant refused to perform after it had entered upon the performance of the agreement. In *Kadish* v. *Young*, 108 Ill. 170, the court held that the premature refusal to perform was not a breach, because the other party to the contract had not elected to treat it as a breach. The same result would have been reached in that case if the English doctrine had not been applied. In *Fox* v. *Kitton*, 19 Ill. 519, all the court decided was that the innocent party may treat a premature repudiation as an offer to rescind the agreement. In *Chamber of Commerce* v. *Sollitt*, 43 Ill., 523, it appeared that, while the defendant announced his inability to perform before the time for performance arrived, yet he did not withdraw such refusal to carry out the agreement before such time, and the suit was not brought until the period for fulfillment of the agreement had come and passed. In *Follansbee* v. *Adams*, 86 Ill. 14, the parties

to the contract, after one of them (the plaintiff) had notified the other (the defendant) that he could not perform, adjusted the matter, and on his adjustment it was agreed that plaintiff owed defendant a certain sum. Thereafter, plaintiff having sued defendant for failure to perform the contract, this settlement was pleaded as a defense. Of course, it was held that it constituted a perfect defense to the action. The contract was, by the act of the party, extinguished before the time for performance arrived. How could there thereafter be any liability thereunder? The court was not called upon to decide whether the plaintiff, by his premature refusal, had broken the agreement. The principle on which the decision rests is that the parties to a contract may, even before performance is due, extinguish it. The scope of the decision is disclosed in the last sentence of the opinion, "We are satisfied, after careful consideration of the whole record, that the court decided right in holding the contract rescinded." In *Railway Co.* v. *Richards*, (Ill. Sup.) 38 N. E. Rep. 773, the breach consisted of acts in contravention of the terms of the contract after the time for performance had arrived. The court, indeed, indorses the English doctrine, but what was said on the subject was pure dictum. In *Zuch* v. *McClure*, 98 Pa. St. 541, the court held that a premature repudiation did not constitute a breach, as the innocent party did not elect to so regard it. The result in this case would have been the same if the English rule had not been adopted. In *Heard* v. *Bowers*, 23 Pick. 455, the court intimated that, if a party voluntarily puts it out of his power to perform a contract before the day of performance arrives, he by that act breaks the agreement. See page 460 In *Dingley* v. *Oler*, 11 Fed. Rep. 372, the court applied the English doctrine; and when this case was decided on appeal in the Federal Supreme Court (117 U. S. 490, 16 Sup. Ct. 850), that court intimated that it considered the English doctrine as sound, but the decision below was reversed on the ground that, even assuming that doctrine to be preferable, the facts did not bring the case within it, for the reason that no distinct repudiation of the agreement before the

time for performance had been shown. In the case of *U. S.* v. *Smoot*, 15 Wall. 36, the court, while leaning very decidedly towards the English rule, held that the case was not brought within its scope, for the same reasons which govern the decision in that court in *Dingley* v. *Oler*. In *Dugan* v. *Anderson*, 36 Md. 567, the court, while not called upon to settle the question, indicated that, on the score of convenience, it might, when called upon to settle the point, adopt the English rule. But, as we have already seen, it is indefensible to rest the English doctrine upon the mere ground of convenience, and in this case it appeared that the contract was broken while it was being performed. In *Hosmer* v. *Wilson*, 7 Mich. 294, the action was brought to recover the value of labor expended on materials out of which an engine was to be constructed by plaintiff in error for defendant in error. The defendant in error had repudiated the contract while plaintiff in error was performing it. Of course, this was a breach of the agreement. No question of premature repudiation was involved. In *Platt* v. *Brand*, 26 Mich. 175, it would seem that the plaintiff, against whom the defendants sought to set up, by way of recoupment, a claim for damages for a breach of contract to furnish glass, had broken the contract after performance thereof had been entered upon, although at a time anterior to the time when delivery of the installment which he refused to deliver was due. In *Wolf* v. *Marsh*, 54 Cal. 228, it appeared that the written instrument sued upon was given on condition that it was not to be enforced until a certain mine should yield a profit to the defendant, and that, if it should not yield a profit to him, the instrument was to be void. The defendant sold the mine, and the court held that the instrument at once became enforceable. By the act of sale the defendant had put it out of his power to make the mine yield a profit to him, and the court therefore very properly held that the instrument could be enforced without waiting future developments. In *Sullivan* v. *McMillan*, (Fla.) 8 South. 450, the refusal to go on with the contract was made after performance thereof had been entered upon. Therefore no question of pre-

mature refusal was involved. The court did not adopt the English doctrine. On the contrary, it stated that the case did not call for a decision on that point. The court said: "The case at bar does not, however, call for an expression of opinion, as between the doctrine of *Hochster* v. *De La Tour* and that of *Daniels* v. *Newton*. It rests upon another and unquestionable doctrine. The time for performance was over when the breach complained of was committed. The contract was entire, and not severable in its character, and had been performed in part, at least; and upon a breach of the entire contract, it being committed by the defendant while the plaintiff was ready and willing to perform, the latter became entitled to recover in one action the same damages as if he had fully performed his contract." In *Maltby* v *Eisenhauer*, 17 Kan. 308, Justice Brewer said: "To what extent a contract may be held to be broken before the time for performance arrives may not be entirely settled. There are authorities which say that if, before the time for performing the contract arrives, the promisor expressly renounces the contract, the promisee may treat this as a breach, and may at once maintain an action in respect thereof. Several of these cases were for breaches of contracts to marry, and the courts in many of them express themselves qualifiedly, and as doubtful whether the proposition was correct, as applicable generally to all classes of contracts. Be the proposition ever so sound, we think it is not applicable here." In *Grau* v. *McVicker*, 10 Fed. Cas. 996, it was squarely decided that the premature repudiation of an agreement is a present breach thereof. The decision in this case is founded entirely on *Hochster* v. *De La Tour*. In *McPherson* v. *Walker*, 40 Ill. 371, all the court decided was that a refusal to perform, not withdrawn before the time of performance, operates as a waiver of an offer to fulfill the agreement at the time stipulated therein. The court, so far from adopting the English doctrine, laid down the very rule we hold to be proper in cases of this kind: "The rule is, if one, bound to perform a future act, before the time for doing it declares his intention not to do it, this of itself is not a breach of the contract;

but, if this declaration be not withdrawn when the time arrives for the act to be done, it constitutes sufficient excuse for the default of the other party." In *Davis* v. *Furniture Co.* (W. Va.) 24 S. E. Rep. 630, the court follows the English doctrine, but the question was not discussed. The leading decision opposed to the Hochster case is *Daniels* v. *Newton*, 114 Mass. 530. Nor does it stand alone. It has been followed in *Carstens* v. *McDonald* (Neb.) 57 N. W. Rep. 757, and *Clark* v. *Casualty Co.*, 67 Fed. Rep. 222. See *Kelly* v. *Oliver*, (N. C.) 18 S. E. Rep. 698. That the English courts are not disposed to give the rule in the Hochster case very wide scope appears to be shown by the fact that nothing short of the most positive repudiation of an agreement will suffice to give the innocent party, at his option, a cause of action when the repudiation is premature. See *Iron Co.* v. *Naylor*, 9 Q. B. Div. 648; *Avery* v. *Bowden*, 5 El. & Bl. 714; *Reid* v. *Hoskins*, 6 El. & Bl. 953; *Johnstone* v. *Milling*, 16 Q. B. Div. 460.

Nothing decided by this court in *Davis* v. *Bronson*, 50 N. W. Rep. 836, conflicts with our ruling in this case. There the plaintiffs and defendants had made a contract for the construction of a creamery. All that was held in that case was that plaintiffs could not, in the face of a refusal to accept, construct the creamery, and then sue the defendant for the contract price. Their remedy was to sue for damages for breach of the contract. When one has contracted to erect for another a building, and the latter, when the time for commencing construction thereof arrives, refuses to permit the builder to enter upon his premises for the purpose of carrying out his contract, it is obvious that the owner of the land has prevented the performance of the contract by the builder, and has therefore been guilty of a breach thereof. Indeed, there is eminent authority that notice that one will not stand by an agreement, though given before performance by him is due, is a present breach of the agreement, if at the time it is given the time for the other party to enter upon performance has arrived. *Danforth* v. *Walker*, 37 Vt. 244; *Hinkley* v. *Steel Co.*, 121 U. S. 264, 7 Sup. Ct. 875; *Hosmer* v. *Wilson*, 7 Mich. 304; *Sullivan* v. *Mc-*

Millan (Fla.) 8 South. Rep. 457, 458; *Dillon* v. *Anderson*, 43 N. Y. 232; *Lamoreaux* v. *Rolfe*, 36 N. H. 33; *Parker* v. *Russell*, 133 Mass. 74. Whether this doctrine is sound, or whether the better rule is that such notice is merely a waiver of performance, irrevocable in character, inevitably involving an ultimate breach, it is unnecessary for us to decide. If one has agreed to manufacture and deliver certain goods at a specified time, and the other party has agreed to take them, it is evident that a notice not to manufacture them is not only a waiver of the manufacture of the articles, but also of the tender of them, in fulfillment of the agreement, and the waiver is irrevocable. To advise a manufacturer that he need not manufacture, because the purchaser will not accept, is irrevocably to waive tender on the day for delivery, for he cannot deliver goods of his own manufacture without producing them. But, while a future breach is certain, can it logically be said that it has already taken place? Is it sound to declare, as some of the decisions do, that in such a case the performance by the manufacturer has been prevented? See *Cort* v. *Railway Co.*, 17 Q. B. 127. But we express no opinion on this point, as it is not involved. What we do decide is that the letter of September 13th, although embodying a positive refusal to perform, did not place it in the power of the plaintiff to treat the contract as broken, assuming that September 30th was the day fixed for performance. But it is undisputed that under the contract the plaintiff might, at his option, have delivered the flax at any time during the month of September. When he received the second letter from the defendants (i. e. the one dated September 13th), it was in his power at that time to exercise his option to call for the performance of the agreement. The refusal of the defendants to perform was a standing waiver of tender of performance by the plaintiff, so long as such refusal was not withdrawn, and there is no pretence that it was ever retracted. For the purpose of establishing a party's liability for breach of contract, his refusal to perform, made at the time for performance, or made before and not withdrawn at that time, is equivalent to a then offer to perform by the other

party, followed by a refusal by the party who so refuses before an offer is made. This is elementary law, and the principle is embodied in our Code. Sections 3774, 3820, subd. 3, and § 3823, Rev. Codes. Had plaintiff been absolutely entitled to performance on the day he received defendant's second refusal to perform, he could, without tender of notice, have treated the contract as then broken. Does the fact that he had only an option to call for fulfillment of the agreement affect his right? We think not, so far as tender is concerned. All that was necessary to entitle him to insist on performance on any day prior to September 30th was notice to the defendants to that effect, and an offer to perform. But the unwithdrawn refusal to recognize the contract constituted a waiver of tender of performance. Whether it constituted a waiver of notice that the plaintiff then elected to exercise his option to make an earlier delivery of the flax, is another question. It is not claimed that the plaintiff in any manner brought to defendants' notice his purpose to exercise his option to call for performance before September 30th. To allow him to wait and watch the fluctuations of the market, and then, after the last day for delivery had passed, claim that he had secretly decided to insist upon performance at a particular time prior thereto, or on the last day itself, according as his interests would be best subserved, would be a dangerous doctrine, and one that there is no necessity for adopting, seeing that it was easy for him to manifest his election in a way that would make it irrevocable, and bring it to the knowledge of the defendants. He should not be afforded the opportunity of playing fast and loose with the rights of the other party, but should be required to declare his purpose, or be held, in the absence of notice to the contrary, to have elected to wait until the last day for performance. Unless this rule is adopted, the vendor, who has an option to deliver at any time within six months, and who is notified by the other party immediately after the contract is made that such other party will not stand by the agreement, could remain quiet during this entire period, and then select such a day as the day when he

had elected to call for performance, and therefore as the day of breach, as would give him the largest amount of damages. We hold, therefore, that the plaintiff could not claim that he decided to exercise his option to tender the property before the last day of performance,—i. e. September 30th. Indeed, he does not pretend that he is entitled to recover damages on a theory of a breach of the contract at any time between September 13th and September 30th. Proceeding on a hypothesis which to us is inexplicable, under the circumstances, he seeks to hold defendants responsible for the difference between the contract price and the price he realized on the sale of the 5,000 bushels of flax in Duluth on the 9th of September. That he cannot bind defendants for the purpose of fixing the damages they must pay by the sale in Duluth is obvious, for two reasons: First. It was not made in the mode pointed out in the statute. The statute, recognizing a settled rule of the common law, permits the vendor in an executory contract of sale, the title not having passed to the vendee, to treat the property as the property of the vendee, for the sole purpose of fixing the measure of damages, and then proceed to sell it on the theory of the foreclosure of a vendor's lien for the purchase price. The property is to be sold in the manner pointed out by the statute for the sale of pledged property. The vendee is made liable for the deficiency, if any. Sections 4833, 4988, Rev. Codes. But the sale in Duluth was not made in conformity with the provisions of the statute relating to the sale of pledged property. No notice of the time and place of sale was given to the defendants, as required by § 4760, Rev. Codes, nor was the sale at public auction upon the notice to the public usual at the place of sale in respect to auction sales of similar property, as required by § 4763, Rev. Codes. Another conclusive answer to the position taken by plaintiff, that he could bind the defendants by the price realized on the sale in Duluth, is that the contract had not then been broken. It is only after breach that the statute permits the vendor to proceed to sell as in case of a pledge, for the purpose

of fixing the vendee's liability for the deficiency. Section 4988, Rev. Codes.

It is urged that by selling the 5,000 bushels of flax in Duluth, with a view of fixing the defendants' damages, the plaintiff chose his remedy, and hence cannot pursue any other remedy for damages. We are unable to discover that any question of remedy is here involved. If the vendee breaks his contract, the vendor may recover damages according to the rule laid down in subdivision 2 of § 4988 and § 5009, Rev. Codes, unless he has in fact proceeded under § 4833, and actually fixed the damages thereunder. It is only when the property has been resold in the manner prescribed by § 4833 that the deficiency fixes the measure of damages. If the property has not in fact been resold under that section, then subdivision 2 of § 4988 and § 5009 point out the true measure of damages. The right to hold the vendor responsible for damages on this theory is not cut off unless the property has in fact been "resold in the manner prescribed by § 4833." A mere attempt to proceed thereunder will not bar the right to damages according to subdivision 2 of § 4988 and § 5009. Nothing short of an actual sale in the manner prescribed by § 4833 will have such effect. Counsel first contends that damages cannot be recovered on the theory of a sale to foreclose a vendor's lien, because the vendor failed to sell in the manner prescribed by § 4833; and yet *una et eadem flatu*, they insist that plaintiff should not be allowed damages under the other subdivision of § 4988,—a claim utterly untenable if this fact be true. They would make an abortive attempt to proceed under § 4833 fatal to the recovery of any damages whatever, although the vendee has not thereby suffered any injury whatsoever. We cannot assent to a position so repugnant to the explicit language of the statute, and so contrary to natural justice.

Having reached the conclusion that the contract was not broken by defendants before September 30th, this was the day for performance, as the plaintiff had not elected to make delivery before that time. All that was necessary to put the defendants in default

was a tender of peformance, followed by their refusal. But an offer by plaintiff on the 30th of September was waived by their unretracted repudiation of the contract. He is deemed to have made it, and to have been met by a refusal. This constitutes a breach as of that day. If, then, there was any evidence tending to support the verdict as to the amount of damages, the verdict must be sustained, although directed by the court. The fact of liability is conclusively established. The defendants having requested the court to direct a verdict in their favor, and the court having instructed the jury to find for the plaintiff, on his motion, the defendants must be regarded as having submitted all controverted facts to the court for decision; no request having been made by them, after their motion for a directed verdict had been over-ruled, that any question of fact be submitted to the jury. It follows that if there is any evidence at all to support the verdict, in point of damages, the judgment must be affirmed. The defendants by their motion took the position that there was no question of fact which they desired to have submitted to a jury, and cannot complain of the decision of any question of fact on which the evidence is conflicting which the court must be regarded as having made by instructing the jury to find for the plaintiff. After a party has moved the court that the jury be instructed to render a verdict in his favor, he must, if the court denies his motion, specifically request that there be submitted to the jury the questions of facts which he desires to have so submitted. Otherwise he is deemed to have acquiesced in the decision of such questions by the court, and, if the court directs a verdict in favor of the other party, on his motion, the defeated litigant is not in a position, in case of his failure to make such requests, to claim that any issue upon which the evidence is conflicting should have been left to the decision of the jury. 2 Thomp. Trials, § 2272; *Mayer* v. *Dean*, 115 N. Y. 550, 22 N. E. Rep. 261; *Provost* v. *McEncroe*, 102 N. Y. 650, 5 N. E. Rep. 795; *Winchell* v. *Hicks*, 18 N. Y. 558; *Colligan* v. *Scott*, 58 N. Y. 670; *Merwin* v. *Magone*, 17 C. C. A. 361, 70 Fed. Rep. 776; *Beuttell* v. *Magone*, 157

U. S. 154, 15 Sup. Ct. 566; *Chrystie* v. *Foster*, 9 C. C. A. 606, 61 Fed. Rep. 551; *Sutter* v. *Vanderveer*, 122 N. Y. 652, 25 N. E. Rep. 907. It follows, as we have already said, that, if there is any evidence in the case tending to prove the amount of damages for which the verdict was directed, the defendants, not being in a position to complain that that question was not settled by the jury, are bound by the finding of the trial court, just as they would have been bound had the verdict been voluntarily rendered by the jury. On the 9th of September, plaintiff sold 5,000 bushels of flax, through brokers in Duluth, and realized 84 cents a bushel from the sale. While this evidence was perhaps competent to prove the value of the flax on the 9th of September, it has no tendency to prove its value at such a time after September 30th as would have sufficed for the seller, acting with reasonable diligence, to affect a sale. Sections 4988, 5009, Rev. Codes, fix the measure of damages in such cases. They provide as follows:

"Sec. 4988. The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is not vested in him is deemed to be: (1) If the property has been resold pursuant to § 4833 the excess, if any, of the amount due from the buyer under the contract, over the net proceeds of the resale; or, (2) if the property has not been resold in the manner prescribed by § 4833 the excess, if any, of the amount due from the buyer under the contract, over the value to the seller together with the excess, if any, of the expenses properly incurred in carrying the property to market over those which would have been incurred for the carriage thereof, if the buyer had accepted it."

"Sec. 5009. In estimating damages the value of property to a seller thereof is deemed to be the price which he could have obtained therefor in the market nearest to the place at which it should have been accepted by the buyer, and at such time after the breach of the contract as would have sufficed with reasonable diligence for the seller to effect a resale."

In this case, there being no evidence tending to prove the

value of the property at Kelso at such time after September 30th as would have sufficed, with reasonable diligence, for the plaintiff to effect a sale thereof, the court had no basis, even on the theory that all issues of fact were submitted to it for decision, for finding the value of the flax at that time. The state of the evidence was such that the plaintiff, while establishing a breach of the contract, had failed to show any actual damages. On the evidence as it stood, the most the plaintiff could have recovered was nominal damages. For the error of the court in directing a verdict for the plaintiff on the theory that the price realized by him on the sale of the flax in Duluth fixed the measure of his damages, the judgment and the order denying a motion for a new trial are reversed, and a new trial is ordered. Under the facts of this case, the proper measure of damages is the difference between the price agreed to be paid for the flax and its market value at Kelso, at such time after September 30th as would have sufficed, with reasonable diligence, for the plaintiff to effect a sale thereof, and the excess of expense, if any, mentioned in § 4988, Rev. Codes. See Rev. Codes, § 5009.

(72 N. W. Rep. 938.

HERBERT ROOT *vs.* RODERICK ROSE, *et al.*

Opinion filed October 18th, 1897.

Malicious Prosecution—Probable Cause.

In an action for malicious prosecution, probable cause is, as a general rule, conclusively established by the fact that in the proceeding charged to have been instituted and carried on without probable cause the decision was adverse to the defendant therein, despite the fact that such decision has been reversed, and such defendant has finally succeeded in the case.

Conviction Procured by Fraud Not Conclusive.

If, however, the prosecutor of such proceeding (the defendant in the action for malicious prosecution) procured the decision therein through fraud, such decision is not conclusive on the question of probable cause.

Conclusiveness of Court's Finding After Reversal.

Where, upon uncontroverted facts, a prosecution to punish a person for contempt, and to disbar him, was set on foot, *held* that the decision of the District Court that such facts warranted a conviction for contempt and the disbarment of the defendant is conclusive on the question of probable cause, although such decision was subsequently reversed by the Supreme Court.

Judge Not Liable to Civil Action for Judicial Act.

The judge of a superior court is not liable in a civil action for damages on account of any judicial action taken by him in a proceeding before him as such judge, in which he had jurisdiction; and the fact that it is charged that he acted corruptly does not affect this principle.

Judge Acting Without Jurisdiction Not Liable.

It would seem (but the point is not decided) that, even in a case where the court of which he is judge had no jurisdiction of the subject-matter, he is not liable unless the want of jurisdiction is so palpable that it is obvious that he could not honestly assume to act as judge in such matter.

Effect of Allegation of Official Misconduct.

The fact that it is alleged that the judge who rendered the decision which was afterwards reversed not only acted carruptly in deciding the case, but also was himself one of the instigators of the prosecution, does not establish any cause of action against him. Probable cause being shown by the decision against the plaintiff in the suit for malicious prosecution, it is not competent to prove the misconduct of the judge as a ground for overthrowing the conclusive force of such decision on the question of probable cause.

Appeal from District Court, Barnes County; *Glaspell*, J.

Action by Herbert Root against Roderick Rose, Herman

Winterer, E. H. Briggs, and Herman O. Sterl. Judgment for defendants upon their demnrrer to the complaint dismissing plaintiff's action. Plaintiff appeals.

Affirmed.

Herbert Root, for appellant.

The complaint avers a conspiracy to unlawfully vex, annoy, persecute and damage plaintiff in his person and property. This is an actionable wrong. *Stewart* v. *Cooley*, 23 Minn. 347. This court has held that defendants' acts were not "due process of law." *State* v. *Root*, 5 N. D. 487, 67 N. W. Rep. 590. Judges are liable for civil damages when acting without jurisdiction of the subject-matter. *Bradley* v. *Fisher*, 13 Wall. 335; *Lange* v. *Benedict*, 73 N. Y. 12; *McCall* v. *Cohen*, 16 S. C. 444; *Busteed* v. *Parsons*, 54 Ala. 393, 12 A. & E. Enc. L. 33; *Calder* v. *Halkett*, 3 Moore's Privy Coun. Cas. 73; 1 Addison on Torts, § 697 pg. 651; 3 Lawson R. R. & Pr. 1841, § 1075; Bigelow on Torts 125; Jaggard on Torts 123. The officers who enforced the void order are also liable. *Bigelow* v. *Stearns*, 19 Johns 39; *Savacal* v. *Boughton*, 5 Wend. 172; *Com.* v. *Martin*, 105 Mass. 178; *Vredenburgh* v. *Hendricks*, 17 Barb. 183, 22 A. & E. Enc. L. 531; *Batchelder* v. *Currier*, 45 N. H. 460.

Roderick Rose, and *Winterer & Winterer* for respondent.

The District Court had jurisdiction of the subject-matter of contempts. Sections 5112, 5222, 5251, 5174, 5185, 7200, and 7850, Comp. Laws. Also over the subject-matter of the disbarment of attorneys. Sections 472, 477, Comp. Laws. Jurisdiction of the subject-matter is the power lawfully conferred to deal with the general subject involved in the action. *Hunt* v. *Hunt*, 72 N. Y. 217; *Cooper* v. *Reynolds*, 10 Wall. 308; Mechem on Public Officers 625; 1 Beach Eq. Pr. 13; Cooley Const. Lim. 499. The defendant Rose cannot be held liable in damages for an act done by him as judge, however erroneous the act may have been. *Bradley* v. *Fisher*, 13 Wall. 335; *Yates* v. *Lansing*, 5 Johns 291; *Lang* v. *Benedict*, 73 N. Y. 12; *Cooke* v. *Bangs*, 31 Fed. Rep. 640; *Stewart* v.

Cooley, 23 Minn. 347; *Terry* v. *Wright*, 47 Pac. Rep. 905; *Busted* v. *Parsons*, 25 Am. Rep. 688; *Austin* v. *Vrooman*, 28 N. E. Rep. 477; *State* v. *Wolever*, 26 N. E. Rep. 762; *Rains* v. *Simpson*, 32 Am. Rep. 609; *Hughes* v. *McCoy*, 19 Pac. Rep. 674; *Irwin* v. *Lewis*, 56 Ala. 190; *Kress* v. *State*, 65 Ind. 106; *Turpen* v. *Booth*, 56 Cal. 65; *Weaver* v. *Devendorf*, 3 Den. 114; *Stone* v. *Graves*, 8 Mo. 148; *Londegan* v. *Hammell*, 30 Ia. 508; *Booth* v. *Kurrus*, 55 N. J. L. 370, 26 At. Rep. 1013; *Bamster* v. *Wakeman*, 23 At. Rep. 385; Cooley on Torts, 403–416. Judges are not liable in damages for acts in excess of but not in complete absence of jurisdiction. *State* v. *Wolever*, 26 N. E. Rep. 762; *Pickett* v. *Wallace*, 57 Cal. 555; *Rutherford* v. *Holmes*, 66 N. Y. 368; *Truesdale* v. *Combs*, 33 Ohio St. 186; *Bigelow* v. *Stearns*, 19 Johns 38; *Piper* v. *Pearson*, 2 Gray 120. Officers as essential parts of the court are likewise exempt from civil liability. *Taylor* v. *Bidwell*, 65 Cal. 489, 4 Pac. Rep. 491; *Bostwick* v. *Lewis*, 2 Day (Conn.) 447; *Dunlap* v. *Glidden*, 31 Me. 435; *Severance* v. *Jedkins*, 73 Me. 376; *Garing* v. *Frazer*, 76 Me. 37; *Phelps* v. *Stearns*, 4 Gray 105; *Curtis* v. *Fairfield*, 16 N. H. 542; *Smith* v. *Lewis*, 3 Johns 157; *Jones* v. *McCaddin*, 34 Hun. 632; *Cunningham* v. *Braun*, 18 Vt. 123; *Bell* v. *Senneff*, 83 Ill. 122; *Turpen* v. *Booth*, 56 Cal. 68; *Downs* v. *Lent*, 6 Cal. 95; *Gordon* v. *Farren*, 2 Dougl. (Mich.) 411, 1 Waits Pr. 227. The defendant Winterer as states attorney cannot be held liable for his official act, because the court had jurisdiction of the case and he cannot be held liable for executing the court's order. Bishop's Non-Contract Law 792. *Marks* v. *Townsend*, 97 N. Y. 590; *Melten* v. *Adams*, 52 N. Y. 409; *Murphy* v. *Walters*, 34 Mich. 180; *Fenelon* v. *Butts*, 49 Wis. 342; *Hahn* v. *Schmidt*, 64 Cal. 284; *Fisher* v. *Langbein*, 103 N. Y. 84; *Dusy* v. *Helin*, 59 Cal. 188. The defendant Sterl, as clerk of court, cannot be held liable, the rule is that "a ministerial officer who performs in the prescribed manner and with due care and diligence an act imposed by law incurs no liability to an individual injured thereby." Mechem on Pub. Officers § 661; *Highway Com'rs.* v. *Ely*, 54 Mich. 175; *Sage* v.

Laurain, 19 Mich. 137; 1 Jaggard on Torts 127. The same protection extends to the sheriff. Mechem on Pub. Officers, §§ 745, 768; Cooley on Torts 460. The charge of conspiracy in the complaint does not change the nature of the action or add to its legal effect. The test as to whether such action will lie is whether or not the act accomplished after the conspiracy has been formed is itself actionable. *Delz* v. *Winfre*, 80 Tex. 400, 26 Am. St. Rep. 755; *Robertsou* v. *Parks*, 24 At. Rep. 411; *Kimball* v. *Harman*, 6 Am. Rep. 340; *Laverty* v. *Vanarsdale*, 65 Pa. St. 507; *Hutchins* v. *Hutchins*, 7 Hill 104; Cooley on Torts 125; *City* v. *Simmons*, 23 N. E. Rep. 211; *Race* v. *Coolidge*, 121 Mass. 393; *Van Horn* v. *Van Horn*, 20 At. Rep. 485; *Stevens* v. *Rowe*, 59 N. H. 578. The allegation of conspiracy is mere surplusage, and is not necessary to support the action. *Mapstrick* v. *Ramge*, 9 Neb. 390; *Strout* v. *Packard*, 76 Me. 156; *Laverty* v. *Vanarsdale*, 65 Pa. St. 507; *Hutchins* v. *Hutchins*, 7 Hill 104; *Verplanck* v. *Van Buren*, 76 N. Y. 259; *Jones* v. *Baker*, 7 Cow. 445; *Sheple* v. *Page*, 12 Vt. 519. Proof of conspiracy is not necessary to a recovery even when alleged. *Buffalo L. O. Co.* v. *N. Y. S. O. Co.*, 42 Hun. 156; *Buffalo L. O. Co.* v. *Everest*, 30 Hun. 586; *Hutchins* v. *Hutchins*, 7 Hill 167; *Van Horn* v. *Van Horn*, 56 N. J. L. 318.

CORLISS, C. J. The complaint in this case presents, upon a superficial reading of it, a strange medley of conspiracy, false imprisonment, malicious prosecution, slander, and other unlawful invasions of the plaintiff's rights. Distinct causes of action appear to succeed each other in rapid succession, each making its separate claim for heavy damages for the wrong it essays to charge against the parties to this alleged conspiracy, the defendants in this case. If the sufficiency of the pleading is to be tested by the number and character of the adjectives employed by the pleader, —if the marshaling of a formidable array of intense epithets can obscure or change the character of the facts which are spread upon the face of the complaint, or alter the legal rules which apply to such facts, then, indeed, has the plaintiff stated a cause of action entitling him, if sustained by evidence, to the recovery

of very heavy damages. A dark and foul conspiracy has been formed and executed by the defendants, having for its object the malicious prosecution of the plaintiff, his unlawful arrest, his incarceration in a noisome prison, the defamation of his character, and the wresting from him of the privilege of following the profession of the law for a livelihood by accomplishing his disbarment. So runs the complaint in its theory. But when we read its admitted facts in the light of legal principles hoary with time and of universal recognition, we can find nowhere within its four corners any charge of an actionable wrong. An examination of the pleading as a whole discloses the fact that there is only one conspiracy alleged, and only one series of acts performed in furtherance thereof. Therefore all artificial lines dividing the complaint into different causes of action must be obliterated. With these arbitrary barriers removed, and the facts stripped of the disguise of verbiage by which the plaintiff has attempted to alter their character and legal effect, we find ourselves in the presence of a very simple case. The defendants are charged with having confederated together for the unlawful purpose of harassing and damaging the plaintiff by means of certain proceedings in court; and it is alleged that in pursuance of said conspiracy the defendants procured from third persons certain affidavits, and on the basis of such affidavits had the plaintiff prosecuted for contempt of court, and to secure his disbarment as a practicing attorney; that, as a result of such prosecution, he was imprisoned, and finally adjudged guilty of contempt of court, and disbarred; that on appeal to the Supreme Court the judgment in the disbarment proceedings and the order in the contempt proceedings were reversed; and that ultimately such proceedings terminated in his favor. It is thus seen that the action is for malicious prosecution, and for malicious prosecution only. There was no false imprisonment, for plaintiff's arrest was in a proceeding in court over which the court had jurisdiction, and, in which an arrest was proper, so far as the contempt proceedings were concerned.

The charge of conspiracy adds nothing to the case. A con-

spiracy, if proved, might augment the damages; but it would not of itself transmute nonactionable into actionable facts. If that which was in fact done by the conspirators was not a legal wrong, the circumstance that the defendants entered into a confederation to accomplish the result which actually was accomplished, and that all that was done was done under and in furtherance of the conspiracy, is entirely immaterial. *Delz* v. *Winfree*, 80 Tex. 400, 16 S. W. Rep. 111; *Kimball* v. *Harman*, 34 Md. 407; *Hutchins* v. *Hutchins*, 7 Hill, 104; Cooley, Torts, 125; *City of Boston* v. *Simmons*, (Mass.) 23 N. E. Rep. 211; *Rice* v. *Coolidge*, 121 Mass. 393; *Van Horn* v. *Van Horn* (N. J. Sup.) 20 Atl. Rep. 485; *Stevens* v. *Rowe*, 59 N. H. 578; *Robertson* v. *Parks*, 76 Md. 135, 24 Atl. Rep. 411; *Lavarty* v. *Vanarsdale*, 65 Pa. St. 507.

It is doubtful whether the complaint contains a sufficient allegation as to want of probable cause; but it is immaterial whether it does or not for it also contains another averment which is fatal to that allegation. The plaintiff himself sets forth the facts that the decision of the District Court in both the contempt and the disbarment proceedings was adverse to him; and that it was only after an appeal that it appeared that he should not have been punished for contempt, and aught not to have been disbarred. Having failed to allege that the judgment against him was obtained by the unfair devices of the defendants, or any of them, imposing upon the court, and deceiving it as to the facts, his admission that the original decision was against him is conclusive on the point that there was probably cause for the contempt and disbarment proceedings complained of. Here was no misrepresentation as to facts by the defendants knowing them to be false, no artifices used by them to keep witnesses from the court, no fraudulent practices preventing an investigation of the case on its merits; but only the insistence by them on conceded, or at least uncontroverted facts, that the plaintiff had rendered himself amenable to the court for contempt, and had forfeited his privilege to pursue further the practice of the law. Plaintiff does not claim that the facts which were presented against him were false,

but only that they did not in law constitute a sufficient ground for an adverse decision in either of the proceedings which were in fact instituted against him. The basis of his claim is that the defendants set on foot a prosecution which they had no right to assume could be maintained under the law, but which a court of competent jurisdiction decided to be well supported by legal rules and principles. That the decision of the District Court that the facts established, and which are not here controverted, constituted a good reason in law for the judgment which was rendered in the contempt and disbarment proceedings is conclusive in this action on the question of probable cause, has the support of an unbroken line of adjudications from the decision in *Reynolds* v. *Kennedy*, 1 Wils. 232, to the present time. *Whitney* v. *Peckham*, 15 Mass. 243; *Burt* v. *Place*, 4 Wend. 591; *Boogher* v. *Hough*, 99 Mo. 183, 12 S. W. Rep. 524; *Crescent City Live-Stock Co.* v. *Butchers' Union Slaughter-House Co.*, 120 U. S. 141, 7 Sup. Ct. 472; *Herman* v. *Brookerhoff*, 8 Watts. 240; *Griffis* v. *Sellars*, 15 N. C. 177; *Spring* v. *Besore*, 12 B. Mon. 551; *Witham* v. *Gowan*, 14 Me. 362; *Payson* v. *Caswell*, 22 Me. 212; *Bacon* v. *Towne*, 4 Cush. 217; *Parker* v. *Huntington*, 7 Gray, 36; *Clements* v. *Excavating Co.* (Md.) 10 Atl. Rep. 442; *Phillips* v. *Village of Kalamazoo*, (Mich.) 18 N. W. Rep. 547; *Morrow* v. *Manufacturing Co.* (Mass.) 43 N. E. Rep. 105; *Dennehy* v. *Woodsum*, 100 Mass. 195; *Adams* v. *Bicknell* (Ind. Sup.) 25 N. E. Rep. 804; *Palmer* v. *Avery*, 41 Barb. 290; *Miller* v. *Deere*, 2 Abb. Prac. 1; *Womack* v. *Circle*, 32 Grat. 324; *Kaye* v. *Kean*, 18 B. Mon. 839; *Welch* v. *Railroad Corp.*, 14 R. I. 609; Cooley, Torts, 185; Newell, Mal. Pros. 291 *et seq.*; *Bitting* v. *Ten Eyck*, 82 Ind. 421. See, also, *Womack* v. *Circle*, 29 Grat. 192; *Kirkpatrick* v. *Kirkpatrick*, 39 Pa. St. 288; *Ross* v. *Hixon* (Kan. Sup.) 26 Pac. Rep. 955. No different doctrine was established in *Goodrich* v. *Warner*, 21 Conn. 432. All that was claimed there was that an adverse decision was, after reversal, at least some evidence of probable cause. Whether it would be conclusive evidence in the absence of fraud on the part of the defendant in the action for malicious prosecution was not involved. Nor do the decisions in Iowa,

although departing somewhat from the doctrine supported by the overwhelming weight of authority, lay down any rule which would take from the judgment rendered in the contempt and disbarment proceedings, despite the subsequent reversal thereof, its force as conclusive evidence of probable cause. Here, then, is no possibility of claiming that the decision was brought about by the wrongful conduct of the defendants causing an error as to the facts, for the theory of the case is that the ground of reversal was that the conceded facts did not justify the judgment rendered. The solemn judgment of the court in a proceeding that uncontroverted facts establish a particular liability should, although reversed by a higher tribunal, be conclusive evidence that those who instituted the proceeding had probable cause for believing that such facts created such liability. An examination of the Iowa cases will disclose the fact that they enunciate no principle which is inimical to our decision on this branch of the case. *Olson* v. *Neal* (Iowa) 18 N. W. Rep. 863; *Bowman* v. *Brown* (Iowa) 3 N. W. Rep. 609; *Moffat* v. *Fisher*, 47 Iowa, 473.

These considerations dispose of the case so far as three of the defendants are concerned. The action is against the sheriff, the state's attorney, and the clerk of the District Court of Barnes county, in this state, and also the Honorable Roderick Rose, formerly district judge of the Fifth judicial district, which includes within its boundaries the County of Barnes. The clerk, sheriff, and state's attorney are clearly not liable. The only remaining question is whether the complaint sets forth a liability with respect to Judge Rose. That for any judicial act the judge of a superior court can never be held responsible in a civil action for damages, even when he acts corruptly, is one of the elements of the common law, and on its unimpaired preservation rests the security of republican government. The reasons which underlie this great and salutary principle have been so often marshaled by abler pens, that nothing will excuse the reiteration of them here. Cooley, Torts, 403 *et seq.*; *Lange* v. *Benedict*, 73 N. Y. 12; *Bradley* v. *Fisher*, 13 Wall. 335; *Grove* v. *Van Duyn*, 44 N. J. Law, 654;

Terry v. *Wright*, (Colo. App.) 47 Pac. 905; *Banister* v. *Wakeman*, 64 Vt. 203, 23 Atl. Rep. 585; *Booth* v. *Kurrus*, 55 N. J. Law, 370, 26 Atl. Rep. 1013; *Stewart* v. *Cooley*, 23 Minn. 347; *Rains* v. *Simpson*, 50 Tex. 495; *Fray* v. *Blackburn*, 3 Best & S. 576; *Randall* v. *Brigham*, 7 Wall. 523; *Munster* v. *Lamb*, 49 Law T. (N. S.) 253; *Cooke* v. *Bangs*, 31 Fed. Rep. 640; *Yates* v. *Lansing*, 5 Johns, 281; *State* v. *Wolever* (Ind. Sup.) 26 N. E. Rep. 762; *Austin* v. *Vrooman*, (N. Y. App.) 28 N. E. Rep. 477.

The single inquiry is left whether the fact that it is averred that Judge Rose instigated the prosecution against the plaintiff renders him liable when, but for this fact, he could not be sued. It is obvious that, if Judge Rose had caused a proceeding of the character carried on before him to be commenced before another district judge, he (Judge Rose) would not have been liable under the facts of this case, however wrongful the motive of the other district judge might have been in rendering a decision against the plaintiff in such proceeding. No inquiry can be made into the honesty of the decision of a court when that decision is interposed as conclusive evidence of probable cause. Said the court in *Crescent City Live-Stock Co.* v. *Butcher's Union Slaughter-House Co.*, 120 U. S. 141, 7 Sup. Ct. 472: "But the rule in question, which declares that the judgment or decree of a court having jurisdiction of the parties and of the subject-matter in favor of the plaintiff is sufficient evidence of probable cause for its institution, although subsequently reversed by an appellate tribunal, was not established out of any special regard to the person of the party. As we have already seen, it will avail him as a complete defense in an action for a malicious prosecution, although it may appear that he brought his suit maliciously for the mere purpose of vexing, harassing, and injuring his adversary. The rule is founded on deeper grounds of public policy in vindication of the dignity and authority of judicial tribunals constituted for the purpose of administering justice according to law, and in order that their judgments and decrees may be invested with that force and sanctity which shall be a shield and protection to all parties and

persons in privity with them. The rule, therefore, has respect to the court, and to its judgment, and not to the parties, and no misconduct or demerit on their part, except fraud in procuring the judgment itself, can be permitted to detract from its force. It is equally true and equally well settled in the foundations of the law that neither misconduct nor demerit can be imputed to the court itself. It is an invincible presumption of the law that the judicial tribunal, acting within its jurisdiction, has acted impartially and honestly. The record of its proceedings imports verity. Its judgments cannot be impugned except by direct process from superior authority. The integrity and value of the judicial system as an institution for the administration of public and private justice rests largely upon this wholesome principle." See, also, *Bacon* v. *Towne*, 4 Cush. 217, 236. As Judge Rose would not be liable at all in the supposed case, it is plain that the only ground on which he can be held liable in the case at bar is that he himself was guilty of corruption in the decision of the contempt and disbarment proceedings against the plaintiff. It is thus made apparent that the real foundation of the recovery against Judge Rose sought by this suit is the alleged misconduct of a judge of a court of superior jurisdiction in this state while acting in the performance of the duties imposed upon him by law. Of what value to the public interests is the rule which throws absolute immunity around judicial officers if it is to be gradually frittered away by exceptions of the character which it is here urged take this case out of the general rule. Proof that a judge instigated a prosecution is no more than evidence of malice and corruption at the most. But the law will not permit these facts, or any facts, to be established against a judge as the basis of civil liability for misconduct in the performance of his judicial duties. It is strictly in the line of a judge's duty to see to it that proceedings to punish for contempt and proceedings to disbar dishonest attorneys are instituted by the proper persons or authorities. A judge having knowledge of facts, or believing that there exist facts, warranting the punishment of a person for contempt of court, or calling for

the disbarment of an attorney at law, certainly owes a duty of appraising the proper officer, or some suitable person or body, of such facts, and urging that steps be taken to vindicate the supremacy of the law. He cannot himself institute or carry on such proceedings. And yet how can he discharge his duty with fidelity to the large public interests at stake in cases of this kind if he may be called to account for his conduct, and made to pay heavy damages, because a jury shall forsooth guess that he acted corruptly, and not for the general good? It is urged that Judge Rose is liable because he did not have jurisdiction of the subject-matter. Where there is a palpable want of jurisdiction over the subject-matter,—as in case a county judge should try a person for murder,—it might be claimed that he did not in fact act as a judge, and could not have considered that he was so acting. But we do not wish to be understood as holding that in every case where the court has no jurisdiction of the subject-matter the judge thereof is liable for acts performed by him as judge. It will not do to assert that he never can act as judge where he has no jurisdiction of the subject-matter, as the question whether such jurisdiction exists is not infrequently a question difficult of solution, and in every instance a judge does in fact act as a judge in determining whether, in the particular case, jurisdiction over the subject-matter exists, unless perhaps in those rare instances in which the assumption of jurisdiction is so extravagant as to preclude any possibility that the judge ever thought he was acting as such. See *Bradley* v. *Fisher*, 13 Wall. 335; *Lange* v. *Benedict*, 73 N. Y. 12; *Grove* v. *Van Duyn*, 44 N. J. Law, 654. However, we need express no opinion on this point whether a judge can claim protection when it is finally established that he had no jurisdiction over the subject-matter. In the case at bar the jurisdiction of the District Court over the general subject-matter of punishing for contempt of court, and over proceedings for the disbarment of attorneys, at the time such proceedings were instituted, does not admit of question. This constitutes jurisdiction over the subject-matter. *Hunt* v. *Hunt*, 72 N. Y. 217; *Cooper* v.

Reynolds, 10 Wall. 308, 316; *Lange* v. *Benedict*, 73 N. Y. 12. Whether the facts set forth in those proceedings presented a case of contempt of court or a case warranting the disbarment of the plaintiff, was a question of law to be decided by the court, the same as any other legal question; but the decision was made in a case in which full jurisdiction over the person and the subject-matter was by law vested in the court rendering such decision. We deem it due to Judge Rose to say that there was nothing in the decision by him of the contempt and disbarment proceeding, which was subsequently reversed by this court, savoring in the remotest degree of corruption or misconduct in office

The order sustaining the demurrer to the complaint and the judgment based thereon are affirmed. All concur.

(72 N. W. Rep. 1022.)

STATE *ex rel* ARTHUR TOMPTON *vs.* DAVID DENOYER, *et al.*

Opinion filed November 1st, 1897.

Allotment Indians—Voting Precincts—Mandamus.

Where certain territory was situated within the limits of the County of Benson, in this state, and also within the limits of the Devils Lake Indian Reservation, and where said territory had, under an act of congress, been allotted to certain Indians and persons of Indian descent in severalty, and the preliminary patent therefore issued to such persons, and where said persons were living upon their respective allotments, and farming the same, it was the duty of the county commissioners of Benson county to establish a voting precinct within or for said territory.

Indians Citizens of the United States.

Such Indians and persons of Indian descent, so residing upon lands allotted to them in severalty, and upon which the preliminary patents had been issued, are citizens of the United States, and qualified electors of this state.

Void Legislation.

Section 480, Rev. Codes, in so far as it is a restriction upon the right of suffrage, as defined in § 121 of the Constitution of this state, is unconstitutional and void, as not having been adopted by a majority of the voters of this state, voting at a general election, as provided by § 122 of said Constitution.

Appeal from District Court, Benson County; *Morgan*, J.

Application by the State of North Dakota, on the relation of

Arthur Tompton and others, for a writ of mandamus to David Denoyer and others, county commissioners of Benson county.

Judgment for plaintiff awarding peremptory writ of mandamus and defendants appeal.

Modified.

O. D. Comstock, *E. S. Rolfe*, (*Cochrane & Feetham* of counsel) for appellant.

The people of the state have disclaimed all right and title to all lands owned or held by any Indian or Indian tribes within the state. Subdivision 2, § 4, Enab. Act. Subdivision 2, § 203 Const. The allotment of lands in the reservation has not terminated the tribal relations of the Indians. *U. S.* v. *Flournoy*, 71 Fed. Rep. 578. And the United States has never been released from the obligations by which it assumed to preserve these lands for the use and benefit of the Indians. *U. S.* v. *Mullin*, 71 Fed. Rep. 682; *U. S.* v. *Flournoy*, 69 Fed Rep. 892. The title to the land is in the United States. *U. S.* v. *Mullin*, 71 Fed. Rep. 684; *U. S.* v. *Flournoy*, 69 Fed. Rep. 892; *Beck* v. *Flournoy*, 65 Fed. Rep. 35. And the Indian agents have a right to remove all persons upon the reservation contrary to law. *Eells* v. *Ross*, 64 Fed. Rep. 419. State process cannot run there at all in civil or other cases but by a special exception or reservation in the cession. *U. S.* v. *Ames*, 24 Fed. Cases, 14441. The words "absolute jurisdiction and control of congress" as used in the Constitution and Enabling Act mean "exclusive jurisdiction" for all purposes except taxation. *Truscott* v. *Hurlbut*, L. & C. Co. 73 Fed. Rep. 64; *Ry. Co.* v. *Fisher*, 116 U. S. 28, 6 S. C. Rep. 246. And jurisdiction to punish other than Indians for crimes committed on this territory. *Draper* v. *U. S.*, 164 U. S. 910, 17 S. C. Rep. 107; *U. S.* v. *Thomas*, 151 U. S. 577, 14 S. C. Rep. 426; *U. S.* v. *Kagama*, 6. S. C. Rep. 1109; *U. S.* v. *McBrutney*, 104 U. S. 621. The states wherein governmental establishments exist, if jurisdiction over them has been ceded away do not regard them or their occupants as subject to state control. The inhabitants cannot vote or be taxed, nor are they

bound by state laws. *Com.* v. *Clarey*, 8 Mass. 72; *U. S.* v. *Ames*, 24 Fed. Cases 788; *Sinks* v. *Reese*, 19 Ohio St. 306; *U. S.* v. *Cornell*, 25 Fed. Cases 648; *Peo.* v. *Godfrey*, 17 Johns 225; *U. S.* v. *Partello*, 48 Fed. Rep. 676; *U.* S. v. *Bevens*, 3 Wheat 388; *Mitchell* v. *Tibbetts*, 17 Pick 298; *Re Town of Highlands*, 22 N. Y. Supp. 137; *Fort Leavenworth Ry. Co.* v. *Lowe*, 5 S. C. Rep. 1002, 6 Op. Atty's Gen'l. 577; *Lasher* v. *State*, 17 S. W. Rep. 1064. Mandamus will not issue to compel the defendants to perform a function not within the line of their official duties. *McDermont* v. *Dinnie*, 6 N. D. 278, 69 N. W. Rep. 294; *State* v. *Getchel*, 3 N. D. 243, 55 N. W. Rep. 585. The discretion of defendants could in no wise be controlled as to the place they should designate as a polling place. In *Re McCain*, 68 N. W. Rep. 163; *Heintz* v. *Moulton*, 64 N. W. Rep. 135; High Ex. Rem. § 34; Merrill on Mandamus, § 110.

Tracy R. Bangs, for respondent.

Section 480, Rev. Codes, passed in 1885, is an attempted restriction upon the right of suffrage, and conflicts with § 122 Const. and is void. The enabling act does not deprive the courts of the state of jurisdiction over the Indian reservation, or over its citizens located thereon. *Draper* v. *U. S.*, 164 U. S. 240; *U. S.* v. *McBratney*; 104 U. S. 621. The duty is imposed by statute upon the county commissioners to provide election precincts. Section 481 Rev. Codes. Section 2005 Rev. Stat. of U. S. These relators are citizens and entitled to vote. Supp. Rev. Stat. U. S. 536; *State* v. *Morris*, 55 N. W. Rep. 1086; *State* v. *Frazier*, 44 N. W. Rep. 471, 28 Neb. 438; *Painter* v. *Ives*, 4 Neb. 128.

BARTHOLOMEW, J. The relators herein are Indians or persons of Indian descent. The defendants are the county commissioners of Benson county, in this state. Relators applied to the proper District Court, by petition, for a writ of mandamus requiring the defendants to establish a voting precinct for certain described territory. The alternative writ was issued, and upon the return day the defendants appeared and made answer. The matter was submitted to the District Court upon stipulated facts, and on

such facts the court issued its peremptory writ, requiring the defendants to establish a voting precinct at a designated point. The question sought to be settled in this litigation is the right of relators to vote in this state. As the question pertains to the sovereign right of suffrage, it is of importance, not only to these relators, but to the state at large; and it has been presented to this court with an ability commensurate with its importance. From the stipulated facts it appears that the territory within and for which the election precinct is desired forms a part of Benson county, and is also within the limits of the Devils Lake Indian Reservation; the defendants, as commissioners of said county, held regular sessions for the transacion of business after January 1, 1896, and prior to the application for the writ, but failed to establish any voting precinct within or for the specified territory; that the relators and many other Indians and persons of Indian descent reside upon the lands described in the petition for the writ; that said lands have been allotted to them in severalty, under certain specified acts of congress; that they have received patents therefor from the United States, as provided in said act of congress; that they reside upon the tracts of land allotted and patented to them severally, and have made improvements thereon, and are engaged in farming and stock raising; that they are not supported in whole or in part by the United States, but support themselves by their aforesaid avocations; that they fulfill all the requirements of said act of congress as to birth, age and residence, and all the residence requirements of the laws of North Dakota, to constitute them legal voters. It also appears that a petition was presented to the defendants praying the establishment of a voting precinct for said territory, and that said petition was denied, while election precincts had been established for all the remaining portions of said Benson county; that relators belong to the Wahpeton and Sisseton bands of Sioux Indians, and that on said reservation there are three persons known as "chiefs," one being hereditary, and two tribal elective chiefs, and that these chiefs exercise sway, so far as the customs and authority per-

mitted to be exercised are concerned, in the same manner that Indian chiefs ruled in years gone by; that the lands allotted to the petitioners have never been taxed in said county, nor have the petitioners ever been taxed in any way in said county. Under these facts and the law, appellants claim that the congress of the United States had exclusive jurisdiction over the territory sought to be included within the said election precinct, and that appellants, as such commissioners, had no right or authority to establish a voting precinct thereon.

The second subdivision of § 4 of the Enabling Act approved February 22, 1889, and under which North Dakota, South Dakota, Montana, and Washington were admitted as states of this Union, provides: "That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States." The people of this state, by the second subdivision of § 203 in their Constitution, disclaimed all right and title to said lands in the precise terms of the Enabling Act, and declared that such Indian lands "shall remain under the absolute jurisdiction and control of the congress of the United States." Since, by the stipulation of facts, it appears that the territory in question was and is within the limits of the Devils Lake Indian Reservation, and is occupied by Indians, it is urged that it comes clearly within the Enabling Act, and is within the absolute jurisdiction of congress,—a jurisdiction so exclusive that no state or county official has any right or authority to perform any act that shall effect said territory or the persons residing thereon. Respondents deny any such extended jurisdiction. Their position is that the absolute jurisdiction and control of congress, as expressed in the Enabling Act, extends

only to the right to control the disposition of the land, and does not necessarily include exclusive jurisdiction and control of the persons occupying the land or of the personal property thereon. They claim that they are citizens of the United States residing within the State of North Dakota, and amenable to all the laws, civil and criminal, of said state, and likewise entitled to all the privileges and immunities conferred by such laws upon other citizens of the United States resident within such state. In 1887 congress passed an act generally known as the "Dawes Bill," entitled "An act to provide for the allotment of lands in severalty to Indians of the various reservations, and to extend the protection of the laws of the United States and the territories over the Indians and for other purposes. The act was approved February 8, 1887. The fifth section declares: "Upon the approval of the allotments provided for in this act by the secretary of the interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever." The sixth section reads: "Upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotment shall have been made under the provisions of this act,

or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

The facts show that lands were allotted to these respondents, under the provisions of said act, on November 1, 1892, and that what we may term the "preliminary patents" were issued to them for their respective allotments on April 10, 1893; that they are living upon the lands so allotted to them in severalty, and have improved the same, and are engaged in farming thereon, and are entirely self-supporting. It remains, then, for us to determine whether or not the act of appellants in establishing a voting precinct upon said territory would in any manner conflict with the jurisdiction of congress over said lands, and also whether or not these respondents are legal voters in the State of North Dakota. It is conceded that, under § 481, Rev. Codes, it had become the duty of appellants to divide the entire County of Benson into election precincts prior to the time this application was made, unless they were prohibited from so doing by the acts of congress and the provisions of our State Constitution heretofore mentioned. The question of the extent of the jurisdiction of congress over the lands of the United States and over Indian reservations has been often before the courts, and perhaps not with entirely uniform results. We think it must be conceded that there is a difference between lands ceded to the United States, and actually occupied as a fort, arsenal, dockyard, or some similar purpose, and the public domain generally. In the former cases jurisdiction is exclusive for all purposes. Persons residing

upon such tracts are not regarded as citizens of the state that may surround such tracts. They can claim none of the privileges and immunities given by the laws of such state. Nor can the state courts punish for any crime committed upon the tract by whomsoever committed, and, unless the right is specially reserved, state officials cannot enter upon the tract for the purpose of serving a warrant of arrest for a crime committed elsewhere, or for the purpose of serving any process whatever. *U. S.* v. *Ames*, 24 Fed. Cas. 784 (No. 14,441); *Com.* v. *Clary*, 8 Mass. 77; *Sinks* v. *Reese*, 19 Ohio St. 316; *Mitchell* v. *Tibbets*, 17 Pick 298; *In Re Town of Highlands* (Sup.) 22 N. Y. Supp. 139. But this cannot be true when we speak of the public domain generally, although the title thereto is in the United States, and congress has absolute jurisdiction and control over the disposition thereof. It is common knowledge that the political and judicial jurisdiction of a state extends in full force over all of what is generally known as the "public domain" lying within the geographical limits of such state. All state laws, civil and criminal, are enforced thereon. Improvements thereon are, under our statutes, taxed as personal property, and all personal property maintained thereon is taxable, and persons residing thereon are taxable; yet the land itself is not taxable, nor can the person residing upon such land, until the extinguishment of the title of the United States under some law of congress, do any act that shall affect such title. They cannot sell or incumber the land; yet, other conditions existing, they are none the less citizens of the United States and of the state, and are entitled to the full protection and all the privileges and immunities of the state laws, and their right to vote is never questioned because they reside upon land the title to which remains exclusively under the control of the general government.

Wherein, then, lies the difference in the jurisdiction exercised by the general government over the lands of the public domain and over Indian Reservations or Indian lands? When we turn to the Enabling Act, we see that it required the state to "forever

disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereof shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States." Thus far the statute is dealing with the title to the land only, and the unappropriated public lands and lands owned or held by an Indian or Indian tribes are placed upon the same basis or footing so far as the right of the United States to dispose of the title is concerned. But the statute immediately adds, "and that said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States." This provision applies to the Indian lands only, and it is not confined to the matter of title. It deals with a jurisdiction that extends to the lands themselves, and must have intended a more enlarged jurisdiction than was conferred by the preceding language. Does it thereby create a jurisdiction as exclusive as in cases of lands ceded to the United States by a state for specific purposes, as hereinbefore considered? The reasons which actuated congress in thus retaining the broader jurisdiction over the Indian lands are perfectly apparent. These Indian lands are now universally held by the Indians under some treaty or contract with the United States, and common good faith required congress to retaiu all the jurisdiction over these lands necessary to enable the United States to fulfill its treaty and contract obligations. Moreover, a well-recognized moral obligation rests upon the general government to care for these unfortunate wards of the nation. This duty cannot be performed unless the general government retains the right to exclude the white race from the Indian lands; otherwise the Indian will be speedily dispossessed. Government must retain the power to establish agencies, erect school houses and churches, and introduce all desired civilizing influences, without being in any manner dependent upon the state. This increased jurisdiction was required for the best welfare of the Indian, and was in line with

the government policy which seeks to convert the nomadic savage into the civilized citizen.

The powers and duties of the United States in this behalf are clearly set forth and defined in *Beck* v. *Real Estate Co.*, 12 C. C. A. 497, 65 Fed. Rep. 35, and *U. S.* v. *Flournoy Live-Stock & Real Estate Co.*, 69 Fed. Rep. 892. These cases involved the validity of certain leases made by Winnebago Indians of lands that had been allotted to them in severalty, under the provisions of the "Dawes Act"; the lands being within the limits of the Omaha and Winnebago Indian Reservation, in the State of Nebraska. The leases were held to be absolutely void, as, under the terms of the act, the United States held the title in trust for the Indians for the period of twenty-five years, and all contracts made during said period with other than native Indians were declared null and void. And the cases held that these provisions were necessary in order to enable the United States to fulfill its treaty obligations, and carry out its policy of civilizing the Indians. The case of *U. S.* v. *Mullin*, 71 Fed. Rep. 682, which arose over allotments on the same reservation, went one step further, and held that the United States was not relieved from its duties of guardianship and protection of the members of an Indian tribe, assumed by treaty with such tribe, in consequence of the Indians becoming citizens of the United States. But in neither of these cases is it decided, and in the case in 69 Fed. Judge Shiras expressly declines to decide, whether or not lands thus allotted cease to be a part of the Indian reservation. Nor do we think that question is or can be material in the case at bar, because, under the Enabling Act and under the disclaimer in our Constitution, "Indian lands," as the words are there used, include all lands "owned or held by any Indian or Indian tribes"; so that, in order that land should be under the absolute jurisdiction and control of congress, it was not necessary that it be included within any reservation, but only that it be "owned or held by an Indian." It is certainly favorable to these appellants to hold that congress has the same jurisdiction over alloted lands within the limits of an original

Indian titles by the allotments of such lands to the Indians in severalty. It provided in § 6 'that, upon the completion of said allotments and the patenting of said lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside.' But the act at the same time put limitations and restrictions upon the power of the Indians to sell, incumber, or deal with the lands thus to be allotted. Moreover, by § 4 of the act of 1887, Indians not residing on a reservation, or for whose tribe no reservation had been provided, were empowered to enter a designated quantity of unappropriated public land, and to have patent therefor; the right, however, of such Indian to sell or incumber being regulated by provisions like those controlling allotments in severalty of lands comprised within a reservation. From these enactments it clearly follows that at the time of the admission of Montana into the Union, and the use in the Enabling Act of the restrictive words here relied upon, there was a condition of things provided for by the statute law of the United States, and contemplated to arise where the reservation of jurisdiction and control over the Indian lands would become essential to prevent any implication of the power of the state to frustrate the limitations imposed by the laws of the United States upon the title of lands once in an Indian Reservation, but which had become extinct by allotment in severalty, and in which contingency the Indians themselves would have passed under the authority and control of the state. It is also equally clear that the reservation of jurisdiction and control over the Indian lands was relevant to, and is explicable by, the provisions of § 4 of the act of 1887, which allowed non-reservation Indians to enter on, and take patents for, a certain designated quantity of public land. Indeed, if the meaning of the words which reserved jurisdiction and control over Indian lands contended for by the defendant in error were true, then the State of Montana would not only be deprived of authority to punish

offenses committed by her own citizens upon Indian Reservations, but would also have like want of authority for all offenses committed by her own citizens upon such portions of public domain within her borders as may have been appropriated and patented to an Indian under the terms of the act of 1887. The conclusion to which the contention leads is an efficient demonstration of its fallacy. It follows that a proper appreciation of the legislation as to Indians existing at the time of the passage of the Enabling Act, by which the State of Montana was admitted into the Union, adequately explains the use of the words relied upon, and demonstrates that, in reserving to the United States jurisdiction and control over Indian lands, it was not intended to deprive that state of power to punish for crimes committed on a reservation or Indian lands by other than Indians or against Indians, and that a consideration of the whole subject fully answers the argument that the language used in the Enabling Act becomes meaningless unless it be construed as depriving the state of authority to it belonging in virtue of its existence as an equal member of the Union."

These authorities establish firmly the proposition that the jurisdiction reserved by the Enabling Act was not an exclusive jurisdiction. It did not take Indian lands out of the jurisdiction of the state where located, in the sense that the lands in another state are excluded. The United States retained all jurisdiction necessary for the disposition of the land and the title thereto; all jurisdiction necessary to enable it to carry out all treaty and contract stipulations with the Indians; all jurisdiction necessary to enable it to protect and civilize its unfortunate wards. But the state had jurisdiction to tax the property of its citizens within the reservation, to enter thereon for the purpose of enforcing, by levy and sale, the collection of such tax. It had jurisdiction to punish its citizens for crimes committed one against the other thereon. And the principle of these decisions logically and necessarily lead further, and give the state the right to extend to its citizens lawfully upon such Indian lands all the privileges and immunities

of the laws of the state, where the same in no manner conflict with the reserved jurisdiction of the United States. And this construction places the Enabling Act in entire harmony with the Dawes Bill. The latter declares that Indians to whom allotted lands have been patented "shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside." It follows, then, that if these relators were citizens and legal voters in this state, it was the duty of appellants to establish a voting precinct for them.

Were these relators voters? Under § 480, Rev. Codes, they would not be voters unless they had entirely abandoned their tribal relations, and were in no manner subject to the authority of any Indian chief or Indian agent. Appellants contend that, under the stipulated facts, these respondents do not fulfill the requirements of the statute. Respondents, without admitting the appellant's contention, urge that the statute itself is unconstitutional. Section 121 of our Constitution defines who shall be deemed qualified electors, and the first class is "Citizens of the United States." The sixth section of the Dawes Act declares that these relators are citizens of the United States. Hence they must be qualified electors, unless barred by § 480, Rev. Codes. Such section is clearly a restriction upon the right of suffrage, as established by said § 121 of the Constitution. But § 122 of the Constitution declares: "* * * But no law extending or restricting the right of suffrage shall be in force until adopted by a majority of the voters of the state voting at a general election." It is conceded that § 480, Rev. Codes, has never been so adopted; hence, in so far as it restricts the constitutional right of suffrage, it is of no effect. The points that we have discussed were before the Supreme Court of Nebraska in *State* v. *Norris*, 55 N. W. Rep. 1086, and the decision in that case is direct authority for the conclusions we have reached. The order of the District Court is modified in so far as it required appellants to establish a voting place at a particular point within said precinct, as that matter

rest in the discretion of appellants, and could not be controlled by mandamus.

In all other respects the order appealed from is affirmed, and the peremptory writ of mandamus, as thus modified, must be obeyed. All concur.

Modified and affirmed.

(72 N. W. Rep. 1014.)

IOWA & DAKOTA LAND COMPANY *vs.* BARNES COUNTY.

Opinion filed October 29th, 1897.

Tax Sale—Mistake of Officer—Recovery of Bid.

In 1888 the county treasurer of Barnes County sold the lands described in the complaint at a tax sale, for an alleged tax levied on the lands in 1887. The lands so sold were described upon the assessment roll, and also upon the tax duplicate delivered to the treasurer by the county clerk, by a system of arbitrary signs or symbols, which descriptions were, at a date long subsequent to said sale, held to be insufficient in law, and void, under a decision of this court. *Held*, that inasmuch as the defective descriptions of the land were placed upon the assessment roll and tax list of the county by other officials of the county, who were responsible for the descriptions, and by them delivered to the treasurer, it became the duty of the treasurer, as a ministerial officer, to sell the lands so described, upon which the tax was not paid, and that such sale, under the facts stated, was not a mistake or wrongful act of the treasurer, within the meaning of § 1629 of the Comp. Laws. No action will lie, upon such a state of facts, under said section, to recover the amount bid with interest, either against the county, or the county treasnrer who made the sale.

Appeal from District Court, Barnes County; *Rose*, J.

Action by the Iowa & Dakota Land Company against Barnes County. Judgment for defendant, and plaintiff appeals.

Affirmed.

Newman, Spalding & Phelps, for appellant.

Edward Winterer, for respondent.

WALLIN. J. This action was tried in the District Court without a jury, and comes here for a trial anew, under § 5630 of the Rev. Codes. There was a judgment below of dismissal, with costs against the plaintiff. The facts which are decisive of the case

are undisputed. Among other things, the complaint alleges that one Bensen was county treasurer of Barnes County in the year 1888, and, as such treasurer, sold the lands described in the complaint, at the annual tax sale of 1888, to one Bowdle, for alleged taxes levied against said land in the year 1887, and that Bowdle's claim against Barnes County arising on such sale has never been paid, but has been transferred to the plaintiff, and constitutes plaintiff's cause of action. The theory of the plaintiff's action is that the county treasurer sold the lands, not only without legal authority, but sold them by his own mistake or wrongful act, and that in so doing the county became liable for the principal and interest on the amount bid at such sale, and the treasurer and his official bondsmen became ultimately liable to the county for such principal and interest, under the provisions of § 1629 of the Comp. Laws, which section was in force at the time of the sale. The plaintiff's theory of the tax sale in question is embodied in the following paragraph of its complaint: "That said lands herein described were not assessed for taxation in the year 1887, and no taxes were levied thereon in that year; that in the year 1887 the auditor of said defendant, Barnes County, made out a tax list of the taxable lands in said county, which said tax list did not contain a list or description of said parcels of land hereinafter described, or of the lands for the alleged taxes on which either or any of the said parcels were so as aforesaid sold, and neither of said parcels of land was entered upon the tax list of said Barnes County for the year 1887." After alleging that the auditor of the county made out a tax list in 1887, and a duplicate thereof, and that such duplicate list was properly authenticated and delivered to the treasurer, the complaint further states that said duplicate tax list "did not contain a list or description of the pieces or parcels of land hereinafter described, or either of them." The lands referred to are described in the complaint in this action properly, and in the usual way. Issue was joined upon said averments of the complaint, and at the trial a stipulation embracing an agreed state of facts was brought up on the record, which

is substantially as follows: First. That the treasurer of Barnes county, at the tax sale in 1888, as treasurer, sold the lands described in the complaint, for taxes claimed to have been levied thereon in the year 1887, to said Bowdle, for the several sums as stated in the complaint; that tax certificates issued on said sales, and were delivered to Bowdle by said treasurer; that the sums paid the treasurer on such sales have never been repaid to said Bowdle or to the plaintiff; and that Bowdle's claim has been transferred to the plaintiff. Second. That prior to said tax sale said treasurer gave the notice of said tax sale prescribed by law, and that, among other things, said notice embodied a list of the lands in question, and a description thereof. That the asssement rolls, tax list, and duplicate tax list of Barnes county contained no other description of the lands described in the compaint for the years in question than the description set forth in the stipulation aforesaid, which description is found in Exhibit A of the stipulation, and constitutes the only description of the lands found in the assessment roll, tax list, and duplicate tax list of Barnes county for the years in question. It will be unnecessary to set out Exhibit A in full. One description will show the essential characteristics of all. The first description in said Exhibit A is as follows:

Description.	Section.	Township.	Range.
N ½ of S. E ¼	25	138	56

Plaintiff's counsel declares in his brief—and the fact is conceded—that the descriptions on the county records (*i. e.* on the tax roll, tax list, and duplicate tax list) are of the same character as those considered and held to be insufficient by this court in *Power* v. *Larabee*, 2 N. D. 141, 49 N. W. Rep. 724, and *Power* v. *Bowdle*, 3 N. D. 107, 54 N. W. Rep. 404. From this brief statement of the issues and facts in the record, it appears that this court will not be embarrassed by the presence in the record of conflicting evidence or disputed facts. It is agreed that the county treasurer sold the lands described in the complaint for alleged taxes, and for the sums alleged and set opposite such

description, and that said lands were not otherwise described on the tax records of the county at the time in question than as above set out, and that said records, one and all, contained an attempt to describe the land as above stated. But counsel, while agreeing as to the concrete facts, are wide asunder in their theories. Plaintiff's counsel insists that this court having declared in the two cases cited that just such descriptions as those existing and found upon the tax records in this case at the time of the sale were insufficient and wholly void as descriptions of land, and hence could not authorize either an assesment, levy, or tax sale, therefore the same kind of descriptions which exist in this case are not only void, but they are so void and so utterly worthless as descriptions that the records upon which the sales in question were made are, for all legal purposes, as if absolutely blank, and devoid of any attempt to describe the lands. This extreme view is combated by counsel of the defendant; his contention being that the symbol-writing descriptions found upon the records in this case, as in all the cases, are not blanks, in fact, but are attempts, though abortive, to describe the lands. In disposing of the case, it must be presumed that in this jurisdiction, as in many others, it is firmly settled, in the absence of statutory provision giving indemnity to tax-sale purchasers, that such purchasers, under the rule *caveat emptor*, take tax titles with full notice of any and all defeats in the tax proceedings which may render their titles voidable or void, and that, if the titles so acquired are set aside by the courts, the purchasers are remediless. This rule has the support of an overwhelming array of authority. It was announced by the Supreme Court of the Territory of Dakota, and this court has repeatedly recognized and applied the same rule. *McLauren* v. *City of Grand Forks*, 6 Dak. 397, 43 N. W. Rep. 710; *Budge* v. *City of Grand Forks*, 1 N. D. 309, 47 N. W. Rep. 390; *Tyler* v. *Cass Co.*, 1 N. D. 369, 48 N. W. Rep. 232. Under the doctrine of these cases, plaintiff became chargeable with nctice of the defects in the descriptions of the lands in question,—such defects being obvious, and appearing upon all the tax records, at

the time that the lands were sold to Bowdle; hence neither Bowdle or his assignee, under the rule *caveat emptor*, could recover the amount of his bids of the county. This rule is conceded by plaintiff's counsel to be settled in this state, but counsel's claim is that the county is primarily liable, under § 1629 of the Comp. Laws, which section was in force at the time of the sale, and which reads: "When by mistake or wrongful act of the treasurer land has been sold on which no tax was due at the time, the county is to save the purchaser harmless by paying him the amount of principal and interest at the rate of twelve per cent. per annum from the date of sale, and the treasurer and his sureties shall be liable for the amount to the county on his bond or the purchaser may recover the same directly from the treasurer."

It will be observed that if the plaintiff can, under this statute, recover against the county, in this action, the amount paid by him at the tax sale, with 12 per cent. interest thereon from the date of sale, under the same statute the county may recover over against the treasurer and his official bondsmen, so that ultimately the treasurer or his bondsmen must repay the amount out of their private funds. The question involved here, therefore, is of the gravest importance, especially to all persons who held the office of county treasurer while the statute was in force, and to their official bondsmen as well. The question presented for the determination of this court is whether, under said section of the statute, and upon the facts disclosed in this case, a purchaser at a tax sale can recover of the county the amount of his bid, with interest. This court has had occasion to consider and elaborately comment upon the section of the statute in question in another case. See *Tyler* v. *Cass Co.*, 1 N. D. 369, 48 N. W. Rep. 232. In that case the land which was sold was properly described upon the tax rolls, but the title of the lands, when sold by the treasurer, was vested in the United States, and for this reason the tax sale was held to be void. An action was brought against the county by the purchaser at such tax sale to recover the amount paid for the land, with interest, and the plaintiff sought to recover under

the same statute invoked by the plaintiff in this action. The case is instructive, and contains an exhaustive consideration of the statute in all of its bearings. True, the infirmity in the tax sale which defeated the same in the Tyler case was different from that existing in the sale we are considering in the case at bar. In the Tyler case it was conceded that the county officials had no right whatever to tax the lands, or place the lands on the tax rolls of the county, because the land belonged to the United States government. It was strenuously contended there, in plaintiff's behalf, that the plaintiff was entitled to recover under this statute, because the land was in fact unlawfully sold by the treasurer to the plaintiff at a time when it belonged to the government, and that such sale must have been the result either of the "mistake or wrongful act of the treasurer." This view of the statute was not sustained by this court; the court holding, in effect, that, while the tax sale was illegal and void, it did not occur on account of either the mistake or wrongful act of the treasurer, but was brought about wholly by the mistake or wrongful act of other county officials, who are directly chargeable with the duty of assessing the lands of the county for taxation, and with preparing the tax list and furnishing the treasurer with a duplicate of such list as his guide in collecting taxes, and selling property described in his list, upon which taxes became delinquent. Upon this view of the statute, and cognate statutes, the court held that the sale of government lands, while illegal, was not the result of any mistake or wrongful act of the treasurer, but was the mistake of other officers, and, hence, that the purchaser could not recover under the statute. On principle, we are unable to distinguish the Tyler case from that under consideration. True, the particular facts which rendered the tax sale illelag are widely different. In the case at bar the lands were liable to taxation, and hence could be sold at tax sale to satisfy any tax lawfully assessed against them. The vice of the tax in the case at bar consists in a defective description of the lands upon the tax rolls of the county. At and prior to the sale the same kind of descriptions were used in

Barnes County, and in some other counties in the then Territory of Dakota. Referring to this mode of describing realty, this court in *Power* v. *Bowdle*, 3 N. D. 128, 54 N. W. Rep. 411, said: "Those who have close relations with the local land officers and with such of the county officers as have copied and adopted the symbol writing from the land officers, are indeed strongly impressed with the idea that all of the people understand and use this mode of describing land. We cannot come to the same conclusion. We think symbol writing in tax records has already disappeared, and is no longer employed in county offices in this state; and our belief is strong that when the public land has been disposed of, and the local land officers have performed their limited and temporary functions, and have removed further west, it will be found that symbol writing in describing realty will have failed to become ingrafted upon the vernacular language. We feel justified in our conclusion from our observation and experience in the older states of the West." For reasons stated in the opinion from which we have quoted, as well as those in other cases where similar descriptions were considered and condemned, this court held that such descriptions were radically defective and insufficient in law as descriptions of land for the purpose of assessment. We still adhere to the soundness of that holding. But while, upon authority and upon grounds of public policy, such descriptions were, from our point of view, insufficient in law to support a tax levied thereunder, the fact nevertheless stands out that each and every parcel of the land sold in those earlier cases, as in the case at bar, was attempted to be described, and was in fact described, on all the tax records of the county, in the manner indicated, *i. e.* by symbol writing. The case we are discussing is a case of a tax sale of lands which are inadequately described upon the tax records, and does not resemble a case where lands are not attempted to be described upon the records or listed at all. If a county treasurer should willfully sell a tract of land for alleged delinquent taxes, which was not in any manner attempted to be described, a widely-different question would be presented. We

need not speculate upon the legal results of the case supposed, as no such case is presented in this record. The treasurer in this case sold the land which was attempted to be described, and which was in fact described, in accordance with the mode of description which we have designated. It was not until long subsequent to the tax sale that this court judicially determined that such descriptions as were used in describing the lands sold by the treasurer in this case were insufficient in law to support a tax. Moreover, the descriptions under which the lands were sold were not manufactured and placed upon the duplicate lists, by mistake, or wrongfully, or at all, by the county treasurer; but, as we have seen, the treasurer took from other county officials, who were responsible for the descriptions and for the assessment, the duplicate list or tax warrant containing the descriptions of the land in question. Under such circumstances, we are of the opinion that it was neither a mistake nor a wrongful act upon the part of the treasurer; within the meaning of the statute, to sell the lands at tax sale by the descriptions found upon the tax duplicate or warrant, which was made out and furnished him by other officers who were made directly responsible for preparing and describing the lands upon such duplicate list or warrant. It was the province of other officials to resolve all doubts, and place lands upon the rolls which were taxable, and to determine, upon their own responsibility, the kind and character of the descriptions by which such lands were to be identified. With this duty the county treasurer had nothing whatever to do. Hence we conclude that the sale based upon the descriptions in the duplicate was not a mistake or wrongful act upon the part of the treasurer, and hence such sale was not within the purview of the section in question. The statute was not a general statute indemnifying all purchasers at tax sales whose titles fail on account of defects of procedure. Unless the defects in procedure are traceable to some mistake or wrongful act of the treasurer himself, no recovery is possible, under the statute. With the policy of the statute we have nothing to do.

The judgment below will be affirmed. All the judges concurring.

(72 N. W. Rep. 1019.)

DANIEL PATTERSON *vs.* G. A. WARD, *et al.*

Opinion filed October 29th, 1897.

Receiver—Purchasing Trust Property.

While the receiver is ordinarily, and from considerations of public policy, prohibited from purchasing as an individual what he sells as receiver, or purchasing as receiver what he sells as an individual, yet where the parties consented beforehand to such transaction, where the transaction was clearly for the benefit of the trust property, and the trust property has received the full benefit thereof, the parties cannot afterwards be heard to object to such transaction.

Personal Contracts.

A receiver, as an officer of the court, must stand impartial as between the parties, but he is not thereby prohibited from dealing with a party if, through such dealing, such party can receive no advantage over the other.

Compensation of Receiver Judicial Matter.

Fixing the fees of the receiver is a matter of judicial determination, and is peculiarly in the discretion of the trial court, and such determination will not be disturbed in this court except in clear case of abuse.

Appeal from District Court, Traill County; *McConnell*, J.

Action by Daniel Patterson against G. A. Ward and others. From an order settling the account of H. D. Hurley, receiver, plaintiff appeals.

Affirmed.

M. A. Hildreth, for appellant.

Carmody & Leslie, for respondents.

BARTHOLOMEW, J. This is an appeal from an order settling and allowing the accounts of H. D. Hurley as receiver in the above entitled action for the year 1894. On a motion to dismiss we held the order appealable. 6 N. D. 359, 71 N. W. Rep. 543. The action involved two sections of land in Traill County owned by the defendants Ward and Hall. Plaintiff claimed a mortgage on the lands, and the action was brought in April, 1894, to foreclose the mortgage. Plaintiff asked the appointment of a receiver, and on May 7th, said Hurley was duly appointed as such receiver. He accepted

the trust, gave bonds, and entered upon the performance of his duties. The receivership covered all of said lands except 40 acres, where the buildings stood. This was reserved to the defendants. All of the land was under cultivation, and the receiver farmed it for the season of 1894, and in November rendered his account as receiver to the court. Plaintiff filed objections to certain items of the account. After much delay, and several partial hearings, the account was finally allowed substantially as filed. From this account it appears that the receiver purchased a portion of the seed grain from himself. It also appears that he hired the defendants to do certain plowing, and at harvest time employed them to do a large amount of harvesting. In the fall the receiver took his own threshing outfit, and threshed the grain. It is against the charges for these items and the claim of the receiver for fees and allowance that the objections are primarily leveled. In considering the actions of this receiver, it is proper to keep constantly in mind the circumstances surrounding his appointment and the nature of his duties. It differs widely from the ordinary appointment of a receiver of real estate, whose duties are practically limited to receiving and accounting for the rents and profits arising out of the trust property. Here the receiver was by the terms of his appointment directed to farm the lands. The appointment, as stated, did not become operative until May 7th. This was after the season for putting in crops was well advanced. The amount of land to be cropped was 1,240 acres. About 300 acres was unplowed. No preparations existed for doing the work. Seed grain must be procured, men and teams and machinery must be found, and the large amount of work incident to putting in the crop must be done in a very limited time, in order to be of any practical value. It would be extremely unlikely that any sufficient force of men and teams and machinery could be found at that date that was not already engaged for the season. So that necessarily the receiver was at a great disadvantage in hiring help, not only then, but equally so at harvesting time. It required a large amount of energy and exec-

utive ability to carry out the terms of the order of appointment. Few men would have been willing to undertake it, and still fewer could have successfully accomplished it. Necessarily, a large amount of discretion must be allowed the receiver. It is clear from the wording of the order of appointment, and the stipulation entered into at the time, that these difficulties were comprehended, and this exercise of discretion anticipated. It is urged that a receiver is prohibited from contracting with himself, or making a profit out of the trust property. We deem it well settled that a receiver will not, in ordinary cases, be permitted to purchase as an individual what he sells as a receiver, or to purchase as receiver what he sells as an individual. The law, from considerations of public policy, will not permit a person holding a fiduciary relation to surround himself with the temptations that necessarily arise where his individual interests are directly opposed to the interests of his *cestui que* trust. Nor will it permit him to make a profit out of trust funds or trust property in his hands. High, Rec. § 193 *et seq.*, and cases cited; Beach, Rec. § 270 *et seq.*, and cases cited. But, while such is the law, we deem it equally true under the above authorities, and sound upon every principle of equity jurisprudence, that, where the contracts of the receiver are clearly for the best interests of the trust property, and where they were entered into with the full knowledge and consent of the parties, and where the trust estate has received the full benefit of such contracts, the parties cannot be heard to say that compensation shall not be made therefor. In this case it is undisputed that the seed grain furnished by the receiver was furnished at a less price than like grain could be obtained for elsewhere. This was to the advantage of the trust property, and clearly did not negative good faith in the receiver; and the receiver testifies touching this seed, and a small amount of plowing done by the receiver, that the price was very reasonable, and that Mr. Patterson wished him to do the plowing and furnish the seed. And the same must be said of the threshing. The receiver was an extensive farmer in the immediate vicinity. He had on his own farm the teams,

machinery, and force to constitute a threshing outfit. When his own threshing was done, he took this outfit over to the trust property, and threshed the grain raised thereon. It is well known that there is each fall a definite and well-nigh uniform price per bushel for threshing the different kinds of grain. This threshing was done for the customary price in that locality. There was, no doubt, a margin of profit in doing the work, but whatever Mr. Hurley received in that connection he received, not by virtue of his appointment as receiver, and not as a profit on trust funds or trust property, but by virtue of the fact that he owned or controlled the teams, machinery, and men, and made a profit on their labor that did the work. We know of no law that forbade it. But, be that as it may, there is evidence tending to show that plaintiff knew that Mr. Hurley was going to do the threshing; that he consented thereto; that he was present during the whole time the threshing was being done, looking after the grain; that he boarded with the receiver, and never at any time made any objection whatever to having the work done by the receiver. He was the party beneficially interested in having the work done. He has received the benefit therefrom, and consented that the work should be done by Mr. Hurley. This brings him clearly within the principles already announced. Nor can we disturb the ruling of the District Court as to the sum allowed to Ward for harvesting. It is, of course, elementary that a receiver should stand impartial between the parties, just as much so as the court. In this case the net proceeds arising from the sale of the crops would be paid to plaintiff, Paterson, and the receiver would not be permitted to pay the defendant Ward, from the proceeds of the farm, an excessive price for labor performed in raising the crop, as that would be incompatible with his duty to be impartial. We do not understand that any objection is made to the fact that Ward was employed by the receiver, as the whole case shows that it was the expectation that Ward would be or might be so employed, provided he would do the work as well and as cheaply as other parties; and that was perfectly natural in view of the

fact that Ward was on the ground, and had in his possession the stock and machinery with which he had theretofore farmed the land. The objection urged is that the price allowed Ward was in excess of that for which others might have been employed to do the same work. Upon the question of the value of the work there is a direct conflict in the testimony. Several witnesses swear that they had done similar work, or hired similar work done, at a less price per acre. Other witnesses testify that the price allowed was a fair and reasonable price for the work performed. Be this as it may, the receiver testifies—and he is entirely undisputed—that he could not procure any one else to do the work as cheaply as Ward did it, and when we remember the disadvantageous circumstances under which the receiver went upon the labor market to procure so large an amount of work, we can readily understand how this may be true, even though ordinarily like work could be procured at a reduced figure. The court settled and allowed the compensation of the receiver at $500 for the year. As we said in *Cutter* v. *Pollock*, 4 N. D. 205, 59 N. W. Rep. 1062, this was a matter for judicial determination. It was peculiarly within the discretion of the trial court, who was much more familiar with the amount of work performed by the receiver than we can be. To us the charge appears reasonable, and there is not a word of evidence to the contrary. There is nothing in the record that warrants a reversal. The receiver applied in this court for an allowance for attorney's fees on this appeal. The receivership is not closed. Such application can be made to the lower court when the remittitur goes down.

Affirmed. All concur.

(72 N. W. Rep. 1013.)

INDEX.

ABANDONMENT. See HOMESTEAD, 215.

ACCEPTANCE OF BENEFIT.

The acceptance of alimony under a decree awarding a gross sum in full of all alimony costs, etc., will preclude an appeal from the judgment. *Williams* v. *Williams*, 269.

ACCIDENT INSURANCE. See INSURANCE.

1. One who has started to hunt prairie chickens with a loaded gun at a season of the year when it is unlawful to kill prairie chickens has not, by such act, committed the offense of attempting to kill prairie chickens. *Cornwell* v. *Fraternal Accident Association*, 201.

2. One who hunts for game with a loaded gun cannot be said to have voluntarily exposed himself to unnecessary danger by such act, within the meaning of the provision in an accident insurance policy which declares that, for injuries sustained by reason of a voluntary exposure to unnecessary danger, there can be no recovery. *Cornwell* v. *Fraternal Accident Association*, 201.

3. Nor is an attempt to scale a bank with a loaded gun in hand a voluntary exposure to unnecessary danger, within the meaning of such a provision. *Cornwell* v. *Fraternal Accident Association*, 201.

ACCOUNTS OF RECEIVERS. See RECEIVERS, 359.

ACTUAL POSSESSION.

When the purchaser of land under a contract for a deed goes upon the same, and crops it for a number of years and exercises all the acts of ownership and possession over the same necessary to obtain the full beneficial use of the land, he is in actual possession thereof although he may never have lived upon the land or fenced any portion thereof. *Nearing* v. *Coop*, 345.

ADVERSE POSSESSION.

1. There can be no adverse possession of lands in the Indian country. *Kreuger* v. *Schultz*, 310.

2. Compiled Laws, § 3303, declaring a deed of realty void if another is in actual possession claiming title, does not apply where possession has not ripened into title. *Kreuger* v. *Schultz*, 310.

AGENCY. See PRINCIPAL AND AGENT, 94, 254, 180, 454.

Any agent or sub-agent holding paper for collection may give notice of dishonor with like effect as an owner of the paper. *Ashe* v. *Beasley*, 191.

ALIMONY. See APPEAL, 269; DIVORCE, 269.

AMENDMENTS. See VERDICT, 94; PLEADING, 152, 533; APPEAL, 191; PRACTICE, 152; PARTIES, 152.

ANSWER. See PLEADING, 263.

APPEAL. See NEW TRIAL, 276, 361; ERRORS OF LAW, 361; DIVORCE, 269.

1. An order of the District Court vacating judgment and granting new trial of a case tried by that court without a jury is void. A motion to dismiss an appeal from the judgment, because the same had been vacated in the court below, denied because the order of the District Court was void from the beginning and did not operate to vacate the judgment. *McKenzie* v. *Bismarck Water Co.*, 361.

2. The appellant must embody in his abstract the necessary facts to sustain his contentions. The court will not explore the record for the purpose of finding something to induce it to arrive at a different conclusion from that reached by the trial court. *Ashe* v. *Beasley & Co.*, 191.

3. When there is a variance between the allegations of the complaint and the evidence, but no objection is made to the evidence on that account, the appellate court will treat the pleading as amended to conform to the proof. *Ashe* v. *Beasley & Co.*, 191.

4. Where in a decree for divorce plaintiff is directed to pay a certain specified sum in full of all alimony and costs, the acceptance of the amount so decreed by defendant will preclude an appeal from the judgment. *Williams* v. *Williams*, 269.

5. In order to review rulings of the court as errors of law, there must either be a request for verdict, an exception to the submission of questions of fact to the jury, or a motion for new trial for insufficiency of evidence. *Henry* v. *Maher*, 413.

6. No errors of law will be considered unless specified in the statement. *Henry* v. *Maher*, 413.

7. Where a motion for a new trial is based on a statement, errors will be disregarded, unless specified in the statement. *Thompson* v. *Cunningham*, 426.

8. Where a case was tried in the county court, and judgment rendered for defendant, plaintiff, by appealing under Rev. Code, § 6591, to the District Court, waived an appeal to the Supreme Court. *Field* v. *Great Western Elevator Co.*, 424.

9. The question of insufficiency of the evidence not raised by a proper assignment of error will not be considered on appeal. *Colby* v. *McDermont*, 495.

10. Where defendants motion for a directed verdict is overruled, and evidence is offered in defense, if the motion is not renewed at the end of the case, the same will be deemed waived, and the merits of the motion will not be considered on appeal. *Colby* v. *McDermont*, 495.

11. An order granting a new trial on the ground that the evidence does not sustain the verdict is in the discretion of the court. *Gull River Lumber Co.* v. *Osborne-McMillan Elevator Co.*, 276.

APPEAL—Continued.

12. Harmless error is not ground for reversal. *Underwood* v. *Atlantic Elevator Co.*, 274.

13. A variance not objected to will be considered cured as by amendment to conform to the proof. *Ashe* v. *Beasley*, 191.

14. It cannot be first objected on appeal that no notice of intention to move for new trial was served. *Fletcher* v. *Nelson*, 94.

15. Evidence examined, and *held*, that the order granting a new trial upon the ground that the verdict was not justified by the evidence was not an abuse of judicial discretion, and hence the same is affirmed. *Gull River Lumber Co.* v. *Osborne-McMillan Elevator Co.*, 276.

16. Time for appeal from an order does not begin to run until service of the order upon the attorney of record for the defeated party. *McKenzie* v. *Bismarck Water Co.*, 361.

APPEALABLE ORDERS. See RECEIVERS, 359.

An order settling the final account of a receiver is an appealable order. *Patterson* v. *Ward*, 359.

ASSESSMENT. See TAXATION, 56.

ASSIGNMENTS OF ERROR. See APPEAL, 495.

ATTACHMENT. See SUBJECT OF ACTION, 117; JURISDICTION, 117.

1. In this action an attachment issued, based upon an affidavit which stated as the sole ground of the attachment "that the defendant, Richard E. Giese, has left the State of North Dakota, with intent to cheat and defraud his creditors." *Held*, construing § 5352, Rev. Codes, that said affidavit is insufficient in substance to authorize an attachment under said section. *Severn* v. *Giese*, 523.

2. The attachment by garnishment of property of defendant upon which the garnishee has a lien is sufficient, under Minnesota statutes cited in the opinion, to give a court jurisdiction to render a valid judgment in *rem* against a non-appearing nonresident defendant served by publication only. The court has power to make all necessary orders for the ultimate application of defendant's interest in the property in satisfaction of such judgment. *Hartzell* v. *Vigen*, 117.

ATTORNEYS. See MALICIOUS PROSECUTIONS, 575.

1. The attorney of record is entitled to service of all orders in the case, and time for appeal from an order does not begin to run until service of the order upon the attorney of record for the defeated party. *McKenzie* v. *Bismarck Water Co*, 361.

2. Attorneys fees may be recovered as damages in an action for the malicious prosecution of a civil suit. *Kolka* v. *Jones*, 461.

BANKS AND BANKING.

1. Where intervener indorsed for collection to A. bank, which forwarded it for collection to N. Bank, a certificate of deposit in L. Bank, and N. surrendered it for L's draft, and credited the amount thereof to A., which issued its certifi-

BANKS AND BANKING—Continued.

cate of deposit to intervener, *held*, on the draft's not being paid, that intervener, and not N., was the owner thereof, intervener having surrendered A's certificate of deposit, and A. having credited the amount of the draft to N., and N. having charged that amount to A.—*National Bank of Commerce* v. *Johnson*, 180.

2. When an instrument is intrusted to a bank for collection, the bank secures no title thereto, and no right to hold it in any other capacity than as agent. *National Bank of Commerce* v. *Johnson*, 180.

3. If, from the indorsement, or the circumstances of the case, it appears that the bank was to credit the owner of the paper with the amount thereof, when collected, such bank becomes, upon the receipt of the money, the debtor of the owner, and at this moment the relation of principal and agent is transmitted into that of creditor and debtor. *National Bank of Commerce* v. *Johnson*, 180.

4. When the owner of paper indorses it for collection, this is notice to every person or bank into whose hands the paper may come that the owner has not parted with his beneficial title, but has merely parted with possession, for the sole purpose of collection. The paper remains the paper of the owner down to the moment of collection, no matter how many hands it may pass through in the process of transmitting for collection; and no one through whose hands it passes can, before such collection, by credits, advances, or in any other way, secure any lien thereon or right thereto as against the owner, who may at any time prior to collection follow it into the hands of any subagent. *National Bank of Commerce* v. *Johnson*, 180.

5. In the absence of circumstances showing a contrary purpose on the part of the owner, the agent or subagent has authority to receive only cash in making the collection; and, if he accepts other paper instead of cash,—as a draft or check—the owner may treat either the original or the substituted paper as his property, and may follow it in the hands of the bank receiving it, although such bank has credited it as cash to the bank transmitting the original paper to it for collection. The right to make such credit, and thereby change the relation of principal and agent to that of creditor and debtor, does not exist until the agent collects the claim in money, unless there is something in the circumstances of the case showing that the parties intended that the agent should be authorized to accept, at its own risk, a draft or check instead of cash. *National Bank of Commerce* v. *Johnson*, 180.

6. But when cash is received, and credited to the transmitting bank, the relation of principal and agent between the collecting bank and the owner of the paper ceases; and thereafter whatever right the owner has as against the collecting bank is to the credit in favor of the transmitting bank, so far as he can trace the proceeds of his property into such credit. *National Bank of Commerce* v. *Johnson*, 180.

7. Intervener held a certificate of deposit issued to him by the Lloyds National Bank. He indorsed it for collection and credit to the Anacortes Bank, which forwarded it for collection to the plaintiff. Plaintiff received from the Lloyds National Bank its draft on a St. Paul Bank, and surrendered the certificate. It gave the Anacortes Bank credit for the amount of the draft, and that bank

BANKS AND BANKING—Continued.

reported to intervener that the certificate had been collected, and, at his request, issued to him its certificate for the amount reported as collected. The St. Paul draft was not paid. The plaintiff immediately notified the Anacortes Bank that the collection had not been made, and charged the amount back to it. The Anacortes Bank notified the intervener of this fact, and he surrendered his certificate issued by it. That bank credited to the plaintiff the amount of the supposed collection. The plaintiff at no time since this has claimed to be the owner of the draft, or to have any interest therein, save as collateral to its claim against the Anacortes Bank for an overdraft. *Held*, that the intervener is the owner of such draft, and entitled to receive the dividends thereon payable out of the assets of Lloyds National Bank declared by the comptroller of the currency. *National Bank of Commerce* v. *Johnson*, 180.

8. The fact that the intervener did not surrender up his certificate until after the Anacortes Bank had suspended operations does not affect the question; it appearing that the plaintiff had, in accordance with the facts claimed that the collection had not been made, and had charged back the draft to the Anacortes Bank, and the intervener having acted on such claim, and acquiesced therein, by surrendering his certificate issued to him by the Anacortes Bank, without any withdrawal of such claim being made by plaintiff, and the plaintiff, insisting down to and upon the trial that it had not made the collection, but that it merely held the draft as collateral to its demand, against the Anacortes Bank for an overdraft. *National Bank of Commerce* v. *Johnson*, 180.

BILLS AND NOTES. See NEGOTIABLE INSTRUMENTS.

BILL OF SALE. See SALES, VENDOR AND PURCHASER.

BURDEN OF PROOF. See EVIDENCE, 417, 497; INDORSEMENT, 245; PLEADING.

1. Where plaintiff alleged that promissory notes payable to order on which the action was brought, were sold, indorsed, and transferred to the plaintiff in good faith before maturity and issue is joined upon this allegation the burden is on plaintiff to establish it by proof, and plaintiff must show that the note was indorsed in fact by the payee. *Vickery* v. *Burton*, 245.

2. When fraud in the inception of a negotiable instrument is proved, the burden of proof is shifted to the indorsee to prove that he is a purchaser for value before maturity without notice and in good faith. *Knowlton* v. *Schultz*, 417.

BONA FIDE PURCHASER. See NEGOTIABLE INSTRUMENTS, 417.

CHANGE OF VENUE. See JUSTICE OF THE PEACE, 413.

CHATTEL MORTGAGES. See TROVER AND CONVERSION.

1. Subscribing witnesses to a chattel mortgage should be called to prove its execution when the fact of its execution is put in issue. *Brynjolfson* v. *Northwestern Elev. Co.*, 450.

2. By authorizing the mortgagor to sell mortgaged property, the mortgagee waives his lien and cannot thereafter sue a purchaser of such property for its conversion. *New England Mtge. Security Co.* v. *Great Western Elev. Co.*, 407.

CHATTEL MORTGAGES—Continued.

3. Evidence held to show that the parties did not intend to give a mortgage. *Plano Mfg. Co.* v. *Daley*, 330.

4. The sale by a mortgagor of crops subject to a chattel mortgage lien, vests title to the crops in the purchaser incumbered with the lien and the mortgagee may sue in conversion before the maturity of the debt secured by the mortgage. *Ellestad* v. *Northwestern Elev. Co.*, 88.

CITIZENS.

Allotment Indians are citizens of the United States and of the state in which they reside and entitled to all the privileges and immunities of citizens, including the right to vote. *State* v. *Denoyer*, 586.

CLAIM AND DELIVERY. See PLEADING 330; TROVER AND CONVERSION, 88.

1. The owner of land leased with reservation of the title to crops in him until division, can maintain claim and delivery for possession of the crops. *Angell* v. *Egger*, 391.

2. In claim and delivery by the landlord against the tenent for possession of crops under title contract and before division, the landlord is entitled to judgment for possession of the whole crop and the alternative in the judgment should be for amount justly due the owner under the contract for his share of the crops and for advances due him. *Angell* v. *Egger*, 391.

3. Where notes are placed with a third party to be delivered when the maker directs, replevin therefor by the payee will not lie where the maker directs that they shall not be delivered. *Nichols & Shepard Co.* v. *First Nat. Bank*, 404.

4. A general denial puts in issue plaintiff's ownership and right of possession and the wrongful detention. *Plano Mfg. Co.* v. *Daley*, 330.

5. Though a defendant alleged fraud in the giving of a mortgage under which plaintiff claims right to possession, *held* that defendant might recover on proof merely that no mortgage was intended by either party to be given. *Plano Mfg. Co.* v. *Daley*, 330.

6. A verdict which failed to find the value of plaintiff's interest held amendable. *Fletcher Bros.* v. *Nelson*, 94.

7. Evidence examined and held to sustain the judgment for defendant. *Towle* v. *Greenberg*, 37.

COMPROMISE. See CONTRACTS, 518.

COMPLAINT. See SUPPLEMENTAL COMPLAINT, 222; PLEADING.

CONDEMNATION PROCEEDINGS. See PARTIES, 152; PRACTICE, 152.

1. Condemnation proceedings should be brought in the name of the corporation and not in the name of its receiver. *Bigelow* v. *Draper*, 152.

2. All issues in condemnation proceedings except the issue of compensation are triable by the court without a jury. *Bigelow* v. *Draper*, 152.

3. The question of the necessity of condemning property is a judicial question triable by the court. *Bigelow* v. *Draper*, 152.

CONDEMNATION PROCEEDINGS—Continued.

4. The legal necessity for the taking of private property for railroad purposes exists when it appears that such property is needed by the corporation to enable it to augment the safety of its roadbed. *Bigelow* v. *Draper*, 152.

5. The diversion of a portion of a non-navigable water course where such diversion is needed for a public use, is permissible. *Bigelow* v. *Draper*, 152.

6. The right of the riparian owner to have a natural stream flow over his land is such property as may be condemned for railroad purposes. *Bigelow* v. *Draper*, 152.

CONFIRMATION OF SALE. See EXECUTION SALES, 293.

CONTRACTS. See VENDOR AND PURCHASER, 400; PRINCIPAL AND AGENT, 400; SALES, 400.

1. Contract for the purchase of hotel furniture examined and construed. *Martin* v. *Luger Furniture Co.*, 351.

2. It is lawful for parties to contract with reference to the title to the produce of land and such contract will be enforced according to its terms. *Angell* v. *Egger*, 391.

3. Contract as to the working of land construed and held to vest in the owner of the land, title to crops grown thereon until division thereof by the owner. *Angell* v. *Egger*, 391.

4. The renter of land cannot replevin the crops before division thereof, the owner of the land may do so under title contract. *Angell* v. *Egger*, 391.

5. Under an executory contract by which a vendor agrees to sell and deliver to the vendee certain personal property and the vendee agrees as part consideration therefore to deliver to the vendor certain personal property then owned by him, no title to the property passes either way until the acceptance by the vendee of the property specified in the contract. *Nichols, Shepard Co.* v. *Paulson*, 400.

6. Where the vendee in an executory contract for sale of personal property wrongfully refuses to accept the same, such refusal may constitute a breach of contract but it gives the vendor no title to the property that was to be delivered in part payment of the property refused. *Nichols, Shepard Co.* v. *Paulson*, 400.

7. Section 3840, Rev. Codes, which declares that "a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it," presupposes a valid contract between the parties that rests upon sufficient consideration. *McArthur* v. *Dryden*, 438.

8. The construction of a written contract is for the court, and it is incompetent to prove by the parties what either considered as its meaning or legal effect. *Anderson* v. *First National Bank*, 497.

9. Evidence in this case examined, and *held* sufficient to support the defense of total want of consideration for the notes and mortgage sued upon. While the settlement of a good-faith difference between parties, when voluntarily made, and without any material mistake of fact, will furnish a sufficient consideration for any promise based upon such settlement, yet, where one of the parties knew or

CONTRACTS—Continued.

had good reason to believe that his claim had no just foundation in fact, the compromise of such claim will furnish no consideration for the promise of the other party based thereon. *Fryer* v. *Cetnor*, 518.

10. The repudiation of a contract before the time for performance arrives does not constitute a breach thereof. The only effect of such repudiation is to dispense with an offer to perform by the other party; if such refusal to stand by the agreement is not withdrawn before the performance is due under the terms thereof. *Stanford* v. *McGill*, 536.
11. The vendor in a contract to sell property of a certain description, no particular articles being agreed upon, can, after he has made, before the day of delivery, an *ex parte* selection of the property he intends to deliver under such contract, sell such property to another without being guilty of breach of agreement. All that the law requires of him is, that he make delivery of property of the description mentioned in the contract at the time delivery is due. *Stanford* v. *McGill*, 536.
12. Whether the sale, by the vendor is an executory contract for the sale of specific property, of the very property to which such contract relates before the day of delivery thereunder has arrived, is a breach of agreement on the ground that the vendor has thereby put it out of his power to perform the agreement, not decided. But the mere making of a second executory contract to sell the same property is not of itself a breach of the prior executory contract. The vendor does not thereby incapacitate himself from carrying out his contract. *Stanford* v. *McGill*, 536.
13. Where a party has an option to deliver property, under a contract, at any time between certain dates, he must, if he intends to treat the time of performance as having arrived and therefore to hold a repudiation of the agreement by the vendee before the last day for performance has arrived as a breach thereof, notify the vendee that he has exercised his option to call for an earlier delivery. But no offer to perform is necessary, as that is waived by the vendee's refusal to perform. *Stanford* v. *McGill*, 536.
14. The delivery of contract of sale operates to pass title to the property therein described. *Fletcher Bros.* v. *Nelson*, 94.
15. Where a party is legally bound to execute certain papers, but refuses to do so unless the other party enters into further agreements, such further agreements are without consideration. *Gaar, Scott & Co.* v. *Green*, 48.

CONTRACT FOR DEED. See LANDLORD AND TENANT, 345.

1. When the purchaser of land under a contract for a deed goes upon the same, and crops it for a number of years, and exercises all the acts of ownership and possession over the same necessary to obtain the full beneficial use of the land, he is in actual possession thereof, although he may never have lived upon the land or fenced any portion thereof. *Nearing* v. *Coop*, 345.
2. A party while thus in possession, has a right to the full control of the land, and may lease the same; and neither his tenant nor the vendor can defeat an action to recover the rent by showing that such vendee was in default under his contract, and that the vendor had the legal right to dispossess him by foreclosure or otherwise. So *held* in an action where the tenant claimed to have leased from both parties, and agreed to pay rent to the vendor only in case he had the better right thereto. *Nearing* v. *Coop*, 345.

CONSTITUTIONAL LAW.

1. When the constitution creates a judicial office and court, and prescribes the jurisdiction of such court, neither the office nor the court can be abolished by statute, nor can the jurisdiction of such court as to amount involved be diminished or increased by the legislature. *McDermont* v. *Dinnie*, 278.

2. Section 2209, Rev. Codes, undertook to supercede the police magistrates and their courts, provided for by § 113 of the state constitution, by the municipal courts therein established, which last named courts were given all the powers and jurisdiction of such police magistrates, and, in addition thereto, other jurisdiction not mentioned in said section of the constitution. *Held*, that said § 2209, Rev, Codes, is unconstitutional and void. *McDermont* v. *Dinnie*, 278.

3. Under § 183 of the Constitution, the indebtedness of a city cannot be increased beyond the limit therein specified, even though such debt is incurred by the issue of bonds, for the purpose of refunding the indebtedness of such city. In such a case the debt is temporarily increased beyond the constitutional limit, and such increase may be permanent, owing to the loss or diversion of the fund created by the sale of such refunding bonds. *Birkholz* v. *Dinnie*, 511.

4. Section 480, Rev. Codes, in so far as it is a restriction on rights of suffrage as defined in § 121, Const., is unconstitutional as not having been adopted by a majority of the electors of the state voting at a general election. *State* v. *Denoyer*, 586.

5. A state law which directs that the entire tract of land be sold to the highest bidder for the taxes delinquent thereon violates no constitutional provision. *Shattuck* v. *Smith*, 56.

6. Though the insolvency law is unconstitutional as to creditors whose debts were contracted before its passage in so far as it assumes to discharge claims without full payment, it is valid so far as it provides for the transfer of the debtors property to an assignee to be distributed among his creditors. Hence, no creditor whensoever his debt was contracted can levy upon such property after title thereto has vested in an assignee under the statute. *Elton* v. *O'Connor*, 1.

7. The legislature may by joint resolution merely, declare that the question whether a constitutional convention shall be held, shall be submitted to the people. *State* v. *Dahl*, 81.

8. Mandamus cannot be invoked to compel officers to do an unlawful or unconstitutional act. *McDermont* v. *Dinnie*, 278.

CONSTITUTIONAL CONVENTION. See MANDAMUS, 81.

There is inherent legislative power to call a constitutional convention notwithstanding § 202 of the Constitution points out how it may be amended. *State* v. *Dahl*, 81.

CONSIDERATION. See CONTRACT, 518.

CREDITORS BILL. See RECEIVERS, 361.

CROPS. See TROVER AND CONVERSION, 88; CHATTEL MORTGAGES, 88; PROPERTY.

1. The owner of real estate is presumptively the owner of the annual crops grown thereon. *Ellestad* v. *N. W. Elev. Co.*, 88.

CROPS—Continued.

2. The purchaser of crops on which there is a chattel mortgage, obtains title thereto subject to the mortgage lien. *Ellestad* v. *N. W. Elev. Co.*, 88.

CURATIVE LEGISLATION. See TAXATION 56.

It is competent for the legislature by curative act to validate a defective levy which it might originally have authorized to be made in the manner in which it was done. *Shattuck* v. *Smith*, 56.

DAMAGES.

1. In an action for malicious prosecution of a civil suit attorneys fees paid in the defense of the original suit, if shown to be reasonable, may be recovered as damages. *Kolka* v. *Jones*, 461.

2. The measure of damages in an action by a vendor to recover damages for breach by a vendee of an executory contract of purchase and sale, is fixed by §§ 4988 and 5009, Rev. Codes, where the vendor does not elect to proceed under § 4833, Rev. Codes. *Stanford* v. *McGill*, 537.

3. It is only when property has been re-sold by the vendor in the manner prescribed by § 4833 that he can recover the damages mentioned in subdivision 1, of § 4988; and if it is not so sold, the measure of damages is governed by subdivision 2, of §§ 4988 and 5009. An abortive attempt to proceed under § 4833 will not preclude a recovery of damages under subdivision 2 of §§ 4988 and 5009. *Stanford* v. *McGill*, 537.

DEBTOR AND CREDITOR. See BANKS AND BANKING, 180.

DEMAND. See TROVER AND CONVERSION, 444.

DEMURRER. See PLEADINGS, 263.

DEPOSITIONS. See EVIDENCE.

1. A notice to take depositions should state the name of each witness to be examined. *Ashe* v. *Beasley & Co.*, 191.

2. All objections to depositions except for incompetency or irrelevancy must be taken before the trial is commenced or they are forever waived. *Anderson* v. *First Nat. Bank*, 497.

DISTRICT COURTS.

The District Court has no jurisdiction to order the new trial of a case tried before it without a jury under § 5630, Rev. Codes. Such order granting a new trial if made, is void, having no foundation in the statute. *McKenzie* v. *Bismarck Water Co.*, 361.

DISTRICT JUDGE. See JUDGE, 575.

A District Judge cannot be held civilly liable for official action in matters within the jurisdiction of his court. *Root* v. *Rose*, 575.

DIVORCE.

Where in judgment for plaintiff in divorce the court directs payment to defendant of a certain sum in full of alimony, defendant by accepting the sum is precluded from appealing. *Williams* v. *Williams*, 269.

ELECTIONS.

1. It is the duty of county commissioners to furnish and establish polling precincts and places within their county and within the boundaries of an Indian reservation to enable allotment Indians possessing the other qualifications of electors to vote. *State* v. *Denoyer*, 586.

2. Indians and persons of Indian descent residing on land allotted to them in severalty under the "Dawes Act" are citizens and entitled to vote. *State* v. *Denoyer*, 586.

ELECTORS. See ELECTIONS.

ELEVATOR COMPANIES. See TAXATION, 41.

EMINENT DOMAIN. See CONDEMNATION PROCEEDINGS, 152.

EQUITY.

A bill in equity under exceptional facts may be maintained to vacate an execution sale on account of fraud. *Warren* v. *Stinson*, 293.

ERROR. See NEW TRIAL, 361; APPEAL, 361.

1. Error without prejudice is not ground for reversal. *Underwood* v. *Atlantic Elev.* 274.

2. ... not specified in the statement of case and notice of intention, will not be considered. *Henry* v. *Maher*, 413.

3. Errors in law within the meaning of the statute are rulings, instructions, and the like, which occur before the rendition of a verdict or decision. *McKenzie* v. *Bismarck Water Co.*, 361.

4. An erroneous conclusion of law deduced from findings of fact is not an error in law occurring at the trial. *McKenzie* v. *Bismarck Water Co.*, 361.

5. Error cannot be predicated upon a charge to which no exception was reserved. *Colby* v. *McDermont*, 495.

ESCROW. See NEGOTIABLE INSTRUMENTS, 404.

ESTOPPEL. See PRACTICE, 407; CHATTEL MORTGAGES, 407.

1. Estoppel bind privies as well as those who create them. *Peabody* v. *Lloyds Bankers*, 27.

2. One who furnishes money to buy goods in the name of another, and carries on business as such other's manager, and in every way creates the false appearance that such other was the owner, is estopped from setting up his ownership of the goods, as is also his creditor, knowing the facts. *Peabody* v. *Lloyds Bankers*, 27.

3. Where in a jury trial, counsel on both sides request the court to direct a verdict, and a verdict is directed, counsel thereby consent to a withdrawal of the case from the jury and consequently are estopped from predicating error upon such withdrawal. *New England Mortgage Secty. Co.* v. *Great Western Elevator Co.*, 407; *Stanford* v. *McGill*, 536.

EVIDENCE. See JUDICIAL NOTICE, 310; DEPOSITIONS, 191; BURDEN OF PROOF, INDORSEMENT.

1. *Prima facie* a chose in action is what appears to be due upon it, and unless the presumption is rebutted by legal evidence, it is conclusive. *Anderson* v. *Bank*, 497.

2. Conclusiveness of conviction of accused where the conviction is reversed on appeal as establishing probable cause in action for malicious prosecution. *Root* v. *Rose*, 575.

3. Decision of District Court convicting an attorney of contempt and disbarring him, *held*, conclusive on question of probable cause though the decision was reversed on appeal. *Root* v. *Rose*, 575.

4. It is not competent to prove misconduct of judge convicting accused as a ground for overthrowing the conclusive force of such decision on the question of probable cause. *Root* v. *Rose*, 575.

5. It is ordinarily incompetent to prove what either party to a written contract considered its meaning or legal effect. *Anderson* v. *Bank*, 497.

6. Opinions as to value of commercial paper are incompetent. *Anderson* v. *Bank*, 497.

7. Upon the question of value of commercial paper it is competent to prove the insolvency of the maker, the fact that the paper is not secured, or that the security is inadequate, the existence of a defense to the paper, and other facts of a like nature affecting its value. *Anderson* v. *Bank*, 497.

8. In claim and delivery a general denial puts in issue plaintiff's ownership and right of possession and the wrongful detention by defendant, and under such general denial defendant may introduce evidence to establish any of the issues raised. *Plano Mfg. Co.* v. *Daley*, 330.

9. Under an allegation that the chattel mortgage was obtained by fraud, and when the evidence showed mutual mistake, a verdict for defendant was sustained. *Plano Mfg. Co.* v. *Daley*, 330.

10. The statute providing that the sale of personalty without change of possession is presumptively fraudulent, is not merely a rule of evidence. *Conrad* v. *Smith*, 337.

11. When fraud in the inception of a negotiable instrument has been proved, the burden shifts to the indorsee to prove that he is a purchaser for value before maturity without notice and in good faith. *Knowlton* v. *Schultz*, 417.

12. The execution of a chattel mortgage being put in issue, the best evidence of its execution was the testimony of subscribing witnesses and not the evidence of the mortgagor. *Brynjolfson* v. *N. W. Elev. Co.* 450.

13. Agency cannot be proved by declarations or acts of the agent. *Gordon* v. *Vermont L. & T. Co.*, 454.

14. The voluntary dismissal of a civil action by the party controlling the same is *prima facie* evidence of want of probable cause. *Kolka* v. *Jones*, 461.

15. Malice may ordinarily be inferred by a jury from want of probable cause. *Kolka* v. *Jones*, 461.

16. The commencement by a party in his own name of an action upon a claim held by him for collection, after he had received reliable information that the claim

EVIDENCE—Continued.

had been paid by the debtor, is conclusive evidence of want of probable cause. *Kolka* v. *Jones*, 461.

17. A judgment reciting extraneous matter is not evidence of the truth of such extraneous matter in favor of or against either party in a subsequent proceeding. *Sobolisk* v. *Jacobson*, 175.

18. The certificate of protest is *prima facie* evidence of the facts of presentment, demand and dishonor therein set forth. *Ashe* v. *Beasley & Co.*, 191.

19. Where the only controverted point related to the matter of payment for wheat delivered by plaintiff to defendant's elevator, *held*, it was proper to prove by the plaintiff that defendant's agent assigned as a reason for refusing to pay him that the wheat had never been delivered. *Benjamin* v. *N. W. Elev. Co.*, 254.

20. Where issue is joined on an allegation in the complaint that promissory notes, payable to order, on which the action is brought, were sold, indorsed, and transferred to the plaintiff in good faith, before maturity, the burden is on the plaintiff to establish the truth of such allegations by evidence; and, among other things, the plaintiff must show that the notes were in fact indorsed by the payee. *Vickery* v. *Burton*, 245.

21. The mere fact that a promissory note, when offered in evidence, had indorsed upon its back the name of the payee, does not establish the fact that the payee indorsed the same, in the absence of proof of actual indorsement. *Vickery* v. *Burton*, 245.

22. Plaintiff alleged that he was the owner of promissory notes payable to the order of Pulaski J. Scovil, and at the trial put the notes in evidence. On the back of each appeared the following indorsement: "P. J. Scovil." *Held*, that such indorsement does not raise a presumption of law that the notes were indorsed in fact by Pulaski J. Scovil, and, without further evidence, such indorsement furnishes no proof that the payee indorsed said notes. There is no legal presumption that P. J. Scovil is the same person as Pulaski J. Scovil. *Vickery* v. *Burton*, 245.

23. Evidence held sufficient to justify the verdict in action of conversion. *Underwood* v. *Atlantic Elev. Co.*, 274.

24. Evidence held insufficient to justify the verdict in action for conversion. *Gull River Lumber Co.* v. *Osborne, McMillan Elev. Co.*, 276.

25. Courts will take judicial notice that certain lands are within the Indian country. *Kreuger* v. *Schultz*, 310,

26. Evidence examined and found sufficient to sustain the findings in action of claim and delivery. *Towle* v. *Greenberg*, 37.

27. A duly qualified surgeon who has testified as to the condition in which he found an amputated leg, may testify what in his opinion was the cause of the condition in which he found the leg. *Tullis* v. *Rankin*, 44.

28. A party who desires to challenge the sufficiency of evidence to support a verdict must either request that a verdict be directed in his favor or except to the charge of the court submitting questions of fact to the jury—or he may move for a new trial on the ground of the insufficiency of the evidence. *Henry* v. *Maher*, 413.

EXCEPTIONS. See ERROR, 495; EVIDENCE, 413.

EXECUTION. See REDEMPTION, 285–293; JUDGMENTS, 317.

1. Failure to secure confirmation of an execution sale does not of itself invalidate the sale. *Warren* v. *Stinson*, 293.

2. The owner's remedy to set aside an execution sale is by motion, yet under exceptional circumstances an equitable action may be maintained for that purpose. *Warren* v. *Stinson*, 293.

3. On an application to confirm an execution sale under § 5149, Comp. Laws, the court cannot look beyond the report of sale; and if such report on its face shows that the proceedings were regular, it is the duty of the court to confirm the sale. The application is *ex parte*, and nothing is before the court thereon except the report. No inquiry is to be made as to the facts outside of the report. The order of confirmation settles no question of fact or proposition of law as against the owner of the property sold. *Warren* v. *Stinson*, 293.

4. Plaintiff purchased real property on which a judgment was a lien. Defendant, as agent of the judgment creditor, The Altman & Taylor Company, called on him to pay the same. Both went to the former owner of the property, who was under obligation to pay the same as between plaintiff and himself. This former owner promised, in presence of plaintiff and defendant, the agent, to pay it. Plaintiff then departed, leaving the agent and the former owner together. Thereafter the judgment creditor, without notifying plaintiff that the judgment had not been paid, or that it intended to sell his land to satisfy the same, advertised and sold the land under execution issued upon the judgment. On the sale the judgment creditor bought in the land, and thereafter assigned the certificate to the defendant. Plaintiff did not know of the sale until after the time for redemption had expired. None of the papers relating to the sale were placed on record until after the redemption period had expired. The land was sold for a grossly inadequate price. *Held*, that it was not error to set aside the sale. *Warren* v. *Stinson*, 293.

5. While inadequacy of price will not warrant the setting aside of an execution sale for the reason that the opportunity to redeem affords the owner of the property full protection, yet, if he does not know of the sale, and is not chargable with knowledge thereof until the time for redemption has expired, gross inadequacy of price, coupled with nnconscionable conduct on the part of the judgment creditor, will constitute a reason for annulling the sale when the judgment creditor buys the property at the sale, and the deed is executed and delivered to an assignee of the certificate of sale, who is not a *bona fide* purchaser, and who is cognizant of all the facts excusing the owner of the property from not knowing of the fact of sale in time to redeem. *Warren* v. *Stinsan*, 293.

6. An execution may issue in the name of a deceased judgment creditor. Formal proceedings reviving the judgment in the name of the representatives of deceased are not now necessary. *Daisy Roller Mills* v. *Ward*, 317.

7. A redemptioner must redeem from another redemptioner, on sale of real estate under execution, or on foreclosure of a mortgage by advertisement, within 60 days after the last preceding redemption, although a year has not yet expired since the day of sale. *State* v. *O'Connor*, 285.

EXEMPTIONS. See HOMESTEAD, 482; JUDGMENT; FALSE PRETENSES, 175.

1. A recital in a judgment that the debt upon which it was obtained was contracted under false pretenses is not evidence against the judgment debtor in an action brought by him against the sheriff for seizing exempt property, such property not being exempt as against a judgment founded on a debt incurred for property obtained under false pretenses. *Sobolisk* v. *Jacobson*, 175.

2. Under the statutes of Dakota Territory as they existed in 1888, a single man who never had wife or child was not entitled to homestead exemptions. *McCanna* v. *Anderson*, 482.

EXPERT TESTIMONY. See EVIDENCE, 44.

FALSE PRETENSES. See EVIDENCE, 175; EXEMPTIONS, 175.

FOLLOWING TRUST FUNDS.

Where an agent entrusted with the collection of paper accepts in payment thereof a draft or check instead of cash, the owner of the paper may treat either the original or substituted paper as his property, and may follow it in the hands of the bank receiving it although such bank has credited it as cash to the bank transmitting the original paper to it for collection. *National Bank of Commerce* v. *Johnson*, 180.

FORECLOSURE. See MORTGAGES, RECEIVERS.

1. After a mortgage to secure an indebtedness was made by the Bismarck Water Company, and duly recorded, judgments were obtained against said company by the plaintiffs, and an action was instituted in the District Court by said judgment creditors in the nature of a creditor's bill, in which the Central Trust Company, as representing the mortgagees, was allowed to intervene as a party. In said action, and before the intervener became a party thereto, a receiver was appointed at the instance of the plaintiffs, and said receiver, in February, 1894, pursuant to the terms of his appointment, took possession of the plant of the water company, and ever since then said receiver has had the exclusive control and management of said company and its business, and has collected and received all of the rents, profits, and earnings of said company. Said mortgage, in terms, in addition to other property, pledged the earnings and rents of the company to secure the payment of the debt, and was prior in time and superior in equity to the claims of the plaintiffs. *Held*, that all earnings and rents collected or received by the receiver are held subject to the superior lien of the mortgage, and the same must be paid over, after deducting the expenses of the receivership, to satisfy any deficiency which may exist after a sale of the property is made pursuant to the foreclosure judgment. *McKenzie* v. *Bismarck Water Company*, 361.

2. The court below, by its foreclosure judgment, directed that the entire plant of the Bismarck Water Company embraced within the mortgage, and consisting of real, personal, and mixed property, should be sold in its entirety, without separation, and sold without the right of redemption from such sale; and further directed that immediately upon such sale a deed of all of said property should be delivered to the purchaser, which deed would entitle the purchaser forthwith to take and keep possession of all of said property as absolute owner. *Held*, that this feature of the judgment entered below was entirely proper. *McKenzie* v. *Bismarck Water Co.*, 361.

FOREIGN JUDGMENT.

When pending an action upon notes, judgment thereon was recovered in another state, the plaintiff cannot file a supplemental complaint alleging recovery of such judgment, but the rendition thereof constitutes a bar to the further prosecution of the action. *Swedish American Nat. Bank* v. *Dickinson Co.*, 222.

FRAUD.

An execution sale may be vacated for fraud. *Warren* v. *Stinson*, 293.

FRAUDULENT CONVEYANCES.

1. Where a conveyance was made without change of possession, which under the statute created a conclusive presumption of fraud, the creditor obtained a vested right not affected by a subsequent act converting the conclusive presumption into a rebuttable one. *Conrad* v. *Smith*, 337.
2. A conveyance fraudulent as to one creditor held fraudulent as to the others. *Daisy Roller Mills* v. *Ward*, 317.
3. A fraudulent grantee who paid mortgages on the property *held* not entitled to hold the same as security. *Daisy Roller Mills* v. *Ward*, 317.
4. A fraudulent grantee who purchased a judgment decreed superior to mortgages paid by him *held* entitled to priority under such judgment. *Daisy Roller Mills* v. *Ward*, 317.
5. A receiver of the property *held* not a necessary party to an action to set aside a fraudulent conveyance thereof. *Daisy Roller Mills* v. *Ward*, 317.
6. Conveyances *held* fraudulent. *Daisy Roller Mills* v. *Ward*, 317.

GAME. See ACCIDENT INSURANCE, 201.

GARNISHMENT. See SUBJECT OF ACTION, 117; JURISDICTION, 117.

GENERAL DENIAL. See PLEADING, 330; CLAIM AND DELIVERY, 330; EVIDENCE, 330.

HIGHWAYS.

A highway *held* to have been acquired by prescription, both as against the government and railroad company. *Walcott Township* v. *Skauge*, 382.

HOMESTEAD. See MORTGAGES, 215.

1. A homestead *held* to have been abandoned by removal from the state. *Kuhnert* v. *Conrad*, 215.
2. A homestead right acquired after the execution of a mortgage on the premises *held* subject to the mortgage although mortgage not signed by wife of mortgagor. *Kuhnert* v. *Conrad*, 215.
3. Under the statutes as they existed in 1888, a single man, who never had wife or child, was not entitled to the homestead exemption. *McCanna* v. *Anderson*, 482.

HUSBAND AND WIFE. See HOMESTEAD, 215.

INDIAN COUNTRY. See ADVERSE POSSESSION 310; JUDICIAL NOTICE, 310.

INDIAN LANDS.

Indian lands defined. *State* v. *Denoyer*, 586.

INDIAN RESERVATION. See ELECTIONS, VOTERS.

INDORSEMENT. See NEGOTIABLE INSTRUMENTS, 245, 417; BURDEN OF PROOF, 417; EVIDENCE, 417.

1. There is no presumption that the indorsement P. J. Scovil on the back of a note was made by the payee Pulaski J. Scovil. *Vickery* v. *Burton*, 245.
2. The mere fact that a promisory note when offered in evidence, had indorsed upon its back the name of the payee, does not establish the fact that the payee endorsed the same, in the absence of proof of actual indorsement. *Vickery* v. *Burton*, 245.
3. Where the complaint avers the indorsement of paper to plaintiff before maturity for value and this averment is denied by the answer, the burden is on plaintiff to establish the truth of his allegation by evidence, and plaintiff must show that the notes were in fact indorsed by the payee. *Vickery* v. *Burton*, 245.
4. When fraud in the inception of a negotiable instrument is proved, the burden is shifted to the indorsee to prove that he is a purchaser for value, before maturity without notice, and in good faith. *Knowlton* v. *Schultz*, 417.

INSOLVENCY.

1. A creditor of an insolvent debtor whose claim accrued before the enactment of the insolvency law under which such debtor is seeking discharge from his debts, may prove his claim and receive his dividends without waiving his right to insist that the discharge feature of such statute is as to his claim a law impairing the obligation of his contract in so far as it assumes to discharge his claim without full payment. *Elton* v. *O'Connor*, 1.
2. Under Rev. Code, Ch. 38, relating to insolvency, no creditor whose debt existed when the law was passed can levy on the property of the insolvent after the title has vested in the assignee. *Elton* v. *O'Connor*, 1.

INSURANCE.

1. An attempt to scale a bank with a loaded gun *held* not a voluntary exposure to unnecessary danger, within the terms of an accident policy. *Cornwell* v. *Fraternal Acc'd't. Ass'n of America*, 201.
2. One hunting game with a loaded gun *held* not to have voluntarily exposed himself to unnecessary danger, within the terms of an accident policy. *Cornwell* v. *Fraternal Acc'd't. Ass'n. of America*, 201.

INTERVENTION.

1. To entitle a party to intervene in an action, he must have such a direct and immediate interest in the matter in litigation that he will either lose or gain by the direct legal operation and effect of the judgment. *Bray* v. *Booker*, 526.
2. The vendee agreed to pay a portion of the purchase price to a national bank, a creditor of the vendor. *Held*, that in an action by the vendor to enforce a vendor's lien for the unpaid purchase price, the receiver of such bank cannot intervene, because the bank has no lien itself on the property, and no interest in the vendor's lien thereon, and it will not be affected by any personal judg-

INTERVENTION—Continued.

ment which may be rendered against the vendee for the purchase price. The receiver of the bank, if he has a right to enforce against the vendee his promise to pay a portion of the purchase money to the bank, can still enforce such promise, whatever the decision in the present action may be. The only right which he has, if any, is an action at law upon the promise of the vendee to pay a portion of the purchase money to the bank. *Bray* v. *Booker*, 526.

JOINT RESOLUTION. See CONSTITUTIONAL LAW, 81.

JUDGES.

1. A judge of a court of record is not liable for damages for judicial actions, though he is charged with acting corruptly. *Root* v. *Rose*, 575.
2. Even in a case where the court of which he is a judge had no jurisdiction of the subject matter, the liability of the judge is doubted unless the want of jurisdiction is so palpable that it is obvious that he could not honestly assume to act as judge in such matter. *Root* v. *Rose*, 575.

JUDGMENTS. See CLAIM AND DELIVERY, 391; FOREIGN JUDGMENT, 222.

1. Form of judgment in action of claim and delivery by landlord against tenent for possession of crop under title contract. *Angell* v. *Egger*, 391.
2. A judgment purely *in rem* will not merge the cause of action on the original claim and therefore will not constitute a bar to an action thereon in another jurisdiction. *Swedish Am. Nat. Bank* v. *Dickinson Co.*, 233.
3. An order confirming an execution sale determines no question of fact or law as against the owner. *Warren* v. *Stinson*, 293.
4. Under § 5110, Comp. Laws, when the judgment creditor dies, execution may be issued by the representatives of the deceased and in his name. Proceeding for the revival of the judgment in the name of the representatives is not now necessary. *Daisy Roller Mills* v. *Ward*, 317.
5. A judgment on a note determining that the note was given for property obtained by the maker by false pretenses *held* not conclusive of that fact in an action by the judgment defendant against the sheriff for seizing property exempt except as against a judgment founded on a debt incurred for property so obtained. *Sobolisk* v. *Jacobson*, 175.

JUDICIAL NOTICE. See EVIDENCE, 310.

JURISDICTION. See JUSTICE OF THE PEACE, 413.

1. The District Court has no jurisdiction to grant a new trial of an action tried to the court without a jury, and an order granting a new trial is void. *McKenzie* v. *Bismarck Water Co.*, 361.
2. The jurisdiction of the land department to cancel an entry is not dependent upon jurisdiction of the person of any one. *Guaranty Sav. Bank* v. *Bladow*, 112.
3. The garnishment of property under the Minnesota statute gives sufficient jurisdiction *in rem* upon which to base service upon a non-resident by publication. *Hartzell* v. *Vigen*, 117.
4. A judge of a court of record is not ordinarily liable for malicious prosecution even when the court had no jurisdiction of the subject-matter of the controversy in which he acted. *Root* v. *Rose*, 575.

JUSTICE OF THE PEACE.

An action was commenced before a justice of the peace. On application of the defendant, it was transferred to the next nearest justice in the same county. The defendant appeared before such justice without objection, and the case was tried before him upon the merits. *Held*, that such justice had jurisdiction of both the subject-matter and the person of the defendant, and that defendant could not for the first time raise in the District Court the point that the record did not affirmatively show that the parties had not agreed upon a justice to whom the case should be transferred. *Henry* v. *Maher*, 413.

LAND CONTRACTS. See CONTRACTS, 391.

LAND DEPARTMENT. See PUBLIC LANDS, MORTGAGES, NOTICE, JURISDICTION.

The land department has until a patent has been issued, complete control of the question whether it will cancel an entry. *Guaranty Sav. Bank* v. *Bladow*, 112.

LANDLORD AND TENENT. See CLAIM AND DELIVERY, 391. CONTRACTS, 391.

1. A purchaser of land under a contract who goes upon the same and crops it, and exercises acts of ownership, *held*, to have a right to lease the same, as against his tenant or his vendor. *Nearing* v. *Coop*, 345.

2. Whether an agreement constitutes a lease or a mere hiring of the person who is to work land as a servant of the owner thereof it is lawful in any event for the parties to contract with reference to the title to the produce of the land. *Angell* v. *Egger*, 391.

LEGISLATURE.

1. It is competent for the legislature by curative act to validate a defective levy, which it might originally have authorized to be made. *Shattuck* v. *Smith*, 56.

2. A particular question or proposition may be submitted to the people to be voted upon, by a joint legislative resolution. *State* v. *Dahl*, 81.

3. It is the duty of the secretary of state to certify to the county auditors of the various counties in the state a joint resolution passed by the legislature that the question whether a constitutional convention should be held should be submitted to the people. *State* v. *Dahl*, 81.

MANDAMUS. See VOTERS, INDIANS.

1. Mandamus is the proper remedy to compel the secretary of state to certify to the various county auditors a joint legislative resolution requiring a vote as to whether a constitutional convention should be held. *State* v. *Dahl*, 81.

2. On mandamus against a mayor and auditor of a city to compel the issuance of warrants for the salary of the relator, defendants can raise the constitutionality of the act creating his office. *McDermont* v. *Dinnie*, 278.

MALICIOUS PROSECUTION.

1. An action will lie for malicious prosecution of a civil suit, though the defendant therein was not arrested. *Kolka* v. *Jones*, 461.

2. Malice may be inferred from want of probable cause. *Kolka* v. *Jones*, 461.

MALICIOUS PROSECUTION—Continued.

3. Malice will not sustain an action for malicious prosecution if want of probable cause is not shown. *Kolka* v. *Jones*, 461.

4. Plaintiff may recover in action for malicious prosecution of civil suit, reasonable attorney's fees paid out. *Kolka* v. *Jones*, 461.

5. Voluntary dismissal of a civil action by plaintiff is *prima facie* evidence of want of propable cause. *Kolka* v. *Jones*, 461.

6. Whether plaintiff in the action believed he had probable cause, is a question of fact for the jury. *Kolka* v. *Jones*, 461.

7. In an action for malicious prosecution, probable cause is, as a general rule, conclusively established by the fact that in the proceeding charged to have been instituted and carried on without probable cause the decision was adverse to the defendant therein, despite the fact that such decision has been reversed, and such defendant has finally succeeded in the case. *Root* v. *Rose*, 575.

8. If, however, the prosecutor of such proceeding (the defendant in the action for malicious prosecution) procured the decision therein through fraud, such decision is not conclusive on the question of probable cause. *Root* v. *Rose*, 575.

9. Where upon uncontroverted facts, a prosecution to punish a person for contempt, and to disbar him, was set on foot, *held*, that the decision of the District Court that such facts warranted a conviction for contempt and the disbarment of the defendant is conclusive on the question of probable cause, although such decision was subsequently reversed by the Supreme Court. *Root* v. *Rose*, 575.

10. The judge of a superior court is not liable in a civil action for damages on account of any judicial action taken by him in a proceeding before him as such judge, in which he had jurisdiction; and the fact that it is charged that he acted corruptly does not affect this principle. *Root* v. *Rose*, 575.

11. It would seem (but the point is not decided) that, even in a case where the court of which he is judge had no jurisdiction of the subject-matter, he is not liable unless the want of jurisdiction is so palpable that it is obvious that he could not honestly assume to act as judge in such matter. *Root* v. *Rose*, 575.

12. The fact that it is alleged that the judge who rendered the decision which was afterwards reversed not only acted corruptly in deciding the case, but also was himself one of the instigators of the prosecution, does not establish any cause of action against him. Probable cause being shown by the decision against the plaintiff in the suit for malicious prosecution, it is not competent to prove the misconduct of the judge as a ground for overthrowing the conclusive force of such decision on the question of probable cause. *Root* v. *Rose*, 575.

MECHANICS LIENS.

1. Any description in an affidavit or notice for a lien which will enable a party familiar with the locality to identify the property with reasonable certainty is sufficient as between the parties. *Howe & Co.* v. *Smith*, 432.

2. Where the affidavit described the property to be charged with the lien as lot 5, block 32, Keeny & Devitt's Addition to Fargo, and the proper description was lot 5, block 32, Keeny & Devitt's Second Addition to Fargo. *Held* under the facts of the case that the affidavit was sufficient. *Howe & Co.* v. *Smith*, 432.

MORTGAGES. See REDEMPTION, 285; FORECLOSURE, 361.

1. A wife of a mortgagor who acquired a homestead in the mortgaged property after giving the mortgage, *held* to have no right in the premises as against the mortgagee. *Kuhnert* v. *Conrad*, 215,
2. Where tenents in common mortgaged the property to secure a joint debt, the wife of one not joining in the mortgage; but subsequent to the execution and delivery of the mortgage said mortgagor and wife established a home upon the mortgaged premises. *Held* that the lien of the mortgage was superior to the homestead interest and that the wife secured and had no interest prior to that of the mortgagee. *Kuhnert* v. *Conrad*, 215.
3. It is proper in judgment for foreclosure of a mortgage upon the entire plant of a water company embracing real, personal and mixed property, to decree a sale of the property in its entirety without separation, and that the purchaser be let into immediate possession, without right of redemption in mortgagor. *McKenzie* v. *Bismarck Water Co.*, 361.
4. The fact that the mortgagee of the holder of a patent certificate may not have had notice of the proceedings to cancel such certificate, or any opportunity to be heard therein, does not render void the action of the land department in canceling such certificate, but merely entitles him to a hearing on the question of the legality of the original entry in a proper action in court. In such action the burden of proof is upon him to make out a *prima facie* case, the certificate after cancellation being no longer any evidence to support his claim. *Guaranty Savings Bank* v. *Bladow*, 108.
5. Whether a mortgagee, without foreclosing his mortgage, and securing by purchasing on the foreclosure sale the interest of the mortgagor, can maintain an action to have the holder of a patent based upon a subsequent entry decreed to be a trustee for him on the theory that the original entry was legal, and should not have been canceled, not decided in this case. *Guaranty Savings Bank* v. *Bladow*, 108.
6. A redemptioner must redeem from another redemptioner on sale of real estate on foreclosure of a mortgage by advertisement within 60 days after the last preceding redemption although a year has not yet expired since the day of sale. *State* v. *O'Connor*, 285.
7. A first mortgagee is entitled to rents, earnings and profits of mortgaged property in preference to judgment creditors of the mortgagor. *McKenzie* v. *Bismarck Water Co.*, 361.

MUNICIPAL COURT ACT.

Section 2209 Rev. Codes, creating a municipal court for cities is in conflict with § 113 of the State Constitution, and void. *McDermont* v. *Dinnie*, 278.

MUNICIPAL CORPORATIONS.

1. The provision for taking yeas and nays on passage of ordinance does not apply to tax levy. *Shattuck* v. *Smith*, 56.
2. Under §183 of the Constitution the indebtedness of a city cannot be increased beyond the limit therein specified, even though such debt is incurred by the issue of bonds for the purpose of refunding the indebtedness of such city. *Birkholz* v. *Dinnie*, 511.

MUNICIPAL CORPORATIONS—Continued.

3. Where a school district is divided, by the organization of a city or incorporated town or village situated within said district, into a special school district, under the provisions of Chapter 62, of the Laws of 1890, the board of arbitration provided for by said chapter to equalize the interest of said districts must take into consideration the school building owned by the original district, and adjust the rights of the respective districts concerning the same. *State* v. *School District No. 21*, 488.

NEGLIGENCE.

An attempt to scale a bank with a loaded gun in hand is not a voluntary exposure to unnecessary danger. *Cornwell* v. *Fraternal Acc'd't. Ass'n*, 201.

NEGOTIABLE INSTRUMENTS. See PRINCIPAL AND AGENT, 180; INDORSEMENT.

1. An agent entrusted with negotiable paper for collection only must, collect in cash and not in drafts or checks. *Nat. Bank of Com.* v. *Johnson*, 180.

2. When the owner of paper indorses it for collection this is notice to every person into whose hands the paper may come that the owner has not parted with his beneficial title, but has merely parted with possession for the sole purpose of collection. *Nat. Bank of Com.* v. *Johnson*, 180.

3. The certificate of protest of negotiable paper is *prima facie* evidence of the facts of presentment, demand, and dishonor. *Ashe* v. *Beasley & Co.*, 191.

4. When a note is payable at a bank, a statement in the certificate of protest that it was presented at the place of payment and payment demanded is sufficient evidence of a legal demand, without statement as to whom it was presented. *Ashe* v. *Beasley & Co.*, 191.

5. In determining whether notice of dishonor has been given indorsers, each agent and sub-agent for collection is to be regarded as a purchaser of the paper. *Ashe* v. *Beasley*, 191.

6. Notice of dishonor given by a proper party inures to the benefit of every party to the paper whose right to give similar notice has not been lost. *Ashe* v. *Beasley*, 191.

7. The statute making a certificate of protest *prima facie* evidence of presentment, demand, and dishonor, applies to inland bills. *Ashe* v. *Beasley*, 191.

8. The burden *held* on plaintiff to establish an allegation that the note sued on was in fact indorsed to him. *Vickery* v. *Burton*, 245.

9. The mere fact that a note offered in evidence bore on its back the name of the payee does not establish an endorsement by him. *Vickery* v. *Burton*, 245.

10. The name "P. J. S." on the back of a note *held* not to raise the presumption that the note was indorsed by Pulaski J. S. *Vickery* v. *Burton*, 245.

11. When fraud in the inception of a promissory note is proven, the burden is shifted to the indorsee to prove that he is a purchaser for value before maturity, without notice, and in good faith. *Knowlton* v. *Schultz*, 417.

12. Where promissory notes were placed by the parties thereto in the hands of a third party, with instructions not to deliver the same until the maker so directed, the transaction did not constitute an escrow. The notes still remained in the control of the maker. There was no delivery in law, and no title to the notes vested in the payee. *Nichols & Shepard Co.* v. *First Nat. Bank*, 404.

NEGOTIABLE INSTRUMENTS—Continued.

13. The maker of the notes having directed such third party not to deliver the notes, replevin therefor by the payee named therein against such third party would not lie. *Nichols & Shepard Co.* v. *First Nat. Bank*, 404.

14. *Prima facie* the value of a negotiable instrument is what appears to be due upon it. *Anderson* v. *First Nat. Bank*, 497.

15. Witnesses cannot testify generally as to the value of commercial paper but must confine their evidence to facts which bear upon the question of value. *Anderson* v. *First Nat. Bank*, 497.

NEW TRIAL.

1. "Errors in law," within Rev. Code, § 5472, subd. 7, relating to new trials, are rulings, instructions, and the like which occur before the rendition of a verdict or decision. *McKenzie* v. *Bismarck Water Co.*, 361.

2. Service of order granting new trial on an attorney not the attorney of record *held* insufficient to start running the time for appealing. *McKenzie* v. *Bismarck Water Co.*, 361.

3. Under Rev. Code, § 5630, a motion for a new trial based on errors in law occurring at the trial will not lie. *McKenzie* v. *Bismarck Water Co.*, 361.

4. A party who desires to challenge the sufficiency of evidence to support a verdict must either request that a verdict be directed in his favor, or except to the charge of the court submitting questions of fact to the jury. In either of which cases he may review the rulings of the court as errors in law. Or he may move for a new trial on the ground of the insufficiency of the evidence. No other mode of raising the question of insufficiency of evidence is provided by law. *Henry* v. *Maher*, 413.

5. Where a motion for a new trial on the ground of insufficiency of the evidence is made upon the minutes of the court, the notice of intention must specify the particulars wherein the evidence is alleged to be insufficient, or the motion must be denied. *Henry* v. *Maher*, 413.

6. If a motion for new trial is made on a statement of the case, the specification must be embodied in the statement, or the motion must be denied. In either case this court on appeal is not permitted to look into the evidence unless the statute in this respect is obeyed. *Henry* v. *Maher*, 413.

7. No errors in law will be considered by this court unless they are specified in the statement of the case. *Henry* v. *Maher*, 413.

8. Where an action is tried to the court without a jury under § 5630, Rev. Codes, neither a motion for a new trial is necessary nor can a new trial be ordered in the District Court, but the cause is tried anew in the Supreme Court on appeal and upon the record made below. *McKenzie* v. *Bismarck Water Co.*, 361.

9. A notice of motion for a new trial containing a notice that the motion would be made on the minutes of the court, and on a certain ground, *held* sufficient as a notice of intention. *Fletcher* v. *Nelson*, 94.

10. The court cannot vacate a verdict of its own motion on the ground that it violates instructions, or is not justified by the evidence, unless it is apparent that the verdict is the result of passion or prejudice. *Flugel* v. *Henschel*, 205.

NEW TRIAL—Continued.

11. An order granting a new trial upon the ground that the evidence is insufficient to justify the verdict, being an order resting in the sound legal discretion of the trial court, will not be disturbed except in case of abuse. *Gull River Lumber Co.* v. *Osborne McMillan Lumber. Co.*, 276.

NOTICE. See DEPOSITIONS, 191.

The fact that the mortgagee of the holder of a patent certificate received no notice of the proceeding for the cancellation of the entry of his mortgagor does not render void the decision of the land department cancelling the entry. *Guaranty Savings Bank* v. *Bladow*, 108.

NOTICE OF DISHONOR. See NEGOTIABLE INSTRUMENTS, 191.

NOTICE OF INTENTION.

1. Notice of intention may be waived and objection made for first time in appellate court that no notice of intention has been given comes too late. *Fletcher Bros.* v. *Nelson*, 94.

2. Where a motion for a new trial is made on the minutes of the court on the ground of insufficiency of the evidence the notice of intention must specify the particulars wherein the evidence is alleged to be insufficient or the motion will be denied. *Henry* v. *Maher*, 413.

ORDINANCE.

Yeas and nays on passage of ordinance required by statute, does not apply to tax levy. *Shattuck* v. *Smith*, 56.

OWNER. See CROP, 88; REAL ESTATE, 88.

PARTIES. See JUDGMENTS, 317; PRACTICE, 317; MORTGAGES, 215.

1. An execution may be taken out in the name of the deceased judgment creditor without proceedings for reviving judgment in the names of representatives. *Daisy Roller Mill* v. *Ward*, 317.

2. The court may amend pleadings and proceedings after verdict and upon its own motion so as to substitute the name of the corporation as plaintiff instead of the names of its receivers. *Bigelow* v *Draper*, 152.

3. Condemnation proceedings should be instituted in the name of the corporation and not in the name of the receivers. *Bigelow* v. *Draper*, 152

4. The right of a mortgagee before foreclosure to maintain action to have the holder of the patent based upon a subsequent entry decreed to be trustee for him, not determined. *Guaranty Savings Bank* v. *Bladow*, 108.

PARTNERSHIP. See PRINCIPAL AND SURETY, 255.

PATENT. See PUBLIC LANDS, 108; MORTGAGES.

PAYMENT. See EVIDENCE.

Where the only controverted point related to the matter of payment for wheat delivered by plaintiff to defendant's elevator, *held* it was proper to prove by the plaintiff that defendant's agent assigned as a reason for refusing to pay him that the wheat had never been delivered. *Benjamin* v. *N. W. Elev. Co.*, 254.

PHYSICIANS AND SURGEONS.

1. When the facts are known and have been testified to by the expert, it is not necessary to put a hypothetical question. *Tullis* v. *Rankin*, 44.
2. Opinion of surgeon as to cause of condition of limb is competent. *Tullis* v. *Rankin*, 44.

PLEADING.

1. A demurrer to an answer under Rev. Codes, § 5277, need specify no particulars in which the answer is insufficient. *Van Dyke* v. *Doherty*, 263.
2. An answer setting forth new matter consisting of conclusions only, is demurrable. *Van Dyke* v. *Doherty*, 263.
3. When the means of full and positive information as to a matter are readily accessible to defendant, he cannot deny an allegation as to the matter on information and belief merely. *Van Dyke* v. *Doherty*, 263.
4. A pleading may be amended after verdict substituting the name of a corporation as plaintiff in place of the names of its receivers. *Bigelow* v. *Draper*, 152.
5. The facts embodied in a supplemental complaint under the Code must relate to the cause of action set forth in the original complaint, and must be in aid thereof. *Swedish American Nat. Bank* v. *Dickinson Co.*, 222.
6. It is not proper to bring into a case, by supplemental complaint, new facts which have arisen since the action was commenced, and which by themselves constitute a new and independent cause of action, without reference to the facts alleged in the original pleading. *Swedish American Nat. Bank* v. *Dickinson Co.*, 222.
7. *Held*, that when, pending an action upon notes, judgment thereon was recovered in another state, the plaintiff could not file a supplemental complaint alleging recovery of such judgment, but that the rendition thereof constituted a bar to further prosecution of the action. *Swedish American Nat. Bank* v. *Dickinson Co.*, 222.
8. In claim and delivery a general denial puts in issue plaintiff's ownership and right of possession, and also the wrongful detention by the defendant, and under such denial defendant may introduce evidence to establish any of the issues so raised. *Plano Mfg. Co.* v. *Daley*, 330.
9. Where, in claim and delivery, plaintiff bases his claim to the property upon a chattel mortgage executed by defendant, and defendant, in his answer, admits the execution of the mortgage, and denies all the other allegations of the complaint, and also pleads certain facts upon which he predicates fraud in procuring the mortgage, if the evidence fails to establish fraud, but does show that defendant never intended to give, and plaintiff never intended to take, a mortgage upon the property in controversy, and that the mistake was not the result of defendant's negligence, then the defendant will be entitled to a verdict in his favor, notwithstanding his failure to prove fraud. *Plano Mfg. Co.* v. *Daley*, 330.

PRACTICE. See JUDGMENTS, 317; FRAUDULENT CONVEYANCES, 317; REDEMPTIONER, 285; APPEAL, 191; PARTIES, 317–152; VERDICT, 330; CHANGE OF VENUE, 413.

1. Where both parties move for a directed verdict, they thereby consent to withdrawal of the case from the jury and cannot predicate error upon the withdrawal. *N. E. Mt'ge. Sec. Co.* v. *G. W. Elev. Co.*, 407.

PRACTICE—Continued.

2. Where mortgagee of chattels consented to their sale by the mortgagor. *Held* error to direct verdict for the mortgagee in action against the purchaser for conversion. *N. E. Mt'ge. Sec. Co.* v. *G. W. Elev. Co.*, 407.

3. When fraud in the inception of a negotiable instrument is proved, the burden is shifted to the indorsee to prove that he is a purchaser for value before maturity without notice and in good faith. *Knowlton* v. *Schultz*, 417.

4. A verdict contrary to the evidence or instructions of the court cannot stand. *McArthur* v. *Dryden*, 438.

5. Where a motion for a new trial is based upon a statement, errors, (whether in the verdict, decision, or in the rulings of the court below) will be disregarded in this court unless the same are specified in the statement. *Thompson* v. *Cunningham*, 426.

6. A party who desires to challenge the sufficiency of evidence to support a verdict must either request that a verdict be directed in his favor or except to the charge of the court submitting questions of fact to the jury, in either of which cases he may review the rulings of the court as errors in law. Or he may move for a new trial on the ground of the insufficiency of the evidence. No other mode of raising the question of the sufficiency of the evidence is provided by law. *Henry* v. *Maher*, 413.

7. Where a motion for a new trial on the ground of insufficiency of the evidence is made upon the minutes of the court, the notice of intention must specify the particulars wherein the evidence is alleged to be insufficient. *Henry* v. *Maher*, 413.

8. Where a motion for new trial is made on a statement of the case, the specification of particulars wherein the evidence is alleged to be insufficient must be embodied in the statement or the motion will be denied. *Henry* v. *Maher*, 413.

9. No errors in law will be considered by the Supreme Court on appeal unless they are specified in the statement of the case. *Henry* v. *Maher*, 413.

10. Notice of intention to move for new trial may be waived, by not objecting on this ground until after appeal is taken. *Fletcher Bros* v. *Nelson*, 94.

11. A verdict may be amended where proofs are uncontroverted so as to show value of property in claim and delivery. *Fletcher Bros.* v. *Nelson*, 94.

12. It is proper for court to direct verdict where proofs are uncontroverted or necessary facts are admitted in the pleadings. *Fletcher Bros.* v. *Nelson*, 94.

13. It is bad practice to unite notice of intention to move for new trial and motion for new trial in one paper. *Fletcher Bros.* v. *Nelson*, 94.

14. Fixing fees of a receiver is a matter of judicial determination and is in the discretion of the trial court. *Patterson* v. *Ward*, 609.

15. Where evidence has been improperly received, the correct practice is for the litigant against whom it was offered to request the court to instruct the jury to disregard it, and not ask that it be stricken out, although subsequent developements in the case demonstrate its incompetency. *Kolka* v. *Jones*, 461.

PRACTICE—Continued.

16. Where evidence is competent so far as it goes, but is not sufficient to establish a case, or a right to certain damages, it is not error to refuse to strike out such evidence. The party should ask for a directed verdict, or move the court to charge the jury that the plaintiff has failed to make out a case or to establish a right to recover the particular damages, as the case may be. *Kolka* v. *Jones*, 461.

17. In stating an objection to evidence or the ground of a motion, the particular objection or ground relied on must be specified, unless it is one which could not possibly be obviated. If it is not so specified, the point will not be considered in this court, if it could possibly have been obviated on the trial. *Kolka* v. *Jones*, 461.

18. Where defendant, after his motion to direct a verdict is overruled, introduces evidence in the case, and then fails to renew his motion at the close of the case, he is not in a position to claim that the court erred in denying his motion. *Colby* v. *McDermont*, 495.

19. No portion of the charge having been excepted to, the defendant cannot predicate error upon instructions to the jury. *Colby* v. *McDermont*, 495.

20. The question of the insufficiency of the evidence not having been raised in this court by a proper assignment of error, such question will not be considered. *Colby* v. *McDermont*, 495.

21. The promissory notes of individuals have no market value, and evidence of their market value is therefore incompetent. Witnesses are not permitted to testify generally as to the value of such paper, but must confine their evidence to facts which bear upon the question of value. The insolvency of the maker, the fact that the paper is not secured or that the security is inadequate, the existence of a defense to the paper, and other facts of a like nature affecting the value of such paper, may be proved. But mere opinions as to value are not competent. This is the rule not only in actions for conversion of such paper but also in actions in which the party injured waives the tort and sues in assumpsit for the value of such paper on the theory of a sale. *Anderson* v. *First Nat. Bank*, 497.

22. *Prima facie* a chose in action is worth what appears to be due upon it, and unless the presumption is rebutted by legal evidence it is conclusive. *Anderson* v. *First Nat. Bank*, 497.

23. All objections to depositions, except for incompetency or irrelevancy, must be taken before the trial is commenced or they are forever waived. *Anderson* v. *First Nat. Bank*, 497.

24. The construction of a written agreement is a question of law for the court, and therefore ordinarily it is incompetent to prove what either party to a written contract considered its meaning or its legal effect. *Anderson* v. *First Nat. Bank*, 497.

25. When a conclusive defense is proved without objection on the ground that it is not set up in the answer, and the court, on motion, amends the answer to conform to the proof, it is the duty of the court to direct a verdict for the defendant. *McCormick H. M. Co.* v. *Larson*, 533

PRACTICE—Continued.

26. Where a suitor moves the court to direct a verdict in his favor and his motion is over-ruled, he must thereafter specifically request that the question he desires to have submitted to the jury be so submitted or he is deemed to have agreed that all controverted questions of fact be decided by the court. If he makes no such request he cannot complain of a directed verdict if the evidence is conflicting. But the rule will not apply if the verdict would be held to be unsupported by the evidence, although voluntarily tendered by the jury. *Stanford* v. *McGill*, 536.

27. An affidavit for attachment stating "that the defendant Richard E. Giese has left the State of North Dakota with intent to cheat and defraud his creditors" as the sole ground for attachment is insufficient. *Severn* v. *Giese*, 523.

28. To entitle a party to intervene in an action he must have such a direct and immediate interest in the matter in litigation that he will either lose or gain by the direct legal operation and effect of the judgment. *Bray* v. *Booker*, 526.

29. The vendee agreed to pay a portion of the purchase price to a national bank, a creditor of the vendor. In an action by the vendor to enforce a vendor's lien for the unpaid purchase price the receiver of such bank cannot intervene because the bank has no lien itself on the property and no interest in the vendor's lien thereon, and it will not be affected by any personal judgment which may be rendered against the vendee for the purchase price. *Bray* v. *Booker*, 526.

30. Where there is a substantial conflict in the evidence it is error to withdraw an issue of fact from the jury. *McRea* v. *Hillsboro Nat. Bank*, 353.

31. The time within which an appeal from an order may be taken does not begin to run until service of the order upon the attorney of record for the defeated party. *McKenzie* v. *Bismarck Water Co.*, 361.

32. A formal proceeding reviving a judgment in the name of the representative of the judgment creditor is not necessary under § 5110 Comp. Laws. *Daisy Roller Mills* v. *Ward*, 317.

33. The proper remedy to set aside an execution sale is by motion, yet under exceptional facts a bill in equity may be filed for that purpose. *Warren* v. *Stinson*, 293.

34. Acceptance of benefit under a final decree will preclude an appeal therefrom. *Williams* v. *Williams*, 269.

35. Great caution is necessary in taking a controverted question of fact from a jury, and this should never be done in a case where there is reasonable doubt upon the state of the evidence. *Vickery* v. *Burton*, 253.

36. Evidence and instructions in this case examined. *Held*, construing § 5475, Rev. Codes, that the court was not warranted in vacating the verdict, and granting a new trial on its own motion. *Flugel* v. *Henschel*, 205.

37. Under § 5475, Rev. Codes, the trial court would not be justified, as a rule, in vacating a verdict of its own motion merely upon the ground that the verdict violates the instructions of the court, or is not justified by the evidence. These are grounds available on motion made by the party aggrieved by the verdict. *Flugel* v. *Henschel*, 205.

PRACTICE—Continued.

38. Unless there has been such a manifest disregard of instructions or of the evidence that the court is at once satisfied that the verdict is the result of passion or prejudice, or of a plain disregard of the instructions to the jury, the court cannot be sustained in vacating a verdict on its own motion. The power to vacate should be exercised with great caution, and only in extreme cases. *Flugel* v. *Henschel*, 205.

39. When a motion for a new trial embraces the ground that the evidence does not justify the verdict, the motion, upon such ground, is addressed to the sound judicial discretion of the trial court; and the order made thereon, based upon such ground, will not be reversed in this court, unless the record discloses a case of abuse of discretion. This is especially true in cases where a new trial is ordered in the court below. *Gull River L. Co.* v. *Osborne McMillan Elev. Co.*, 276.

40. A defendant in an action on contract is under no obligation to litigate in that action the extraneous issue whether the debt sued on was incurred for property obtained under false pretenses. Accordingly, *held*, that when, in an action of that character, the complaint embodied allegations of facts relating to false pretenses, and the judgment by default adjudged that the debt on which the judgment was rendered was incurred for the property obtained under false pretenses, such judgment was no evidence whatever as to the fact of false pretenses, in an action brought by the defendant in the judgment against the sheriff for seizing exempt property, such property not being exempt as against a judgment founded on a debt incurred for property obtained under false pretenses. The question of false pretenses must be litigated as a fact in the action brought by the owner of the property against the sheriff. *Sobolisk* v. *Jacobson*, 175.

41. When there is a variance between the allegations of the complaint and the evidence, but no objection is made to the evidence on that account, the pleading may be treated as amended to conform to the proof. *Ashe* v. *Beasley & Co.*, 191.

42. As to practice of filing and province of supplemental complaint. *Swedish Am. Nat. Bank* v. *Dickinson Co.*, 222.

43. An action to condemn property for railroad purposes should be brought in the name of the corporation and not in the name of the receivers appointed in foreclosure proceedings. *Bigelow* v. *Draper*, 152.

44. It is competent for the court of its own motion after verdict to amend the pleadings and all proceedings by inserting the name of the corporation as plaintiff, instead of the names of the receivers. *Bigelow* v. *Draper*, 152.

PRESCRIPTION. See PUBLIC LANDS, 382.

PRESUMPTION. See BURDEN OF PROOF, 245.

1. Authority to sell implies power to warrant. *Fletcher Bros.* v. *Nelson*, 94.

2. It is presumed that the owner of land owns the crops grown thereon. *Ellestad* v. *N. W. Elev. Co.*, 88.

3. The indorsement P. J. Scovil on the back of notes offered in evidence raises no presumption that the notes were indorsed by Pulaski J. Scovil. *Vickery* v. *Burton*, 245.

PRINCIPAL AND AGENT. See BANKS AND BANKING.

1. Where the vendor's agent makes an unauthorized conditional delivery of property to the vendee, the vendor cannot convert such delivery into an unconditional one, so as to pass title. *Nichols & Shepard Co.* v. *Paulson*, 400.

2. Agency cannot be established by the statements or acts of the pretended agent. Nor will the ratification of an act that the principal was bound to perform or of an act that could only inure to its benefit have any tendency whatever to establish an agency to act generally concerning the matter for such principal. *Gordon* v. *Vermont L. & T. Co.*, 454.

3. It is competent for plaintiff to prove in an action of trover and conversion against an elevator company, that the reason assigned by defendants agent for refusing to pay for the grain alleged to have been converted was that the grain had never been delivered. *Benjamin* v. *N. W. Elev. Co.*, 254.

4. When an instrument is entrusted to bank for collection the bank secures no title thereto and no right to hold it in any other capacity than that of agent. *Nat. Bank of Com.* v. *Johnson*, 180.

5. If the bank entrusted with the collection of paper was to credit the owner of the paper with the amount thereof when collected, such bank becomes upon receipt of the money, the debtor of the owner, and at this moment the relation of principal and agent is transmuted into that of creditor and debtor. *Nat. Bank of Com.* v. *Johnson*, 180.

6. The right to change the relation of principal and agent to that of creditor and debtor does not exist until the agent collects the claim in money. *Nat. Bank of Com.* v. *Johnson*, 180.

7. An agent or sub-agent for the collection of paper entrusted for collection has no implied authority to accept anything but cash in making the collection, and if he receives other paper instead of cash, as a draft or check, the owner may treat either the original or the substituted paper as his property. *Nat. Bank of Com.* v. *Johnson*, 180.

8. One having authority to sell has implied authority to warrant the goods sold. *Fletcher* v. *Nelson*, 94.

9. The authority of one having power to sell is exhausted by a sale, hence a recission by him does not bind the principal. *Fletcher* v. *Nelson*, 94.

PRINCIPAL AND SURETY.

The sureties for the fidelity of a firm as agents *held* not liable for funds misappropriated by one of the firm after dissolution. *Standard Oil Co.* v *Arnestad*, 255.

PROCESS. See ATTACHMENT, JURISDICTION.

1. Garnishment of property of a non-resident, non-appearing defendant *held* to give the court jurisdiction of such defendant, so as to render a judgment *in rem.* *Hartzell* v. *Vigen*, 117.

2. The words "subject of the action," in Gen. St. Minn. 1894, § 5204, subd. 3, relating to service of process, mean the controversy between the parties, and not the property of defendant which has previously been seized on attachment. *Hartzell* v. *Vigen*, 117.

PROTEST. See NEGOTIABLE INSTRUMENTS, 191.

PUBLIC LANDS.

1. The principle which declares that time does not run against the government and that no rights can be acquired by adverse possession of land the title to which is in the government does not apply where the government has expressly granted the right of way for the construction of highways as it did by § 2477, Rev. Stat. U. S. *Walcott Tp.* v. *Skauge*, 382.

2. In 1866, Congress by legal enactment "14 Stat. 253" declared that "the right of way for the construction of highways over public lands not reserved for public uses is hereby granted." *Held*, that this was a grant *in præsenti*, and that when accepted by the Territory of Dakota, it took effect as of the date of the grant. *Walcott Township* v. *Skauge*, 382.

3. A mortgagee of the holder of a patent certificate is not entitled to notice of the proceedings to cancel such certificate. But the fact that he received no notice of such proceeding and had no opportunity to be heard, entitles him to a hearing upon the legality of the original entry in a proper court proceeding. *Guaranty Sav. Bank* v. *Bladow*, 108.

PUBLICATION OF SUMMONS. See PRACTICE.

An attachment or garnishment of property of defendant is sufficient under Minnesota statute to give jurisdiction to render a judgment *in rem* based upon a non-resident defendant by publication of summons. *Hartzell* v. *Vigen*, 117.

QUESTIONS OF FACT.

Where the evidence showed that B. was the owner of land and from seed purchased of plaintiff planted, harvested, threshed, and sold a crop raised on said land, it was not error for the court to submit the jury the question of L's. ownership of the crop. *Ellestad* v. *N. W. Elev. Co.*, 88.

RAILROADS. See CONDEMNATION PROCEEDINGS, 152; TAXATION, 56.

1. An action to condemn property for railroad purposes should be brought in the name of the company despite the fact that its property is in the hands of receivers appointed in foreclosure proceedings. *Bigelow* v. *Draper*, 152.

2. When it is made to appear that private property is needed for railroad purposes to enable the railroad corporation to augment the safety of its roadbed at points where the roadbed is unsafe at a particular time of the year the same can be taken under law of eminent domain. *Bigelow* v. *Draper*, 152.

3. The right of the riparian owner to have a natural stream flow over his land is such property as may be condemned for railroad purposes. *Bigelow* v. *Draper*, 152.

REAL ESTATE. See REDEMPTION, 285.

The owner of real estate is *prima facie* the owner of the crops raised thereon. *Ellestad* v. *N. W. Elev. Co.*, 88.

RECEIVERS. See PARTIES, 152; FRAUDULENT CONVEYANCES.

1. While the receiver is ordinarily, and from consideration of public policy, prohibited from purchasing as an individual what he sells as receiver, or purchasing as receiver what he sells as an individual, yet where the parties consented

RECEIVERS—Continued.

beforehand to such transaction, where the transaction was clearly for the benefit of the trust property, and the trust property has received the full benefit thereof, the parties cannot afterwards be heard to object to such transaction. *Patterson* v. *Ward*, 609.

2. A receiver, as an officer of the court, must stand impartial as between the parties, but he is not thereby prohibited from dealing with a party if, through such dealing, such party can receive no advantage over the other. *Patterson* v. *Ward*, 609.

3. Fixing the fees of the receiver is a matter of judicial determination, and is peculiarly in the discretion of the trial court, and such determination will not be disturbed in this court except in clear case of abuse. *Patterson* v. *Ward*, 609.

4. In condemnation proceedings the corporation should be named as plaintiff and not the receivers appointed in foreclosure action who have possession of the property. *Bigelow* v. *Draper*, 152.

5. A receiver of rents and profits of real estate appointed after fraudulent conveyance of the land had been made, is not a necessary party to an action to set aside such fraudulent conveyance. *Daisy Roller Mill* v. *Ward*, 317.

6. An order passing upon the account of a receiver is a determination in the nature of a final judgment of a special nature and is appealable. *Patterson* v. *Ward*, 359.

7. A receiver appointed for the Bismarck Water Co. at the instance of judgment creditors thereof who operated the plant, was required to pay rents and profits to the holders of the first mortgage on the plant. The mortgagees being held prior in time and superior in equity to plaintiff in the creditor's suit. *McKenzie* v. *Bismarck Water Co.*, 361.

REDEMPTION.

1. It is competent for the court to decree sale without right of subsequent redemption, in foreclosure of mortgage upon an entire water plant consisting of real, personal and mixed property. *McKenzie* v. *Bismarck Water Co.*, 361.

2. A redemptioner must redeem from another redemptioner on sale of real estate under execution or on foreclosure of a mortgage by advertisement within 60 days after the last preceding redemption although a year has not yet expired since the day of sale. *State* v. *O'Connor*, 285.

RENTS AND PROFITS. See FORECLOSURE, 361.

REPEALS BY IMPLICATION. See STATUTES, 382.

REPLEVIN. See CLAIM AND DELIVERY, 330; PRACTICE, EVIDENCE.

RES ADJUDICATA. See FOREIGN JUDGMENT, 222; PRACTICE.

RIPARIAN RIGHTS. See CONDEMNATION PROCEEDINGS, 152.

SALES. See VENDOR AND PURCHASER, 536, 400; CONTRACTS.

1. A sale of personal property without change of possession is presumptively fraudulent. This presumption is not a mere rule of evidence, but forms a part of the substantive law. *Conrad* v. *Smith*, 337.

2. Fraud, ignorance of fact, and inadequacy of price will vitiate an execution sale when directly attacked upon such grounds. *Warren* v. *Stinson*, 293.

3. Under an executory contract for acceptance of property, no title passes until acceptance by vendee of specified property. *Nichols & Shepard Co.* v. *Paulson*, 400.

4. Where a vendee under an executory contract refuses to accept the property tendered, it gives the vendor no title to property which was to be delivered in part payment thereof. *Nichols & Shepard Co.* v. *Paulson*, 400.

5. Where the vendee who has received property conditionally returns it, and the vendor sells it to another, he cannot claim that the title had passed to the first vendee. *Nichols & Shepard Co.* v. *Paulson*, 400.

6. A warranty made after passage of title to induce the purchaser to accept and keep the property sold *held* without consideration. *Fletcher* v. *Nelson*, 94.

7. Delivery of a bill of sale *held* to pass title. *Fletcher* v. *Nelson*, 94.

8. Vendor in a contract to sell property of a certain description, where no particular articles are agreed on, can sell property selected by him for delivery without a breach of the agreement. *Stanford* v. *McGill*, 536.

9. Where a party has option to deliver property under a contract between certain dates, to show repudiation of agreement by vendee before the last time has arrived, he must have notified the vendee of his option to call for an earlier delivery. *Stanford* v. *McGill*, 536.

10. Where a vendor has agreed to sell property of a certain description, but without selecting particular articles, the making of a second contract to sell the same property *held* not a breach of the prior executory contract. *Stanford* v. *McGill*, 536.

SCHOOL DISTRICTS.

Where a school district is divided by the organization of a city or incorporated town or village situated within said district into a special school district, under the provisions of Ch. 62, Laws 1890, the board of arbitration provided for by said chapter to equalize the interest of said districts must take into consideration the school building owned by the original district and adjust the rights of the respective districts concerning the same. *State* v. *School District No. 21*, 488.

SPECIFICATION OF PARTICULARS. See STATEMENT OF CASE, 413 426.

Specification held sufficient. *McCormick H. M. Co.* v. *Larson*, 533.

STATEMENT OF CASE. See PRACTICE, 413, 426.

1. Specifications of error must be embodied in the statement of the case or a motion for new trial based thereon will be denied. *Henry* v. *Maher*, 413; *Thompson* v. *Cunningham*, 426.

2. No errors of law will be considered by the appellate court unless they are specified in the statement of the case. *Henry* v. *Maher*, 413.

STATUTES See FRAUDULENT CONVEYANCES, 337; REPEALS BY IMPLICATION.

1. Revised Codes, § 5053, providing that sales of personalty without change of possession shall be presumed to be fraudulent is not retroactive. *Conrad* v. *Smith*, 337.

2. Section 37 of Ch. 29 of the political Code of 1877 of Dakota Territory declared "that all public highways which have been or may hereafter be used as such for twenty years or more shall be deemed public highways." Section 1 of Subch. 2 of Ch. 112 of the Session Laws of Dakota Territory for 1883 declared: "All public roads and highways within this territory which have been opened and in use as such and included in a road district in the town in which the same are respectively situated during twenty years next preceding the time when this act shall take effect [January 1, 1884] are hereby declared to be public roads and highways and conformed and established as such whether the same have been lawfully laid out, established and opened or not." *Held*, that the latter section did not by implication, repeal the former. *Walcott Township* v. *Skauge*, 382.

STATUTES CITED AND CONSTRUED.

COMPILED LAWS.

SEC.		PAGE.	SEC.		PAGE.
499		194	2463		483-486
500		194	2467		483-486
501		195	3303		313
507		195	4500		199
844		72	4505		200
880		72	4506		199
922		73	4507		200
956		73	4508		200
1021		72	4615		500
1588		69	5110		321
1629		601-602-605	5142	Subd. 2	309
2449		483-486	5289		197
2450		483-486	5299		504
2451		483-487	5449		75
2458		483-487			

REVISED CODES.

SEC.		PAGE.	SEC.		PAGE.
480		586-600	5268		265
481		592	5277		265
491		82	5291		239
509		82	5297		159
1050		389	5301		232
2209		279-282	5352		523-525
2210		279-282	5352	Subd. 2	524
2789		207-208	5404		376
2947	Subd. 3,	161-162-167	5420		167

STATUTES CITED AND CONSTRUED—Continued.

3316		91	5467		414-415-492
3553		403	5472	Subd. 7	372
3579		453	5474		99-414
3581		453	5475		209
3582		453	5526		175
3599-3604		4	5539		306
3774		569	5540		286-290
3820	Subd. 3	569	5541		286-290
3823		569	5542		286-290
3840		442-530	5544		287-288
3848		420	5578		375
3888		102	5580		375
3932		104	5581		398
3936		103	5605		371
4308		457	5626		360
4629		440	5630		373-601
4657		43	5687		504
4738		452	5724		371
4760		570	5725		371
4763		570	5732		371
4791		432	5854		286
4830		529	5869		265
4833		570-571-573	5904		75
4867		251	5955		164
4884		251	5958	Subd. 1	162
4885		251	5958	Subd. 6	161
4988		570-573-574	5959		166
4988	Subd. 2	571	5961		157
5009		571-573-574	5962		157
5012		500	5970		157
5052		323	6036		4-5-13
5053		339-43	6053		7
5199		236	6085		7
5200		236	6591		425-426
5201		236	6749		415
5203		236	7693		202
5239		532	7694		202-203

SESSION LAWS.

YEAR.	CHAP.	SEC.		PAGE.
1875	37	----		483
1883	112	----		389
1890	62	169-173		----
1890		174-190		----
		111-112		489-492
1890	132	7	Subd. 9	42
1890	132	48		69-70-71
1890	132	70-72-82		73-74-75

STATUTES CITED AND CONSTRUED—Continued.

1890	135	----	59
1890	184	----	213
1891	69	----	202
1801	104	----	69–77
1891	106	----	70
1893	33	----	73
1877 Pol. Code	29	37	389

MINNESOTA STATUTES.

Section 5204, Subd. 3, Statutes 1894, 117.

UNITED STATES STATUTES.

24 U. S. Stat. at Large, 388, 598.

CONSTITUTION.

SEC.	PAGE.	SEC.	PAGE.
14	164	121	600
66	84	122	586
83	82	176	60
85	280	182	517
110	280	183	513–514–517
111	280	202	87
112	281	203	590
113	281–283	210	163
120	586		

SUBJECT OF ACTION.

The words "subject of the action" as found in Subd. 3, § 5204, General Statutes of Minnesota 1894, relate to the controversy between the parties and not to the property attached. *Hartzell* v. *Vigen*, 117.

SUBSCRIPTION.

Subscription to bonus for remodeling a building construed, and *held*, that there was no condition precedent that plaintiff had failed to perform. *Martin* v. *Luger*, 351.

SUBROGATION.

As a part consideration for conveyances made and received for the purpose of defrauding creditors of the grantor, the grantee agreed to and did pay off certain valid encumbrances upon the land so fraudulently conveyed. *Held*, that he was not subrogated to the rights of the mortgagees as against creditors procuring the setting aside of such fraudulent conveyances. *Daisy Roller Mills* v. *Ward*, 317.

SUMMONS. See PUBLICATION OF SUMMONS, GARNISHMENT, ATTACHMENT, JURISDICTION.

SUPPLEMENTAL PLEADING. See PLEADING, 222;

SURETY. See PRINCIPAL AND SURETY, 255.

TAXATION.

1. In 1888 the county treasurer of Barnes County sold the lands described in the complaint at a tax sale, for an alleged tax levied on the lands in 1887. The lands so sold were described upon the assessment roll, and also upon the tax duplicate delivered to the treasurer by the county clerk, by a system of arbitrary signs or symbols, which descriptions were, at a date long subsequent to said sale, held to be insufficient in law, and void, under a decision of this court. *Held*, that inasmuch as the defective descriptions of the land were placed upon the assessment roll and tax list of the county by other officials of the county, who were responsible for the descriptions, and by them delivered to the treasurer, it became the duty of the treasurer, as a ministerial officer, to sell the lands so described, upon which the tax was not paid, and that such sale, under the facts stated, was not a mistake or wrongful act of the treasurer, within the meaning of § 1629 of the Comp. Laws. No action will lie, upon such a state of facts, under said section, to recover the amount bid with interest, either against the county, or the county treasurer who made the sale. *Iowa & Dak. L. Co.* v. *Barnes County*, 601.

2. An assessment of railroad property *held* not invalid because the value fixed was less than the actual value, in the judgment of the assessing board, where there are grave doubts as to the liability of the property to taxation. *Shattuck* v. *Smith*, 56.

3. Records of the board of county commissioners, showing a levy of a specific amount for each item of county expense, *held* a sufficient compliance with the law as to such itemized statement. *Shattuck* v. *Smith*, 56.

4. That an assessor, acting in good faith, assesses certain property at less than its actual value, does not render the assessment invalid. *Shattuck* v. *Smith*, 56.

5. The law directing an entire tract to be sold for taxes delinquent thereon is not unconstitutional. *Shattuck* v. *Smith*, 56.

6. The legislature can validate a defective levy which it might have authorized to be made in the manner in which it was done. *Shattuck* v. *Smith*, 56.

7. The omission of taxable property by the assessor in good faith will not invalidate the entire assessment. *Shattuck* v. *Smith*, 56.

8. Under the laws of 1890, a tax sale is not invalid by reason of the auditor's selling for an amount in excess of the amount due. *Shattuck* v. *Smith*, 56.

9. Where, prior to the date at which property is to be assessed and listed, an elevator company sold the wheat in a certain elevator in good faith, it was not liable to taxation as property of the elevator company though it was not shipped out until after such date. *State* v. *Minneapolis & N. Elevator Co.*, 41.

TROVER AND CONVERSION.

1. Evidence held sufficient to sustain the verdict against an elevator company for the conversion of wheat covered by chattel mortgage at suit of the mortgagee. *Underwood* v. *Atlantic Elev. Co.*, 274.

2. Evidence held insufficient to sustain a verdict for plaintiff the mortgagee of a crop of wheat, against an elevator company for conversion of the wheat. *Gull River Lumber Co.* v. *Osborne-McMillan Elevator Co.*, 276.

3. Declarations of an elevator company's agent made subsequent to the transaction

TROVER AND CONVERSION—Continued.

in controversy, are not competent evidence against it, in an action against it for conversion of chattel mortgaged grain. *Benjamin* v. *Northwestern Elev. Co.*, 254.

4. Declarations of an elevator company's agent as to why he had refused to pay for wheat proved to have been received by him into the elevator are competent against the defendant company as part or the *res gestæ*. *Benjamin* v. *Northwestern Elev. Co.*, 254.

5. Where the mortgagee authorized the mortgagor to sell the property described in the mortgage at private sale, and with the proceeds pay the debt secured by the mortgage, and the sale was accordingly made by the mortgagor but he failed to pay the debt. *Held*, that by authorizing such sale the mortgagee waived the lien of the mortgage and could not thereafter recover the property nor its value from the purchaser. *N. E. Mtg. S. Co.* v. *Great Western Elev. Co.*, 407.

6. L. gave a chattel mortgage on the crop to the plaintiff, which was duly filed for record. After the mortgage was filed, but before the maturity of the debt secured by it, L. sold the crop to the defendant, and the defendant received possession thereof in one of its elevators. The mortgage embraced the usual stipulations empowering the mortgagee to take possession of the property at once upon a sale or other disposition of the property by the mortgagor. *Held*, that the sale and delivery of the crop to the defendant by the mortgagor operated, *eo instanti*, to vest in the plaintiff the right to take possession of the crop, and to sue for and recover either the crop itself or its value. Defendant acquired title by its purchase of the crop, but such title was incumbered by the mortgage, of which defendant had constructive notice. *Ellestad* v. *Northwestern Elev. Co.*, 88.

7. Verdict against an elevator company in conversion for buying wheat covered by chattel mortgage set aside as not supported by the evidence. *McArthur* v. *Dryden*, 438.

8. Where plaintiffs, claiming certain grain under a chattel mortgage, demanded the delivery to them of the grain before suit was brought for converting the grain, such demand being made of defendant's agent in charge of one of its elevators located within this state in which the grain was stored at the time of such demand, *held*, that such demand was sufficient, as against the elevator company. *Seymour* v. *Cargill Elev. Co.*, 444.

9. The execution of a chattel mortgage being put in issue, plaintiff, to prove the same, testified himself to the execution thereof by the mortgagor; but he did not call the subscribing witnesses, or prove that they were dead or resided out of the state, or that any effort had been made to secure their testimony. *Held*, under the common-law rule relating to proof of instruments to which there are subscribing witnesses, and our statutes applicable to such a case, the plaintiff has failed to prove the execution of the chattel mortgage by the best evidence, and that, therefore, it was error to receive it in evidence over defendant's objection. *Brynjolfson* v. *Northwestern Elev. Co.*, 450.

TRUST FUNDS. See FOLLOWING TRUST FUNDS, 180.

USURY.

Under Ch. 184, Laws 1890, no action can be maintained against the original owner of a usurious promissory note by the maker to recover the amount thereof, unless such original owner transfers or parts with such note before maturity, without giving the purchaser notice of its usurious character. *Hanson* v. *Cummings State Bank*, 212.

VARIANCE.

The appellate court will treat the complaint as amended to correspond with the proofs where there is a variance between the allegations of the complaint and the evidence but no objection to the evidence on that account. *Ashe* v. *Beasley & Co.*, 191.

VENDOR AND PURCHASER. See SALES.

1. Only the seller of real property has a vendor's lien thereon for the unpaid purchase price. One to whom, with the vendor's assent, the vendee has agreed to pay a portion of the purchase money, cannot claim such a lien. *Bray* v. *Booker*, 526.

2. Following the ruling of this court upon practically the same evidence in *Paulson* v. *Ward*, 58 N. W. Rep. 792, 4 N. D. 100, it is *held* that the conveyances here attacked were executed and received for the purpose of defrauding the creditors of the grantors, and are, as against these plaintiffs, void. *Daisy Roller Mills* v. *Ward*, 317.

3. Where, in an action by creditors of the grantors to set aside conveyances of real estate as fraudulent and void, it is shown that the conveyances were executed and received for the purpose of defrauding any creditor of the grantors, then, under § 5052, Rev. Codes, such conveyances are fraudulent as to all creditors of the grantors. *Daisy Roller Mills* v. *Ward*, 317.

4. Where, at the time of the execution of the conveyance of real estate made and received for the purpose of defrauding the creditors of the grantors, the grantee, as a part of the same transaction, agrees with the grantors to pay off certain existing valid encumbrances upon the real estate so fraudulently conveyed, and subsequently, and in pursuance of such agreement, the grantee pays such encumbrances, he cannot, when such conveyances are declared fraudulent and void as against the creditors of the grantors, hold such conveyances as security for the amounts so paid. *Daisy Roller Mills* v. *Ward*, 317.

5. But where at the suit of one judgment creditor of the grantors, such conveyances are declared fraudulent and void, and the lien of the judgments of such creditor are declared superior to any claim of the grantee under such conveyances, and thereafter such grantee purchases such judgments, and has them assigned to a trustee for his benefit, in such case, when another action is brought by other judgment creditors of the grantors to set aside the same conveyances, and a decree to that effect is obtained, and the land ordered sold upon executions issued upon the latter judgments, the grantee is entitled to have a provision in such decree declaring the liens of the judgments so purchased and held by him, through his trustee, senior and superior to the liens of any of the judgments held by the plaintiffs in the second action. *Daisy Roller Mills* v. *Ward*, 317.

VENDOR AND PURCHASER—Continued.

6. Where at the time of the sale of personal property, and of the attachment thereof as the property of the vendor, and of the first trial of the action brought by the purchaser against the sheriff for conversion, the statutes declared that the fact that a sale was not accompanied by an immediate delivery, and followed by an actual and continued change of possession, should create a conclusive presumption of fraud, and that the sale should for that reason be void, *held*, that under such statute the attaching creditor obtained a vested right which could not be affected by a subsequent act converting the conclusive presumption of fraud into a rebuttable presumption of fraud. Such a statute is not a mere regulation of the law of evidence, but forms part of the substantive law. *Held*, further, that the new statute did not relate to past sales, but was prospective in his operation. A creditor whose claim accrued before the sale, and who did not subsequently to the sale alter his position to his detriment, is nevertheless a creditor, within the meaning of the statute. *Conrad* v. *Smith*, 337.

7. Under an executory contract by which a vendor agrees to sell and deliver to the vendee certain personal property, and the vendee agrees, as a part consideration therefor, to deliver to the vendor certain personal property then owned by him, no title to property passes either way until the acceptance by the vendee of the property specified in the contract. *Nichols, & Shepard Co.* v. *Paulson*, 400.

8. Where, in such a case, the vendee, when such property is subsequently tendered, wrongfully refuses to accept the same, such refusal may constitute a breach of the contract, but it gives the vendor no title to the property that was to be delivered in part payment of the property refused. *Nichols & Shepard Co.* v. *Paulson*, 400.

9. Where an agent of the vendor make a conditional delivery of property to the vendee, when, to the knowledge of the vendee, he had no authority so to do, the vendor may immediately retake the property; but he cannot convert such unauthorized conditional delivery into an unconditional delivery, so as to pass the title to the vendee. *Nichols & Shepard Co.* v. *Paulson*, 400.

10. Where the vendee of personal property, who has received the same conditionally, returns said property, as not complying with the conditions, and the vendor subsequently sells such property to a third person, he cannot claim that there was such a delivery to and acceptance by the first vendee as passed the title to him. *Nichols & Shepard Co.* v. *Paulson*, 400.

11. The vendee of land under a contract for deed, who crops the land and exercises all the acts of ownership and possession over the same necessary to obtain the full beneficial use of the land, is in actual possession thereof although he may never have lived upon the land or fenced any portion thereof. *Nearing* v *Coop*, 345.

12. The vendee of land under a contract for deed has a right to the full control of the land and may lease the same, and neither his tenent nor the vendor can defeat an action to recover the rent by showing that such vendee was in default under his contract and that the vendor had the legal right to dispossess him by foreclosure or otherwise. So held in an action where the tenent claimed to have leased from both parties and agreed to pay rent to the vendor only in case he had the better right thereto. *Nearing* v. *Coop*, 345.

VENDOR AND PURCHASER—Continued.

13. The vendor in a contract to sell property of a certain description, no particular articles being agreed upon, can, after he has made before the day of delivery, an *ex parte* selection of the property he intends to deliver under such contract, sell such property to another without being guilty of a breach of agreement. All that the law requires is that he make delivery of property of the description mentioned in the contract at the time delivery is due. *Stanford* v. *McGill*, 536.

14. Whether the sale by the vendor is an executory contract for the sale of specific property, of the very property to which such contract relates before the day for delivery thereunder has arrived is a breach of agreement on the ground that the vendor has thereby put it out of his power to perform the agreement, not decided. But the mere making of a second executory contract to sell the same property is not of itself a breach of the prior executory contract. *Stanford* v. *McGill*, 536.

15. Where a party has an option to deliver property under a contract at any time between certain dates, he must, if he intends to treat the time of performance as having arrived, and therefore to hold a repudiation of the agreement by the vendee before the last day for performance has arrived as a breach thereof, notify the vendee that he has exercised his option to call for an earlier delivery. But no offer to perform is necessary, as that is waived by the vendees refusal to perform. *Stanford* v. *McGill*, 536.

16. Where all the terms of a sale of personal property which has been identified are agreed upon, and embodied in a writing signed and delivered, such delivery of the writing operates to pass title to the purchaser. Accordingly, *held*, in the case of a sale of a mare, when the writing so made and delivered contained a stipulation that the sale was made without any warranty, that an oral warranty of quality, made an hour after the delivery of the writing, and made only as an inducement to the purchaser to accept and keep the mare, could not be enforced as a contract, such oral warranty being without consideration. *Fletcher Bros.* v. *Nelson*, 94.

17. An agent, having authority to sell particular property, has implied power to warrant the goods sold; but, after consummating a sale, the authority of the agent is exhausted. He cannot, by a subsequent agreement, made without the consent of his principal, rescind the sale, and then enter into a new contract of sale to the original purchaser. *Fletcher Bros.* v. *Nelson*, 94.

VERDICT. See PRACTICE, 391–407–205.

1. In claim and delivery, when the value of the plaintiff's interest in the property is not found in the verdict, but such value is not controverted, and may be ascertained by mere computation made upon the pleading, the verdict may be amended by the court, and a judgment may be entered based upon the amended verdict. *Fletcher Bros.* v. *Nelson*, 94.

2. Where facts are not controverted, or are admitted in the pleadings, it is the province of the court to direct a verdict; and this is the rule in claim and delivery cases, as well as other cases of a civil nature. *Fletcher Bros.* v. *Nelson*, 94.

3. Where there is a substantial conflict in the evidence, it is error to withdraw an issue of fact from the consideration of the jury. Evidence examined, and *held*, that the instructions of the trial court, directing a verdict in plaintiff's favor,

VERDICT—Continued.

constituted an invasion of the province of the jury, and hence were error. *McRea* v. *Hillsboro National Bank*, 353. *Vickery* v. *Burton*, 245.

4. Evidence held to be sufficient to justify the verdict. *Underwood* v. *Atlantic Elevator Co.*, 274.

5. Form of judgment or verdict in claim and delivery. *Angell* v. *Egger*, 391.

6. Evidence examined and held verdict properly directed for defendant, in action of claim and delivery by chattel mortgagee. *Plano Mfg. Co.* v. *Daley*, 330.

7. It was error for the trial court to direct a verdict for plaintiff a chattel mortgagee suing for conversion of mortgaged chattels against the purchaser from his mortgagor where the evidence showed an oral consent to such sale by the plaintiff. *New Eng. Mtg. Sec. Co.* v. *Great Western Elev. Co.*, 407.

8. Where, in a jury trial, counsel on both sides request the court to direct a verdict, and a verdict is directed, counsel thereby consent to a withdrawal of the case from the jury, and consequently are estopped from predicating error upon such withdrawal. *New Eng. Mtg. Sec. Co.* v. *Great Western Elev. Co.*, 407.

9. A verdict that must be either without support in the testimony or contrary to the instructions of the court cannot stand. *McArthur* v. *Dryden*, 438.

10. Where evidence is competent so far as it goes but is not sufficient to establish a case it is proper to ask for a directed verdict. *Kolka* v. *Jones*, 461.

11. A party who desires to challenge the sufficiency of evidence to support a verdict, must either request that a verdict be directed in his favor or except to the charge of the court submitting questions of fact to the jury. *Henry* v. *Maher*, 413.

12. While a jury which has taken a view, under the statute, of the premises which it is claimed will be damaged by a proposed diversion of a water course therefrom, may weigh the evidence as to value in the light of what they have seen, yet their verdict must be within the limits of such evidence. It cannot rest alone upon their own judgment, based upon mere inspection of the property. *Bigelow* v. *Draper*, 152.

13. Under § 5475, Rev. Codes, the court is not warranted in vacating a verdict on its own motion. *Flugel* v. *Henschel*, 205.

14. Court is not justified of its own motion in vacating a verdict because contrary to the evidence or instructions. These are grounds available on motion made by the party aggrieved by the verdict. *Flugel* v. *Henschel*, 205.

15. Unless there has been such a manifest disregard of the court's instructions or of the evidence that the court is at once satisfied that the verdict is the result of passion or prejudice, the verdict should not be vacated of the court's own motion. The power to vacate should be exercised with great caution and only in extreme cases. *Flugel* v. *Henschel*, 205.

16. When a suitor moves the court to direct a verdict in his favor and his motion is over-ruled, he must thereafter specifically request that the question he desires to have submitted to the jury be so submitted or he is deemed to have agreed that all controverted questions of fact be decided by the court. If he makes no such request he cannot complain of a directed verdict if the evidence is conflicting. But the rule will not apply if the verdict would be held to be unsup-

VERDICT—Continued.

ported by evidence although voluntarily tendered by the jury. *Stanford* v. *McGill*, 536; *Colby* v. *McDermont*, 495.

17. When a conclusive defense is proved without objection on the ground that it is not set up in the answer, and the court on motion amends the answer to conform to the proof, it is the duty of the court to direct a verdict for the defendant. *McCormick H. M. Co.* v. *Larson*, 533.

VESTED RIGHTS. See FRAUDULENT CONVEYANCES, 337.

VOTERS.

1. Where certain territory was situated within the limits of the County of Benson, in this state, and also within the limits of the Devils Lake Indian Reservation, and where said territory had, under an act of congress, been allotted to certain Indians and persons of Indian descent in severalty, and the preliminary patent therefore issued to such persons, and where said persons were living upon their respective allotments, and farming the same, it was the duty of the county commissioners of Benson County to establish a voting precinct within and for said territory. *State* v. *Denoyer*, 586.

2. Indians and persons of Indian descent, residing upon lands allotted to them in severalty, and upon which the preliminary patents have been issued, are citizens of the United States, and qualified electors of this state. *State* v. *Denoyer*, 586.

3. Section 480, Rev. Codes, in so far as it is a restriction upon the right of suffrage, as defined in § 121. of the constitution of this state, is unconstitutional and void, as not having been adopted by the majority of the voters of this state, voting at a general election, as provided by § 122 of Const. *State* v. *Denoyer*, 586.

WAIVER. See VENDOR AND PURCHASER, 536.

1. A notice of motion for new trial, otherwise in proper form, which contains a notice that the motion will be made upon the minutes of the court, and upon a ground specifically stated in the notice, will operate as a notice of intention, as well as a notice of motion. *Held*, further, where the objection is made for the first time in this court that no notice of intention was ever served, that such objection comes too late. The objection is waived by not being made in the trial court. *Fletcher Bros.* v. *Nelson*, 94.

2. By appealing from a judgment of a county court to the District Court, the appellant waives his right to appeal from such judgment to the Supreme Court, and such waiver is irrevocable. *Field* v. *Great Western Elevator Co.*, 424.

3. Where on application of defendant an action pending in justices court was transferred to the next nearest justice in the same county and defendant appeared before such justice without objection, and the case was tried before him on the merits, it is too late thereafter for defendant to raise the point that the record does not affirmatively show that the parties had agreed upon a justice to whom the case should be transferred. *Henry* v. *Maher*, 413.

4. Where defendant after his motion to direct a verdict is overruled introduces evidence in the case, he waives any right to predicate error upon this adverse

WAIVER—Continued.

ruling unless he renews his motion at the close of his case. *Colby* v. *McDermont*, 495.

WAREHOUSEMEN.

Public warehousemen are not liable to taxation for property held in store for others and for which their warehouse receipts or storage tickets are outstanding. *State* v. *Minneapolis & Northern Elev. Co.*, 41.

WARRANTY. See SALE, 94; PRINCIPAL AND AGENT, 94.

WATER COURSE. See CONDEMNATION PROCEEDINGS, 152.

WATER POWER COMPANIES. See FORECLOSURE, 361.

YEAS AND NAYS. See ORDINANCES, 56; MUNICIPAL CORPORATIONS, 56.