REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

NOVEMBER, 1900 TO JANUARY, 1902

ALSO

RULES OF PRACTICE OF THE SUPREME COURT

JOHN M. COCHRANE, Reporter

VOLUME 10

GRAND FORKS, N. D.:
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1902

OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

HON. ALFRED WALLIN, Chief Justice.

HON. N. C. YOUNG, and

HON. D. E. MORGAN, Judges.

R. D. HOSKINS, Clerk.

JOHN M. COCHRANE, Reporter.

CONSTITUTION OF NORTH DAKOTA.

Section 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.

Section 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

Aasen, Soly v. ... 108
Aasen, Township of Noble v. ... 264
American Mortg. Co. v. Mouse River Live Stock Co. ... 290
Andrews v. Schmidt ... 1
Angell, Kipp v. ... 199
Angell, Kuhnert v. ... 59
Andrus, Porter v. ... 558
Ausk v. Great Nor. Ry. Co. ... 215

B

Barras, Bastien v. ... 29
Bastien v. Barras ... 29
Baumann, Brokken v. ... 453
Beatty, McDonald v. ... 511
Becker, Wishek v. ... 63
Bekkedahl, James v. ... 120
Bennett, Eaton v. ... 346
Bergman v. Jones ... 520
Billings, McCardia v. ... 373
Boyd v. Wallace ... 78
Bradley, State ex rel Martin v. ... 157
Brokken v. Baumann ... 453
Brooks Elev. Co., Caldwell v. ... 575

C

Campbell, Eakin v. ... 416
Casselman, Flath v. ... 419
Case, J. I., Threshing Mach. Co. v. Olson ... 170
Charlebois, Nichols & Shepard Co. v. ... 446
City of Fargo, Roberts v. ... 230
City of Fargo, Pickton v. ... 469
Clendenning v. Hawk ... 90
Collins, State v. ... 464
Coler v. Coppin ... 86
Conrad, Orcutt v. ... 431
Commow, McManus v. ... 340
Coppin, Coler v. ... 86
Corey v. Hunter ... 5
Cornwell, Dever v. ... 123
Crawford, Lee v. ... 482
Caldwell v. Brooks Elev. Co. ... 575
Clopton v. Clopton ... 569

D

Dever v. Cornwell ... 123
Donovan, State ex rel McClory v. ... 508
Donovan, State ex rel McClory v. ... 203
Douglas v. Richards ... 366

E

PAGE

Eakin v. Campbell ... 415
Easton v. Lockhart ... 181
Eaton v. Bennett ... 346
Emmons, Grandin v. ... 223
Engstad v. Grand Forks County ... 54

F

Faber v. Wagner ... 287
Farwell v. Richardson ... 34
First Nat. Bank of Langdon v. Prior ... 146
First Nat. Bank of St. Thomas v. Flath ... 275
First Nat. Bank of St. Thomas v. Flath ... 281
Flath, First Nat. Bank of St. Thomas v. ... 275
Flath, First Nat. Bank of St. Thomas v. ... 281
Flath v. Casselman ... 419
Fluegel, Geils v. ... 211
Foye, Kidder County v. ... 424

G

Gang, State ex rel Laird v. ... 331
Garbutt, Prondzinski v. ... 300
Geils v. Fleugel ... 211
Georgia, Kulberg v. ... 461
Gilbertson, Hagen v. ... 546
Grand Forks County, Engstad v. ... 54
Grandin v. Emmons ... 223
Great Nor. Ry. Co. Ausk v. ... 215
Grovenor v. Signor ... 503
Gunn v. Lauder ... 389

H

Hagen v. Gilbertson ... 546
Hammond, Wishek v. ... 72
Hanberg, National Bank of Wahpeton v. ... 383
Hanson, Shepard v. ... 194
Hawk, Clendenning v. ... 90
Hawk v. Konouzki ... 37
Hardy, Porter v. ... 551
Hayes, Rosebaum v. ... 311
Hilliard, State v. ... 436
Holz, Minnesota Thresher Mfg. Co. v. ... 16

PAGE

J

James v. Bekkedahl..... 120
Jones, Bergman v..... 520
Jones, Ness v..... 587

K

Kidder County v. Foye..... 424
Kipp v. Angell..... 199
Kitching, Power v..... 254
Kitzman v. Minnesota Thresher Mfg. Co. 26
Kol in re..... 493
Konoutzki, Hawk v..... 37
Kuhnert v. Angell..... 59
Kulberg v. Georgia..... 461

L

Lake, N. P. Ry. Co. v..... 541
Lally, Teinen v..... 153
Lauder, Gunn v..... 389
Lauder, White v. 400
Lee, McGuin v..... 160
Lee v. Crawford..... 482
Lindblom v. Sonstelie..... 140
Littel v. Phinney..... 351
Lockhart, Easton v. 181

M

Mapes v. Metcalf 601
Massey, State v..... 154
McCardia v. Billings 373
McDonald v. Beatty..... 511
McDonald, Minneapolis Threshing Mach. Co v..... 408
McCollam, Phelps v..... 536
McGuin v. Lee..... 160
McIntosh County, Wiles v.... 593
McKenzie, State exrel Sunderall v. 132
McLeod, U. S. Savings & Loan Co. v. 111
McManus v. Commow..... 340
Metcalf, Mapes v..... 601
Merchant v. Pielke..... 48
Miller, Taylor v..... 361
Minnesota Thresher Mfg. Co. v. Holz 16
Minneapolis Threshing Mach. Co. v. McDonald 408
Minnesota Thresher Mf Co. Kitzman v. 26
Monarch Elevator Co., Willard v. 400
Mouse River Live Stock Co., American Mortg. Co. v..... 290

N

National Bank of Wahpeton v. Hanberg 383

PAGE

Nelson, Powers Dry Goods Co. v. 580
Ness v. Jones..... 587
Nichols v. Tingstad..... 172
Nichols & Sheard Co. v. Paulson 440
Nichols & Shepard Co. Charlebois v. 446
N. P. Ry. Co. v. Lake..... 541
Nolin, Vidger v..... 353

O

Olson, J. I. Case Threshing Mach. Co. v..... 170
Orcutt v. Conrad 431

P

Paine, Sheets v..... 103
Patterson v. Plummer..... 95
Paulson, Nichols & Shepard Co. v. 440
Peckham v. Van Bergen..... 43
Phelps v. McCollam..... 536
Phinney, Littel v..... 351
Pielke, Merchant v..... 48
Pickton v. City of Fargo..... 469
Plummer, Patterson v..... 95
Porter v. Andrus..... 558
Porter v. Hardy..... 551
Power v. Kitching..... 254
Powers Dry Goods Co. v. Nelson 580
Prior, First Nat. Bank of Langdon v. 146
Prondzinski v. Garbutt..... 300

R

Reynolds v. Strong..... 81
Richardson, Farwell v..... 34
Richards, Douglas v..... 366
Roberts v. City of Fargo..... 230
Roberts v. Roberts..... 531
Rosenbaum v. Hayes..... 311

S

Sanderson v. Winchester..... 85
Schaffner v. Young..... 245
Schmidt, Andrews v..... 1
Second Nat. Bank of Winona v. Spottswood 114
Sheets v. Paine..... 103
Shepard v. Hanson..... 194
Signor, Grovenor v..... 503
Smith v. Smith..... 219
Soly v. Aasen..... 108
Sonstolie, Lindblom v..... 140
Spottswood, Second Nat. Bank of Winona v. 114

PAGE

State ex rel Martin v. Bradley.. 157
State ex rel McClory v. Donovan 203-608
State ex rel Laird v. Gang.... 331
State v. Massey..... 154
State ex rel Sunderall v. McKenzie 132
State v. Hilliard..... 436
State v. Collins..... 464
State v. The North Dakota Children's Home Society 81
Strong, Reynold v. 493

T

Taylor v. Miller..... 361
Teinen v. Lally.....153
Tingstad, Nichols v..... 172
Thompson v. Thompson..... 564
Township of Noble v. Aasen.. 264

PAGE

U

United States Savings & Loan Co. v. McLeod 111

V

Van Bergen, Peckham v..... 43
Vidger v. Nolin..... 353

W

Wagner, Faber v..... 287
Wallace, Boyd v..... 78
West In re..... 464
White v. Lauder..... 400
Willard v. Monarch Elev. Co.. 400
Winchester, Sanderson v..... 85
Wishek v. Becker..... 63
Wiles v. McIntosh County.... 594
Wishek v. Hammond..... 72

Y

Young, Schaffner v..... 245

TABLE OF DAKOTA CASES CITED IN OPINIONS.

		PAGE
Anderson v. Bank	5 N. D. 80	94
Angell v. Egger	6 N. D. 391	41
Aultman & Co. v. Siglinger, (S. D.)	50 N. W. Rep. 911	179
Baird v. Gleeker, (S. D.)	52 N. W. Rep. 1097	365
Bank v. Barnes	8 N. D. 432	526-529
Bank v. Canfield (S. D.)	81 N. W. Rep. 630	41
Bank v. Davis	8 N. D. 83	113-154-417-453
Bank v. Flath	10 N. D. 291	561
Bank v. Francis	8 N. D. 369	533
Bank v. Johnson	6 N. D. 180	152
Bank v. Lang	2 N. D. 66	151
Bank v. Laughlin	4 N. D. 391	358-555
Bank v. Oium	3 N. D. 193	84
Bidgood v. Elevator Co.	9 N. D. 627	41
Bishop v. Railroad Co.	4 N. D. 536	420
Black v. Walker	7 N. D. 414	420
Boyd v. Von Neida	9 N. D. 337	36-37
Brynjolfson v. Elevator Co.	6 N. D. 452	344
Cannon v. Deming	3 S. D. 421	295
Christianson v. Association	5 N. D. 438	201-285
Clendenning v. Hawk	8 N. D. 419	90
Coler v. Coppin	7 N. D. 418, 421	87-88
Coler & Co. v. Dwight School Twp.	3 N. D. 249	87-88
Conrad v. Smith	6 N. D. 337	249
Consolidated, etc., Irrigation Co. v. Hawley	7 S. D. 229	406
Cosan v. Bunker, (S. D.)	50 N. W. Rep. 84	101
Deering & Co. v. Venne	7 N. D. 576	360
DeLendrecie v. Peck	1 N. D. 422	588
Dever v. Cornwell	10 N. D. 123	349
Divet v. Richland Co.	8 N. D. 65	498
Donovan v. Elevator Co.	8 N. D. 585	295
Douglas v. Glazier	9 N. D. 615	370
Douglas v. Richards	10 N. D. 366	349
Dunham v. Peterson	5 N. D. 414	562
Dunn v. Bank, (S. D.)	77 N. W. Rep. 111	561
Eaton v. Bennett	10 N. D. 346	483-487-488
Ecker v. Lidskog, (S. D.)	81 N. W. Rep. 905	594
Edmonson v. White	8 N. D. 72	214-459
Elevator Co. v. Bottineau Co.	9 N. D. 346	253
Emmons Co. v. Lands of First Nat. Bank	9 N. D. 583	478
Engine Works v. Knerr	7 N. D. 195	549
Engstad v. Dinnie	8 N. D. 1	239,244
Erickson v. Bank	9 N. D. 81	154-549
Erickson v. Kelly	9 N. D. 12	113-203
Farmers & M. Nat. Bank v. Davis	8 N. D. 83	113-154-417-453
Farrington v. Investment Co.	1 N. D. 102	253-347-349-350-479
Finlayson v. Peterson	5 N. D. 587	123-130-226
First Nat. Bank v. Laughlin	4 N. D. 391	358-555
First Nat. Bank of Devils Lake v. Merchants Nat. Bank	5 N. D. 161	549
Foogman v. Patterson	9 N. D. 254	460

		PAGE
Freeman v. Wood	88 N. W. Rep. 731	539
Gaar, Scott & Co. v. Spaulding	2 N. D. 414	206
Gauthier v. Rusicka	3 N. D. 1	25
Geils v. Fleugel	10 N. D. 211	353-417-549
Ginnonatti v. Michelletti (S. D.)	87 N. W. Rep. 587	520
Graham v. Graham	9 N. D. 88	220
Greenberg v. Bank	5 N. D. 483	48
Grigsby v. Day. (S. D.)	70 N. W. Rep. 881	101
Gunn v. Lauder	10 N. D. 389	400-445
Haxtun Heater Co. v. Gordon	2 N. D. 246	32
Hayes v. Taylor	9 N. D. 92	154
Hegar v. DeGroat	3 N. D. 355	349-350
Henry v. Maher	6 N. D. 413, 414	588
Hollinshead v. Stuart & Co.	8 N. D. 53	328
Holt v. Van Eps	46 N. W. Rep. 689	101
Howland v. Ink	8 N. D. 63	420
In re Fluegel's Estate	10 N. D. 211	549
In re Kaeppler	7 N. D. 435	586
Iowa & D. Land Co. v. Barnes & Co.	6 N. D. 601	491
Iowa Inv. Co. v. Shepard	8 S. D. 332	381
Irrigation Co. v. Hawley	7 S. D. 229	406
Investment Co. v. Smith	7 N. D. 236	299
Jasper v. Hazen	4 N. D. 1	161-169
Johnson v. Day	2 N. D. 259	382
Joslyn v. Smith	2 N. D. 53	326
Keith v. Haggart	2 N. D. 18	171
Kipp v. Angell	10 N. D. 199	353-418
Kitzman v. Mfg. Co.	10 N. D. 26	539
Knowlton v. Schultz	6 N. D. 417	283-561
Kolka v. Jones	6 N. D. 461	51
Kuhnert v. Angell	8 N. D. 198	60
Kuhnert v. Conrad	6 N. D. 215	533
Landauer v. Improvement Co. (S. D.)	72 N. W. Rep. 467	561
Larson v. Dutiel (S. D.)	85 N. W. Rep. 1008	169
Linander v. Longstaff	7 S. D. 157	594
Loan Co. v. McLeod	10 N. D. 111	203-353-417
Machine Co. v. Lee (S. D.)	57 N. W. Rep. 238	171
Machine Co. v. Skau (S. D.)	75 N. W. Rep. 199	84
Magnusson v. Linwell	9 N. D. 157	420
Manufacturing Co. v. Hanson	3 N. D. 81	122
Manufacturing Co. v. Holz	10 N. D. 16	28
Manufacturing Co. v. Person (S. D.)	79 N. W. Rep. 833	365
Massillon Eng. Co. v. Hubbard (S. D.)	77 N. W. Rep. 588	539
Mather v. Darst (S. D.)	82 N. W. Rep. 407	130
McDonald v. Beatty	9 N. D. 293	516
McDonald v. Nordyke Marmon Co.	9 N. D. 290	223-226-227
McFall v. Simmons. (S. D.)	81 N. W. Rep. 898	500-503
McHenry v. Bret	9 N. D. 68	107
Meldahl v. Dobbin	8 N. D. 115	349-350
Merchant v. Pielke	9 N. D. 245	50
Minneapolis Th. Mach. Co. v. Skau, (S. D.)	75 N. W. Rep. 199	84
Minnehaha Co. v. Thorne. (S. D.)	61 N. W. Rep. 688	72
Mooney v. Donovan	9 N. D. 93	154
Money v. Williams	9 N. D. 329	283-561
Morrison v. Oium	3 N. D. 76	322
Muri v. White	8 N. D. 58	420
Narregang v. Brown Co. (S. D.)	85 N. W. Rep. 602	255-264
National Bank of Commerce v. Johnson.	6 N. D. 180	152

		PAGE
National Cash Register Co. v. Wilson..	9 N. D. 112	417
Nation German Am. Bank v. Lang.....	2 N. D. 66	151
Newell v. Wagness	1 N. D. 69	530
Nichols & Shepard Co. v. Paulson.....	6 N. D. 400	442
Nichols & Shepard Co. v. Strangler....	7 N. D. 102	550
Noble Tp. v. Aasen	10 N. D. 264	155-157-435
Noble Tp. v. Aasen	8 N. D. 77	353-358-359
O'Brien v. Miller	4 N. D. 308	357
O'Neil v. Taylor	3 N. D. 47	347-349-350 479-481
Osborne v. Lindstrom	9 N. D. 1	258
Otto Gas Eng. Wks. v. Knerr	7 N. D. 195	549
Paine v. Dickey Co.	8 N. D. 581	498
Parrish v. Mahany	12 S. D. 278	407
Parsons v. Venzke	4 N. D. 469	457
Paulson v. Nichols & Shepard Co.	8 N. D. 606	443
Peckham v. Van Bergen	8 N. D. 595	44-549
People's State Bank v. Francis	8 N. D. 369	533
Plunket v. Evans	2 S. D. 434	360
Power v. Bowdle	3 N. D. 107	105-349-490
Powers v. Bowdle	3 N. D. 107	490
Power v. Kitching	10 N. D. 254	498
Power v. Larabee	2 N. D. 141	105-349-350-475-479--490
Power v. Larabee	3 N. D. 502	520
Prondzinski v. Garbutt	9 N. D. 239, 243, 244	207-306-307-335
Prondzinski v. Garbutt	8 N. D. 191	309
Red River Valley, etc., Co. v. Smith....	7 N. D. 236	299
Red River Valley Nat. Bank v. Barnes..	8 N. D. 432	526
Register Co. v. Wilson	9 N. D. 112	417
Reilly v. Phillips (S. D.).....	57 N. W. Rep. 780	228
Richards v. Stark Co.	8 N. D. 392	249-251-498
Ricks v. Bergsvendsen	8 N. D. 578	154
Roberts v. Bank	8 N. D. 504	260-130-128-106-107-349-350-491
Roesler v. Taylor	3 N. D. 546	58
Rosenbaum v. Hayes	5 N. D. 476	319
Rosenbaum v. Hayes	8 N. D. 462, 471, 472	319-322
Rosum v. Hodges	1 S. D. 308	406-407
Sanford v. Elevator Co.	2 N. D. 6	589
Sargeant v. Kindred	5 N. D. 8	25
Savings Bank v. Canfield (S. D.).....	81 N. W. Rep. 630	41
Searles v. Seipp	6 S. D. 472	557
Security Imp. Co. v. Cass Co.	9 N. D. 553	370
Sheets v. Paine	10 N. D. 103	349
Shepard v. Hanson	9 N. D. 249	196-198-199
Shennan v. Thresher Co. (S. D.)	82 N. W. Rep. 413	414
Slattery v. Donnelly	1 N. D. 266	588
Smith v. Smith	7 N. D. 404	220-221-222
Smith v. Smith	8 N. D. 219	574
Stanford v. McGill	6 N. D. 536	413
St. Anthony & Dak. Elev. Co. v. Bottineau Co.	9 N. D. 346	253
State v. Becker	3 S. D. 29	211
State v. Callahan	4 N. D. 481	137
State v. Crum	7 N. D. 299	268
State v. Donovan	10 N. D. 203	612
State v. Haas	2 N. D. 202	408

		PAGE
State v. Henning (S. D.)	54 N. W. Rep. 536	487
State v. Langlie	5 N. D. 594	331-337
State v. Markuson	5 N. D. 147	273
State v. McGruer	9 N. D. 566	205-206-207
State v. McKenzie	10 N. D. 132	418
State v. McNulty	7 N. D. 169	211
State v. Morgan	2 S. D. 32	498
State v. Nomland	3 N. D. 427	498
State v. Root	5 N. D. 487	273
State v. Sioux Falls Brewing Co. (S. D.)	50 N. W. Rep. 629	160
State v. Swan	1 N. D. 5	58
State v. Woodmanse	1 N. D. 246	498
Stolzman v. Wyman	8 N. D. 108	6-14-116
Sweigle v. Gates	9 N. D. 538	260-262-106-130-349-350-490
Sykes v. Hannawalt	5 N. D. 335	83-85
Taylor v. Jones	3 N. D. 235	420
Towne v. Elevator Co.	8 N. D. 200	405-407
Township of Noble v. Aasen	10 N. D. 164	155-435
Township of Noble v. Aasen	8 N. D. 77	353-358-359
Turner v. St. John	8 N. D. 245	32
Tyler v. Shea	4 N. D. 377	74
Union Nat. Bank v. Moline, Milburn & Stoddard Co.	7 N. D. 201, 219	330
Union Nat. Bank v Oium	3 N. D. 193	84
United States Sav. & Loan Co. v. McLeod	10 N. D. 111	417-203-353
Vivkery v. Burton	6 N. D. 245	283-561
Walcott Tp. v. Skauge	6 N. D. 382	545
Wambole v. Foote	2 Dak., 1	130
Warder, Bushnell & Glessner Co. v. Ingli	1 S. D. 155	407
Wells Co. v. McHenry	7 N. D. 246	128
Wessel v. Mortgage Co.	3 N. D. 160	598
Wood Machine Co. v. Lee (S. D.)	57 N. W. Rep. 238	171
Woods v. Nash	7 N. D. 376	613
Yorke v. Yorke	3 N. D. 343	360

In Memoriam.

PROCEEDINGS
IN MEMORY OF
JUDGE JOSEPH M. BARTHOLOMEW.

At the opening of the September term of the Supreme Court on Tuesday, the 17th day of September, 1901, Hon. Guy C. H. Corliss, chairman of the committtee on resolutions of the North Dakota State Bar Association, addressed the court and presented the following memorial passed by the State Bar Association and asked that the same be spread upon the minutes of the court.

MEMORIAL.

Judge Bartholomew, who so recently laid aside the ermine, has, at the great summons which sooner or later comes to all, put off as well those earthly habiliments which here enrobe the human soul. While the stream of his life was flowing on with its noiseless and unruffled yet powerful current, it plunged without a moment's warning adown the precipice of death into that dark and mysterious abyss we call the unknown.

He to whom justice was so sacred, may well claim from his professional brethren that unstinted justice be done his memory by written and spoken eulogy, though if he could yet speak from out the unseen no solicitation for encomiums would be heard from his lips, for he was one of the most modest of men.

The members of the Bar Association of this state make this permanent record of his worth as a man in all relations, and his exceptional ability and fidelity as a judge. His nature was kindness itself. His geniality was not something put on and worn to attract. Every one felt it to be the outward expression of innate warmth of heart and broad human sympathy. While one of the most approachable of men he yet possessed a dignity of bearing and an elevation of character that compelled respect. He impressed all with whom he came in contact as a man of power. Though quiet, modest, unobtrusive, and unpretentious, all left his presence feeling that there resided in him great strength of will and firmness and de-

cision of character, that none could take liberties with him and that he possessed all the elements of true heroism. No matter what troubles beset his pathway his serene and unruffled temper was never disturbed; and not even his most intimate friends ever heard complaint of any character from his lips. As a judge he has left upon the records of this state in his judicial opinions so many witnesses to his ability, learning, sound judgment, powers of reasoning and discrimination, conscientious research and study, and abiding love of equity, that other commendation of his judicial work is rendered superfluous. Breadth and solidity; mastery of legal and equitable principles; close and cogent logic; a beautiful, pure and clear style; and fullness of legal learning are found there, not as we catch occasional and momentary glimpses of the moon when the sky is overcast, but shining with a steady and unbroken radiance from every page of his judicial utterances. Is it a vain boast when we ask whether juridical history furnishes many judicial careers which in so short a time have achieved a more enviable success? We believe that he will be known in after days as one of the great judges of the state.

Patient in hearing; exhaustive in research; deliberate in maturing his conclusions; without pride of opinion; always receptive of new light; self reliant and yet appreciating the value of precedents; gracious in his demeanor with the bar and his brethren of the bench; loved and respected by them all; far above even the suspicion of the possibility of any unworthy motive entering to disturb the incorruptible discharge of his judicial duty; he may well be described and he will long be remembered as an ideal judge.

While our hearts are sad that he has been taken from our midst, we yet feel thankful that his departure was painless and that life was vouchsafed unto him until his judicial career was ended.

He died as he lived, departing from earthly scenes as quietly as he was wont to go about in the walks of daily duty.

May his well rounded, fruitful and beneficent life be an inspiration to us all.

President Newman, of the State Bar Association, then presented and read the following resolutions of the Barnes County Bar Association:

A busy and successful career of bright, and brainy activity, coupled with a life of arduous labor in an exemplary performance of every duty, both personal and public, has sadly, yet gloriously, closed.

An honored member of our profession, a just judge, a loyal and patriotic citizen, a profound scholar, an intrepid soldier, and an ideal character, has responded to the summons of his Creator, and, departing this life, gone to his rest and reward: and while the volume and value of his life work are amply sufficient to commend

and commemorate his memory, nevertheless, we, the members of the Barnes County Bar Association do hereby resolve that—

Whereas, it has pleased Him, in whose hands are all the issues of life, to remove from among us, and from those to whom he has ever been a devoted and loving husband and father, our beloved brother and faithful friend, the Honorable Joseph M. Bartholomew, late chief justice of the Supreme Court of this state, who departed this life on Sunday, the 24th day of March, 1901, at his home in the city of Bismarck, therefore, we, the members of this association, yielding unhesitatingly to the summary command of an omnipotent and adorable Deity, nevertheless, sincerely deplore the loss of our departed brother, whose conscientious and considerable labor, both as a citizen and judge, has contributed so materially to the development and progress of our society and state.

And be it further resolved that we hereby extend to his bereaved and sorrowing family our heartfelt sympathy and condolence in this their great affliction, and we further respectfully request them to remember that our respect and admiration for our deceased brother, invited, encouraged and enjoyed by reason of his uprightness and fidelity, impel us to beg leave to mourn with them their great loss.

We hold that in the greatest trials, sadness is ameliorated and sorrow is to some extent expelled by kindly sympathy, especially where the cause arises from the loss of a man of such unequalled courage, conviction and character, and we therefore trust that the state wide sympathy as expressed by the members of our profession will afford comfort and consolation to our departed brother's friends and family.

Be it further resolved, that these resolutions be spread upon the minutes of this association; that a copy be forwarded to Mrs. Bartholomew and to the State Bar Association, and that at the next regular term of the District Court for Barnes county appointed to be held in June, 1901, in Valley City, the president of this association respectfully move the honorable court for an order directing that a copy of these resolutions be by the clerk entered upon the record of said court.

Dated March 27th, A. D. 1901.

EDWARD WINTERER,
LEE COOMBS,
S. M. LOCKERBY,
ALFRED ZUGER,
E. T. BURKE,
Committee.

Mr. Newman also read a memorial of the Cass County Bar Association, as follows:

"The silver cord is loosed, the golden bowl is broken, the pitcher is broken at the fountain, the wheel is broken at the cistern, the dust returns to the earth as it was, and the spirit has returned unto God who gave it."

Another life has gone out. A brother rests, the fitful fever of his life over, his work done.

Yesterday, in the full strength and vigor of his matured manhood, his life well rounded in the service of the state, the honor of public duty well and conscientiously performed resting gracefully upon him, Joseph M. Bartholomew received the final summons, and passed gently from the finite to the infinite, from the temporal to the eternal; and it becomes us as associates in his chosen and loved profession, bowing humbly to the wisdom of the Omniscient, to reverently and lovingly lay upon the altar of his memory, our weak tribute of words of praise, and the higher, nobler, holier tribute of our steadfast affection and admiration.

The record of his services on the supreme bench during the closing decade of the past century in assisting to mold the jurisprudence of this young commonwealth, and to lay broad and deep the foundations for the administration of justice within her borders, is made up and closed forever; and marks him as a man far above the ordinary in his profession; a man of ample learning, keen discrimination, accurate judgment, profound convictions of right and justice, and a high sense of the duties and responsibilities of his exalted position; and will stand as a lasting monument to his spotless integrity, his lofty patriotism, his honesty of purpose, his uprightness of character, his eminent judicial fairness and candor, and his fearlessness in the performance of duty.

In private life, to know was to admire and love him. Always genial, always kindly, always considerate, with a sympathetic gentleness of character born of true manhood, the hours of social intercourse with him become to us all, pleasant cherished memories.

Our deepest sympathy goes out to his family, in this the hour of their darkest sorrow. In his passing to a new life, the state loses a patriotic, faithful, conscientious citizen, society a true man and the profession an eminently able and honest member; and when the final verdict is in, it will be written, "Here was a man."

March 25, 1901.

SETH NEWMAN,
GEO. W. NEWTON,
CHAS. A. POLLOCK,
Committee.

Chief Justice Alfred Wallin said:

Gentlemen of the Bar:

The resolutions which you have presented voice the high estimate which the members of this court have long since individually placed upon the character and abilities of Judge Bartholomew. Of the departed chief justice it may be said without exaggeration that he was not only a distinguished man, he was that certainly, but was in many points of view a very remarkable man,

and one who legitimately earned and richly deserved the high professional honors which have been repeatedly conferred upon him by the suffrages of the people of this state. It will be difficult in my judgment to overstate the value of Judge Bartholomew's services to the profession, and to the public at large, which were rendered during the eleven years of his service as a member of this court. It is conceded by those who were familiar with the deceased and are in a position to correctly estimate his abilities that he was by nature peculiarly equipped for the discharge of judicial duties. He was a natural judge and the gifts of nature were reinforced by life-long diligence in the varied walks of his chosen profession. He was moreover a forceful man and one who habitually reached his own conclusions as a result of independent processes of thought and investigation. He was possessed of unusual strength of will and was tenacious of his convictions when once deliberately reached, and yet with him firmness never degenerated into stubbornness. In his relations with members of the bar it is universally conceded that Judge Bartholomew was exceptionally considerate and often deeply sympathetic, while his intercourse with his associates upon the bench was marked by sweetness and dignity of language and demeanor which evoked their constant admiration and their profound respect.

The opinions of this court as formulated by the deceased will certify to his exceptional abilities as an opinion writer, to his learning as a lawyer and to his acumen as a judge; and not less so than to the sacredness of his judgment as a practical man of affairs.

These opinions have been read with profit and increasing appreciation alike by the bar and his associates upon the bench and therefore the prediction may safely be indulged that the deliverances from this bench as made by the late chief justice will furnish a source of valuable information and precedent for many years to come; and if happily this shall be the verdict of posterity as well as that of his contemporaries, the highest ambition of the deceased will have been realized. It was his highest purpose to be of real service in his allotted sphere to the people among whom his lot was cast.

The resolutions which you have presented will be entered upon the records of the court, there to remain as a tribute to the memory of the Honorable Joseph M. Bartholomew. It is so ordered.

Hon. Guy C. H. Corliss then addressed the court as follows:

May it please the court and gentlemen of the bar:

With our spirits refined and chastened by the nation's unspeakable loss and by a sorrow in which eighty millions of people are partakers, we are met together on an occasion which reminds us of yet another loss and another sorrow peculiarly our own.

The administration of justice, in its legal sense, is for this day, by the order of this court, suspended, to the end that the bench and

bar of this state may do justice, in its broader significance, to the memory of one who possessed, in an exceptional degree, those rare qualities which constitute the ideal judge.

We are assembled not to debate his worth as a man, or his strength as a magistrate, but to pronounce and record the final and irreversible judgment, without dissent of his professional brethren, touching his character, his attainments, his intellectual endowment and his judicial career. The position which Judge Bartholomew occupies, and will continue to occupy in the juridical history of this commonwealth, is not open to controversy. The unanimous verdict of those whose opinion on such a subject is of value has assigned him a station so commanding that he must, indeed, be a great judge who shall leave behind him a more enviable and enduring fame. Not that we place him in the very first rank of jurists with Marshall, and Shaw, and Gibson, and Mansfield. Not that we claim he possessed that transcendent gift we call genius. Such an encomium would be tinged with flattery. And he, the most modest of men, would, in life, have scorned to be the recipient of fulsome laudation, and now that he is gone, in what way can we better honor his memory than by speaking of him that exact truth, which would have been more grateful to his ear than overstrained praise. And when only the truth has been spoken—when our words have been kept strictly within the bounds of veracity—they must nevertheless be so eulogistic in character that those who knew him not will I fear fancy that the warmth of friendship has colored and warped our judgment.

Judge Bartholomew was born on the 17th of June, 1843, at Clarksville, McLain county, in the state of Illinois. His father was George M. Bartholomew, a son of Major-General Joseph Bartholomew, who served his country as soldier with valor and distinction in no less than three wars. When Gen. Bartholomew was hardly more than a mere child he joined the revolutionary army. Again, in 1812, he shouldered his musket in our second struggle with Great Britain. In 1832 he led the Indiana infantry against the Indians in the Black Hawk war of that year. For bravery in that war he was breveted brigadier general of volunteers, and two years later he was raised to the rank of major general by the president of the United States for his skill and rapidity of movement in relieving Lieutenant (afterwards president) Taylor, who was besieged by Indians in Fort Harrison.

Judge Bartholomew's mother was a Heffner, of Virginia. Her father was a planter and a man of influence in that state. It was from his mother, I am informed, that he inherited that kindness of heart, that thoughtfulness of others, and that uncomplaining and never failing patience which were among the notable traits of his character. When he was only two years of age his parents moved with him, their first born, to Lodi, Columbia county, Wisconsin. Here he received his early education and grew up to manhood. When he was 18 years of age he entered the Wisconsin State University,

but his patriotism prevented his completing his course. In August, 1862, when he was only 19, he enlisted as a private in Company H of the Twenty-third Wisconsin Infantry volunteers. He was mustered out November 14, 1865, as first lieutenant of one of the companies of that regiment. He was in the battles of Chickasaw Bayou and Arkansas Post, and also participated in the various engagements around Vicksburg. He formed part of the army that besieged that city, and was likewise engaged in the siege of Jackson, Miss. He aided in capturing the forts at the mouth of Mobile Bay. Later his command was transferred to the department of the gulf, and he was under Gen. Banks in the Red River campaign. During his whole army experience, covering a period of over three years, he was never wounded or taken prisoner, and lost but ten days from illness, a most exceptional record for one who had seen such long, active and dangerous service.

At the close of the war he took up the study of law in the office of Senator Allison of Iowa. He was admitted to practice at Dubuque in that state in 1869. For a while he was located at Lodi, Wis., and he then moved to Red Oak, Ia., where he enjoyed a successful practice for eight years. In 1878 Judge Bartholomew married Miss Mary S. Harrington, of Virginia, who with their only daughter, Miss Freddie, survives him. In 1883 he came to the Territory of Dakota, settling in LaMoure, where he resided until 1889, when he was elected one of the first judges of the Supreme Court of the new state of North Dakota. He was re-elected in 1894 and left the bench at the expiration of his second term in January, 1901, having served a little over 11 years as Supreme Court judge, during a portion of this time being chief justice of the court. Immediately on retiring from the bench he resumed the practice of his profession, and although less than three months had elapsed at the time of his death he had already been retained in a number of complicated cases involving large sums of money. He died suddenly of heart disease at his home on Sunday, March 24, of this year. He was supposed to be in perfect health and his unexpected death was a great shock to the people of the state.

I will not soon forget that Sunday on which word came to me over the wire from Judge Young that he whom I so much esteemed and admired had died without a moment's warning. To me it was more startling than the flash of lightning from a cloudless sky. It was as though some favorite elm or well known oak, large in girth, rich with its wealth of foliage, its branches widespread, deeply rooted in the soil, and apparently sound to the very heart, had, in the stillness of the noon day, while standing in the glory of its strength and beauty, seemingly able and destined to withstand the blasts of many years to come, fallen with far resounding crash to the earth that nourished it, one moment life with its fullness and its promise, the next moment death, with its unspeakable ruin, filling the beholder with dismay.

If we should judge him by the number of his days, we would say that he died comparatively young. He was only in his 58th year when the great summons came. But if we judge him by the truest of all standards, what he achieved and the impress he left upon the commonwealth in which he labored, we may truthfully say of him that he died in the fullness of years. And yet, how short was his judicial career when compared with that of many distinguished judges. That he won so high a reputation during so relatively brief a service on the bench, affords conclusive proof of his peculiar and eminent fitness for the judicial office. Marshall himself had not built up a greater fame at the close of the first eleven years of his labors as chief justice, and had he then died the title of the "Great Chief Justice" would not have been his, albeit, he would have left behind him a reputation as a jurist of eminent ability. While truth compels us to assign to Judge Bartholomew a station not in the first rank among the few loftiest judicial names, it also demands that we take note of the fact that they enjoyed the double advantage denied to him of great length of judicial service and the opportunity for the highest distinction on the bench incident to formative or transition periods in jurisprudence. What he might have wrought under similar conditions, we cannot tell. Certainly, no one who knows what he did do, would venture the prediction that to have done Marshall's work was beyond the scope of his brain.

How fortunate was he in his death. If the time had indeed come when he must put off this mortal body, who could wish that the mode of his departure had been different? Without any of the suffering of body or mind incident to a lingering illness he fell in the fullness of his strength and in the activity of all his powers. No tossing upon a feverish pillow, no consciousness of waning vitality, no weakening of the intellectual faculties, no sad and weary hours of looking forward to the near and approaching grave; but with the full tide of life at its very flood surging through his veins, the future stretching away before him in an attractive vista of years of congenial work, of usefulness, and of increasing reputation, he sank without a moment's warning on the threshold of his home into the arms of the Infinite Beneficence. Nor was Providence altogether unkind to him in the time of his departure. We regret that longer life was not vouchsafed to him, and yet we cannot but feel grateful that that mysterious and unescapable change we call death came not until he had finished his judicial labors and had delivered on John Marshall day, at the capitol, in the presence of the legislature and the state officials, that thoughtful, discriminating and eloquent address on the life of the great chief justice; that address in which he unconsciously delineated many of the traits of his own character and many of the qualities of his own mind. Doubtless his life would have been more rounded if he had lived another decade. But such disappointment is common to mortal flesh. Few, indeed, leave behind them perfectly finished careers. Of most it is true, that even while they plan and

labor on the uncompleted structure "comes the Blind Fury with the abhorred shears and slits the thin spun life." He was one of the most modest of men. Self glorification was utterly foreign to his nature. He even appeared to shrink from listening to that praise from others which was justly his due. He served his country faithfully and honorably throughout the greater part of the war of the rebellion and many must have been his deeds of courage and self denial, from the day he enlisted until he was mustered out. And yet, during eleven years of intimate acquaintance with him I never heard him allude to his military career. It was a subject on which his lips were absolutely sealed. He had engaged in and won important forensic battles, and we all know how natural it is for the lawyer to narrate the incidents of such memorable struggles in his hours of relaxation among his professional friends, but I never heard him refer, except in the most incidental way, to a single litigation in which he had figured as counsel while he was at the bar. His grandfather had left behind him a brilliant record as a soldier and a patriot,—and how prone are we all to recount and even magnify the notable achievements of our ancestors. But his closest friends never heard him boast that in his lineage there was a name so justly warranting family pride. He was, as Mr. Engerud has well said, one of the kindest of men. I believe he was incapable of consciously doing aught to injure the feelings of another. It was this quality that endeared him to the bar and to his associates upon the bench, and to the people of the state as well. Especially warm was the regard of the younger lawyers for him, they who need and appreciate kindly sympathetic encouragement. There are doubtless some present who felt the trepidation incident to a first appearance before the Supreme Court materially lessened because he occupied a seat on the bench. I question whether at the time of his death he had or whether he ever had a single bitter personal enemy. He loved solitude. He preferred to be much alone, and yet the social side of his nature was largely developed. He did not feel the need of friendly intercourse. He had within him resources upon which he could draw at pleasure; and yet he enjoyed converse with his fellow man; nor was there anything aristocratic, haughty or distant in his relations with others, no matter how ignorant, inferior in intellect or humble in social position the individual might be. Any analysis of his character would be sadly incomplete which omitted what was perhaps the most striking element in his nature,—his quiet heroism. There is a heroism which can storm a battery, and there is a heroism which can serenely face death on the scaffold in a great cause. Such heroes, however, are under the stimulus of excitement and are buoyed up by the thirst for fame. But there is another heroism of a loftier type. No bugle calls stirs its blood. It hears not the plaudits of millions ringing in its ears. Its imagination is not thrilled by the thought that it will leave behind a name in the grateful memory of coming generations. It bears without a murmur the heaviest burdens, knowing full well

that the world will never realize the grievous weight under which it walks, sometimes staggering in the pathway of duty. It hears and hopes for no other commendation than the voice of conscience. It makes no complaint and through trials which would crush many it maintains an outward composure as though the life was spent in an atmosphere of perennial peace. Such was the heroism of Judge Bartholomew. Seldom if ever have I seen it equalled. I question if it ever has been surpassed.

This but one of the many illustrations of his remarkable strength of character. He was a self centred man. There was nothing of the clinging vine in his nature. In trouble he did not ask any sympathy. He did not even seek that relief which comes to the burdened spirit when it pours into the ears of another its tale of sorrow, though sympathy be denied. In tribulations his lips were sealed. He felt no need of external aid, for the strength within him sufficed to bear him through every vicissitude. He was a man of extraordinary reticence. He had friends to whom he was warmly attached; and yet to none did he ever fully unbosom himself. It was not a haughty reserve. It appeared to be a constitutional trait. Circumstances may have contributed to develop it, but its roots were deep in his nature. His joys, his disappointments, his trials, his aspirations, his religious thoughts found audience only within him. They never rose to his lips, for a perennial reticence barred all egress.

I have spoken of him as an ideal judge. He had the judicial temperament and cast of mind in a pre-eminent degree. In this respect he could not be surpassed, and seldom has been or will be equalled. He was one of a thousand. Calm, steady, free from the disturbance of prejudice and one-sided intensity, instinctively weighing everything in the balance, holding the judgment in check until he had pondered long and deeply and had considered every conceivable conclusion in all its relations; he was born for the bench as Alexander was born for conquest. It was this temperament and this structure of mind that in a measure disqualified him from rising rapidly to a commanding position at the bar. When he was nominated for the Supreme bench he had no such general standing as a lawyer among the people of the state as his talents entitled him to. Men with less intellectual calibre had attracted more notice. But the members of his own profession knew him to be one of the very ablest lawyers in the state.

From eleven years intimate acquaintance with him I can bear witness that he was singularly free from any pride of opinion. His mind was always open to light. The writing of an opinion did not necessarily set his judgment so that new argument could not remould it. Not that his mind was weakly plastic. The very reverse was the case. Its fiber was exceedingly strong. And he was so painstaking in his work, and his will was so firm that nothing like vacillation characterized his conduct in the decision of a case. The conclusion he reached was not easily altered. But this was not because he loved to

flatter himself with the thought that he was nearly infallible, but because the comprehensiveness of his mind enabled him in the great majority of cases to consider before the preparation of his opinion every circumstance and every argumnt so that new light on the case was no longer possible. Not a few of the written opinions of the court, of which he was a member were radically changed after reargument; and some of these opinions were his own. There was never a time during his eleven years' service on the bench when he could not weigh a criticism of any opinion he had written with the same judicial fairness with which he originally approached the consideration of the case. In this connection I would allude to the firmness of his will. He did not call upon the heavens to witness that he could not be moved from his decision or deflected from his purpose. Loud vaunting was never his style. But those who knew him realized that the quiet unboastful man was anchored to his determination, not with a silken cord, but with a cable of steel. The logical power of his mind was great. Indeed if he had any weakness as a judge, it was a tendency to follow the windings of logic to conclusions somewhat at variance with practical judgment. His judgment, however, was sound and safe, and in the last analysis he would sacrifice on its altar the result to which logical processes had conducted him. But he sometimes seemed to witness with regret the destruction of the beautiful and flawless offspring of his reason. When, however, syllogisms brought him to conclusions inimical to natural justice there was no regret—not even a moment's hesitation. Logic he could—and even legal principles he sometimes was strongly tempted to—push aside to thwart the machinations of wrong. Abhorrence of every form of injustice was so deeply rooted in his nature that time and again he had to struggle to look beyond the narrow horizon of the particular case into the broader field of future consequences from the deviation from settled doctrines that equity might, in the immediate present, be done. Oftentimes he would, for a moment, make the plea of Bassanio, that established rules be departed from that evil might be foiled. It was the man that spoke then. But it was never long before the spirit of Portia filled him, and the magistrate answered the appeal of the man as Portia did that of the friend of Antonio, that to unsettle the law is a greater evil than to maintain its integrity at the cost of injustice in a single case.

His knowledge of principles and his grasp of the philosophy of the law were ample. We do not claim for him the legal learning of a Story; nor had he travelled as far a-field as theoretical jurists in speculation and investigation into the genesis and history of various systems of jurisprudence. But he was thoroughly equipped for the great work of the practical administration of justice through the instrumentality of human tribunals. A redundancy of legal learning is of no advantage to the practical jurist. Indeed it sometimes enfeebles the mind and creates a confusion which renders it difficult

and often impossible to select from the exuberant wealth of materials the controlling doctrine in the case. After all, the great faculty needed on the bench is the power to seize upon the dominant principle in the clash between widely different rules, all seemingly applicable to the case. He seemed to know, by a sort of legal instinct, what rules must give way and what must be accorded supremacy, when to many minds the question would be exceedingly difficult of solution. His mind was discriminating, and yet his intellectual vision was not microscopic. The brain that is too fertile in distinctions can never take a broad view of any subject, and is therefore unfitted for judicial work. In the main, the rights of litigants must be judged by general principles, and by keeping the mind free from quibbling and hair splitting in exploring the record for the vital and controlling facts. As between the over-subtle intellect and the one somewhat deficient in powers of discrimination, but possessing soundness of judgment and breadth of view, the later is far the safer and more valuable for the work of the bench. Judge Bartholomew, however, did not belong to either class. In this respect he seemed to me to be as nearly perfect as is possible to fallible man. He could and did discriminate sharply when there was ground for distinction. But he could not—and he never essayed to—"sever and divide a hair twixt north and northwest side." He had no slavish veneration for precedents. And yet he saw that a rational deference to authority was of the very essence of the law, and that in the main necessary changes should emanate from the legislative body. No one could be more ready in a proper case to deal fearlessly and radically with an unsound decision. But he was no judicial iconoclast smiting the established system that he might erect in its place his personal views as to what the law ought to be.

He had not the root and branch spirit of Bentham. Neither had he the ultra conservatism of Lord Eldon. As a general rule he pursued the beaten paths of jurisprudence. And yet, he also saw that legal science was not perfect, that it must grow, and that some of its best developments might come from a wise and cautious use of the power of the judge to alter what had become obsolete, or what was bound to work intolerable injustice.

Those who had occasion to appear before the Supreme Court while he was one of its judges will not soon forget his urbanity on the bench. He never exhibited the least impatience, even under circumstances calculated to disturb the equipoise of the calmest mind. He invariably accorded to counsel a most respectful attention. He did not essay, by remarks from the bench, to parade his legal learning, nor did he ever, in the argument of a case, espouse either side, and thus force counsel to engage in a contest with the court as well as with his adversary. Whatever observations he made during the discussion of a case were in the nature of inquiries to elicit information, or of a brief statement of his views; and sometimes he would indicate that a particular point was giving him trouble and ask counsel

for light. His graciousness has undoubtedly encouraged and helped many a young attorney who, for lack of experience, had not yet acquired the self possession of a veteran of the bar. But while he was kind and gracious, he never suffered any one to forget that he was in a court of justice and what was demanded by the proprieties of the place. There was nothing in his manner unbecoming his high position. Far from it. His dignity of bearing could not be surpassed. Those who knew him well saw behind it the real dignity of character of which it was the outward and natural expression. He did not pose. He did not by his demeanor say: "I am Sir Oracle." He was dignified in his bearing simply because within him were high ideals, lofty self-respect and true nobility of character. His dignity was a part of the man, not something put on for outward show. And it attended him wherever he went. In court and out of court, at home, on the street, in social intercourse, in his intimate relations with his associates on the bench—everywhere, he had the same quiet and never failing dignity which compelled the respect of all. Approachable, genial, companionable, he yet had that about him which warned all who came in contact with him that there was a line of familiarity which none must pass. Although I enjoyed an intimate acquaintance with him, I would as soon have thought of smiting him in the face as of greeting him with some of the well known forms through which good fellowship is oftentimes expressed. I could lay my hand on his shoulder in expression of my regard or sympathy. But I would have deemed it almost sacrilege to have struck him on the back with a loud and boisterous salutation.

Although he was not connected with any church organization he was at heart a religious man. On the subject of religion, however, as on so many other subjects, he was extremely reticent. Seldom did he allude to it and then only in the briefest manner. Just what theological views he entertained it is impossible to tell. Though I essayed a number of times to draw him out I never could ascertain whether he clung to the older orthodoxy, or accepted the modern modifications thereof or should be classed among the radicals. Perhaps he knew not himself and it is no matter. Theological systems are not religion. They are multitudinous and evanescent, while religion is one and experiences no change. They come and go as shadows pass over a summer landscape.

> "Our little systems have their day.
> They have their day and cease to be.
> They are but broken lights of Thee,
> And Thou, O Lord, art more than they."

From the few words he dropped I inferred that he leaned towards the older creeds; and yet it was not difficult to discover in him a sympathy with Whittier's sublime rebuke of man's futile efforts to measure the Infinite and search out the Divine plan.

"Who fathoms the Eternal Thought,
Who talks of scheme and plan.
The Lord is God. He needeth not
The poor device of man.

"I walk with bare, hushed feet
The paths ye tread with bloodness shod.
I dare not fix with mete and bound
The love and power of God."

He believed that man is not flesh that perisheth, but spirit that is immortal; that there is a Moral Governor of the universe whose nature is love and whose unchangeable purpose is beneficence; and that the Divine plan is the development of the human soul into harmony with the Infinite Soul. No subscription of any creed would have added aught to the evidence that he was religious in the truest sense of the word. This was shown by his gentleness, his kindness, his sympathy, his unfaltering fealty to duty; his heroism, his life of self sacrifice, his high ideals, his purity in all relations and his tender and unspeakable devotion to those who were nearest to him. What are these but religion itself.

I hardly dare allude to his incorruptibility as a judge lest I insult his memory by seeming to indicate that his fair name as an upright magistrate is in need of defense. No testimony from his professional brethren on this point is called for. The people believed and rightly belived in his unspotted purity as a jurist with a faith that nothing could have shaken and which was as wide as the borders of the state.

The opinions he wrote were characterized by a high order of excellence not only for the soundness of their views but for their literary merit as well. His style was terse, pointed and clear. He possessed a very happy faculty of orderly and lucid exposition of the facts, and no man could determine more quickly or more infallibly the essential facts of the cause to be decided. His reasoning was compact, and there was a smooth flow to his sentences which made the reading of them a pleasure. It may be truthfully said that he possessed a beautiful and correct style; that it was not marred either by redundancy or by poverty of expression; and that strength and dignity always characterized it.

His reputation as a judge extended far beyond the limits of his state. There are some here today who have felt the thrill of pride at hearing unstinted praise of his work by able lawyers and judges in other jurisdictions. He was an orator of more than ordinary strength and he has delivered some addresses in the state that will be long remembered.

He is gone and yet he is still with us,—with us in memories that will not soon fade away. We again see him enter this temple of justice at the head of his associates and ascending the bench take his seat thereon and preside over the deliberations of this court with his

accustomed dignity and grace. We look upon his benignant and intellectual countenance as of yore. We hear the mild tones of his voice. His presence inspires us with the feeling that he is every inch the judge and that the seat he occupies is his by an almost indefeasible title. He is with us, too, in the inspiration of his example, and he lives and will continue to live for the Bench and Bar and people of the state,—aye, and of the nation also, in his solid and enduring contributions to jurisprudence. His memory will not soon perish. For many years will he be accepted in this state as the standard by which to guage judicial fitness and judicial work. Long will it be ere he will share the fate common to lawyers and judges whose names are not connected with some great historic event,—their gradual fading from a distinctive view as the age in which they live recedes, even as the forest trees on the mountain side, though some of them be monarchs, are finally enveloped and lost to sight in the blue haze of the far receding hills. It requires no stretch of the imagination to predict that even a century hence those who can judge of his work will pay him the tribute that he labored on the temple of justice with usefulness and distinction. Can a lofty and pure ambition ask a more precious fame?

Hon. Seth Newman then addressed the Court and said:

May it please the court:

Nearly five months have passed since, without premonition, Judge Bartholomew passed to his final rest. On the suggestion of his death, this court adjourned as a mark of esteem, and appointed this time as the most appropriate occasion for hearing such tributes of love and respect as his brethren of the bench and bar should see fit to offer to his memory.

The effect of the sudden shock, the poignant sorrow, felt at the first intelligence of his unexpected demise, have been mellowed by the passing of time, and we may now, with clearer vision, with more accurate discrimination—calmly and dispassionately, here, in this temple of justice—where extravagant statement and fulsome adulation would be ill advised—do more complete justice to his character as a lawyer, a jurist, a citizen and a man. It is not my purpose to enter on an extended eulogy of Judge Bartholomew. My acquaintance with him began on his accession to the Supreme bench of the state and continued for eleven years until his death. Our intercourse, living in widely separated localities, was not as intimate socially as it would have been under other conditions, and there are other members of the bar, who, from more intimate knowledge of him personally, are more competent to form a just estimate of his personal and social character; yet I can not refrain, at this time, from offering my feeble tribute to his worth, expressing my deep conviction of the nobility of character he exhibited in all the walks of life, and the true manhood, which was ever the overshadowing attribute

of his nature. Our judgment of the living is never accurate, never clear, never dispassionate, never just. The struggles, failures, disappointments and perplexities of life cloud our vision and distort our perception. The passions common to humanity, accentuated and intensified by the fierceness of the struggle for existence, unfit us to clearly perceive, and justly appreciate the virtues of our fellows.

But in the presence of the great mystery which we call death, human prejudices, human passions, envy, hatred and malice shrivel and pass away, charity holds the scales with which we weigh the deeds of men, and in the purer light of the chastening influence of the great destroyer, we discern more clearly the true character of those who have left us forever. It has been said that "the evil men do lives after them," but as the golden rule of life, enunciated by the Great Teacher, becomes more and more the basis of human motive and human action, the evil perishes. Only the purer, nobler, higher elements of character survive, and become enduring memories, which we ever delight to cherish. They are the voices of the voiceless speaking on forever. Conscious that in life all walk in the shadow of faults and failures which ever beset and hamper us, in the presence of death, under the gracious influence of faith in the brotherhood of man, we more and more willingly judge as we would be judged. The voice of envy is hushed. Passion, prejudice, jealousy, all animosities are forgotten. Peculiarities, traits born of environment and of special conditions in life, fade away. Only the sterling worth of true manhood, and nobility of character, remain and endure while memory lasts.

When a man dies who has heroically fought the battles of life, who has been true to his convictions of duty, and faithful to every trust, who with the courage of his convictions has stood strenuously for the right, unawed by foe, unswerved by friend, he is entitled to our praise and highest admiration, and in paying tribute to his memory we honor ourselves and the civilization to which we belong.

The literature of the world is rich with the tributes of love and admiration paid to such; the homage instinctively given to the manifestation of the highest type of manhood, the recognition accorded to the most perfect development of human life. The people of all nations have delighted to honor those who have uttered the best thought, and steadfastly stood for the noblest endeavor of their time.

Upon the intelligence, courage, integrity, virtue and patriotism of the citizen, rests the success and perpetuity of free institutions, and it well becomes us as Americans, to honor the memory of a brave, intelligent, independent man, of unblemished integrity, purity of motive, steadfastness of purpose, and unwavering determination for the right, who has met the duties of life heroically and performed them faithfully. Such a man was Joseph M. Bartholomew.

As a lawyer he was the peer of any in the state. He was no mere case lawyer, but was familiar with, and had a keen discriminating understanding of the great fundamental principles of natural justice

and equity, which are the foundation of all law—and of their proper application to the transactions of life. His perception and understanding of the framework and nature of the American system of constitutional government were clear and well defined, and he had an abiding faith in the ability of the American people to maintain and perpetuate that government. He was thoroughly conversant with the line of demarcation which separates federal from state jurisdiction in our complex system. He was a man of original thought, of breadth, learning and great logical reasoning power, painstaking, conscientious, and industrious.

With a receptive mind always open to conviction, ever considerate of the rights and feelings of others, tenacious in his own opinions, while extremely tolerant of all others, with a temperament always calm, self possessed, and genial, with a fine sense of justice and right, he was a model jurist. His opinions written while on the bench were a credit to himself and an honor to the court, and to the state. They were always clear, scholarly, concise, logical, forceful and convincing. He was ever mindful of the fact that the province of the courts is, to declare and enforce the law, not to make it. On the bench he was ever patient, affable and genial, yet always dignified and just. In the discharge of official duties he was unapproachable and incorruptible, and knew neither friend nor foe. The accidents of wealth, position and influence were not persuasive with him.

He was a man of courage and acted without fear. He was loyal to his convictions, thought for himself and spoke what he thought. Friendship could not swerve nor enmity deter him. He clearly saw the path of duty and courageously followed it. His self respect was his constant companion. He was without vanity or ostentation, yet a commendable pride gave him great force of character.

He was an absolutely honest man. No cloud of suspicion ever rested over him, no breath of calumny ever touched him, no arrow of vituperation was ever aimed at him.

As a citizen he was irreproachable. In the agony of his country, he offered his life for her protection. Upon all social and political questions he was found with those who wrought for the good of the social fabric. With his qualities and characteristics, good citizenship was a matter of course, a necessity.

But above his qualities as a lawyer, above the ermine he wore, above all other elements of character, towered in calm majesty like a lofty mountain peak, a genial, kindly humanity, a tenderness of sympathy, a kindness of heart, a gentleness of manner, a sincerity of friendship, a true, noble manliness, that overshadowed all else.

He was more than a lawyer, more than a jurist, more than a citizen, more than a patriot. He was a true man. It was this that drew to him the admiration, the respect, and the sincere friendship of all who associated with him.

It is as a type of that which is best and highest in life that we

honor him. We cherish most, his qualities of soul. These will endure in memory when all others are forgotten.

In the full power of his mature manhood he left us.

In the midst of the activities and responsibilities of the practice of his chosen profession, in the prime and vigor of life, at the meridian of his usefulness, at the summit of his career, with the well earned honors of official service resting gracefully upon him, the future full of hope and promise of rich reward, the summons came, and he passed gently, silently beyond the limits of our vision, beyond the reach of human praise or blame, beyond the bounds of time and space, beyond the sunset's purple twilight, and entered the dawn of eternity, that vast realm of peaceful rest, peopled by the innumerable, the final goal of all human hope and aspiration, leaving with us, only the memory of a brave, honest, true, noble man, who bowed alone to death.

GENERAL W. H. STANDISH.

May it please the court:

It was my lot to know Judge Bartholomew from the organization of our state until the time of his death. During two years of that time I was placed in daily contact with him at Bismarck. Living in the same building, and meeting him there and at his home, seeing his demeanor towards his neighbors and those coming in contact with him officially and as citizens or neighbors, I can say that I can cheerfully and heartily endorse and second the resolutions that have been placed before this court by the three different associations and the remarks of the court.

HON. BURLEIGH F. SPALDING.

May it please the court:

I have not come here prepared or expecting to say anything on this occasion, but there are one or two elements in the character and make up of Judge Bartholomew that have always struck me very forcibly. From the earliest dawn of history to the present time, it has been customary on the death of distinguished citizens and public servants for the public to analyze their characters and their abilities. This is well. It serves as a guide to the young and to the inexperienced and to those taking their places. It has of late years been somewhat in vogue to consider only men of genius, only those pursuing or directing their efforts in the line of some specialty, as being the most valuable citizens and the most entitled to the encomiums of their fellow men. It is a question in my mind whether this is the correct method by which to estimate any person's life either in public or private. It has often occurred to me if the world were made up only of specialists, of people who were

brilliant in certain lines, that it would be a very ill balanced world, and that especially in a republic. It would be far wanting in the elements which are necessary to the equipoise of the state and its institutions. It has seemed to me rather, that the public servant—that the private citizen was the best public servant and the best private citizen who was the best balanced in all lines and in all directions, whose judgment was good, who was not carried off by flights of fancy, or in any particular line, to the exclusion of the other sides of his character, or the other phases of his occupation or position; and in thinking on this line, and in line with that thought, it seems to me that I have never known a man who more fully lived, or came up, to the ideal of a well rounded citizen, of a well balanced public servant, of a fully equipped judge than did the late Judge Bartholomew. And, for these reasons, to say nothing of many others, his death is a great loss to the bar and to the bench of the State of North Dakota. Men of character and integrity combined with legal attainments of high order, of ripe judgment and symmetrical in all the elements of manhood and good citizenship are not always available for positions of trust and responsibility and the people of this state have reason in the death of Judge Bartholomew to mourn the loss of one who in my estimation came very near filling all these requirements.

EDWARD ENGERUD.

If the court please:

There was one element in the character of Judge Bartholomew which more than any other won the affections of the younger members of the bar. We all knew, appreciated and admired his personal dignity, his ability and learning, but the one great trait which appealed to the hearts of every member of the bar, and particularly of us younger members who came in contact with him, was the kindliness of the man. No one could come in contact with Judge Bartholomew without feeling that he was a man of warm sympathies and kind heart, ready to extend kindly encouragement to earnest effort. His integrity, dignity, learning and ability won our respect, but his dignified kindliness won our hearts. Hence it was that when the sudden news of Judge Bartholomew's death came, it was especially a shock to the young members of the bar. Each one felt, I am sure, as I did, that we had lost a personal friend.

M. H. BRENNAN.

May it please the court:

I had the pleasure of meeting a gentleman from Seattle, who was on his way to Europe in the interest of a large estate. In the course of our conversation he said: "You have a brilliant court here in North Dakota and you have lost a very brilliant man, (refer-

ring to Judge Bartholomew.) The decisions of this court have great respect in other states. We think very much of them in our state." I told him I felt considerable pride in that as a member of the bar of North Dakota, and I tell this little incident here as something of more value than I could say as showing the wide reputation of Judge Bartholomew in regard to his ability. I have noticed that his writings stand the test of literary criticism and his addresses meet with unanimous popular approval, two qualities which are rarely found in the same person.

I shall feel that life was not spent in vain if, when I am gone, even one person shall feel as deeply for me as I do for Judge Bartholomew.

W. E. PURCELL.

May it please the court:

It was my fortune to know Judge Bartholomew reasonably well, and with profit to myself. When he was nominated and elected a member of this court there was perhaps somewhat of a feeling pervading the people of the state that perhaps he was not as well qualified as many other lawyers in the state to perform the duties of an appellate judge, but his work, as a member of this tribunal, in a very short time dispelled any fears as to his fitness for the position. He demonstrated as a member of this court, to the legal profession and to the people of this state, that he had a clear, logical and analytical mind. His decisions will stand as a monument both to his fitness and to his integrity, and the state of North Dakota at no time in the past has lost an officer that she will miss more than Judge Bartholomew.

C. E. LESLIE.

May it please the court:

I did not intend to say anything in memory of Judge Bartholomew, not that I do not wish to, but because there are so many here who are more able to do so.

I generally say but little on occasions of sadness, as I feel very strongly when anything of this kind really moves me, and therefore I shall say very little.

It has been my fortune to be a member of the bar and appear before the Supreme Court of three different states, each of these states have a Supreme Court whose decisions stand high. The old state of Vermont which had upon its Supreme Court bench such men as Colmer, Redfield and Barrett who certainly rank high, as members of this court who have had occasion to examine eastern authority well know.

The Supreme Court of Minnesota under Chief Justice Gilfillan was certainly a very strong Supreme Court, but I have never felt

that the Supreme Court of North Dakota need take a second place. And of the members of this Supreme Court we all recognize the fact that the chief justice, who has lately been taken from us, did much to give our Supreme Court the standing it has, and we all, both admire him and his memory.

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.

APPEALS, NOTICE HOW SERVED, WHEN ENTITLED TO BE HEARD.] The notice of appeal in civil cases shall be signed by the appellant or a licensed attorney residing in this state, and 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 case shall not be heard at such term unless a printed abstract and a printed brief shall be served and filed by one party or the other as provided by section 5632, Revised Codes, at least twenty-five days prior to the first day of such term.

RULE V.

PAPERS TO BE TRANSMITTED.—CLERK'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, with his certificate attached thereto as herein provided. 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 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. 190...

(Seal.) .....Clerk.

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

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 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 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. 190...

(Seal.) .....Clerk.

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

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

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; a statement of the case and a copy of the judgment, 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. 190...

(Seal.) .....Clerk.

RULE VI.

RECORDS TO BE TRANSMITTED ON APPEALS.—FROM ORDERS.—FROM JUDGMENTS.] On appeal from an order, the record transmitted must contain the order appealed from and all of the original papers used by each party on the application for such order, or copies thereof, as provided in section 5607, Revised Codes. When any portion of the record is embraced in the stenographer's minutes the same shall be transcribed and certified to by the presiding judge. All papers and evidence must be described in the order as provided in section 5719, Revised Codes,

On appeal from a judgment the record must contain the judgment roll, as defined in section 5489, Revised Codes, and such other orders and papers as have been, by the order of the court, incorporated into and made a part of it, including such order. And in making up such judgment roll the papers constituting the same shall when practicable be securely attached together in the order set forth in Rule XII, for the prepartion of abstracts.

In all cases the record transmitted must contain the certificate of the judge, as provided in Rule IX.

Whenever copies of any papers included in the record are transmitted to this court, on appeal, in place of the original, such copies must be plainly typewritten, double spaced, on good paper and the pages thereof must be consecutively numbered and the lines on each page must be so numbered.

RULE VII.

SETTLEMENT AND CONTENTS OF STATEMENT OF THE CASE IN CASES NOT TO BE TRIED ANEW ON APPEAL UNDER SECTION 5630.] The statement of the case in cases not to be tried anew on appeal, under section 5630, must be prepared, and settled in conformity with sections 5464, 5465, 5466, 5467, 5468, 5469 and 5470, Revised Codes.

Following the title of the case it shall contain:

First—A specification of the errors of law upon which the appellant intends to rely.

Second—If the decision is attacked for insufficiency of the evidence it must contain a specification of the particulars in which the evidence is alleged to be insufficient to justify the verdict or other decision.

The errors upon which the party relies must be stated, with so much of the evidence and proceedings and other matters as are necessary to explain it and no more.

The specifications above mentioned are vital parts of the statement of the case and must be included in and settled and allowed by the district court as parts thereof.

If the evidence, or any part thereof, is embraced in the statement, it must be epitomized by excluding all superfluous matter and verbiage.

The evidence shall be reduced to a narrative form, except in those particulars in which a transcript of part of the stenographer's minutes becomes necessary to preserve the sense or present the particular points of error. All superfluous matter, including all evidence not bearing upon the specifications, is required to be rigorously excluded.

The stenographer's minutes of the trial, if settled and allowed, do not constitute a statement of the case, in this class of cases, within the meaning of the law and will not be so regarded by this court.

The portion of such statement containing the evidence shall be clearly typewritten, double spaced, on good paper and the pages shall be consecutively numbered and the lines on each page so numbered.

Documents on file in the case and original exhibits offered in evidence, or properly certified or authenticated copies of such documents and such exhibits, may be attached to and made a part of the statement in the case, or their substance stated. In setting out exhibits, exclude all merely formal parts.

When it is necessary to embody exhibits in the statement and they are of such a nature that they cannot be readily attached to the remainder of the statement of the case, they, as well as all other exhibits included in the statement must be clearly identified as a part of the statement by a proper reference thereto in the judge's certificate to the settled statement and filed with and transmitted to this court as a part of the record.

(For statements under section 5630 see Rule XV.)

RULE VIII.

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 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.

RULE X.

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 certificate of the clerk of this court that no return has been filed, the respondent may on eight days' notice in writing to the appellant 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.

RULE XI.

DEFECTIVE RETURN, HOW CURED.] If the record returned 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, and in such terms as shall be just, 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. Such application may be made at any time before the case is finally submitted.

RULE XII.

PREPARATION OF ABSTRACTS IN CASES WHICH ARE NOT TO BE TRIED ANEW ON APPEAL UNDER SECTION 5630.] The abstract in cases which are not to be tried anew under section 5630, Revised Codes, shall be prepared in substantially the following manner and form:

IN THE SUPREME COURT.

STATE OF NORTH DAKOTA.

.....Term, 190...

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

VS.

RICHARD ROE, Defendant and } Appellant or Respondent, as case may be.

COMPLAINT.

The plaintiff is 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.)

(The summons is made a part of the record by statute.)

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....., 190.., 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.....of....., 190.., 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 statement of the case as is necessary to show the rulings of the court to which exceptions were taken during progress of the trial.)

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 portions 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....., 190.., 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.....190.., 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.....190.., the plaintiff (or defendant) moved for a new trial upon the grounds therein specified.

On the.....day of....., 190.., 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....., 190.., the following judgment was entered:

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

On the.....day of....., 190.., the plaintiff (or defendant) perfected an appeal to the supreme court of the state of North Dakota from the judgment (or order as the case may be), 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. When statements of the case are framed in accordance with the statute and Rule VII 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 accurate index of its contents, referring to folios and pages. Witnesses shall be indexed by name, and exhibits by the numbers or characters by which they are identified in the record. 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.

When maps, surveys or other material exhibits are included in the record, which it is impossible to duplicate in the abstract, the abstract shall state that fact, and the court will then examine such exhibits in the original record.

(For abstracts in cases to be tried anew on appeal under § 5630, see Rule XVI.)

RULE XIII.

RESPONDENT'S ADDITIONAL ABSTRACT.] If the respondent shall deem the abstract of the appellant, provided for in rule XII, insufficient, he may prepare an amended abstract of such further or additional portions of the record as he shall deem necessary to a full understanding of the questions presented to this court for decision.

RULE XIV.

BRIEFS IN CASES NOT TO BE TRIED ANEW ON APPEAL UNDER SECTION 5630, REVISED CODES.] The appellant's brief, in cases not to be tried anew on appeal under section 5630, Revised Codes, shall contain: First: 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 pages and folios of the abstract which sustain them. Second: 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 asks this court to examine.

Among several points in the 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. (In criminal cases 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 set out in the 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.

In the body of his brief appellant shall present his reasons in support of each error assigned, with a concise statement of the principles of law applicable thereto with authorities supporting the same, treating each assignment relied upon separately, and such errors as are merely assigned and not supported in the body of the brief by reasons or authorities will be deemed to have been abandoned.

The brief of respondent shall be of like character with that required of the appellant, except that no assignment of errors shall be required, and no statement of facts unless that presented by the appellant is controverted.

When there is no assignment of errors, as required by this rule, counsel will not be heard except at the request of the court; and errors not assigned according to this rule will be disregarded. The court may, however, at its option, notice an error not assigned.

(For briefs under § 5630, see Rule XVII.)

RULE XV.

Rules XV, XVI and XVII are applicable only to cases to be tried anew on appeal under the provisions of § 5630, Rev. Codes.

PREPARATION OF STATEMENT OF THE CASE.] The statement of the case, in cases to be tried anew on appeal, under the provisions of section 5630, Revised Codes, must conform as to its contents to the provisions of that section, and shall be settled in the time and in the manner provided by article 8, chapter 10, of the code of civil procedure, being sections 5462 and 5470, Revised Codes inculsive.

It must contain a specification, either that the appellant desires a review of the entire case, or that he desires a review of certain facts, which facts he shall particularly specify.

Such specification may be substantially in the following form:

If the appellant shall specify that he desires a review of the entire case, the specification may be:

"Appellant desires a review of the entire case in the supreme court."

If he shall specify that he desires a review of only particular facts, the specification may be:

"Appellant specifies the following questions of fact, which he desires the supreme court to review, to-wit: (One....., two ....., three....., etc., stating each fact to be reviewed separately and concisely.)"

In all cases where the specification shows that the entire case is to be reviewed in the supreme court, the statement of the case must contain a complete and literal transcript of the stenographer's minutes, (including all objections, motions, rulings and exceptions appearing therein) corrected by the district court on settlement to conform to the truth, and a literal transcript of all evidence offered by deposition, (including all objections, motions, rulings and exceptions shown by such depositions), and must contain all of the evidence offered (including exhibits) and proceedings had upon the trial.

In case the specification shall show that only particular facts are to be reviewed in the supreme court, the statement must contain a literal transcript of so much of the stenographer's minutes (corrected as above), and evidence offered by deposition, (including such objections, motions, rulings, and exceptions appearing in such minutes and depositions), and exhibits as relate to the questions of fact to be reviewed, and must contain so much of all other evidence offered and proceedings had as relates to such questions.

In either case the evidence must be embodied in the statement, without condensation or elimination.

The portion of such statement containing such transcript of the stenographer's minutes and depositions, shall be clearly typewritten, double spaced, on good paper, and the pages shall be consecutively numbered and the lines on each page must be consecutively numbered.

Documents on file in the case and original exhibits, offered in evidence, or properly certified or authenticated copies of such documents and exhibits, shall be attached, and must be made a part of the statement of the case.

When the exhibits are of such a nature that they cannot be attached to the remainder of the statement of the case, they must be clearly identified and authenticated by the district court as part of the statement and filed and transmitted to this court with the record.

The judge who settles the statement of the case, shall append an order thereto settling the same and shall in said order certify that the same is a true and correct statement of the case in the action entitled therein, and contains all the evidence offered and proceedings had upon the trial thereof, including all objections, motions, rulings and exceptions (if only a part of the questions of fact in the case are specified for review, add here, "relating to the questions of fact herein specified for review)" and the foregoing papers marked respectively as exhibits (1, 2, 3, etc., or as the case

may be) are the original exhibits referred to as so marked herein; and the foregoing papers marked as exhibits respectively (4, 5, 6, etc., or as the case may be) are correct copies of the original exhibits referred to as so marked herein. (Here carefully identify and authenticate all exhibits, if any, which are not actually attached to the statement.)

Note.—The district court is urgently requested to see that all statements of the case under § 5630, Rev. Codes, comply with the provisions of that section, and with these rules.)

RULE XVI.

PREPARATION OF ABSTRACTS IN CASES TO BE TRIED ANEW ON APPEAL UNDER SECTION 5630.] But one abstract shall be required in any case tried under the provisions of section 5630, Revised Codes, in which a trial anew of the whole or any part of the case is desired in the supreme court.

Such abstract shall contain substantially in the order herein indicated:

1. The title of the action, entitled in the supreme court.
2. A duplicate of the specifications contained in the statement of the case, showing whether the entire case, or particular questions of fact only are to be reviewed in the supreme court.
3. So much of the pleadings, in proper order, as may be necessary to fully show the issues of fact raised thereby, which are to be reviewed on appeal.
4. So much of the statement of the case, including evidence offered, proceedings had, objections to evidence, motions, rulings and exceptions thereto, in the order in which they appear in the statement of the case, and so much of other matters included in the judgment roll, as shall be material and necessary to the full consideration, trial and determination of all questions to be reviewed on appeal.
5. The findings of fact and conclusions of law of the district court.
6. The judgment, showing date of entry, and date of service of notice of entry.
7. The date of serving and filing notice of appeal.
8. An index of its contents conforming to the index required by rule XII.

All evidence contained in the abstract shall be a literal transcript, by question and answer, of the same, as it appears in the statement of the case.

Such abstract shall be prepared as follows, to-wit:

Within 10 days after the appeal is perfected, (if the statement of the case has been settled before appeal) or within the same time after the statement of the case is settled, (if settled after appeal), or within such further time as may be allowed by stipulation, or by order of the supreme court, or one of the judges thereof upon good cause shown, the appellant shall serve on the respondent a written notice containing:

First. The specifications contained in the statement of the case, showing whether the entire case, or only particular questions of fact are to be reviewed in the supreme court.

Second. A specification of all those parts of the entire record or judgment roll, which he thinks are necessary to be embodied in the abstract to a full consideration of all questions to be reviewed by the supreme court, as shown by such specifications contained in the statement of the case.

The respondent shall thereupon, and within 10 days after the service of such notice upon him, or within such further time as may be allowed by stipluation, or by order, serve upon the appellant a notice of such additional parts of the record or judgment roll, as he thinks material to the consideration of the questions to be reviewed.

Such notices shall clearly identify the parts of the record each party, respectively, desires included in the abstract, either by copying the same, or clearly dsignating them in some other manner.

Only the material parts of exhibits need be copied into the abstract, but the abstract shall contain a concise statement of the nature and substance of all exhibits embodied in the statement of the case which are material to the trial of the questions to be reviewed.

When maps, surveys or other material exhibits are included in the record, which it is impossible to duplicate in the abstract, the abstract shall state that fact, and the court will then examine such exhibits in the original record.

The appellant shall, after the service upon him by the respondent of such notice, arrange all parts of the record specified in both said notices, in the order in which they appear in the judgment roll and statement of the case, and cause the same to be printed pursuant to rule XVIII, and serve and file the same as provided by rules XXI and XXII.

If, at the hearing, it shall appear that any material part of the record has not been embraced in the abstract, the court will, in its discretion, allow, or require, the abstract to be amended, by inserting therein such additional parts of the record as may be material, upon such terms as may be just; and such amendments must clearly refer to the folio of the abstract where the same should be inserted, and shall be printed.

The provisions of this rule with reference to printing, do not however, apply to cases in which by law printed abstracts cannot be required.

If either party shall have caused unnecessary parts of the record to be printed, the court will, on written motion of the adverse party, specifying such unnecessary parts, filed before the final submission of the case, (and upon which no argument will be allowed) make such order as to costs as shall be deemed just.

RULE XVII.

BRIEFS IN CASES TO BE TRIED ANEW ON APPEAL UNDER SECTION 5630 REVISED CODES.] The appellant's brief in cases to be heard under the provisions of section 5630, Revised Codes, shall contain, when practicable:

First. A concise statement of the facts of the case, presenting succinctly the questions involved, and the manner in which they are raised.

Second. It shall also contain the following specifications as concisely stated as may be, to-wit:

1. A specification of errors of law excepted to, and upon which the appellant relies, if any, but such specifications shall not be made as to objections to evidence.

2. A concise specification, by groups or classes, of the evidence objected to, and which he claims should not be considered, appropriately classifying the same and referring to the folios of the abstract where the objections to the same appear.

3. A specification of the issues of fact alleged to have been erroneously decided by the district court, pointing out as specifically as may be, the particulars in which such decision is alleged to be erroneous and referring to the finding of fact and folio of the abstract where such decision is found.

4. A specification of each ultimate fact, which the appellant claims is established by the evidence, and upon which he relies for reversal, referring to the pages or folios of the abstract where the evidence relied upon to establish such fact may be found.

5. A concise specification of the propositions of law applicable to the facts, and which are to be discussed in his brief and argument.

It shall also contain a brief of the argument exhibiting a clear statement of the points of law and fact to be discussed, (as the same appear in his specifications), with a reference to the pages or folios of the abstract and to the authorities relied upon in support of each point.

The respondent's brief shall be of like character with that required of the appellant, except that it need contain no specification of errors of law, and shall contain the specifications herein enumerated concisely stated, to-wit:

1. In case the respondent controverts the statement of the facts in the appellant's brief, his brief shall contain his statement of the facts.

2. A concise specification by groups or classes, of the evidence objected to, and which he claims should not be considered, appropriately classifying the same, and referring to the folios of the abstract where the objections to the same appear.

3. A concise specification of each of the questions of law and fact to be discussed by the respondent in his brief, and argument,

in support of the judgment, referring to the pages or folios of the abstract where the evidence relied on to sustain each fact, claimed in appellant's specifications to have been erroneously decided, may be found.

4. A brief of his argument following the same general plan as provided for the appellant's brief.

Either party may before the argument commences amend the specifications in his brief, in the discretion of the court and upon such terms as shall be just.

The court will, in its discretion, decline to consider any questions of law or fact not raised by the specifications and discussed in the briefs of counsel.

RULE XVIII.

ABSTRACTS AND BRIEFS, PRINTED HOW.] All abstracts and briefs served and furnished to the court in calendar cases—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 and pages, numbering from the commencement to the end 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 case unless the requirements of this rule have been complied with in all papers printed.

RULE XIX.

TYPEWRITTEN 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 typewritten abstracts and briefs are permitted to be served and filed; provided, that the appellant in cases where typewritten 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.

All typewritten abstracts and briefs must be written on paper, the size of which is eight and one-half inches wide and eleven inches long, on one side only, and substantially and durable bound on the left margin and provided with a suitable cover, on which cover shall be written or printed the term of the supreme court in which the action is to be heard, the county from which appealed, the title of the action and name of the attorney preparing the same. The pages thereof shall be consecutively numbered on the outer margin of the page. The abstract shall have subjoined thereto an accurate index of its contents, the same as provided in rule XII.

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 retained with the papers in the case. Double spaced writing only shall be used, except in citations from authorities or from the record in the action. Where more than one authority is cited give each authority in a separate line, indenting the same at least ten space on the machine scale. If carbon copies are used care must be taken that the same are clear and legible, otherwise they may be stricken from the files on motion of counsel or by the court.

RULE XX.

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 expenses 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, which abstract and brief shall conform to the provisions of rule XIX; 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 XXI.

SERVICE OF BRIEFS AND ABSTRACTS.] Not less than 25 days before the first day of the term at which any civil case may be heard, the counsel for appellant shall serve upon the counsel for each adverse party two copies of his brief and abstract and not less than five days before the first day of such term the respondent shall serve upon the counsel for each adverse party two copies of his brief, and amended abstract provided for in rule XIII, if any.

RULE XXII.

FILING OF BRIEFS AND ABSTRACTS.] Not less than 25 days before the first day of the term at which any civil case may be heard, the appellant shall file in the office of the clerk of this court, seven copies of his brief and abstract and not less than five days before the first day of such term the respondent shall file in the office of the clerk of this court, seven copies of his brief, and of his amended abstract, if any. Additional briefs shall not be filed by either party except

upon permission of the court and upon such terms as shall be deemed just.

RULE XXIII

PENALTY FOR VIOLATING RULES AS TO BRIEFS AND ABSTRACTS.] No transcript, or other paper or document which fails to conform to the requirements of these rules, shall be filed by the clerk, but the same shall be immediately returned to the party from whom received.

RULE XXIV.

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 XXV.

CRIMINAL CASES FIRST ON CALENDAR.] All criminal cases 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 cases. Such cases unless continued for cause, shall stand for argument at the first term after the transcript is filed, subject, however, to the requirements of rule XX as to the service of abstracts and briefs. The presence of the defendant in the supreme court shall in no case be necessary unless specially ordered by the court.

RULE XXVI.

ORDER OF CIVIL CASES ON CALENDAR.] All civil cases shall be placed on the calendar by the clerk in the order of filing of the complete record in his office; provided, that no civil case shall be placed upon the calendar by the clerk unless an abstract and brief shall have been filed by one party or the other in his office at least twenty-five days prior to the first day of the term.

All cases on the calendar shall (with the criminal cases) be numbered consecutively, from term to term, in one continued series; and no civil case shall be placed on the calendar except as herein provided, unless by order of the court.

RULE XXVII.

CALL OF CALENDAR—ORDER OF CASES FOR ORAL 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 served and 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 or order will not be heard until all cases regularly prepared have been disposed of, and then only subject to the provisions of rule XXVIII of these rules. Not more than three cases so set for hearing shall be liable to call on any one day.

RULE XXVIII.

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 montion continue such cases over the term unless the disregard of the rules is excused by a showing which is satisfactory to the court.

RULE XXIX.

ARGUMENT AND SUBMISSION OF CASES.] Only one counsel shall without permission of the court argue for each party in a case, except in capital cases, and the time for argument is limited to one hour by counsel upon each side, exclusive of the time allowed by the court for reading any part of the record. The court may, however, extend the time of argument upon application before the argument commences. Any cases may be submitted on printed arguments or briefs.

RULE XXX.

MOTIONS, HOW NOTICED.] Motions, except for orders, of course, shall be made upon written notice to the adverse party of not less than eight days. When a motion for an order is 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 may be heard upon orders to show cause returnable in less than eight days. 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 ready at the opening. Notices and motion papers shall be clearly typewritten in the manner provided by rule XIX for abstracts and briefs.

RULE XXXI.

MOTIONS, WHEN HEARD.] All motions affecting the place of cases on the calendar, may be noticed orally on the call of the calendar; and all motions for continuance and dismissal shall be

in writing and noticed for the first day of the term and will be for hearing previous to the calling of cases for argument.

RULE XXXII.

REHEARINGS, GRANTED WHEN—HOW OBTAINED.] Whether a decision is handed down in term time or in vacation, a petition for a hearing will be entertained if four copies of the same be filed with the clerk within twenty days after the decision is filed and the remittitur 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 typewritten, in the manner provided in rule XIX for briefs and abstracts. It need not be served upon opposite counsel. It shall be signed by counsel particularly setting forth the grounds thereof, and showing either that some question decisive of the case and duly submitted by counsel has been overlooked by the court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the court was not called either in the brief or oral argument, or which has been overlooked by the court; and the question, statute or decision so overlooked must be distinctly and particularly set forth in the petition, which must be filed within twenty days from the date of the decision. No argument or brief will be allowed on the petition. 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. Reargurnents of cases shall ordinarily take precedence on the calendar of all other matters before the court except motions and criminal business.

RULE XXXIII.

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 XXXIV.

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 re-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 XXXV.

CASES MAY BE DISMISSED FOR 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 XXXVI.

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 XXXVII.

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 XXXVIII.

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 XXXIX.

REASONS FOR ORIGINAL APPLICATION TO THIS COURT TO BE STATED —MEMORANDUM OF AUTHORITIES—RETURN AND ISSUANCE OF WRIT

—STAY OF PROCEEDINGS.] 1. If any application made to the court for a writ of mandamus, certiorari, quo warranto, injunction, or for any prerogative writ to be issued in the exercise of its original jurisdiction, and for which an application might have been lawfully made to some other court in the first instance, the affidavit or petition shall, in addition to the necessary matter requisite by the rules of law to support the application, also set forth the circumstances which in the opinion of the applicant, render it proper that the writ should issue originally from this court and not from such other court—the sufficiency or insufficiency of such circumstances so set forth in that behalf will be determined by the court in awarding or refusing the application. In case any court, judge, or other officer, or any board or other tribunal in the discharge of duties of a public character, be named in the application as respondent, the affidavit or petition shall also disclose the name or names of the real party or parties, if any, in interest, or whose interest would be directly affected by the proceedings, and in such case it shall be the duty of the applicant obtaining an order for any such writ to serve or cause to be served upon such party or parties in interest a true copy of the affidavit or petition, and of the writ issued thereon, in like manner as the same is required to be served upon the respondent named in the application in the proceedings, and to produce and file in the office of the clerk of this court the like evidence of such service.

2. All ex parte applications to the court for the issuance of writs in the exercise of its original jurisdiction shall be in writing and filed with the clerk and the same shall be accompanied by a memorandum of points and authorities upon which the application is made.

3. Upon the return day of the alternative writ the respondent may make return, either by demurrer or by answer, or by both. If the return be by demurrer alone, and the demurrer is not sustained, the writ will be ordered to issue without further leave to answer.

4. When an application is made to this court for an alternative writ, an order staying the proceedings of any court or officer, until the return of the writ, will not be made unless due notice of the application for the writ shall have been given to all the parties interested in the proceedings.

RULE XL.

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 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 ap-

plicant 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.

Applications for admission on examination shall be presented on the first day of any regular term of this court and shall be upon written motion. Applicants for license to practice as attorneys and counselors at law upon examination (except graduates of the law department of the state university of the state of North Dakota, the method of whose admission is governed by the provisions of chapter 23 of the laws of 1901), will be examined in open court on the first day of each regular term of court.

No applicant will be examined unless there shall have been filed with the clerk of the supreme court before the first day of the term at which the application is made, a sworn statement by the applicant, setting forth in detail the facts which entitle him to be admitted to the examination, under the provisions of section 421, Revised Codes. Such application shall correctly set forth the period of time actually employed in the study of law by the applicant, whether in a law school, or law office and whether the same was exclusive of other pursuits, the subjects embraced in the course of study pursued and books studied, and the period of the time devoted to each subject, so far as the same is possible, which facts shall be supported by the affidavit of the secretary or Dean of the law faculty of the school attended by the applicant, or by affidavit of the attorney in whose office he studied, as the case may be, and in case all or a portion of such study was in an office the affidavit shall state that such attorney was during such period regularly engaged in the practice of law in this state, and stating that the applicant is of good moral character and any fact tending to show the character of the attainments of the applicant, and also stating in their opinion the applicant posseses the requisite qualifications in point of learning in the law to be entitled to be admitted to practice. In no case will applicants be admitted to the examination unless it shall appear that they have pursued a course of study equivalent to that required of candidates for graduation in the law department of the state university of North Dakota. If satisfied with the sufficiency of 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 examine such applicant touching his qualifications to practice as an attorney in the courts of this state. But any person 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.

RULE XLI.

ATTORNEY'S CERTIFICATES OF CLERKSHIP.] It shall be the duty of the attorneys in this state with whom law students shall commence a course of study to file a certificate in the office of the clerk of the supreme court, which certificate shall in each case state the date of the beginning of the period of clerkship, and such period shall be deemed to commence at the time of such filing and shall be computed by the calendar year; provided, that this rule shall be applicable only to determine periods of study in offices after the taking effect of these rules.

These rules as revised and amended are hereby adopted as the "Revised Rules of Procedure of the Supreme Court of North Dakota." The clerk of this court is directed to spread the same upon the minutes of this court and also to cause the same to be published in pamphlet form at least thirty days prior to March 5, 1902, on which date these rules shall take effect. All former rules of the court are abrogated except so far as it may be necessary to follow them upon appeals which shall be pending when these rules take effect.

Adopted, October 9, 1901.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH DAKOTA

A. C. ANDREWS, *et al vs.* JOHN SCHMIDT, *et al.*

Opinion filed November 14, 1900.

Action on Note—Consideration.

This is an action on a promissory note between the makers and payee thereof, wherein the defense of want of consideration is interposed. On a retrial of the issues of fact in this court it is found as a fact that such note is without consideration, and it is accordingly *held* that plaintiff cannot recover thereon.

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

Action by A. C. Andrews and J. E. Gage against John Schmidt and Joseph Deschenes. Judgment for defendants and plaintiffs appeal.

Affirmed.

Cochrane & Corliss, for appellants.

Jeff M. Myers, for respondents.

YOUNG, J. Action on a promissory note. The trial was to the court without a jury, and resulted in a judgment in favor of defendants dismissing the action on the merits. The note in suit was given to cover an alleged shortage in the accounts of the defendant Schmidt while acting as plaintiff's agent. Deschenes signed as surety. Both defendants interposed want of consideration for the note as a defense. The case is here for trial de novo, but only as to a portion of the facts. It appears that the plaintiff is a co-partnership, and at the times herein named operated a number of grain elevators. One of these was located at the town of Cashel, in this state. Defendant Schmidt was in the employ of plaintiff from August 23, 1895, until December 25, 1897, and was in charge of the elevator at Cashel. Plaintiff also had another elevator at the city

of Drayton, the next station north of Cashel. One H. Hogg was the agent at that point. Schmidt's duties as agent embraced the purchasing and shipment of grain, and also making daily reports of business done by his elevator, including an account of moneys received and disbursed in the conduct of plaintiff's business. The actual bookkeeping was done in Minneapolis from data contained in these reports. Ordinarily, funds to buy grain were forwarded to him by express from the head office of plaintiff in Minneapolis. He had written instructions, however, to draw on plaintiff through its agent Hogg, at Drayton, in case he could not wait for a remittance from Minneapolis. There was a bank at Cashel, and there was at Drayton. On October 31, 1895, Schmidt drew on plaintiff for $1,000, and sent the draft to Hogg, at Drayton, to be cashed. The draft was received by Hogg, and, after being canceled by him, it was sent to plaintiff as a voucher for the payment of $1,000 to defendant Schmidt. The plaintiff charged Schmidt with the full amount of this draft under date of October 31, 1895. Schmidt also entered it on his daily report for that day as a charge against himself. It is conceded that on the day the draft was received Hogg transmitted to Schmidt no other or greater sum than $500. This was delivered to defendant by one Kerr, plaintiff's superintendent of elevators, with a message from Hogg that he could spare no more money that day, but would send more later. The vital controversy in the case is as to whether the remaining $500 was ever received by the defendant. It is conceded that the entire sum represented by the draft continued on the plaintiff's books as a charge against defendant, and that it entered into the balance for which the note in suit was given. The defense of want of consideration urged by both defendants hinges upon the question whether this $500 was received. If it was, the note in suit is without defense; at least so far as the defendant Schmidt is concerned. If it was not received, the amount of the error being in excess of the note, a recovery thereon cannot be had as to either defendant, for, in that event, the note was without consideration. On this point the trial court found "that the said John Schmidt never received from the said H. Hogg, agent of the plaintiffs at Drayton, as aforesaid, or from any other source, upon said $1,000 draft aforesaid, any other or further sum than the said $500 paid to him thereon as aforesaid by said Kerr as aforesaid; that said Hogg, on the day when he remitted the $500 to defendant John Schmidt, through Kerr, only had received $500 in cash from the bank, and that on the following day he received the remaining $500, and delivered it to some third party, whom he believed to be thrustworthy, to deliver to defendant Schmidt; that said third party was a passenger on the train going through Cashel, and he either failed or neglected to deliver same to Schmidt, or else he delivered it to some other person to be handed to defendant Schmidt, and such person either lost or embezzled the said sum; and that the only amount ever received by Schmidt on the $1,000

draft was the $500 delivered to him by Kerr." This finding is challenged in so far as it is determined therein that the $500 in controversy was not delivered to Schmidt. Our consideration of the evidence leads us to the same conclusion announced by the trial court in the above finding, namely, that defendant received from the $1,000 draft only the $500 delivered to him by Kerr. There is no direct evidence whatever that the other $500 ever came into his hands. It is true, Hogg testifies that on the day after he sent the $500 by Kerr he sent the remainder by some one on the train going from Drayton to Cashel. Who the person was, however, he does not remember, but states that he was a trustworthy person. It may be entirely true that the money was sent as stated, yet we are not justified in drawing as a conclusive inference therefrom that it reached the defendant; particularly in view of his denial that he received it. The actual receipt of the money by Schmidt, and not the sending it, is the important and decisive fact necessary to sustain the charge of $1,000 against the defendant, of which he complains, and establish a consideration for the note in suit. Hogg does not testify that the money was delivered; neither does he assume to know. He merely says he sent it. The messenger did not testify. He is unknown, and without name. Schmidt unhesitatingly declares that he did not receive it, and his subsequent attitude lends credence to his statement. On the day he drew the draft for $1,000 he entered it in the daily report transmitted to plaintiff. This was October 31, 1895. On the next day he wrote plaintiff as follows: "I ain't sure if cash report on report number No. 59 (which is the report containing the alleged erroneous charge) is correct. Please, if not correct, let me know." To this plaintiff replied under date of November 4th: "We will look up your cash reports, and advise you if it is wrong; that is, if we can find it readily. We would not have time to check it up from the beginning, as we are too busy. We will do that later." It seems he also called the attention of Kerr, plaintiff's superintendent, to what he thought was an error in his balances, for on December 27, 1895, he again wrote plaintiff on the subject : "Please fix up my cash account. If Mr. Kerr comes around, he can explain to you better. I credited $500 two times in my report, and Mr. Kerr saw through the mistake. I hope you will find the error, and let me know about it." Under date of January 2, 1896, plaintiff replied as follows: "We are unable to find any duplicate charge to your account of $500, but, if you can locate such a difference, we will surely correct the same;" and added that he had probably been misled into thinking there was an error because of certain entries in a previous report, which, however, did not affect his balance. It appears that he not only took the matter up with Kerr, who, as superintendent, frequently visited Cashel, and with plaintiff directly, but also with agent Hogg of Drayton. Other evidence of a similar nature shows clearly that Schmidt's statement that he did not get the $500 is not an afterthought evolved for the

purpose of defeating a recovery on the note. Plaintiff relies entirely upon defendant's alleged silence on the matter of the error to afford proof that he did in fact get the money, and also upon the fact that he permitted the error to be perpetuated for a period of more than a year and a half without correction. In support of the contention that during this time Schmidt acquiesced in the correctness of the charge, and by so doing affirmed again and again, by his silence, that the charge was entirely correct, plaintiff introduced a mass of written documents, comprising 419 daily reports and 189 letters, whose only relevancy and probative value consists in the fact that in none of them was the alleged error referred to in any way. This fact is wholly negative and circumstantial in character, and is not persuasive when considered in connection with the other evidence in the case. It merely shows that defendant did not correct the error in any of his reports, and that he did not incumber any of these particular 189 letters with reference to the alleged error. These facts do not prove anything. The daily reports, as we have seen, were merely a detailed record of each day's business. It was not possible for defendant to correct the error himself. It had gone out of his hands, and beyond his control, onto the books of the plaintiff at Minneapolis. It could be corrected only by plaintiff. As we have seen, defendant was not silent on the subject. It is true, in the course of business he wrote numerous letters, in which no reference was made to it; but it is not reasonable to conclude that, because he did not proclaim the error unceasingly, he thereby admitted he had received the money. He complained of the error to Superintendent Kerr repeatedly. He also complained to Hogg. Moreover, he wrote to plaintiff about it, from whom, and Kerr also, he received promises that it would be investigated, and corrected if it existed; and the record leaves no room for doubt that he rested secure on these assurances. This was the view of the trial court. It found "that at numerous times between the 31st day of October, 1895, and said 16th day of June, 1897, the said John Schmidt talked over and explained to the plaintiff the status of affairs existing with regard to the $1,000 draft drawn on said H. Hogg on the 31st day of October, 1895, and the plaintiff and their properly constituted and authorized agents were fully cognizant thereof, and promised and agreed to investigate the matter, and have it fixed up."

It is appellant's contention that in any event defendant is estopped from claiming that he did not get the $500. This rests entirely upon the theory that the evidence shows that defendant has acquiesced in the error, and thereby prevented plaintiff from ascertaining who got it, and so prevented a recovery of the same when a recovery was possible. This contention is disposed of by the conclusion already announced. Defendant called attention to the error of which he now complains, and repeatedly requested that it be investigated and corrected. If plaintiff suffers prejudice, it is to be directly attributed to its failure to investigate as promised.

It is established also that this particular error was talked over when the note was executed, and that the note was given conditionally upon the express understanding and agreement that the alleged error should be traced out and rectified, and, if it was found that defendant had not, in fact, received the $500 in dispute, the note was to be returned. On this there is a square conflict in the evidence. J. E. Gage, one of the members of the co-partnership of Andrews & Gage, plaintiff herein, and Superintendent Kerr, testified positively that no reference was made to the alleged error, or to any error in the account, and that the note was given unconditionally. Both of the defendants are equally emphatic in their statements to the contrary. In reaching a determination we are compelled to rely upon surrounding circumstances to ascertain where the truth lies. These lead us irresistibly to the conclusion that the note was executed as claimed by the defendants. It is entirely reasonable to believe that the defendants would execute the note under the circumstances as detailed by them, while it is entirely improbable that Schmidt, a man of very limited means, who had persistently claimed that there was an error in the balance charged against him, would give a note covering the error without even mentioning the matter. So, also, it does not appear reasonable that Deschenes, who had no personal interest in Schmidt, would obligate himself to pay a note which, on plaintiff's theory, covered an embezzlement of its funds. Both the defendants are explicit in the statement of what transpired when the note was executed, and we have no hesitation in concluding therefrom that the note was given conditionally, and that it was to be returned in case an investigation showed that defendant Schmidt did not get the $500 in question. The trial court, in weighing the evidence, had the invaluable assistance of the presence of the witnesses, of which this court is deprived. The result reached, however, are the same. The note being without consideration, it follows that plaintiff cannot recover. The judgment of the District Court is affirmed. All concur.

(84 N. W. Rep. 568.)

ABBIE J. COREY *vs.* DAVID HUNTER, *et al.*

Opinion filed November 19, 1900.

Agent—Authority—Foreclosure of Mortgage.

The plaintiff, being the owner of a note secured by a real estate mortgage containing a power of sale, transmitted certain interest coupons to an agent for collection; the plaintiff herself retaining the principal note, not yet due, and the mortgage; such agent having no express authority to do more than collect such interest and remit the same to plaintiff. *Held*, that the agent had no implied authority to foreclose the mortgage.

Evidence Insufficient to Show Authority in Agent.

Held, further, that the evidence did not warrant the court in finding that such agent had either actual control or ostensible authority to foreclose the mortgage.

No Implied Authority.

The fact that a negotiable promissory note is made payable at a particular office does not make the party in charge of said office the agent of the holder of such note to receive payment, unless the note is actually in the possession of said party. Hollinshead v. John Stewart & Co., 8 N. D. 35 and Stolzman v. Wyman, 8 N. D. 108, followed.

Papers Not Properly in Stated Case.

A letter purporting to have been written by one of the counsel for plaintiff was found by the trial judge in the envelope containing plaintiff's deposition, and was by order of the court filed with the clerk. Said purported letter was not offered in evidence. *Held*, that said letter was not properly before the court, and should not be considered.

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

Action by Abbie J. Corey against David Hunter and others to foreclose a real estate mortgage. From a judgment in favor of defendants, plaintiff appeals.

Reversed.

J. G. Hamilton and *Tracy R. Bangs*, for appellant.

The question is one of agency. The statute designates two kinds of agents,—general and special, Rev. Codes 1895, section 4306; and these are divided into two classes,—actual and ostensible, Rev. Codes 1895, section 4307, and any agent has such authority as the principal actually or ostensibly confers upon him. Rev. Codes 1895, section 4320. There must be some substantial ground for the agent's right to act, and his authority must be direct and specific, or the facts and circumstances must be of such a nature that the agent's right to act may be fairly implied. *Trull* v. *Hammond*, 73 N. W. Rep. 642 (644). Particularly is this true where the agent relies on implied authority to charge real property. *Union Mut. L. Ins. Co.* v. *Masten*, 3 Fed. Rep. 881; *Challoner* v. *Bouck*, 56 Wis. 652. Every delegation of power carries with it, by implication, the authority to do those things which are reasonable, necessary and proper to carry into effect the main power conferred and which are not forbidden. But the doctrine of implied authority goes no further than this. *Burchard* v. *Hull*, 74 N. W. Rep. 163 (165). Apparent authority is that authority which an agent appears to have from that which he actually does have, and not from that which he may pretend to have, or from his actions on occasions which are unknown to and unratified by his principal. *Oberne* v. *Burke*, 46 N. W. Rep. 838 (842). The principal is responsible only for the appearance of authority which is caused by himself, and not for an appearance of conformity to authority caused only by the agent. *Edwards* v. *Dooley*, 120 N. Y.

540; *Burchard* v. *Hull*, 74 N. W. Rep. 163 (164). When the agency is to be inferred from the conduct of the principal, that conduct furnishes the only evidence of its *extent* as well as of its *existence*. *Humphrey* v. *Havens*, 12 Minn. 198. No authority to receive payment of a loan is to be implied from the fact that the agent is employed to negotiate it. 1 Am. & Eng. Enc. L. (2d Ed.) 1026 and cases cited; *Western Sec. Co.* v. *Douglass*, 44 Pac. Rep. 257 (259); *Smith* v. *Kidd*, 68 N. Y. 130, 23 Am. Rep. 157 (161); *Schenk* v. *Dexter*, 79 N. W. Rep. 526; *Trull* v. *Hammond*, 73 N. W. Rep. 642 (644.) The fact that a note is made payable at a particular office does not, of itself, invest the person in charge of the office with implied or apparent authority to collect either principal or interest. *Hollinshead* v. *Stuart*, 8 N. D. 35; *Stoltzman* v. *Wyman*, 8 N. D. 108; *Dwight* v. *Lenz*, 77 N. W. Rep. 285; *St. Paul Nat. Bank* v. *Cannon*, 48 N. W. Rep. 526; *Trowbridge* v. *Ross*, 63 N. W. Rep. 534; *Englert* v. *White*, 60 N. W. Rep. 224. The fact that an agent has, from time to time, collected the amount due on interest coupons, he being then in possession of the coupons, does not vest in him either implied or apparent authority to collect the principal without possession of the principal note. *Bull* v. *Mitchell*, 66 N. W. Rep. 632; *Western Sec. Co.* v. *Douglass*, 44 Pac. Rep. 257; *Trull* v. *Hammond*, 73 N. W. Rep. 642; *Joy* v. *Vance*, 62 N. W. Rep. 140; *Porter* v. *Ourada*, 71 N. W. Rep. 52; *Klindt* v. *Higgins*, 64 N. W. Rep. 414; *Bromley* v. *Lathrop*, 63 N. W. Rep. 510; *Stolzman* v. *Wyman*, 8 N. D. 108; *Hollinshead* v. *Stuart*, 8 N. D. 35; *Dexter* v. *Morrow*, 79 N. W. Rep. 394; *Schenk* v. *Dexter*, 79 N. W. Rep. 526; *Burchard* v. *Hull*, 74 N. W. Rep. 163; *Security Co.* v. *Graybeal*, 52 N. W. Rep. 497; *Brewster* v. *Carnes*, 9 N. E. Rep. 323; *Doubleday* v. *Kress*, 50 N. Y. 410, 10 Am. Rep. 502; *Dwight* v. *Lenz*, 77 N. W. Rep. 546; *Campbell* v. *O'Connor*, 76 N. W. Rep. 167; *Chandler* v. *Pyott*, 74 N. W. Rep. 263; *Stark* v. *Olson*, 63 N. W. Rep. 37; *Wilson* v. *Campbell*, 62 N. W. Rep. 278; *Trowbridge* v. *Ross*, 63 N. W. Rep. 534; *Bromley* v. *Lathrop*, 63 N. W. Rep. 511; *Terry* v. *Durrand Land Co.*, 71 N. W. Rep. 525; *United States Bank* v. *Bursom*, 57 N. W. Rep. 705. Nor does the fact that the agent has collected the principal of other loans invest him with such authority. *Church Ass'n* v. *Walton*, 72 N. W. Rep. 998; *Joy* v. *Vance*, 62 N. W. Rep. 140; *Smith* v. *Kidd*, 68 N. Y. 130, 23 Am. Rep. 157, 165. No act of an agent tending to extend the scope of his employment, however extensive or often repeated, which does not come to the knowledge of the principal, will enlarge his authority to bind him. *Oberne* v. *Burke*, 46 N. W. Rep. 838; 1 Am. & Eng. Enc. L. (2d Ed.) 969, note 1. Possession of the securities is the crucial test of an agent's implied or apparent authority to receive payment, and without such possession he is without apparent authority. *Walsh* v. *Peterson*, 81 N. W. Rep. 853 (855); *Trull* v. *Hammond*, 73 N. W. Rep. 642 (644); *Tappan* v. *Morseman*, 18 Ia. 500; *Wooding* v. *Bradley*, 76 Va. 614; *Davidson* v. *Porter*, 57 Ill. 300, and many of the cases above cited.

W. J. Burke and *Bosard & Bosard,* for respondent.

An authority is raised by implication of law where the principal has justified the belief that he has given such authority in cases where he has employed a person in a regular employment and permitted him for a considerable time to transact a particular business for the principal. *Dows* v. *Greene,* 16 Barb. 72; *Lyell* v. *Sanborn,* 2 Mich. 109; 1 Pars. Conts. § 2. An agent entrusted with the performance of a particular duty has implied authority to do such incidental acts as are necessary and usual for carrying out the main purpose of his employment. Addison, Cont. § 58; Storey on Agency, § 443; Storey on Agency, § § 1773, 126. A principal is bound by his agent's acts within the apparent authority which the principal knowingly permits his agent to assume or which he holds the agent out to the public as possessing. *Heath* v. *Stoddard,* 40 Atl. Rep. 547; *Sweetzer* v. *Shorter,* 26 So. Rep. 298; *Lytle* v. *Bank,* 26 So. Rep. 6; *Flagg* v. *Marion County,* 48 Pac. Rep. 693; *Blake* v. *Mfg. Co.,* 38 Atl. Rep. 241; *Sawin* v. *Union B. & S. Ass'n,* 64 N. W. Rep. 402; *Griggs* v. *Sheldon,* 53 Vt. 501; *Thompson* v. *Shelton,* 68 N. W. Rep. 1055; *Phoenix Ins. Co.* v. *Walter,* 70 N. W. Rep. 938. That the person to whom money due another is paid is not in possession of the instruments by which the indebtedness is evidenced, is not conclusive of the question of authority or lack of it. *Thompson* v. *Shelton,* 68 N. W. Rep. 1055; *Phoenix Ins. Co.* v. *Walter,* 70 N. W. Rep. 938. That the authority of an agent is limited to a particular business does not make the agency special. It may be as general in regard to that as if the range of it were unlimited. *Crain* v. *Bank,* 114 Ill. 516; *Anderson* v. *Connelly,* 21 Wend. 279; *Jeffery* v. *Bigelow,* 13 Wend. 518; *Roundtree* v. *Benson,* 59 Wis. 522; *Bell* v. *Offutt,* 10 Bush. 632. McLaughlin had authority to conduct the business of his principal, and therefore had authority to do everything necessary or proper and usual in the ordinary course of that business. *Minor* v. *Bank,* 26 U. S. 46, 7 L. Ed. 47; *Sentell* v. *Kennedy,* 29 La. Ann. 679; *German Fire Ins. Co.* v. *Gunert,* 112 Ill. 68; *Banner Tobacco Co.* v. *Jenison,* 48 Mich. 459; *Shepherd* v. *Gas Light Co.,* 11 Wis. 234; *Bridenbecker* v. *Lowell,* 32 Barb. 9; *Cummings* v. *Sargent,* 9 Metc. 172; *Taylor* v. *LaBeaume,* 14 Mo. 572, 17 Mo. 338; *Baker* v. *Ry. Co.,* 91 Mo. 152; *Johnson* v. *Jones,* 4 Barb. 369. One clothing an agent with apparent authority is not, to parties dealing on the faith of such authority, conclusively estopped from denying it. *Hubbard* v. *Tenbrook,* 2 L. R. A. 823; *Bank* v. *Ry. Co.,* 106 N. Y. 195; *Over* v. *Shiffling,* 102 Ind. 191. Ostensible authority to act as agent may be conferred if the party to be charged as principal, affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency. *Thompson* v. *Shelton,* 68 N. W. Rep. 1055, 49 Neb. 644; *Insurance Co.* v. *Walter,* 70 N. W. Rep. 938, 51 Neb. 182; *Porter* v. *Ourada,* 71 N. W. Rep. 52, 51 Neb. 510; *Frey* v. *Curtis,* 72 N. W. Rep. 478,

52 Neb. 406; *Holt* v. *Schneider,* 77 N. W. Rep. 1086; *Estey* v. *Snyder,* 45 N. W. Rep. 415. Where an agent obtains possession of the property of another by making stipulations or conditions which he was unauthorized to make, the principal must either return the property or, if he receives it, it must be subject to the condition upon which it was parted with by the former owner. *Mundorff* v. *Wickersham,* 3 Am. Rep. 531.

FISK, District Judge. This is an action brought to foreclose a certain mortgage upon real property executed and delivered on January 4, 1892, by the defendants David Hunter and Annie, his wife, to one S. W. McLaughlin, to secure the payment of a certain promissory note for $1,350, payable by its terms at the office of said McLaughlin in Grand Forks, on December 1, 1896, which note and mortgage were on March 4, 1892, assigned to the appellant, Abbie J. Corey, of Brookline, Mass., the assignment of which mortgage was on March 11, 1892, recorded in the office of the register of deeds of Pembina county. No question is raised as to the validity of the transfer of this paper, nor as to the bona fides of the transaction whereby this appellant became the owner of said note and mortgage. Appellant remained in the exclusive possession of said paper from the date of such assignment to her until about November 20, 1897, excepting that, as the coupon interest notes became due, they were forwarded by her to McLaughlin for collection. In 1892 the mortgagors sold the real property described in said mortgage to one Sheppard, who in 1895 sold the same to the respondent O'Sullivan. Neither the mortgagor, Hunter, nor his grantee, Sheppard, ever paid any of the coupon interest notes, excepting those which became due December 1, 1892, and December 1, 1893; but the said McLaughlin remitted to appellant the interest which became due on December 1, 1894, and on December 1, 1895, and appellant had no reason to suppose that said interest had not been paid by the mortgagors to McLaughlin. On or about February 27, 1895, one R. W. Cutts, an attorney at law, and who was an employe in the office of the said McLaughlin, at the request of said McLaughlin, and without the knowledge of appellant, commenced proceedings for the foreclosure of said mortgage by advertisement, pursuant to the power contained in the said mortgage, claiming default by reason of the nonpayment of interest. The notice of said foreclosure was signed: "Abbie J. Corey, Assignee of Mortgage. R. W. Cutts, Attorney, Grand Forks, N. D." Pursuant to said notice of foreclosure, and on April 13, 1895, the respondent McCabe, as sheriff of Pembina county, offered said mortgaged premises for sale, and said real property was bid in in the name of this appellant for the sum of $1,670.74. A certificate of sale was issued as provided by law, and was on the 19th day of April, 1895, filed for record. Said certificate was never delivered to appellant, nor did she know of its issuance until about November 20, 1897. On November 14, 1895, the respondent O'Sullivan paid to McCabe, as

sheriff, the sum of $1,780, for the purpose of effecting a redemption from such foreclosure sale; and the said McCabe, as such sheriff, executed and delivered to respondent O'Sullivan a sheriff's certificate of redemption, which certificate was recorded on November 16, 1897. In September, 1897, respondent O'Sullivan executed and delivered to the respondent John Birkholz two mortgages on the premises so redeemed,—one for $3,500, and the other for $711.66, the former of which was assigned by the said Birkholz to respondent Wallbaum. Both mortgages were duly recorded. The money which was paid to redeem said premises from said foreclosure was by the sheriff, under the directions of said Cutts, remitted to McLaughlin, and no part of the same was ever paid to appellant. So far as this record discloses, appellant had no knowledge of such foreclosure proceedings, nor of the pretended redemption, until November, 1897; and appellant in this proceeding seeks to foreclose said mortgage, and to have said attempted foreclosure by advertisement treated as a nullity.

From the foregoing facts it is apparent that the question here presented is one of agency. Did the persons who were instrumental in the foreclosure proceedings act either as the actual or ostensible agents of appellant? If not, then such foreclosure proceedings were not binding on appellant, and she had the undoubted right to treat them as a nullity. No authority on the part of Mr. Cutts or of respondent McLaughlin is claimed, except such, if any, as may have been acquired through McLaughlin. Nor can it be claimed that McLaughlin had any express authority from appellant to foreclose said mortgage. Had respondent McLaughlin any actual or ostensible authority to collect the debt secured by this mortgage, either by foreclosure of the mortgage or otherwise? If not, then it must follow that respondent O'Sullivan was not justified in paying to respondent McCabe the money which he paid to redeem, and he acquired no rights under such redemption; nor was the respondent McCabe justified in paying such redemption money to McLaughlin. "Actual authority," as defined by the Code, is such authority as the principal intentionally confers upon the agent, or intentionally or by want of ordinary care allows the agent to believe himself to possess. Rev. Codes 1899, § 4321. We are unable to find in this record any evidence of such actual authority, but, on the other hand, the undisputed evidence is that no such authority existed. From the testimony of Mr. Cutts, it appears that he acted solely upon the request and under the instructions of McLaughlin; and appellant denied positively that she ever authorized McLaughlin or Cutts to foreclose said mortgage or to collect said note. Her testimony not only is uncontradicted, but it is strongly corroborated by the fact that at the time of the foreclosure there was no default in the conditions of the mortgage. The principal note was not due, and McLaughlin had remitted to her the installments of interest as they matured. Another circumstance tending to corroborate her testimony is the fact that the note and mortgage were not in the

possession of McLaughlin or the attorney, Cutts. If appellant had directed the foreclosure proceedings to be instituted, it is reasonable to presume that the note and mortgage would have been transmitted by her to McLaughlin for the purpose of foreclosure. Counsel for respondent contend, in effect, that McLaughlin had actual authority to foreclose said mortgage, for the reason, as they claim, that although appellant did not intentionally confer such authority upon her alleged agent, still, in the language of the Code, she "intentionally or by want of ordinary care allowed such agent to believe himself to possess such authority." Counsel, in their brief, after quoting the above section of our Code, use this language: "Can it be thought for one moment that Mr. Cutts, who was the attorney who foreclosed this mortgage, had any doubts whatever about his agency or the agency of McLaughlin, when he made his attorney's affidavit of foreclosure, swearing that he was the attorney for the plaintiff?" Counsel apparently overlook the fact that under the statute which they quote the test is not what authority the agent believed he possessed, but, what did the principal, intentionally or by want of ordinary care, allow the agent to believe himself to possess? Tested by this rule, we have no hesitancy in arriving at the conclusion that there is no sufficient evidence in the record to warrant a court in holding that actual authority existed in McLaughlin to foreclose said mortgage. If appellant intentionally conferred upon McLaughlin any authority to foreclose said mortgage, or if she intentionally or by want of ordinary care allowed McLaughlin to believe that he possessed such authority, the proof of such fact is wholly lacking.

Did McLaughlin possess ostensible authority to foreclose said mortgage? The Code defines "ostensible authority" to be such authority as the principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent posseses. Rev. Codes 1899, § 4322. Did appellant intentionally cause or allow respondents to believe that McLaughlin possessed authority to foreclose said mortgage, or did she, by want of ordinary care, cause or allow them so to believe? We think not. We are unable to find any evidence in the record tending to show such intent on her part, or tending to show a want of ordinary care, such as would cause a belief in the mind of any one that McLaughlin possessed such authority. The most that can be claimed is that McLaughlin acted as appellant's agent in effecting certain loans in this state, including the loan to Hunter, and that from time to time, as the interest or principal of her loans became due, she sent the notes to McLaughlin, with instructions to collect. In no case, however, were any collections made, to appellant's knowledge, except as the notes were sent him by appellant, with special instructions to make the collection; nor did he have any authority from appellant to make any collections of either principal or interest without such instructions. When McLaughlin made collections the proceeds were credited to appellant in McLaughlin's books, and from time to time the amounts thus

standing to the credit of appellant were reinvested, after consulting appellant regarding such reinvestment. In no case were any reinvestments made of her funds without her knowledge and express assent. Whenever there was an amount sufficient for an investment standing to her credit on McLaughlin's books, the latter would notify her of what mortgages he had on hand or could obtain; and, in case she desired to reinvest, she would designate the mortgages she desired to purchase, taking such securities as corresponded as nearly as possible with the amount of money to her credit. Upon receiving her acceptance of an offer, McLaughlin would charge the amount thereof to her account, and assign and forward to her the notes and mortgages. As to whether the relation between appellant and McLaughlin in making these investments was that of principal and agent is immaterial, as it is impossible to conceive that any degree of negligence on the part of appellant in respect to the course of dealing pursued in the investment of her funds could give the appearance of authority to make collections of either principal or interest, since the apparent authority of an agent is limited to acts of a like nature to those from which it is implied. It is clearly manifest, therefore, that an apparent or ostensible authority to foreclose the Hunter mortgage, or to collect the principal debt, could not arise from the course of dealings between these parties in making the reinvestment, however general or plenary the agent's powers in that behalf were.

There are certain well-settled principles which are applicable in all cases involving the question of the existence of an agency or the existence of an agent's authority. A person who deals with an agent does so at his peril. He is bound to know that the person with whom he deals is agent of the person whom he claims to represent, and he is also bound to know the extent of such agent's authority. Agency will never be presumed, but where its existence is denied the burden of proof is upon him who affirms its existence, and the proof of such agency must be clear and specific. 1 Am. & Eng. Enc. L. (2d Ed.) p. 968, and cases cited. The agent's authority must be direct and specific, or the facts and circumstances must be of such a nature that the agent's right to act may be fairly implied. *Trull* v. *Hammond* (Minn.) 73 N. W. Rep. 642-644. "It is, of course, a fundamental principle in the law of agency that every delegation of power carries with it, by implication, the authority to do all those things which are reasonable, necessary, and proper to carry into effect the main power conferred and which are not forbidden. But the doctrine of implied authority goes no further than this." *Burchard* v. *Hull* (Minn.) 74 N. W. Rep. 165. Apparent authority is that authority which an agent appears to have from that which he actually does have, and not from that which he may pretend to have, or from his actions on occasions which are unknown to and unratified by his principal. *Oberne* v. *Burke* (Neb.) 46 N. W. Rep. 842. But the principal is responsible only for the appearance of authority which is caused by himself, and not for an appear-

ance of conformity to authority caused only by the agent. The extent of an authority of an agent depends upon the will of the principal, and the latter will be bound by the acts of the former only to the extent of the authority, actual or apparent, which he has conferred upon the agent. *Edwards* v. *Dooley*, 120 N. Y. 540, 24 N. E. Rep. 827; *Burchard* v. *Hull* (Minn.) 74 N. W. Rep. 164. "When the agency is to be inferred from the conduct of the principal, that conduct furnishes the only evidence of its extent, as well as of its existence. When the belief of the authority of an agent arises only from previous actions on his part as an agent, the persons treating with him must, on their own responsibility, ascertain the nature and extent of his previous employment." Tested by these elementary and well-established principles, we are clearly of the opinion that the course of dealing between these parties with reference to the investment and reinvestment of appellant's funds conferred no implied or apparent authority upon McLaughlin to make collections, either by foreclosure or otherwise; the authority to make collections not being in any degree necessary to the accomplishment of the purposes or object of such agency. Authority to contract confers no authority to sue on the contract. *Markham* v. *Insurance Co.*, 69 Ia. 515, 29 N. W. Rep. 435; 1 Am. & Eng. Enc. L. (2d Ed.) p. 1026, and cases cited. See, also, *Security Co.* v. *Douglass* (Wash.) 44 Pac. Rep. 259; *Smith* v. *Kidd*, 68 N. Y. 130, 23 Am. Rep. 161; *Trull* v. *Hammond*, 73 N. W. Rep. 644. Nor does the course of dealing between appellant and McLaughlin in regard to prior collections of principal or interest warrant the finding that there was an implied or apparent agency or authority to collect the principal of the Hunter debt, either by foreclosure or otherwise. The extent of an agent's authority in certain cases may be governed by usage and custom, but, to have this effect, the authority conferred must be of a kind, or the business transacted of a nature, with reference to which there is a well-defined and publicly known usage. Upon this question, Judge Mitchell, of the Supreme Court of Minnesota, in the case of *Burchard* v. *Hull*, 74 N. W. Rep. 165, says: "It is also true that where the principal confers upon his agent an authority of a kind, or empowers him to transact business of a nature, in reference to which there is a well-defined and publicly known usage, it is the presumption of the law, in the absence of anything to indicate a contrary intent, that the authority was conferred in contemplation of the usage. * * * But, in order to give the usage this effect, it must be known to the principal, or have existed for such a length of time, and become so widely known, as to warrant the presumption that the principal had it in view at the time he appointed the agent. On the facts of this case, the doctrine of implied power cannot be successfully invoked under either of these principles." "There is no proof of any such usage in that business, unless the practice of the Kelleys proves it. But, fortunately, the business methods of the Kelleys are not sufficient to establish a general custom or usage, with reference to which other

people are presumed to contract." "There is a mass of evidence tending to show that it was the custom of the Kelleys to advance money to pay interest on loans placed by them for others, and then foreclose the mortgage, bid the land in, in their own name, and sell it, if not redeemed. But there is not a particle of evidence that plaintiff had any knowledge of such a custom, and, there being nothing in the facts making it her duty to know it, we dismiss the evidence as to the Kelleys' custom with the simple statement that it is wholly irrelevant and immaterial." The record in the case at bar wholly fails to disclose any evidence tending to show any general custom among investment brokers in the locality where McLaughlin carried on his business, or of any particular custom, or that, if any such custom existed, appellant had any knowledge thereof.

Nor did the fact that the Hunter note was payable at McLaughlin's office create any implied or apparent authority upon him to collect the same. In the case of *Hollinshead* v. *John Stuart & Co.*, 8 N. D. 35, 77 N. W. Rep. 89, 42 L. R. A. 659, and also in *Stolzman* v. *Wyman*, 8 N. D. 108, 77 N. W. Rep. 285, this court held that, "when a negotiable promissory note is made payable at a particular office, such fact does not constitute the party in charge of such office the agent of the holder of such note, to receive the money thereon, unless such note is in the possession of such party." While it is true that McLaughlin in some instances collected certain notes for appellant, the record shows that in no instance did he make such collections without first having received from appellant the notes representing the debt collected. And the uncontradicted evidence also shows that prior to the attempted foreclosure in question the respondent McLaughlin never foreclosed any mortgage for appellant, nor had he ever been instructed to do so. In the absence of express authority ,or of circumstances from which actual authority can be reasonably inferred, possession of the securities is the crucial test of an agent's implied or apparent authority to receive payment; and, if the agent has no such securities in his possession, the party who pays money to him assumes the burden of showing the authority of such person to receive the payment. 1 Am. & Eng. Enc. L. (2d Ed.) p. 1026; *Security Co.* v. *Graybeal* (Iowa) 52 N. W. Rep. 499. See, generally, upon this subject, *Security Co.* v. *Douglass* (Wash.) 44 Pac. Rep. 257; *Bull* v. *Mitchell* (Neb.) 66 N. W. Rep. 632; *Smith* v. *Kidd*, 68 N. Y. 130; *Trull* v. *Hammond* (Minn.) 73 N. W. Rep. 642; *Joy* v. *Vance* (Mich.) 62 N. W. Rep. 140; *Porter* v. *Ourada* (Neb.) 71 N. W. Rep. 52. The case of *Burchard* v. *Hull* (Minn.) 74 N. W. Rep. 163, is a very similar case to the one at bar, and the very able opinion of Judge Mitchell meets with hearty approval. Among other things, he says: "The case is entirely free from any element of estoppel by conduct, or of apparent as distinguished from actual authority, or of ratification. The defendant must stand exclusively upon the proposition that the act of the plaintiff in delivering or transmitting the interest coupons (herself retaining the mortgage and principal note) to another, with authority

to collect the same, gave such other person implied authority to foreclose the mortgage if the coupons were not paid. If an agent to whom an interest coupon is sent for collection (while his principal retains in his own possession the collateral mortgage and principal note, not yet due) has implied power to foreclose the mortgage, the sooner men know it the better. We apprehend the announcement of any such doctrine would take both the legal profession and business men by surprise." Again, in the case of *Dexter* v. *Morrow*, 79 N. W. Rep. 394, the Supreme Court of Minnesota, in a case involving the same questions here presented, reached the same conclusion.

During the trial of this case in the court below, a certain letter purporting to have been written by J. G. Hamilton, one of the counsel for the appellant, to one W. A. Joy, who was acting as appellant's agent, was found by the trial judge in the envelope containing appellant's deposition in this case, which letter, after cautioning Mr. Joy as to the care which should be exercised in the taking of the plaintiff's deposition, quoted several provisions of our Code relative to agency, and also containing questions to be propounded to her, and her answers thereto. This letter was, by direction of the trial judge, filed in the office of the clerk of court, and the learned trial judge evidently considered said letter as discrediting the testimony of plaintiff as given in her deposition. While the questions and answers in the deposition correspond with the questions and answers as suggested by counsel in said letter, still we do not consider the same of any importance in determining the issues involved. The suggestions as to what answers should be given were qualified by the statement that such answers should conform to the facts, and, while it is unusual for counsel to suggest the exact form of the answer which should be given by a witness, still we do not think that it is a fair inference to draw from this letter that counsel intended to coach his client to testify to anything but the facts. But this document is not before us, and cannot be considered, for the reason that the same was not offered or received in evidence, and it is therefore improperly in the record. The filing of it as ordered by the trial court in the office of the clerk would not be sufficient, in our opinion, to bring the same upon the record.

The decision of the trial court being inconsistent with the foregoing opinion, it follows that the same must be reversed, and the District Court is directed to enter judgment in favor of the plaintiff for the relief prayed for in the complaint, with costs of both courts. All concur.

YOUNG, J., having been of counsel in said case, took no part in the foregoing opinion, Judge Fisk, of the First Judicial Distict, sitting by request.

(84 N. W. Rep. 570.)

MINNESOTA THRESHER MANUFACTURING COMPANY *vs.* WILLIAM HOLZ, *et al.*

Opinion filed November 20, 1900.

Default Judgment—Motion to Vacate—Time of Making—Notice of Entry.

Construing section 5298, Rev. Codes 1899: On June 22, 1892, judgment was entered in the District Court for Ramsey county, by default, against the defendants and in favor of the plaintiff, upon a promissory note signed by all of the defendants. Immediately after the entry of such judgment a transcript of the same was recorded in Bottineau county, in which county said defendant Frederick Kitzman then, and ever since has, resided. In June, 1899, the judgment, for a cash consideration, was sold and assigned to one Andy Jones, who purchased without notice or knowledge of any defense or equities as between any of the original parties. Jones in June, 1899, issued execution upon the judgment, and caused a levy to be made thereunder upon the property of Frederick Kitzman. Prior to such levy Kitzman had neither notice nor knowledge that the judgment had been entered in fact. After such levy the defendant moved, under section 5298, Rev. Codes 1899, to vacate the judgment upon the ground that the same was entered by reason of said defendant's neglect to interpose an answer and defense in the action, and that said neglect was excusable under the circumstances set out in the moving papers. *Held*, that the motion was not interposed too late. The statute will begin to run only upon actual notice or knowledge of the judgment. Formal and written notice is not, however, essential to start the statute in motion.

Service of Summons Not Notice of Judgment.

Held, further, that personal service of the summons and complaint does not operate as notice of the entry of judgment. Nor, as a general rule, will laches be imputed until after knowledge or notice of the judgment is obtained by the defendant.

Assignee of Judgment Takes Subject to Equities.

Held, further, that an assignee of a judgment, who buys the same in good faith, and without notice or knowledge of defenses or equities as between original parties thereto, nevertheless takes the same subject to such defenses and equities.

Proper Moving Papers to Vacate Default.

In this case the moving papers embraced a proper affidavit of merits and a proposed answer, duly verified, and stating a defense on the merits to plaintiff's cause of action; also, certain affidavits setting out, among other matter, the grounds relied upon by Kitzman as an excuse for his neglect to answer the complaint. *Held*, that in this the moving party pursued the correct practice, in a case where a defendant seeks to vacate a default judgment, and asks leave to answer the complaint.

Counter Affidavits Not Permissible—When.

Against objection, plaintiff was allowed to file counter affidavits whereby the plaintiff attempted to combat the facts and merits as set out by answer and in the affidavit of merits. This was error. Such counter affidavits cannot be presented in opposition to the merits of the defense. The court will examine the defense pleaded, to see

whether the same, on its face, constitutes a defense, but will go no further.

When Counter Affidavits Competent.

Held, further, that the facts set out in the motion papers, and relied upon as grounds of excuse for the default, may be met and opposed by counter affidavits, and, in the consideration of the same, the ruling to be made in the trial court rests in the sound discretion of that court, and the ruling below will not be disturbed in this court except in cases of abuse.

Denial of Motion to Vacate Default Error.

In this case the moving party set out facts showing that the plaintiff before suit was instituted, by its authorized agent compromised with him, and wholly relieved him from liability on said note. This release and defense was set up by answer. As grounds of excuse for his default, the affidavits of Kitzman stated, in substance, that when said agreement of compromise was made he was informed by said agent that the plaintiff would try to collect the note of said other defendants, and would perhaps sue on the note, and that it would be necessary, in the event of such suit being brought, to make him (Kitzman) a party thereto, but that no judgment would be entered against him in that event, and further assured Kitzman that if, by any mistake, a judgment in said action should be entered against him, plaintiff would at once cancel the same as to him. *Held*, that this showing presented a valid excuse for Kitzman's negligence in not answering the complaint, and inasmuch as no attempt was made to controvert the excuse offered, and it appearing that Kitzman pleaded a good defense on the merits, it was error, and constituted an abuse of discretion, to deny the motion, if it be true that the trial court placed its ruling upon the assumption that the excuse, as shown, was insufficient.

Order Reversed.

Upon all the facts appearing of record, the order is reversed.

Appeal from District Court, Ramsey County; *Morgan*, J.

Action by the Minnesota Thresher Manufacturing Company against William Holz and others. From a judgment refusing to vacate a default judgment, defendants appeal.

Reversed.

V. B. Noble and *Redmon, Ink & Wallace*, for appellant.

The power to set aside a judgment for fraud or collusion, though expressly granted by statute in many states, is not dependent upon legislative recognition. *Taylor* v. *Sindall*, 34 Mo. 38; *Marbury* v. *McClurg*, 51 Mo. 256; *Mellick* v. *Bank*, 52 Ia. 94, 36 Am. Dec. 267. Fraud, as a ground for vacating a default, is entirely distinct from the statutory ground of mistake, inadvertence, surprise or excusable neglect. 6 Enc. Pl. & Pr. 175. Where a party by act or declaration lulls his opponent into false security, or by any means deceives him, and thereby obtains a judgment or decree to his prejudice, it is fraudulent and may be impeached upon that ground. Black, Judgmts. §§ 291, 340, 368; *Birch* v. *Frantz*, 77 Ind. 199; Freeman, Judgmts.

§ 489; 6 Enc. Pl. & Pr. 172; *Cadwallader* v. *McClay*, 55 N. W. Rep. 1054. Judgments entered in violation of an agreement to the contrary will be set aside. Black, Judgmts. § 373; 10 Am. & Eng. Enc. L. 905; Hilliard on Injunctions, 137; *Baker* v. *Redd*, 44 Ia. 79; *Keeler* v. *Elston*, 34 N. W. Rep. 891; *Chambers* v. *Robbins*, 32 Vt. 562; *Johnson* v. *Lyons*, 14 Ia. 431. The statute authorizing the opening of judgments is remedial and should be liberally construed in cases where such construction is calculated to advance justice. *Harbaugh* v. *Land Co.*, 109 Cal. 70; *Buell* v. *Emerick*, 85 Cal. 116; *Maline* v. *Big Flat Co.*, 93 Cal. 304; *Stack* v. *Casey*, 22 Ill. App. 412; *People* v. *Campbell*, 18 Abb. Prac. 1; *Wolfe* v. *Railway Co.*, 89 Cal. 337; *Lodtman* v. *Schulleter*, 71 Cal. 94; *Mason* v. *McNamara*, 57 Ill. 274; § 5298 Rev. Codes; *Nichells* v. *Nichells*, 5 N. D. 126; *Griswold* v. *Lea*, 47 N. W. Rep. 955; *Buell* v. *Eurich*, 24 Pac. Rep. 644. Counter affidavits as to the question of meritorious defense will not be considered upon a motion to set aside a judgment. *Mendell* v. *Kimball*, 85 Ill. 582, 6 Enc. Pl. & Pr. 158. The assignee of a judgment takes it subject to all the equities existing between the original parties whether he had notice of the same or not. *Kimball* v. *Cummings* (Ky.) 2 Metc. 327; *Blakesley* v. *Johnson*, 13 Wis. 530; *Rea* v. *Froth*, 88 Ill. 275; *Webber* v. *Tschetter*, 46 N. W. Rep. 201; *Cadwallader* v. *McClay*, 55 N. W. Rep. 1055; *Traphaggen* v. *Lyons*, 38 N. J. Eq. 613; *Stout* v. *Van Kirk*, 10 N. J. Eq. 78; *Sutton* v. *Sutton*, 1 S. E. Rep. 119.

George A. Bangs, for respondent.

The contract relied upon by the defendant is void as against public policy. The agreement made by Kitzman that a judgment might be entered against him, which judgment should be satisfied and discharged thereafter. Greenhood on Public Policy, 5, 446; *Vermont, Etc., Ry. Co.* v. *Railway Co.*, 34 Vt. 149; *Brown* v. *First Nat. Bank*, 37 N. E. Rep. 157; *Richard* v. *Crandall*, 48 N. Y. 343; 9 Am. & Eng. Enc. L. 880; 19 Id. 565; 3 Id. 879. This application was not made in time. The taking of the judgment in June, 1892, was notice to Kitzman of the fact of its rendition, and more than one year elapsed from this notice of judgment before an application was made for its vacation. *Yerkes* v. *McHenry*, 6 Dak. 5; *Sargent* v. *Kindred*, 5 N. D. 472. The personal service of summons and complaint on defendant was legal notice that if he failed to appear and answer judgment would be taken against him by default for the amount claimed in the complaint. *Sluder* v. *Graham*, 23 S. E. Rep. 924; *Littster* v. *Littster*, 25 Atl. Rep. 117. While the statute designates a time within which application must be made for relief, the proceedings thereunder are equitable in court and delay of the moving party after he had notice, actual or implied, of the judgment against him, may justify the court in denying relief on the ground of his laches, though his motion was made or his petition filed within the time named in the statute. Freeman, Judgments, § 105; *Littster* v. *Littster*, 25 Atl. Rep. 117; *Sluder* v.

Graham, 23 S. E. Rep. 924; *Bank* v. *Trust Co.*, 71 N. W. Rep. 928; *Hollinger* v. *Reeme*, 24 L. R. A. 46; *DeCamp* v. *Bates*, 37 S. W. Rep. 644; *In re Gilman's Estate*, 17 N. Y. Supp. 494; *Drummond* v. *Mathews*, 17 N. Y. Supp. 726.

WALLIN, J. This is an appeal from an order of the District Court denying an application made by the defendant Frederick Kitzman to vacate the judgment herein as against him, and allow him (Kitzman) to answer the complaint. The ground of the action for which said judgment was entered was a promissory note for $309.92, signed by all of the defendants. Judgment for said amount, with interest, was entered in the county of Ramsey on the 22d day of June, 1892. Immediately after the entry of said judgment a transcript thereof was docketed in the county of Bottineau, N. D., in which county the defendant Kitzman then resided, and has ever since resided. No appearance having been made in the action, judgment was taken by default after the expiration of 30 days after the date upon which the summons and complaint were served upon the defendant Kitzman. No formal notice of the rendition or entry of said judgment was ever served upon the defendant Kitzman, and it also appears that Kitzman never had actual notice or knowledge of the entry of said judgment at any time prior to the month of June, 1899, at which time a levy was made upon Kitzman's property under an execution based upon said judgment. The record also shows, and the fact is not disputed, that said judgment was for a cash consideration of $150 on the 5th day of June, 1899, sold and assigned to one Andy Jones, who is now the sole owner thereof. The motion to vacate was heard in the District Court on the 6th day of April, 1900, and the same was based upon the following papers submitted by Kitzman: (1) An affidavit of merits; (2) a proposed answer duly verified; (3) the affidavits of Frederick Kitzman, Emma Kitzman Ohnstad, W. H. Redmon, and G. T. Propper. The plaintiff and Andy Jones submitted affidavits of E. D. Buffington and Andy Jones in opposition to the motion. It appears by the affidavits submitted in opposition to the motion that said Andy Jones purchased said judgment without any notice or knowledge of any existing defense or equity in the defendant Kitzman, and without notice of any fact which would render the collection of the judgment unlawful or unjust. It appears substantially by the affidavit of E. D. Buffington that no notice or knowledge was ever received by the plaintiff of any compromise or settlement between Kitzman and the plaintiff, or any agent of the plaintiff, whereby said Kitzman was released from his liability upon the note upon which said judgment was entered, and that no remittance was made to said plaintiff on account of the proceeds or consideration for any such settlement, and that the note was put in judgment in due course of business, and without any knowledge or notice that the same had ever been compromised and settled, as claimed to be the fact by Kitzman, and as set forth in the proposed answer and affi-

davits submitted by him. The affidavit of Buffington further states that G. T. Propper, who makes an affidavit herein, and who was a traveling collector for plaintiff at the time in question, had no authority whatever to complete and close any compromise agreement with Kitzman, such as is claimed to have been made and completed with Kitzman; that, in order to be valid, any such compromise agreement as Kitzman claims and relies upon herein would have to be submitted to and ratified by the plaintiff; and that this was never done, and no such compromise was ever reported to the plaintiff at any time for ratification. The facts, as shown by the answer and affidavits submitted by Kitzman in support of the motion, may be epitomized as follows: That on August 28, 1891, the plaintiff, acting through its authorized agent, one G. T. Propper, entered into a compromise agreement with the defendant Frederick Kitzman, whereby said Kitzman was discharged and wholly released from all liability upon the note upon which said judgment was entered, and that pursuant to such agreement and compromise the plaintiff, by its said agent, wrote out a receipt in full for Kitzman of all demands and claims held at said date by plaintiff against Kitzman, and then and there delivered the same to Kitzman. It further appears in detail by said affidavits and answer: That on said 28th day of August said G. T. Propper called on Kitzman, at a hotel kept by the latter at Towner, N. D., and requested Kitzman to pay two notes then due the plaintiff. One was the note sued on, and the same was signed by Kitzman and the other defendants. The other was an individual note of Kitzman for $206.65. That Kitzman was then, by reason of lack of means, unable to pay said notes, whereupon a negotiation for a compromise of said notes was entered upon, and the same resulted in an agreement to compromise said notes upon the terms and for the consideration hereinafter stated. Kitzman agreed to pay down in cash the sum of $160, and to assign to plaintiff a certain account of $30 against the firm of Stadd & McKee; also to furnish livery service to convey said Propper to Willow City, a distance of about 35 miles from Towner,—and finally agreed to discharge and liquidate the hotel bill of said Propper incurred at said hotel at Towner. If further appears that each and all of said agreements made by said Kitzman, as above set out, were then and there fully performed by Kitzman. It also appears that the plaintiff, through said Propper, agreed, on its part, as follows: To surrender said individual note of Kitzman to Kitzman, and to give Kitzman a receipt in full of all plaintiff's demands to date against him. Said individual note and said receipt were accordingly then and there delivered by Propper to Kitzman. The affidavits submitted by Kitzman, which are uncontradicted, show that, as part and parcel of said compromise, there was a special agreement made with reference to the joint note upon which said judgment was subsequently entered, which was, in substance, as follows: Upon the statement made by the said G. T. Propper that the plaintiff intended to collect something on the note, if possible to do so, of the other signers

thereof, viz: William Holz and Wilhelmina Holz, it was agreed that said joint note should not be surrendered up, but should be retained for collection, at least in part, from the other signers, but that Kitzman should be forever released and exonerated from liability on account of said note, and that Kitzman's receipt in full, then and there delivered, would evidence the fact of such release. It appears that Propper then stated to Kitzman that, in the event of suit being brought upon said joint note, it would be necessary to sue all the signers thereof, but stated in this connection to Kitzman that, if such suit was finally brought upon the note, no judgment would ever be entered therein against him, the said Frederick Kitzman; and to this the said G. T. Propper added the statement that if, by any mistake, a judgment against Frederick Kitzman should be entered in any such action, the same would at once be canceled by the plaintiff. The fact that such compromise agreement was actually made and was fully executed on the part of Kitzman, as above stated, is shown by the affidavits of Frederick Kitzman and his daughter, and their statements are corroborated in all particulars by the affidavit of said G. T .Propper. Nor do the affidavits on the part of the plaintiff and Andy Jones deny or attempt to disprove any matter which is alleged in the affidavits presented by Kitzman touching said compromise, or the terms thereof, except that the affidavit of said Buffington denies that said Propper had authority from the plaintiff to make the compromise, or any compromise, with Kitzman, other than a mere preliminary arrangement, to be submitted to the plaintiff for its approval or disapproval, as plaintiff might elect.

After hearing counsel, the District Court made its order denying the application to vacate the judgment. This order is appealed from, and is assigned as error in this court. In disposing of this assignment of error, we must first consider whether the application to vacate the judgment is made within the time limited by the statute under which the application was made to the District Court. See section 5298, Rev. Codes 1899. This section confers upon the District Court authority within one year after notice thereof to "relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect." In this case respondent's counsel contend that the application to vacate, which was not made until about seven years after the entry of the judgment in question, is too late. We are of the opinion that this contention cannot be sustained. It is undisputed that no formal notice of the judgment was ever served on Frederick Kitzman, and it affirmatively appears, and is not disputed, that Kitzman never had any actual knowledge or notice that the judgment had been rendered or entered in fact. The rule as to notice is that the same need not be a formal or written notice, and that knowledge alone is sufficient. See *Schobacker* v. *Insurance Co.*, 59 Wis. 86, 71 N. W. Rep. 969; *Knox* v. *Clifford*, 41 Wis. 458. But the fact that personal notice of the summons and complaint was made does not give notice of the judgment, within the meaning of the statute. *Wieland* v.

Shillock, 23 Minn. 227. In New York it is held that the power to vacate a judgment is inherent in the courts, and that the same may be exercised, in furtherance of justice, after the lapse of the statutory time which limits such applications. See notes and citations on pages 198, 199, 6 Enc. Pl. & Prac. In Wisconsin the contrary rule prevails. In this case no ruling is required upon this controverted point, inasmuch as we hold upon this record that the defendant is in time; he having moved within time, and promptly after receiving actual notice of the existence of the judgment. Nor can we rule, upon such a state of facts, that the defendant has been guilty of any laches in applying for the equitable relief which he is seeking. See *School Dist.* v. *Schreiner,* 46 Ia. 172.

The respondent also contends that the assignee and purchaser of the judgment is in the position of an innocent purchaser of the judgment, and that as such his rights as purchaser cannot be affected by any defenses or equities existing between original parties of which he had no knowledge or notice. We cannot yield our assent to this proposition. We think that the rule is well settled that the purchaser in good faith and without notice takes a judgment subject to existing equities between original parties. See *Brisbin* v. *Newhall,* 5 Minn. 273 (Gil. 217). See also, 2 Freem. Judgm. § 427.

Another contention which is strenuously urged in respondent's behalf is that an application to vacate a judgment upon the grounds appearing in this record is not based upon any absolute legal right, but that the same is wholly an appeal to the favor, and hence the application is one which the trial court, in the exercise of its judicial discretion, was at liberty either to grant or withhold, and its ruling is therefore not reviewable by this court unless the record discloses a case of abuse of judicial discretion. We acquiesce in this proposition of counsel, to the extent of holding that the appellants' case does not rest upon any strict legal right, but, on the contrary, does rest upon an appeal to the favor, and is therefore addressed to the judicial discretion of the court below. From this it follows that this court, as a court of review, unless there has been an abuse of discretion, will not disturb the conclusion reached in the court below, if it shall appear that that court based its ruling upon any matter which, under the law, came within the proper purview of judicial discretion. But where the ruling below in such cases is governed by a legal principle, or controlled by some matter of positive law, the same is not, within the meaning of the law, addressable to sound judicial discretion, but the same must be made to conform to the law, and for such purpose the ruling is reviewable. It is necessary, therefore, to determine upon this record whether the order in question was in fact based upon matters which lie within the domain of judicial discretion, and to do this we must advert briefly to the facts already stated. It appears that Frederick Kitzman based his claim of relief, first, upon the allegation that the plaintiff had, when judgment was entered, no demand against him which was legally enforceable, for the reason that prior to the institution of the action

the plaintiff had, for a good consideration, canceled the note in suit as against Kitzman, and fully released him from all liability thereunder. To this claim Kitzman superadds the statement that he was directly induced by the plaintiff, through its authorized agent, to refrain from answering in the action, and setting up said compromise and release as a defense upon the merits. These facts were brought to the attention of the trial court—First, by a proper affidavit of merits; second, by a verified answer alleging fully and in detail the fact of said compromise and the release of Kitzman. To this showing as to the merits the moving party added three affidavits, which, in addition to setting out and restating the merits and the entire matter of the alleged compromise and release, proceeded to set out the alleged representations made by plaintiff's authority, which, as Kitzman claims, effectively operated to lull him into a false security, and which in fact, as he claims, induced him not to answer or appear in the action. This brief recapitulation, we think, makes it sufficiently clear that the facts presented to the trial court in the motion papers are divisible into two distinct and well-defined classes, viz: those relating to the merits of the alleged defense, and those which are set up for the purpose of excusing Kitzman's neglect to appear and answer in response to the summons and complaint. The former class of facts is embodied in the verified answer and in the affidavit of merits, while the latter is strictly confined to the averments found in the three affidavits filed in support of the motion.

We have thus entered into detail in order to emphasize the fact that the counter affidavits submitted by the plaintiff, except that of Andy Jones, which is confined to the matter of his purchase of the judgment in good faith, are responsive to the merits of the proposed defense of Kitzman, and are not responsive in any degree to any fact or matter alleged by Kitzman as an excuse for his neglect to appear and answer in the action. We regard this omission in the counter affidavits to deal with Kitzman's alleged excuse for his nonappearance in the action as fatal to the respondent's claim that the question submitted to the trial court was one of discretion. It will be conceded, we think, that Kitzman's neglect to appear in the action is fully excused in his affidavits. The record shows that he did not appear because he relied upon the assurances made in plaintiff's behalf that no judgment would be entered against him in fact, and the further assurance that if a judgment should, under the circumstances, be entered against him by any mistake, the same would be promptly canceled by the plaintiff. The counter affidavits offered by plaintiff were certain affidavits made by one E. D. Buffington, who is the plaintiff's secretary and treasurer. These affidavits, when most liberally construed in plaintiff's favor, tend only to deny the merits of Kitzman's case as the same is pleaded by his answer. They allege, in substance, that said Propper was not authorized to make the compromise and settlement which Kitzman sets out as a defense; and to bolster this statement the further statement is made that no

such compromise was ever reported by Propper to the plaintiff, and that Propper never at any time remitted to plaintiff any of the proceeds due the plaintiff, of the alleged compromise. It is apparent, therefore, that all of the averments in Buffington's affidavit are confined to the merits of the defense as pleaded in Kitzman's proposed answer, and equally apparent that nothing in Buffington's affidavit has any reference to the excuse alleged by Kitzman for his failure to appear and answer in the action. In dealing with the one matter of Kitzman's excuse for his default, we are convinced that the trial court found that the excuse, not being contradicted, was true in fact, and are satisfied, also, that the trial court must have found that said excuse was valid and sufficient in law. The trial court does not set forth any grounds or reasons upon which it proceeded in denying the motion; hence we are compelled to put the same upon some matter of fact which is controverted, or upon some legal principle relating to the case. If the ruling was placed upon the legal ground that the assignee did not purchase subject to equities, or upon the ground that the motion was not made in time, this court, as a court of review, could properly review such ruling, and in so doing would reverse for reasons already stated. But, if the ruling below was based upon the matters of fact as set out in Buffington's affidavit, we would still reverse upon the legal ground that counter affidavits cannot, in this class of cases, be presented for the purpose of disproving any fact relating to the merits of the defense. The answer alleges the essential fact that the plaintiff's compromise discharged and released Kitzman; the plaintiff acting by its agent, one Propper. The counter affidavits squarely and in detail deny this vital averment of fact. We shall rule that counter affidavits are inadmissible for such purpose, and that the same must be confined to a traverse or avoidance of the facts submitted by the moving party as an excuse for his default. We are aware that authorities may be found to the contrary, but we are convinced that the rule as above stated is logical in itself, and has the support of the best-considered cases. See *Worth* v. *Wetmore* (Iowa) 54 N. W. Rep. 56; *Joerns* v. *La Nicca*, 75 Ia. 709, 38 N. W. Rep. 129; *Francis* v. *Cox*, 33 Cal. 325; *Gracier* v. *Weir*, 45 Cal. 54; *Reclamation Dist.* v. *Coghill*, 56 Cal. 607; *Douglass* v. *Todd*, 96 Cal. 655, 31 Pac. Rep. 623; *Buck* v. *Havens*, 40 Ind. 221; *Lake* v. *Jones*, 49 Ind. 297; *Beatty* v. *O'Connor*, 106 Ind. 81, 5 N. E. Rep. 880; *Hill* v. *Crump*, 24 Ind. 291; *Mendell* v. *Kimball*, 85 Ill. 582; *Thelin* v. *Thelin*, 8 Ill. App. 421; *Manufacturing Co.* v. *Thomas*, 17 Ill. App. 235. In the two cases cited from Illinois it is held that no counter affidavits can be offered in applications to be relieved from defaults, but this rule is, we think, more strict than that which obtains in any code state.

In the trial court, Kitzman's counsel objected to the opposing affidavits upon the ground that the same did not tend to controvert the excuse shown for Kitzman's neglect to answer. The trial court admitted these affidavits in evidence, but, as we understand the

ruling, held, in effect, that the same did bear upon and tend to controvert Kitzman's excuse for his negligence. In this we think the court was in error. Neither Buffington nor Andy Jones was in a postion to testify of their own knowledge as to the compromise arrangement. Nor do they attempt to allege or claim that the compromise was not made in fact, and upon the terms shown in the affidavits filed in support of the motion. As we have said, the opposing affidavits are pertinent only upon the question of Propper's authority to represent the plaintiff for the purposes of the compromise. But the question of his authority is the vital question presented in the issue upon the merits tendered in the answer. That question would necessarily be decisive upon the trial of the merits, but the trial court was, upon this application, precluded from considering evidence upon the merits, and could go no further than to inquire whether the applicant had set out a good defense, either legal or equitable. See, on this point, 6 Enc. Pl. & Prac. p. 188, with notes and authorities. Upon the showing made, it is too plain to admit of discussion that Kitzman entered into the compromise in good faith, and that in doing so he fully believed that he was dealing with an authorized agent of the plaintiff. Propper represented himself to be the agent of the plaintiff, and plaintiff was a nonresident, and could act only through agents or officers. Propper had plaintiff's notes with him, and made overtures for a compromise of both notes; and, when the agreement was concluded, Propper surrendered one of the notes without full payment, and this act, so far as appears, has never been repudiated by the plaintiff. Under these circumstances, we think that principles of fairness require that Kitzman should have an opportunity to show, if he can do so, that Propper actually was the plaintiff's agent, with authority to compromise the notes. If we could be sure that the trial court placed its ruling upon the ground that Kitzman had failed to show an adequate excuse for his neglect to answer, we should, in that event, hold that such ruling evidenced an improper exercise of judicial discretion; but, as we have said, the grounds or reasons for the order are not set out by the trial court, and hence this court can only conjecture what they were.

The moving party has pursued correct practice, and such as we think should govern in all applications made by a defendant to vacate judgments entered upon default for answer. He has filed a proper affidavit of merits, and a verified answer setting out a defense, and also set out by affidavits his excuse for not appearing and answering. We intend in this case to settle the practice in this state in this class of cases upon the controverted question of submitting counter affidavits or testimony upon the merits of the defense as set out in the proposed answer and affidavit of merits. See, upon this feature, *Gauthier* v. *Rusicka*, 3 N. D. 1, 53 N. W. Rep. 80; *Sargent* v. *Kindred*, 5 N. D. 8, 63 N. W. Rep. 151. Our conclusion is that the order appealed from must be reversed, and such will be the order of this court. All the judges concurring.

(84 N. W. Rep. 581.)

FREDERICK KITZMAN *vs.* MINNESOTA THRESHER MANUFACTURING COMPANY.

Opinion filed November 21, 1900.

Judgment—Enforcement—Injunction—Remedy at Law.

An independent action in equity to enjoin the collection of a judgment will not lie in a case such as this, where it appears from the facts alleged in the complaint that the plaintiff had an adequate remedy at law by a motion to vacate such judgment under section 5298, Rev. Codes 1899. In disposing of such motions, courts are empowered to administer equitable relief, and apply equitable principles to the facts involved.

Appeal from District Court, Ramsey County; *Morgan*, J.

Action by Frederick Kitzman against the Minnesota Thresher Manufacturing Company and William Holz, sheriff. Judgment for defendants, and plaintiff appeals.

Affirmed.

V. B. Noble and *Redmon, Ink & Wallace*, for appellant.

George A. Bangs, for respondents.

WALLIN, J. This action was brought to permanently enjoin the collection of a judgment, and a temporary injunctional order was issued, restraining proceedings under the judgment. The defendants demurred to the complaint upon the ground that the same did not state facts sufficient to constitute a cause of action. After a hearing in the District Court, that court made an order sustaining the demurrer; also, an order dissolving the injunctional order. These rulings of the trial court have been brought to this court for review, and, in disposing of the entire case in this court, it will be necessary to pass only upon the sufficiency of the complaint. We have no difficulty in reaching the conclusion that the complaint fails to state a cause of action, but this conclusion is predicated upon the theory that the plaintiff has mistaken his remedy. The judgment which is sought to be enjoined is upon a promissory note, and was entered by default on June 22, 1892, in the District Court for the county of Ramsey, in an action in which the defendant herein was plaintiff, and this plaintiff and Wilhelmina Holz and William Holz were defendants. It is alleged in the complaint herein that this plaintiff never was served with notice of the entry of said judgment, and that he never had or received notice or knowledge of the existence of the judgment until the month of June, 1899, when an execution issued upon the judgment, which was then levied on the property of this plaintiff. The complaint further alleges, in substance, that this plaintiff had been released from all liability upon the note sued upon in said action by an agreement made with the defendant herein, through its agent, which agreement and release, as alleged, were made prior to the institution of the

action upon the note. The complaint further charges, in effect, that at the time said agreement of release was made the note was retained by the plaintiff for the reasons that the plaintiff desired to collect the same as against the other signers thereof, and it was then understood and agreed that a suit might be brought against all the signers of the note. In this regard, the complaint expressly charges that the plaintiff was assured by the defendant's agent that no judgment would be entered in such contemplated suit against this plaintiff, and that, if it was so entered by any mistake, the same would be canceled at once by the defendant in this action. The complaint further charges that the plaintiff herein relied upon said assurances of the plaintiff's agent, and was induced thereby to refrain from answering the complaint in said other action, and setting up a defense thereto on the merits of the action. The complaint further states that the representations made to him as above stated were made with the fraudulent intent and purpose of inducing this plaintiff to refrain from answering the complaint and setting up a defense upon the merits. It therefore appears by the complaint that this plaintiff had a defense as against the note upon which said action was based, and further appears that on account of certain fraudulent representations made by the plaintiff in the other action, through its authorized agent, this plaintiff was induced to refrain from interposing such defense, and in consequence of plaintiff's neglect to do so a judgment was entered by default against this plaintiff. It seems entirely clear to this court that the allegations of the complaint show that this plaintiff has an adequate remedy at law, by a motion to vacate the judgment in the other action. Section 5298, Rev. Codes 1899, authorizes the District Court at any time within one year after notice of a judgment to relieve a party therefrom, when the same was "taken against him through his mistake, inadvertence, surprise or excusable neglect." This familiar remedy by motion is both speedy and economical, and it is also well settled that, in granting this relief by motion, the courts will exercise the powers of a court of equity, applicable in administering the relief sought in actions of this nature. From an early period in the history of the common law, courts of chancery have, upon certain grounds, exercised the right to enjoin the enforcement of judgments entered in the common-law courts. The grounds upon which equity could be invoked for such purpose were, however, not very numerous, but among them the ground of fraud in procuring the judgment was always deemed amply sufficient. It is also true that equity would also restrain the enforcement of common-law judgments upon other grounds, and particularly in cases where the facts stated in the bill showed that the complainant had a valid equitable defense to the cause of action at law, but which defense, under the strict rules obtaining at law, he was unable to interpose in the common-law action. It is likewise true that bills of complaint have been in earlier times frequently entertained as a means of obtaining new

trials in actions at law. But this jurisdiction of courts of chancery arose long anterior to the adoption of the amalgamated remedies which are now available under modern statutes, and especially under the Codes of Civil Procedure. New trials are now readily obtainable in courts of law, and defenses which are strictly equitable in character may, under the Codes of Civil Procedure, be interposed by a defendant in an action. But it is further true that under the code procedure certain statutory provisions, such as that embraced in section 5298, have afforded a remedy by motion as a means of relief against judgments which prior to the adoption of the Code was obtainable only in courts of equity. As a result of these innovations upon the ancient procedure, it has seldom been found necessary in the code states for a suitor to enjoin the enforcement of a judgment at law by means of an independent action for equitable relief. At no time would a court of equity interfere if a complete remedy could be obtained at law, and this well-established rule has been frequently applied to cases where the relief sought in equity by an independent action was available to the suitor by motion made under the statute. Under the early practice it was incumbent upon the complainant to set out in his bill facts showing that the courts of law were powerless to afford the remedy sought in equity. Under this rule the omission of this plaintiff to plead any such facts would alone render the complaint demurrable, and no such facts are set out in this complaint.

We shall hold in this case that the complaint is insufficient, and place our ruling upon the ground that under the statute, upon the facts stated, the plaintiff has an adequate remedy by motion under said section, made in the original action. In point of fact, the plaintiff has already obtained a full measure of relief by means of a motion made in the original action to vacate said judgment. The relief was denied in the District Court, but upon appeal the court below was directed to reverse its order and grant the relief sought by the plaintiff. See the case of *Manufacturing Co.* v. *Holz* (decided at this term) 84 N. W. Rep. 581. The authorities cited below will amply sustain our conclusions. See *Wieland* v. *Shillock*, 23 Minn. 227, and 11 Enc. Pl. & Prac. pp. 1197, 1209, and notes and authorities. In this case we do not desire to go further than to hold that, where it appears that a party who seeks to enjoin the collection of a judgment by means of an independant action has an adequate remedy at law by motion, such action will not lie. We find no error in the rulings of the trial court, and the same are, therefore, in all things affirmed. All the judges concurring.

(84 N. W. Rep. 585.)

HENRY BASTIEN *vs.* MICHAEL BARRAS, *et al.*

Opinion filed November 23, 1900.

Mechanics' Lien—Priority—Mortgage.

Under section 4793, Rev. Codes, a mechanic's lien may be had for labor and material used in the construction of a building, which will have priority over a real estate mortgage executed and recorded prior thereto, when the building for which such labor and material was furnished was in process of construction when the mortgage was executed. The right to such lien, however, may be lost by a failure of the lien claimant to assert it.

Waiver of Priority by Laches.

In this case certain lien claimants foreclosed their liens, and in the foreclosure actions made no claim of priority. The judgments entered in each case established the lien as of date of the judgment, and directed a sale of the premises to satisfy the same. It is *held* that the defendants, who purchased the premises at the sheriff's sale made pursuant to said judgments, acquired only the interest of the lien claimant as established by the judgment, and not the interest he would have had had he asserted and established his lien as relating back to the commencement of the building. The interests of defendants are accordingly subordinate to the lien of plaintiff's mortgage.

Real Party in Interest.

It is further *held* that the right to assert such priority belongs exclusively to the person entitled to the lien, and not to a purchaser of the premises at sheriff's sale. The rights of the latter are measured by the lien as established by the judgment.

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

Action by Henry Bastien against Michael Barras and others. Judgment for plaintiff. Defendants appeal.

Affirmed.

Spencer & Sinkler, for appellants.

Plaintiff's mortgage was filed on the 24th day of April, 1897. The building located on the mortgaged land was commenced on the 9th day of December, 1896. The appellants, therefore, who furnished labor and material for the completion of the building, are superior in their liens to the mortgage. *Turner* v. *St. John*, 8 N. D. 245, 78 N. W. Rep. 380; *Haxton Heater Co.* v. *Gordon*, 2 N. D. 246, 50 N. W. Rep. 708; *Vilas* v. *McDonough Mfg. Co.*, 65 N. W. Rep. 488; *Erdman* v. *Moore*, 33 Atl. Rep. 958; *Carew* v. *Stubbs*, 30 N. E. Rep. 219; *Chapman* v. *Brewer*, 62 N. W. Rep. 320; 2 Jones on Liens, 1470; *Milnor* v. *Norris*, 13 Minn. 424; § 4793, Rev. Codes. A subsequent mortgagee is not a necessary party to foreclose a prior mortgage. *Kornegay* v. *Farmers' Steamboat Co.*, 12 S. E. Rep. 122; *Williams* v. *Kerr*, 18 S. E. Rep. 501, 9 Enc. Pl. & Prac. 321; *Carpenter* v. *Brenham*, 40 Cal. 221. The only right which a subsequent purchaser has, not having been made a party

to the foreclosure of a prior lien, is to redeem. *Whitney* v. *Higgins*, 10 Cal. 547; *Gamble* v. *Voll*, 15 Cal. 508; *Gage* v. *Brewster*, 31 N. Y. 217; *Newcomb* v. *Dewey*, 27 Ia. 381; 2 Jones on Liens, § 1579; 2 Jones on Mortgages, § 1395; *Rogers* v. *Holyoke*, 14 Minn. 158; *Johnson* v. *Hosford*, 10 N. E. Rep. 407; *Denton* v. *Ontario Nat. Bank*, 150 N. Y. 126; Wiltsie on Mortgage Foreclosure, § 61; *Evans* v. *Tripp*, 35 La. 371; *Williams* v. *Chapman*, 65 Am. Dec. 669; *Owens* v. *Heidberder*, 44 S. W. Rep. 1079; *Demming Lumber Co.* v. *Savings Ass'n*, 49 N. E. Rep. 28; *American B. & T. Co.* v. *Lynch*, 10 S. D. 410, 73 N. W. Rep. 908.

Gray & Casey, for respondent.

Because the record does not disclose that the notice and bond for appeal were served on defendants, Barras, Wentz and Murphy, the appeal should be dismissed. § 5606, Rev. Codes; 2 Enc. Pl. & Prac. 230, 236; *Castle Dome M. & S. Co.*, 21 Pac. Rep. 746; *De Armaz* v. *Jones*, 34 Pac. Rep. 223; *Gill* v. *Jones*, 52 Pac. Rep. 78; *Pacific Mut. Life Ins. Co.* v. *Fisher*, 39 Pac. Rep. 759; *Grays Harbor Co.* v. *Wotton*, 43 Pac. Rep. 1095. Appellant cannot ask for a trial de novo without making the defendant, Barras, one of the persons most vitally interested, a respondent. *Tyler* v. *Shea*, 4 N. D. 382; *Hamilton* v. *Blair*, 31 Pac. Rep. 197. The notice of appeal describes an ordinary money judgment for $1,389, damages and costs, in favor of respondent, Bastien, and against appellants. Such a notice of appeal is insufficient to give this court jurisdiction of the judgment actually entered. 2 Enc. Pl. & Prac. 218; *Ream* v. *Howard*, 24 Pac. Rep. 913; *Crawford* v. *West*, 39 Pac. Rep. 218; *Kellogg* v. *Smith*, 10 Wis. 135. The appeal bond does not sufficiently describe the judgment appealed from to identify it with certainly, and the appeal should be dismissed. *Smith* v. *Cheatham*, 12 Tex. 37; *Horton* v. *Bodine*, 19 Tex. 280; *Williams* v. *State*, 26 Ala. 85; *Messner* v. *Lewis*, 17 Tex. 519. The undertaking on appeal in this action is not accompanied by the affidavit of the sureties to the effect that each surety is worth any sum whatever over and above his debts and liabilities in property within the state not exempt by law from execution. § 5622, Rev. Codes; *McDonald* v. *Ellis*, 36 Pac. Rep. 37; *Northern Counties* v. *Hender*, 41 Pac. Rep. 913; *Tolerton* v. *Casperson*, 7 S. D. 206, 63 N. W. Rep. 909. The assignments of error on plaintiff's part are insufficient. *Brynjolfson* v. *Thingvalla*, 8 N. D. 106; 2 Enc. Pl. & Prac. 442; *Noyes* v. *Lane*, 48 N. W. Rep. 322; *Bem* v. *Bem*, 4 S. D. 138, 55 N. W. Rep. 1102. Where a mechanic's lien has been foreclosed by appropriate proceedings against the owner of the premises alone, and it nowhere appears in the judgment when the lien attached to the premises, the judgment will operates as a lien upon the premises from the time it was docketed only as against the purchaser at sheriff's sale. *Kendal* v. *McFarland*, 4 Ore. 442; *Reading* v. *Hopson*, 90 Pa. St. 494; *Meggs* v. *Bunting*, 21 Atl. Rep. 588; Boysot on Mechanics' liens, § § 532, 672. The Cairncross and Davies lien

claims are void because of the mingling in the lien claim of lienable and non-lienable articles. *Williams* v. *Toledo Coal Co.*, 36 Pac. Rep. 159, 15 Am. & Eng. Enc. L. (1st Ed.) 142; Boysot on Mechanics' Liens, § 428. Where one sues for material furnished he cannot recover for labor performed. *Eaton* v. *Maletesta*, 28 Pac. Rep. 24.

YOUNG, J. Plaintiff prosecutes this action to foreclose a real estate mortgage executed by Michael Barras, one of the defendants herein, and, as an incident thereto, to have the lien of such mortgage declared paramount to the interests of the other defendants in the mortgaged premises. Barras does not answer. The remaining defendants answered separately, setting forth their respective interests, and ask that the same be adjudged superior to the lien of plaintiff's mortgage. It is admitted that the mortgage was executed as alleged, and that the notes secured thereby are unpaid. The sole controversy in the case is whether the mortgage constitutes a prior lien. The trial court found with plaintiff, and directed the entry of judgment in accordance with the prayer of his complaint. Defendants appeal from the judgment.

For the purpose of this appeal, appellants caused a statement of case to be settled, which embraced all of the evidence offered at the trial, and also a specification that they desired a retrial of the entire case in this court under the provisions of section 5630, Rev. Codes. So far, however, as their appeal relates to a retrial in this court under said section, it has been entirely abandoned. The evidence offered in the trial court has been wholly omitted from the record presented here, and appellants do not now ask a trial de novo. They are satisfied with the findings of fact made by the trial court, but insist that such findings do not warrant the conclusions of law and the judgment of the District Court, wherein it was determined that plaintiff's mortgage was paramount. On the contrary, they contend that the findings of fact, as they stand, entitle them to a judgment declaring plaintiff's mortgage subject and subordinate to their respective interests in the premises. This presents the sole question in the case, and it arises fairly upon the statutory judgment roll. Do the findings of fact warrant the conclusion and judgment of the trial court? We are agreed that they do, and that the judgment of the trial court must accordingly be affirmed. The facts upon which the trial court based its conclusions, so far as pertinent on the question of priority, are these: Plaintiff's mortgage was executed and recorded on February 24, 1897. A building known as the "French College" was then in process of construction on the premises covered by such mortgage. The building was commenced on December 9, 1896, and was not completed until March 24, 1898. Three mechanics' liens were filed against the premises. They were filed approximately a year after plaintiff's mortgage was recorded,—the exact date not being material,—and were for labor and material furnished long subsequent to the recording of the mortgage. These

several liens were foreclosed in actions wherein Michael Barras, the owner of the premises, was sole defendant; and judgments were obtained therein establishing such liens, and directing a sale of the premises to satisfy the same. Appellants are the purchasers at the sheriff's sale made pursuant to said judgments, and their interests in the mortgaged premises are represented by the sheriff's certificates issued on said sales. Neither in the foreclosure proceedings nor in the liens filed did the lien claimants claim liens on the premises anterior in time to the furnishing of the labor and material, which, as we have seen, was subsequent to the recording of plaintiff's mortgage; and the judgments entered, directing the sale of the premises, established the liens only as present liens as of date the judgment, and, in express language, barred only those who should thereafter acquire an interest in said premises from Barras. The most liberal construction of the foreclosure proceedings will not extend the lien established by the judgment prior to the furnishing of the labor and material. In these several foreclosures the lien claimants entirely ignored the fact that the building for which they had furnished labor and material had been in process of construction from December 9, 1896, and were content to claim and establish a lien merely from the date such labor and material were furnished. Under these facts, we think it is entirely clear that the interests of defendants in the premises are subordinate to the lien of the mortgage. They have just what they purchased at the sale, and no more, and that interest was what the lien claimants had to sell. To ascertain the extent of that interest, we must look to the judgments which determined it. They disclose that the liens, at most, did not antedate the furnishing of the labor and material, and were subsequent in time to the execution and recording of plaintiff's mortgage. Appellants' contention seems to be that, inasmuch as the building was under construction when plaintiff's mortgage was executed, it is postponed to mechanics' liens for labor and material thereafter furnished for the purpose of completing it. As a general statement of law, the proposition is correct. See Rev. Codes, § 4793; *Heater Co.* v. *Gordon*, 2 N. D. 246, 50 N. W. Rep. 708; *Turner* v. *St. John*, 8 N. D. 245, 78 N. W. Rep. 340. But it does not apply to the facts of this case as they exist. If this were an action between the mortgagee and the lien chaimants, in which the latter were seeking to make their lien relate back, the principle would be applicable; and undoubtedly such lien claimants could by appropriate proceedings have claimed and established their liens as prior to the mortgage, upon the strength of the fact that the building was being erected when the mortgage was given. But they did not see fit to do so. They were satisfied with subordinate liens, and appellants are merely the purchasers at sheriff's sale of such subordinate interests. Furthmore, these appellants are not lien claimants. They are purchasers, and hold under independent rights, to which the liens filed and foreclosure proceedings are important only for the

purpose of measuring the extent of their purchase. As we have seen, the liens established were subordinate to the mortgage, and appellants acquired no other or greater interest by the purchase at the sheriff's sale. In other words, they acquired the interests which the lien claimants had as fixed by the judgment, and not to what they might have claimed. There is no principle of law or equity which will permit appellants to expand their purchase by parol evidence, and thus make it relate back to a time long anterior to the time when the lien attached as shown by the judgment, and thus secure in this litigation an estate and interest entirely different and of greater value than that actually purchased. If it could be done in the case at bar, it could in similar cases. For instance, on the theory that a purchaser at a foreclosure sale acquires such rights as the lien claimant had before foreclosure proceedings were begun, a purchaser of an 80-acre tract of land at a mortgage foreclosure sale might thereafter insist that in reality he was entitled to 160 acres, because the mortgage which had been foreclosed originally covered 160 acres, and a judgment and decree might have been obtained directing the sale of the entire tract. A sufficient answer would be that no such judgment was in fact rendered, and in the case at bar that the judgments establishing the mechanics' liens established them as subordinate liens in fact, and that the extent of the estate or interest of the purchasers is that actually determined by the judicial proceedings, and not by what might have been determined therein. The particular question involved on this appeal has seldom reached courts of last resort. The few reported cases, however, where it has been presented, hold views entirely in harmony with those we have expressed. *Kendall* v. *McFarland*, 4 Ore. 292; *Reading* v. *Hopson*, 90 Pa. St. 494; *Meigs* v. *Bunting* (Pa. Sup.) 21 Atl. Rep. 588. In *Kendall* v. *McFarland*, supra, the court said: "No time having been specified in any of these judgments when the building was commenced upon which the liens were claimed, the judgments could only operate as liens upon such property, the same as any ordinary judgment, from the time when they were placed upon the judgment-lien docket; and, in consequence of these judgments failing to show when the mechanics' liens attached to the building, we are unable to see how any other or greater interest could have been sold under special execution than was owned by Hunt in the property on the day when the judgments were docketed. In an action to enforce a mechanic's lien, if the party desires the lien to be enforced from the commencement of the building upon which the lien is claimed, the time when the building was commenced should be averred in the complaint, so that it may be determined and adjudged by the court at what time said lien attached to the building. To enable the appellant to hold the premises against the mortgage of respondent, it should have appeared in the judgments and proceedings under which he claims title that these mechanics' liens

attached to the building in question prior to the time when respondent's mortgage was executed and recorded. The time when these liens commenced to have an existence was one of the main questions to be ascertained and judicially determined in said action. If no time was mentioned in said proceedings when said liens attached, we are unable to see how it can be done here, and after said judgments have been executed." In *Reading* v. *Hopson,* supra, it was held that parol evidence might be offered, in a contest between the mortgagee and the lien claimant, to show that a building upon which a mechanic's lien is claimed was commenced prior to the execution of the mortgage. The court said: "But an entirely different case is presented when the question arises between the mortgagee and the purchaser at sheriff's sale, as the bidder at sheriff's sale is not bound to look beyond the record in determining what he shall bid; and it cannot be shown, as against him, that a prior lien has been paid, or is not subsisting; so neither can he take advantage of any fact dehors the record to discharge the land from the lien of the mortgage."

The conclusions of law reached by the trial court upon the facts as found in this case were entirely sound, both in principle and under the authorities, and the judgment is accordingly affirmed. All concur.

(84 N. W. Rep. 559.)

GEORGE N. FARWELL *vs.* S. D. RICHARDSON.

Opinion filed November 26, 1900.

Executors and Administrators—Notes of Decedent—Action—Complaint—Limitations—Allowance of Claims.

This action is brought against the administrator of the estate of W. L. Richardson, and is based upon two promissory notes. The complaint alleges, in effect, that verified claims based upon said notes, respectively, were filed with the administrator for allowance,—one on the 23d day of April, 1898, and the other two days later; that no action was taken on either of said claims by the administrator until the 8th day of July, 1898; that on the date last stated an agreement was entered into between the plaintiff and the administrator and heirs at law of the deceased whereby it was agreed that a certain amount of the claim based on one of the notes should be allowed by the administrator against the estate. It is further alleged that such amount was subsequently and on the 14th day of November, 1898, allowed and indorsed as allowed upon said claim by the administrator, and at the same time the other claim was indorsed as allowed in full by the administrator. On the 9th day of December, 1898, said claims were presented to the County Court for allowance, and the same were then rejected by that court. *Held,* that a demurrer to said complaint for insufficiency was properly sustained by the District Court.

Claims Not Allowed in Ten Days—Rejected.

Held, further, that the nonaction of the administrator upon said claims for a period of time exceeding 10 days next after the claims

were filed with him for allowance operated, under the statute, as a rejection of the claims; and, *held*, further, that the time limited for bringing suit on said claims began to run at once after the 10-day period expired.

Claim Barred.

Held, further, that this claim was barred by the statute of limitation before this action was commenced. See section 6407, Rev. Codes 1899.

Right to Sue Not Revived.

Held, further, that said section contemplates that no claim which has reached the status of a rejected claim will be presented to a County Court for its allowance, and where such claim is in fact presented to such court for allowance, and the same is rejected by the court, that such rejection does not operate to fix any new period of time within which an action can be instituted upon the rejected claim.

Allowance After Time by Administrator Unauthorized.

Held, further, that the indorsement of allowance as made upon these claims by the administrator on November 14, 1898, was futile, and did not operate to allow or validate the claims either in whole or in part. At the time such indorsement was made, the claims had passed beyond the jurisdiction of the administrator to allow the same, and had reached the status of rejected claims.

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

Action by George N. Farwell against S. D. Richardson, administrator of W. L. Richardson. Judgment for defendant, and plaintiff appeals.

Affirmed.

John E. Greene, for appellant.

Smith Stimmel, for respondent.

WALLIN, J. The complaint in this action alleges, in substance, that said W. L. Richardson, deceased, in his lifetime executed and delivered two certain promissory notes, one for $900 and the other for $50, and that said notes are held and owned by the plaintiff. The complaint further alleges that said W. L. Richardson has departed this life, and that said S. D. Richardson is the duly-qualified and acting administrator of the estate of the deceased. It is further averred in the complaint that the plaintiff on or about the 23d day of April, 1898, filed with the said administrator, the defendant, a duly-verified statement of the plaintiff's claim against the estate of the deceased, based upon said note for $900. The complaint further avers "that thereafter, and on or about the 8th day of July, 1898, an agreement was entered into between the plaintiff and said defendant and the heirs at law of the said W. L. Richardson, deceased, whereby it was agreed that the plaintiff would accept in full payment of said claim upon the above described promissory note, as against the estate of said deceased, the sum of two hundred and sixty-eight and 95-100 dollars, with interest thereon

at the rate of eight per cent. per annum from October 15, 1897; that thereafter, and on or about the 14th day of November, 1898, the said claim was by the said defendant duly allowed and approved for the sum of two hundred and ninety-two and 20-100 dollars, which approval was indorsed upon said proof of claim." The language of said indorsement, so far as the same is material, is that the claim "is allowed and approved for the sum of two hundred and ninety-two and 20-100 dollars this 14th day of November, 1898." Said indorsement was signed by the administrator as such. It is also alleged that said claim was presented for allowance to the County Court on December 9, 1898, and was then rejected by said court, and that the defendant has ever since refused to pay the claim. The allegations of the complaint setting out the plaintiff's claim based upon the note for $50 are in all respects similar to those above recited, except that said claim was presented for allowance on April 25, 1898, and except that as to the $50-note there is no averment of an agreement on the part of the defendant to allow the claim, or any part thereof. Said claim was, however, attempted to be allowed in full by the administrator by an indorsement to that effect upon the claim made by the administrator on November 14, 1898.

To this complaint a demurrer was interposed upon the ground that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained, and the court below entered a judgment of dismissal, with costs to defendant. The plaintiff has appealed to this court from such judgment, and the sole question presented for determination is whether the complaint states a cause of action. We are clear that it does not. The case at bar, in its controlling facts, is in all respects similar to the case of *Boyd* v. *Von Neida*, recently decided by this court, and reported in 9 N. D. 337, 83 N. W. Rep. 329. The only feature of this case which differs at all from the case cited consists in the alleged fact that a compromise of the claim based upon the $900-note was made between the plaintiff, on the one part, and the administrator and the heirs at law of the deceased, upon the other part, whereby it was agreed that a certain portion of said claim should be allowed by the administrator; and said portion, it is averred, was subsequently indorsed upon the claim by the administrator as allowed by him. But in view of the statute, which very rigidly controls the allowance and rejection of claims which are presented for allowance to administrators and executors, we are compelled to hold that neither the alleged agreement to allow the claim as above set out, nor the attempted allowance thereof by the administrator, as evidenced by the indorsement upon the claim, has any validity whatever. Both the agreement to allow and the attempted allowance by indorsement occurred after the lapse of more than 10 days next following the date of filing the claim with the administrator. The claim was, therefore, under the statute, a rejected claim at the time of the agreement to

allow and at the time said indorsement of allowance was made. The claim, under the law, was then a rejected claim, on account of the nonaction thereon of the administrator for a period of 10 days after the same had been filed with him for allowance. See *Boyd* v. *Von Neida,* supra. The claim was not only a rejected claim when the indorsement was placed thereon, but it was, also, under a statute of limitations, an outlawed claim at that time, for the reason that the limitation period of three months had fully run when the administrator indorsed his allowance upon the claim. See section 6407, Rev. Codes 1899. The limitation period fixed by the statute starts running at once upon the rejection of a claim which is due by an administrator or executor, and this is true whether such rejection is brought about by his affirmative action or by his nonaction. Once started running, we know of no action which can be taken either by the administrator or the County Court which can fix a new period of limitation. There is certainly no such provision made in section 6407. True, said section provides that, in a case where a claim has been rejected by the County Court, suit may be brought upon such claim within three months after the date of the rejection by that court. It is obvious, however, that this feature of the limitation law can apply only to claims which have been first allowed by the executor or administrator, and then presented to the County Court for its action thereon. This claim was never allowed by the administrator, because he was without power to allow the same when he assumed to do so. If the administrator can allow a rejected claim six months after the rejection, we know of no time fixed by law when he will cease to have authority to allow a claim. In our opinion, to so rule would defeat the wholesome purpose of the statute, which manifestly is to expedite the process of winding up the estates of deceased persons. Our conclusion is that the complaint states no cause of action, and that the judgment must be affirmed. All the judges concurring.

(84 N. W. Rep. 558.)

M. E. HAWK *vs.* A. KONOUZKI, *et al.*

Opinion filed November 26, 1900.

Chattel Mortgage—Foreclosure—Claims of Third Party—Evidence.

This action is brought to foreclose certain chattel mortgages given by the defendant upon his prospective one-half interest in certain crops to be grown and raised by him upon premises described in the complaint. The intervener Mathwig filed a complaint alleging ownership in herself of the wheat in controversy. A warrant was issued under section 5898, Rev. Codes 1899, and the sheriff, under the warrant, seized a quantity of wheat stored in a granary located upon premises then occupied by the defendant. The trial court, after a trial without a jury, entered a judgment of foreclosure, and directed therein that said wheat should be sold by the sheriff, and

that the proceeds of the sale should be divided among the several holders of the chattel mortgages involved. Said intervener appealed from said judgment, and demanded a retrial of all the issues in this court. After a retrial in this court, it is *held* that the evidence in the record fails to show that the mortgagor, the defendant, ever had any title to or interest in the wheat in controversy; and, further, that the evidence affirmatively shows that said wheat was at all times the property of said intervener.

Judgment Reversed.

Accordingly, it is further *held* that said judgment was erroneously entered, and must be reversed, and the action dismissed, with costs.

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

Action by M. E. Hawk against August Konouzki. R. P. Sherman, as president of the State Bank of Tower City, and Emma L. M. Mathwig intervene. Judgment for plaintiff, and Mathwig appeals.

Reversed.

Tilly & McLeod, for appellant.

The defendant, Konouzki, by his contract of lease, agreed that the title and ownership of the crops to be raised on the land rented should remain in the landlord until the conditions agreed to be performed by him were fully performed. He, therefore, had no interest whatever in the crop until he performed his part of the contract and a division of the crop made in accordance with its terms. *Angell* v. *Egger,* 6 N. D. 391, 71 N. W. Rep. 47; *Lloyd* v. *Powers,* 4 Dak. 62, 22 N. W. Rep. 492; *Consolidated L. & T. Co.* v. *Hawley,* 63 N. W. Rep. 904; *Lewis* v. *Lyman,* 39 Mass. 437; *Taylor* v. *Bradley,* 39 N. Y. 129; *Meacham* v. *Herndon,* 6 S. W. Rep. 741; *Prouty* v. *Barlow,* 76 N. W. Rep. 946. It was not proven in this case that the property taken was the identical property covered by the mortgage. *Cadwell* v. *Prey,* 41 Mich. 307; *Pinkstaff* v. *Cochran,* 58 Ill. App. 72; *Union Bank* v. *First Nat. Bank,* 2 Mo. App. 990; *Webb* v. *Phillips,* 80 Fed. Rep. 954; *Cumane* v. *Scheidel,* 70 Conn. 13.

Pollock & Scott, for respondent.

The intervener, Mathwig, should be treated as a mortgagee because of the contracts for lien contained in the lease. The lease should be construed as a whole. §§ 4701, 4703, Rev. Codes; 1 Cobbey on Chattel Mortgages, § 9; *Coe* v. *Cassady,* 72 N. Y. 137; *Cooper* v. *Brock,* 2 N. W. Rep. 600; *Despard* v. *Walbridge,* 50 N. Y. 374; *O'Neill* v. *Murray,* 50 N. W. Rep. 619.

WALLIN, J. The relief sought by the plaintiff in this action is the foreclosure of certain chattel mortgages, and the procedure below was governed by Rev. Codes 1899, §§ 5897-5903. In the District Court the litigation resulted in a judgment in favor of the holders of the several chattel mortgages involved, and was adverse to the interests of Emma L. M. Mathwig, intervener, who has

appealed from the judgment to this court, and demanded a retrial here of the entire case. The evidence and facts controlling the controversy are, in the main, undisputed, and for the purposes of this opinion it will be necessary to set out only an outline of the facts and evidence which we deem essential to a determination of the case. It is conceded that the intervener Emma L. M. Mathwig was, during the time in question, the owner of all the land involved in the action; also that such land consisted of several parcels of farm lands, located, respectively, in Cass county and in the county of Barnes. On March 17, 1898, said intervener leased all of her lands to the defendant, August Konouzki, for the term of one year. Said lease was reduced to writing, and signed by both parties; but the same was not recorded, nor was the same ever filed for record as a chattel mortgage. The most important features of the lease contract may be stated as follows: The lessee, Konouzki, who is described in the instrument as party of the second party, agreed on his part to pay as rent for the premises one-half of all the grain raised thereon, except as to a tract of about 50 acres; and as to such tract he agreed to pay a cash rental of $1.25 per acre. He further agreed to sow wheat, oats, and flax upon certain designated portions of the premises, and to summerfallow a designated portion, and to plow back in the fall of the year all the cultivated parts of the premises. He further agreed to furnish all necessary farming utensils and perform all of the labor necessarily involved in raising the crops agreed to be sown and grown and doing the work in a workmanlike manner. He further agreed to draw out and spread the manure then upon the land, and agreed to deliver one-half of the said grain to an elevator or the cars, and do this free of expense to the party of the first part. There was a certain section of said land which was rented by said intervener from the state at a cash rental, and which was fenced and used as a pasture. In consideration of the use of this land by him the tenant agreed to pay the rental to the state and pay the landowner one-half of the money collected for pasturing the stock of others upon said section. The terms of the lease which bound the landowner, Mrs. Mathwig, were to the effect that she was required to furnish the seed necessary to crop the land, except for said 50 acres for which she was to receive a cash rental. She was further bound to pay one-half of the machine bill for threshing the grain. The lease also embraced the following language: "It is hereby distinctly understood and agreed that the ownership and title to all of said grain shall be and remain in the party of the first part until all the conditions agreed to be performed by the said party of the second part are performed." The last provision in the lease reads as follows "It is hereby fully understood and agreed that all moneys advanced in the way of money, feed, or in any other way for the purpose of assisting in raising or caring for the within crops by the said party of the first part shall be, and it hereby is made, a first lien on all grain that may be owned

by the said party of the second part, and grown on said land." It is undisputed that the sheriff under a warrant issued in the action seized about 1,000 bushels of wheat, which wheat was found on the premises of the intervener, Mrs. Mathwig, which premises were then occupied by the defendant. This wheat, it seems, was within the control of the court below when it entered judgment, and that court adjudged that the same should be sold by the sheriff, and the proceeds of the sale applied in satisfaction of the several debts secured by the chattel mortgages involved in the action. There is no controversy as to the existence or filing of these mortgages, or as to the amount and bona fides of the debts secured by the same. It is claimed by counsel for respondent that the grain raised on the quarter section described in the mortgages was kept separate from other grain, and that soon after it was threshed it was placed in a granary on the land in question, and that one-half thereof was hauled to the elevator, and marketed by Konouzki, acting under the direction of Mrs. Mathwig in so doing. The grain remaining in the granary was the grain seized by the sheriff, disposed of by the judgment. There is no evidence in the case and no claim that Mrs. Mathwig has ever foreclosed, or attempted to foreclose, her lien for any advances made under the last stipulation in the lease, and above quoted, which gave her a lien upon Konouzki's interest in the crops as security for contemplated advances to be made to him by way of assisting him in raising and caring for the crop. Whatever rights the landowner may have acquired or failed to acquire under said lien feature of the lease have never been asserted, or attempted to be asserted, by the landowner; and hence this feature of the lease will be eliminated, and not considered in determining the issues.

Counsel upon both sides have laid stress upon the clause of the lease which provided "that the ownership and title to all of said grain shall be and remain in the party of the first part until all of the conditions agreed to be performed by the said party of the second part are performed." Under this feature of the lease the inquiry is propounded by appellant's counsel as to what title the tenant acquired to the crops raised on the premises during his term, and when he acquired any title thereto, if he ever acquired any title. It is our opinion that upon this record these questions will admit of but one solution. At the time the lease was signed, and at the time when the chattel mortgages were executed and filed, the tenant had no interest in the then prospective crop to which the lien of the mortgages could attach. The interest of the tenant in the crop was a contingent interest, and his title to the crop was conditioned upon the performance of all the covenants to be performed by him under his lease. After he had raised the stipulated crop, and threshed the same, the title to one-half of such crop would pass from the lessor to the tenant only upon the conditions named in the lease. Until these were performed or waived, the title would be and remain

in the landowner. See *Angell* v. *Egger*, 6 N. D. 391, 71 N. W. Rep. 547; also, *Bidgood* v. *Elevator Co.*, 9 N. D. 627, 84 N. W. Rep. 561. The case of *Bank* v. *Canfield* (S. D.) 81 N. W. Rep. 630, differs somewhat in its facts from the case at bar, yet it is entirely pertinent to the point that the title of the crops in this case never would pass from the landowner to the tenant until the conditions upon which title depended were performed by the tenant or waived by the lessor. Applying the rule of law enunciated by said cases to the lease contract in question, it at once becomes apparent that the lien of the chattel mortgages would attach to the crop only after the tenant had fully complied on his part with the terms of the lease. It follows also that the holders of the chattel mortgages who acquired no lien whatever at the time of the filing of the mortgages have the burden of showing that they did in fact acquire a lien at some date subsequent to filing the mortgages. All the mortgages were made and filed prior to threshing the grain; hence, under the provisions of the lease, the mortgagor had no interest in the grain to mortgage at the time the mortgages were executed and filed.

A careful reading of the evidence has served to convince this court that the plaintiff has signally failed to show that the mortgagor, Konouzki, has performed the conditions of the lease on his part. The plaintiff offered no evidence tending to show a performance on the part of the tenant; while, on the other hand, the lessor testified squarely that he had failed to do so. There was evidence offered showing that a crop of wheat was raised in 1898 on the tract of land described in the chattel mortgages, but the evidence falls far short of showing the exact number of bushels grown upon such tract. It further appears that a considerable quantity of the grain which the respondent claims was raised on the mortgaged premises was removed from the granary and sold. The amount so removed cannot be exactly ascertained from the evidence, but Mrs. Mathwig testified that she thought the amount was 896 bushels and 10 pounds. But the general fact that a quantity of grain was taken out of the granary soon after threshing, and was sold, is asserted on both sides, and is a conceded fact in the case; and, as has been seen, the grain seized by the sheriff and disposed of by the judgment is a quantity of grain which was found in the granary after a portion of grain had been removed from said granary to an elevator and marketed. The respondent's contention is that the grain removed and sold represented one-half of the grain which was raised on the tract covered by the mortgages; and, further, that all the grain in question which was taken out of the granary and sold was the share of the landowner in the crop which was raised on said premises. In other words, respondent's counsel claim that the grain raised on the mortgaged premises has, by agreement of the parties to the lease, been divided, and the one-half part belonging to the landowner had been removed and sold by her, and that the other

moiety left in the granary was the one-half share thereof turned over to the tenant after a division of this particular crop; and as to this feature the trial court found as one of its findings of fact that the grain which was unsold and left in the granary was the share which belonged to the tenant, and that he owned the same, after a division of the crop. This court cannot assent to this conclusion of fact. Under the evidence, which is practically undisputed, we have reached an opposite conclusion. As a basis for an examination of the testimony bearing upon this vital question of fact we will here quote a paragraph from the complaint in intervention filed by Mrs. Mathwig: "That, after said grain was threshed in the fall of 1898, the said defendant's share of grain so raised on said described land was taken possession of by the intervener with the defendant's consent, and by her sold, the proceeds of which were kept by this intervener, and applied in payment of moneys advanced by this intervener to the defendant under the terms of the said written lease, and for the purpose of enabling defendant to raise, thresh, harvest, and market such grain so raised on said described land." It therefore is alleged by a verified pleading filed by the intervener that she sold the tenant's share of the grain raised on the mortgaged premises with the consent of the tenant, and that she applied the proceeds of such share to the liquidation of a certain claim which she then had against her tenant on account of advances made by her to him to assist him in executing the lease contract on his part. If these allegations are sustained by the evidence (and we think they are fully sustained), it is manifest that it is of no practical importance to consider in this case whether the tenant, under the evidence, has or has not fully performed the covenants in the lease which are binding upon him. If he has not done so, nevertheless the division of the crop in question was made in fact by the voluntary action of both parties to the lease, and by the consent of both parties the share of the tenant in this crop was set apart and sold at private sale for the tenant's benefit, viz: to pay a debt contracted by him on account of moneys advanced by the landowner to assist him in executing his contract. Mrs. Mathwig testified at length upon the matter of removing and selling the grain. She first testified as to the items of the advances which she made to Konouzki, and gave the aggregate thereof, which was $815.16. She then testified that Konouzki raised a crop on the mortgaged premises in 1898, and that some of said crop was hauled off and sold; "that the part so sold was considered his, and the proceeds thereof were to pay for those things I had to do to fill the contract." Further on she testified as follows: "The grain hauled off and sold in the fall of '98 was so sold to pay a portion of the money I had advanced for Konouzki. The amount I received for this wheat was credited on this $815.16." This testimony was substantially adhered to on cross-examination, and upon a careful perusal of all the evidence in the record we fail to find a scintilla

of countervailing evidence upon the matter of selling the tenant's share of this crop and the disposition of the proceeds of the sale. It is further true that this witness Mathwig frequently stated while on the stand that she claimed the title and ownership of the wheat under her contract with the defendant, and that she rested her title upon the terms of the lease and upon the fact that the tenant had failed and neglected to perform his contract in many respects, which she pointed out in her testimony. But it is our opinion that this claim of the witness, however true it may be in theory, cannot operate to destroy the effect of her direct statements on the stand to the effect that her tenant's share in the wheat had been recognized and separated by her, and thereafter had been sold with his consent, and for his direct benefit. This evidence, moreover, corresponds exactly with the averments of the complaint in intervention filed by this witness to which we have called attention. So far as this action is concerned, we regard this evidence as decisive of the case. We are unable to understand upon what theory of the evidence the trial court found as a fact that the grain left in the granary was the property of the tenant. From the same evidence we are compelled to find that said grain was the property of the landowner, and that the share of the crop in question which belonged to the mortgagor had been set apart by an agreement between the lessor and lessee, and taken away from the granary and sold, long prior to the commencement of this action. It follows, from our views of the evidence and the entire record before us, as above set out, that the grain which the trial court undertook to adjudicate upon and order sold to satisfy the chattel mortgages in question is grain owned by Mrs. Mathwig, and hence grain not covered by or embraced within the mortgages. So far as appears, the tenant never owned this grain. The judgment of the trial court must, therefore, be reversed, and the appellant and intervener, Mrs. Mathwig, is entitled to have judgment entered in the court below dismissing this action, and for her costs and disbursements in both courts; and this court will so direct. All the judges concurring.

(64 N. W. Rep. 563.)

GEORGE C. PECKHAM *vs.* W. W. VAN BERGEN.

Opinion filed November 26, 1900.

Mortgage—Cancellation—Undue Influence—Failure to Satisfy.

Action to cancel notes and mortgage given by plaintiff to defendant. *Held*, on the evidence, that the notes were without consideration, and were procured by undue influence of defendant over plaintiff.

Counting Upon the Statute—Demand For Satisfaction.

The statutory penalty for failure to satisfy a mortgage of record can be recovered only after the holder of the mortgage has failed to comply with a request to satisfy the same, and only then by counting strictly upon the statute prescribing the penalty.

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

Action by George C. Peckham against W. W. Van Bergen. Judgment for plaintiff. Defendant appeals.

Modified.

Newman, Spalding & Stambaugh, for appellant.

L. A. Rose, for respondent.

BARTHOLOMEW, C. J. Action in equity to cancel two promissory notes, and a mortgage securing the same, given by the plaintiff to the defendant on November 12, 1894. There was a decree for plaintiff in the lower court, and defendant appeals, demanding a review of the entire case. The action is grounded upon fraud, duress, menace, and undue influence practiced upon plaintiff by defendant in securing the notes and mortgage. The questions of law involved are of the most elementary character, and counsel are in accord upon them. A decision of the case requires only the investigation of questions of fact. This same case was before us upon another occasion. See 8 N. D. 595, 80 N. W. Rep. 759. In that case the issues of fact had been submitted to a jury, and were all resolved in plaintiff's favor. Upon the second trial the chancellor found that the notes were procured by undue influence, and were without consideration. Under the statute, we are required to exercise our independent judgment upon the facts. Yet where the points are close, and the testimony conflicting or inconclusive, it is not possible, perhaps, for us to remain entirely uninfluenced by the proceedings already had. Any extended discussion of facts in an opinion is always unprofitable, and we must content ourselves with a statement of facts we consider proven, only recurring to the testimony where necessary.

The defendant was a general merchant in the village of Grandin, in Cass county. In the spring of 1890 he brought plaintiff from his home, in an Eastern state, and gave him employment as a clerk in said store at Grandin. As plaintiff was 26 years old when this case was tried, in February, 1900, he could not have been more than 17 years of age when he entered defendant's employ. He remained in such employ until November 12, 1894, prior to which time he had been advanced to head clerk, and had virtual management of the business whenever defendant was absent. During the first year of his employment he received $25 per month, and was furnished board and room. The second year he received $35 per month and the same furnishings. The third year and thereafter he received $800 per year and nothing furnished. In the early part of the third year plaintiff was married, and during that season he built a small house

in Grandin upon a lot that he had purchased. It was this house and lot upon which the mortgage was given. Plaintiff, with his wife, occupied these premises as a homestead from the time the house was finished until the mortgage was given. On and prior to November 12, 1894, the defendant entertained an honest belief that plaintiff had been appropriating to himself sums of money that belonged to the defendant. His bookkeeper had informed him that the cash register would not balance, and some of the clerks claimed to have seen plaintiff ring up the wrong amount on the cash register upon a few occasions. We remark, in passing, that, in our judgment, the evidence fails to establish any specific theft or embezzlement. But the defendant, acting upon his belief in the unfaithfulness of plaintiff, proceeded with the aid of his bookkeeper, one Landt, to investigate plaintiff's affairs. The amount of money that plaintiff had received from defendant was easily ascertainable from defendant's books, as well as the amount of his purchases from the business. They then, as they claim, made an estimate, from such information as they could obtain, of all of plaintiff's expenditures elsewhere. Thereafter, and on the evening of November 12, 1894, at about 9 o'clock, defendant asked plaintiff to go with him into a banking building that stood across the street from the store, and to which building the defendant had keys. The defendant unlocked and opened the front door, and then unlocked another door that led them into the banking room proper. The building was dark, and defendant lighted a lamp. In the rear of the banking room was a room used as a bedroom, in which the bookkeeper, Landt, and one Anthony Van Bergen, a brother of the defendant, had, by previous arrangement, secreted themselves, leaving the door slightly ajar. Immediately after the light was produced, defendant, in broad terms, accused plaintiff of taking money that belonged to defendant. Plaintiff denied the charge, but defendant repeated it in positive terms. Plaintiff repeatedly and vehemently denied it, and begged defendant to cease accusing him of stealing. Defendant told him that his denial was useless; that he (defendant) had procured an expert bookkeeper to look up the account; and that he had positive evidence, and had the proofs in his hands, that plaintiff had stolen a large amount, and the sooner he (plaintiff) admitted it the better it would be for him. Defendant at the time had some papers in his hands which he referred to, without exhibiting, as containing the proofs of his statement. These papers consisted of the accounts and estimates that had been made by himself and the bookkeeper, Landt, and showed that plaintiff's expenditures had exceeded his salary by $923. After repeated charges of theft, and assertion by defendant of positive knowledge of such theft, plaintiff broke down, and admitted, first a small sum, and subsequently larger sums, and, finally, that the amount was $500 or more. As the result of the interview, lasting an hour and a half or more, plaintiff agreed to give the two notes in controversy, aggregating $900, and a mortgage on his

homestead to secure the same. The defendant then called Landt from the back room, and instructed him to draw up the notes and mortgage. This was done, plaintiff signed the same, and the wife's signature to the mortgage was obtained, and the papers delivered. The testimony upon the facts stated is not without conflict, but we state them as in our judgment the proof leaves them. There was also much further testimony bearing upon the question of duress and menace. This we omit entirely, as those conditions were not proven. One or two undisputed matters should be mentioned as bearing upon the question of undue influence. Plaintiff's wife was upon that evening at home alone, momentarily expecting the return of her husband, and she was in a peculiarly delicate condition. Defendant during the interview represented that if plaintiff confessed and arranged the matter it need not be, and would not be, known to outside parties, and referred to the effect it must have upon a young man to have such things known, and also referred to the effect it would have upon the plaintiff's wife and aged parents.

The burden rests upon plaintiff to establish the invalidity of these notes. Whether or not they were supported by any consideration depends upon whether or not plaintiff had in fact fraudulently appropriated any of the defendant's money. If he had, and the amount was uncertain, and the parties agreed upon the amount stated in the notes, then the notes must be sustained, even if it be shown now that the actual appropriation was much less. Plaintiff can only succeed by showing that there was no fraudulent appropriation. He is confronted with the notes, which import a consideration, and by the admission that he undoubtedly made. He testifies in the most positive terms that he never frudulently appropriated to himself any money belonging to defendant. As we have said, there is not sufficient proof of specific acts showing that he did. He also testifies minutely to all the money he received during his employment by the defendant. It seems he received some $350 from the East aside from his salary. This sum was not taken into account in the statement prepared by the bookkeeper. But, had it been, there still would have remained nearly $600 of expenditures beyond legitimate receipts. Plaintiff also, in a general manner, testified to his expenditures, and from his testimony it appears quite clearly that the money he received from legitimate sources was ample to meet all his expenditures. The defendant made no direct attack upon this testimony. He did not seek to establish any expenditures beyond conceded receipts. When upon the witness stand defendant held in his hand the statement which in his interview with plaintiff he declared showed plaintiff's guilt conclusively, yet he made no effort to establish any item upon that statement. This is the more remarkable because plaintiff in his testimony had fixed the limit of his receipts, and, had defendant then shown any expenditure beyond such receipts, he would have entirely destroyed the force of plaintiff's claim that he had not appropriated money. That defendant made no

effort to do so is strongly corroborative of plaintiff's testimony, and, in the absence of plaintiff's admissions, we would not hesitate to hold the notes without consideration. The admissions upon this printed record give no trouble. This matter has been passed upon by those who were in better position to ascertain the truth than we are, and there is so much inherent force in the claim that these admissions were extorted by undue influence that we deem it our duty to so hold. It may be that the majority of men would not have made untruthful admissions incriminating themselves under the same circumstances. But when we remember that for 4½ years, and at a time in life when highly impressionable, plaintiff had been away from home influence and in the employ of defendant; that he had, as the evidence shows, great confidence in, and respect for, defendant; that he practically followed his suggestions and advice in all matters; that the defendant was the one man who would have the greatest influence over him,—we are not surprised that this young man, not yet at the full strength of his mentality, should be found wanting in that stamina required to persist in the denial of a statement made by the defendant in positive terms, and, as he declared, of his own knowledge, and from proofs that he had in his possession that were conclusive. And when we add to this the fact that, considering their respective positions in the community where they resided, the young man must have known that any charge against him of theft made by his employer, whether true or false, would ruin and blast his reputation, and when we add, further, that the defendant pointed out the method by which any such open charge could be avoided, and the plaintiff's wife and aged parents spared the pain of a public disgrace, we think the facts show a case of undue influence and moral coercion which induced plaintiff to make admissions that were untrue in fact. His actions, as soon as he was removed from that influence, all point to his innocence. It a few days after the papers were executed, as soon as he could reasonably be able to get all the facts before an attorney, this action was begun. It will not answer this to say that the young man was so situated that he was forced to protect his reputation by bringing the action. If the course suggested by defendant was being followed, and there is nothing to the contrary in the testimony, knowledge of the matter was confined to those who were actors therein. Plaintiff's reputation with the public was not in danger. On the other hand, defendant had declared plaintiff guilty to his own personal knowledge, and that he held conclusive proof thereof. If plaintiff was in fact guilty, he would know that to bring this action would inevitably result in bringing upon himself all the disgrace that can follow theft and criminality. It is difficult to conceive that he would bring this action in the face of defendant's declarations, did he not know that such declarations were and must be unfounded in fact. From these our views it follows that the notes were without consideration, and the court was right in canceling them.

The trial court, however, rendered judgment against defendant for the sum of $100, the forfeiture specified in section 4724, Rev. Codes, for failure to satisfy of record, on request, a mortgage that has been satisfied in fact. In this the court was wrong. It does not appear that defendant was ever requested to satisfy said mortgage. The forfeiture can be recovered only by counting expressly upon the statute prescribing the forfeiture. *Greenberg* v. *Bank*, 5 N. D. 483, 67 N. W. Rep. 597. The District Court will enter a decree canceling the notes and mortgage as prayed in the complaint, with costs of that court. Neither party will recover costs in this court. Modified and affirmed. All concur.

(84 N. W. Rep. 566.)

EDVINA MERCHANT *vs.* MICHAEL PIELKE.

Opinion filed November 28, 1900.

Malicious Prosecution—Evidence.

To entitle a plaintiff to prevail in an action to recover damages for malicious prosecution, it is necessary to prove that he has been prosecuted by the defendant either civilly or criminally, and that the prosecution terminated in his favor. Further, that such prosecution was malicious, and without probable cause, and resulted in his damage.

Evidence of Malice.

For the purpose of showing the malice of defendant in instituting a criminal prosecution against plaintiff, evidence showing the relation of the parties, defendant's acts, conduct, declarations, and feelings of hostility and ill will towards plaintiff was admissible.

Advice of Counsel.

A defendant in an action for malicious prosecution, who seeks to rely upon the advice of counsel as a defense, must show that he communicated to such counsel all of the facts within his knowledge, and all that he could ascertain with reasonable diligence and inquiry, and that he acted on the advice received honestly, and in good faith in causing the arrest.

Instructions—Good Faith.

In this case defendant consulted an attorney who represented him in a civil action which involved matters closely related to the facts involved in the criminal charge. *Held*, that it was not error to submit to the jury the question whether the defendant acted in good faith in consulting such attorney. *Held*, further, that the court did not err in instructing the jury that it was not enough for defendant to prove generally that he stated all the facts to such attorney, and that it must be shown what facts were submitted to him.

Damages.

A certain instruction defining the elements of damages recoverable in an action for malicious prosecution examined, and *held* to correctly state the law.

Verdict Not Excessive.

The jury returned a gross verdict for $800. *Held*, under the facts of this case, which show that the arrest was actuated by a high degree of malice, that to the extent that such verdict included exemplary damages it is not excessive, or beyond a sound and reasonable discretion.

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

Action by Edvina Merchant against Michael Pielke. Judgment for plaintiff. Defendant appeals.

Affirmed.

Morrill & Engerud, for appellant.

Plaintiff's actual damage as to her feelings, mental suffering, etc., were trifling. Her money loss was only $27.50 and one day's time. Her actual damages, therefore, could not reasonably be placed at more than $50. The balance of the verdict must be accounted for on the theory of exemplary damages. In awarding exemplary damages the law requires a sound discretion based upon reason. The punishment must be in proportion to the offense. *Saunders* v. *Mullen*, 24 N. W. Rep. 529; *International Ry. Co.* v. *Telephone Co.*, 5 Am. St. Rep. 45; *Austin* v. *Wilson*, 50 Am. Dec. 767; *Southern Ry. Co.* v. *Kendrick*, 90 Am. Dec. 332; 12 Am. & Eng. Enc. L. 54. It was error for the court to instruct the jury that defendant was liable for attorney's fees when her attorney was employed by her husband. There is no evidence that plaintiff ever promised to compensate her husband for the expense which he incurred, hence, she, not having incurred this expense or become liable for it, cannot recover damages which she has not sustained. In *Chacey* v. *Fargo*, 5 N. D. 172, the court held, that the plaintiff was entitled to recover the amount expended for medical attendance, on the theory that the plaintiff had assumed that liability.

Smith Stimmel, for respondent.

The court properly charged the jury that it is not enough for defendant to prove generally that all the facts were laid before the attorney, but it must be shown what facts were communicated. *Struby, Etc., Co.* v. *Kyes*, 48 Pac. Rep. 663; *Atchinson, Etc., Ry. Co.* v. *Brown*, 48 Pac. Rep. 31; *Parker* v. *Parker*, 71 N. W. Rep. 421. It was proper for the court to leave it to the jury to say whether the attorney selected was a proper adviser under the circumstances. *Watt* v. *Corey*, 76 Me. 87; *Hess* v. *Banking Co.*, 49 Pac. Rep. 803. It must appear that all the facts within his knowledge, and which he could ascertain by the exercise of reasonable diligence, were laid before his counsel. *Parker* v. *Parker*, 71 N. W. Rep. 421; *Walter* v. *Sample*, 25 Pa. St. 275; *Wuest* v. *American Tobacco Co.*, 73 N. W. Rep. 903. Evidence of ill will was competent as showing malice. *Woodworth* v. *Mills*, 20 N. W. Rep.

728; *Casebeer* v. *Rice*, 24 N. W. Rep. 693; *Travis* v. *Smith*, 44 Am. Dec. 125; *Wild* v. *Odell*, 56 Cal. 136. The facts and circumstances, under which the prosecution acted, were competent for the purpose of showing that a reasonable man could not have believed the truth of the charge made by him. *Lunsford* v. *Deitrick*, 11 Am. St. Rep. 37; *Casebeer* v. *Rice*, 24 N. W. Rep. 693. The elements of actual damage, which it was competent for the jury to consider, were the expenses plaintiff was put to in making her defense, loss of time, deprivation of liberty, loss of society of her family, injury to her good name, personal mortification of being placed under arrest, wounded pride, mental suffering and smart from the malicious arts and acts of oppression of the defendant. *Hamilton* v. *Smith*, 39 Mich. 322; *Kolka* v. *Jones*, 6 N. D. 461, 71 N. W. Rep. 558; *Jackson* v. *Bell*, 58 N. W. Rep. 671; *Sheldon* v. *Carpenter*, 4 N. Y. 579; 55 Am. Dec. 301; *Rockwell* v. *Brown*, 36 N. Y. 217; *Parkhurst* v. *Masteller*, 57 Ia. 474; *Plath* v. *Braunsdorff*, 40 Wis. 107. Exemplary damages are authorized by our statute. § 4977, Rev. Codes. Damages being in the discretion of the jury will not be reviewed except in extreme cases. *Ross* v. *Jones*, 81 Am. Dec. 373; *Chapman* v. *Dodd*, 10 Minn. 350; *Neys* v. *Taylor*, 81 N. W. Rep. 901; *Pratt* v. *Pioneer Press Co.*, 20 N. W. Rep. 87.

YOUNG, J. Action to recover damages for malicious prosecution. Verdict for plaintiff for $800. Defendant moved for a new trial. This was denied, and judgment was entered on the verdict. Defendant appeals from the judgment.

The complaint alleges that the defendant, with malice and without probable cause, procured plaintiff's arrest and imprisonment upon the charge of malicious mischief, of which charge she was thereafter duly acquitted. Damages are alleged as a result of such wrongful arrest as follows: $30.15 expenses incurred in making her defense, and $2,000 for injury to her reputation, and for physical and mental suffering. The answer denied all of the allegations of the complaint.

The order denying the motion for new trial is assigned as error. Consideration of this requires a review of the alleged errors upon which the motion was based. They are: First, errors in the admission of evidence; second, error in the instructions. It appears that since 1898 plaintiff and her husband and their family have resided on a farm owned by the defendant, holding possession thereof under a five-year lease. Defendant and his family have also resided on said farm. The lease reserved certain rights to him, among which was the use of certain buildings. The dwelling houses occupied by the two families are close together, and the same is true of the other farm buildings. Shortly after the execution of the lease, differences arose between the parties thereto as to their respective rights thereunder, which differences resulted in numerous serious controversies between the members of the two families, and were the source of much vexatious litigation. See *Merchant* v. *Pielke*, 9 N. D. 245, 82 N. W. Rep. 878. On August 17, 1899, defendant

caused plaintiff's arrest, which arrest she alleges was without probable cause, and was malicious, and for which she now seeks to recover damages. It is shown that she was acquitted and discharged on August 18, 1899,—being the day succeeding her arrest. The law is entirely clear as to what facts a plaintiff in an action to recover damages for malicious prosecution must prove to warrant a recovery. They are these: "(1) That he has been prosecuted by the defendant, either criminally or in a civil suit, and that the prosecution is at an end; (2) that it was instituted maliciously, and without probable cause; (3) that he has thereby sustained damages." 2 Greenl. Ev. (16th Ed.) 424; 2 Rice, Ev. 1062. As has been seen, plaintiff was prosecuted criminally by defendant, and such prosecution resulted in her discharge. Consequently, the only facts for the jury to determine were the absence of probable cause for the arrest, the existence of malice, and amount of damages; and on each of these they found for plaintiff.

Nine of the errors assigned in the brief of appellant's counsel relate to the admission of evidence. Over defendant's objection the plaintiff and her husband were permitted to give the details of several of the numerous quarrels which occurred between the two families prior to her arrest. It is not necessary to refer to this evidence in detail. We have examined it with care, and agree that it was relevant and material on the existence of malice on the part of defendant in causing plaintiff's arrest. It is true, the jury might have inferred malice from want of probable cause. *Kolka* v. *Jones,* 6 N. D. 461, 71 N. W. Rep. 558. But plaintiff saw fit—as she had a right to do—not to leave the question of malice to inference, and accordingly offered evidence of express malice. To show this, she introduced testimony as to the relations of the parties, feelings of hostility and enmity entertained by defendant towards plaintiff, his acts, conduct, and declarations; all of which was proper to show the presence or absence of malice in making the arrest. Newell, Mal. Pros. 240; *Thurston* v. *Wright,* 77 Mich. 96, 43 N. W. Rep. 860; *Bruington* v. *Wingate,* 55 Ia. 140, 7 N. W. Rep. 479. "Whatever tends to show evil intent—malus animus—on part of the prosecution in instigating the indictment is properly admissible in evidence. The intent with which the prosecution was instigated is the controlling inquiry where there is want of probable cause." *Brown* v. *Willoughby,* 5 Colo. 1. See, also, *Walker* v. *Pittman,* 108 Ind. 341, 9 N. E. Rep. 175; 14 Am. & Eng. Enc. L. 61, notes; 1 Jag. Torts, § 200, and cases cited. Counsel for appellant urges that the admission of the evidence in question was highly prejudicial to defendant for the reason that it led the jury to mulct him in a much larger sum than they would have done had it been excluded. It certainly is true that the sum awarded as damages is not compensatory merely. In fact, the amount of the verdict clearly shows that it is chiefly punitive, and was exacted as smart money because of the evil motive with which

the arrest was made; and it is quite true, as counsel argues, that the amount of the verdict was influenced largely by the evidence complained of. But, nevertheless, the evidence was proper. The existence of malice was material to plaintiff's case, and if it showed that the defendant was actuated by a high degree of malice in causing the arrest, and thus the amount of exemplary damages was increased, he cannot say that he was legally prejudiced, any more than any other litigant who has failed in the testimony on a material issue.

We turn now to the alleged errors in the instructions. It appears that, before swearing out the complaint for plaintiff's arrest, defendant consulted an attorney in reference to making the arrest. The attorney consulted was in defendant's employ in a civil action involving matters closely connected with the facts which were material in the criminal charge. On this the court gave the following instructions, which are assigned as erroneous: (1) "I leave it for you to say from all the evidence in the case whether the defendant acted in good faith in consulting his own attorney employed by him in the civil action, and, if you find that he did not act in good faith in consulting with said attorney, then he cannot plead such advice as a defense to said action." Also the following: (2) "It is not enough for defendant to prove generally that all the facts were laid before the attorney, but it must be shown what facts were submitted." These instructions, in our opinion, correctly state the law. Advice of counsel cannot be resorted to as a mere cover for making a wrongful arrest. It is effectual as establishing the absence of malice and presence of probable cause only when it appears that the person relying thereon for protection "has communicated to his counsel all the facts bearing on the case of which he has knowledge, or could have ascertained by reasonable diligence or inquiry, and has acted upon the advice received honestly and in good faith." Newell, Mal. Pros. 310. In *Bartlett* v. *Hawley* (Minn.) 37 N. W. Rep. 580, the court said: "The advice of counsel is relevant and material both to show probable cause and the absence of malice; and probable cause does not depend upon the actual state of the case in point of fact, but on the honest and reasonable belief of the party prosecuting. But good faith in acting under the advice of counsel is necessary to protect the party." Under some authorities the fact that the attorney consulted was interested in the civil litigation renders his advice inadmissible for purpose of justification. The reason for this, as stated in *White* v. *Carr*, 71 Me. 555, is that "the client knows that he has not consulted a disinterested and unbiased attorney. Neither a judge nor juror thus interested would be competent to sit in the trial of the case; and, if either should act, it would be good ground for a new trial, although he acted honestly. Why should the opinion of an attorney thus interested be entitled to greater respect than the decision of the judge?" The submission to the jury of the question of the defendant's good faith

in consulting the attorney who represented him in the civil litigation in the case under consideration was entirely favorable to defendant. See *Watt* v. *Corey,* 76 Me. 87. Neither is the second instruction complained of open to criticism. The rule is that: "To obtain the protection which the advice of an attorney affords, it is not enough to prove generally that all the facts were laid before him. The proof must show what facts were communicated, so that it may be seen whether the presentation was full and fair." *Mercantile Co.* v. *Kyes* (Colo. App.) 48 Pac. Rep. 663; *Brooks* v. *Bradford,* 4 Colo. App. 410, 36 Pac. Rep. 303; *Railroad Co.* v. *Brown* (Kan. Sup.) 48 Pac. Rep. 31; *Clark* v. *Baldwin,* 25 Kan. 84; *Stevens* v. *Fassett,* 27 Me. 266; 1 Jag. Torts, 621; Newell, Mal. Pros. 318, 325. This instruction was also favorable to the defendant upon the evidence contained in the record.

The court also gave the following instruction, which is, in part, assigned as error: "The elements of damage to be considered by the jury, if you find for the plaintiff, are the expenses plaintiff was put to in the prosecution to protect herself, including reasonable attorney's fees, her loss of time, her deprivation of liberty, the loss of society of her family, injury to her good name, her personal mortification at being placed under arrest, her wounded pride, her mental suffering, and the smart and injury of the malicious acts and acts of oppression of the defendant, if you find any such were committed. These are what are known in law as direct damages, actual damages." This instruction states the general elements of damages, as recognized by both courts and text writers, which naturally result from malicious prosecutions. *Hamilton* v. *Smith,* 39 Mich. 222; *McWilliams* v. *Hoban,* 42 Md. 56; 3 Suth. Dam. (2d Ed.) § 1237; Newell, Mal. Pros. 494; 2 Greenl. Ev. (16th Ed.) 437. Appellant does not challenge it as a correct statement of the law, but it is contended that, as to two of the elements of damages enumerated, it was not applicable to any evidence in the case. It is urged that there is no evidence showing that plaintiff was deprived of her liberty, and that it was error, therefore, to instruct the jury that they might consider this as an element of damage. In this counsel is mistaken. It is true that plaintiff was not committed to jail, but she was nevertheless under arrest, and yielded obedience to the officer responsible for her custody from the time of her arrest until she was discharged at the trial. That portion of the instruction is also criticised wherein the jury are instructed that plaintiff's loss of time is also an element of damage to be considered. This was clearly an inadvertence on the part of the court. Plaintiff made no claim of damage for loss of time. No evidence was offered showing that she lost any time, and no evidence of its value. This portion of the instruction was clearly inapplicable to any evidence in the case. But under the circumstances it could not have misled the jury, and was not prejudicial. Plaintiff was discharged on the day following her arrest, so that it was not possible for the element

of loss of time to become a subject for consideration by the jury in estimating the damages. The reference to loss of time in the charge was superfluous, but, in our opinion, was not misleading, and therefore furnishes no ground of reversal. Thomp. Trials, § 2401.

A gross verdict for $800 was returned. $30.15 of this was for actual expenses incurred by plaintiff to secure her release. What portion of the remainder was compensatory and what punitive is not ascertainable, but it is apparent that the verdict is in a large measure punitive. It does not appear, however, in view of the high degree of malice shown to have actuated the defendant in causing plaintiff's arrest, that the jury went beyond the exercise of a sound and reasonable discretion in fixing the amount of damages. Finding no error in the record, this judgment is affirmed. All concur.

(84 N. W. Rep. 574.)

MATHILDA C. ENGSTAD *vs.* GRAND FORKS COUNTY.

Opinion filed November 22, 1900.

Taxation—Exemptions—Charitable Institutions.

Section 1180, Rev. Codes 1899, provides what property shall be exempt from taxation; and subdivision 6 embraces the following language: "All buildings belonging to institutions of purely public charity, including public hospitals, together with the land actually occupied by such institutions, not leased or otherwise used with a view to profit," etc. Construing the language quoted it is *held* that real estate which is used exclusively for purposes of purely public charity, but which is not owned by an "institution," is not exempt from taxation.

Private Ownership.

Held, further, that real estate which belongs to but one individual, a natural person, cannot, under any circumstances, be entitled to exemption from taxation under the provisions of said subdivision of the statute.

Constitutional Provision Not Self-executing.

Section 176 of the state constitution contains the following language: "And the legislative assembly shall, by a general law, exempt from taxation property used exclusively for school, religious, cemetery, or charitable purposes." Construing the language quoted, *held*, that the same does not of its own force operate to exempt any property from taxation, nor does it purport so to do. The provision is not self-executing.

Public Charitable Uses.

Held, further, that subdivision 6 of said section 1180 of the statute is not repugnant to said constitutional provision, because the statute is narrower in its terms than the constitutional provision, or because it limits the exemption of real estate used for charitable purposes to such real estate as is devoted to purely public charitable uses, and then only to such as belong to an "institution."

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

Action by Mathilda C. Engstad against the County of Grand Forks and others. Judgment for defendants, and plaintiff appeals. Affirmed.

John A. Sorley and *B. G. Skulason*, for appellant.

This action is brought for the purpose of setting aside and canceling the taxes for the year 1898 upon the St. Luke's Hospital, and the lot upon which the same is situated, on the ground that said property was exempt from taxation. Subd. 6, § 5, chapter 126, Laws 1897; § 176 Const. The fact of private ownership is not material, under the statute, in considering whether or not the property is exempt. The character of the use of the property being given the legislature has no choice but to exempt it. *Gerke* v. *Purcell*, 29 Ohio St. 229; *Sisters of Charity* v. *City of Detroit*, 9 Mich. 93. Words used in any statute are to be understood in their ordinary sense except when a contrary intention plainly appears. § 5106, Rev. Codes. Under the act "all buildings belonging to institutions of purely public charity, and all buildings belonging to public hospitals, shall be exempt." Putting it in another form, "all buildings belonging to institutions of purely public charity, and with such institutions are included public hospitals." Under this construction no regard need be had to the manner in which the title is held. Our statute is a copy of section 5, chapter 11, General Laws of Minnesota, 1878. Under this statute it has been held that the question of the use of the property, and whether the hospital was a public hospital determines the exemption and not the question of corporate or private ownership. *County of Hennepin* v. *Brotherhood of Gethsemane*, 8 N. W. Rep. 595. The fact that the hospital receives pecuniary compensation from its beneficiaries does not affect it as a public charity. *St. Joseph's Hospital Ass'n* v. *Ashland County*, 72 N. W. Rep. 43; *City of Philadelphia* v. *Woman's Christian Ass'n*, 17 Atl. Rep. 475; *County of Hennepin* v. *Brotherhood of Gethsemane*, 8 N. W. Rep. 595; 5 Am. & Eng. Enc. L. 897. The rule is that exemption from taxation is not lost by temporary suspicion of the charity. 12 Am. & Eng. Enc. L. 381.

George A. Bangs and *W. L. T. Goodison*, for respondents.

Exemptions are strictly construed. The presumption is, that the state has granted in express terms all it intended to grant at all. Cooley on Taxation, 205; 1 Destey on Taxation, 108; 25 Am. & Eng. Enc. L. 157. The word "institution" in the exempting statute is used to designate a corporation or other organized body instituted to administer the charity, and that the real estate described as belonging to such institution has reference to property owned by the institution. *Humphrey* v. *Little Sisters of the Poor*, 29 Ohio St. 201; *St. Monica Church* v. *New York*, 119 N. Y. 91, 23 N. E. Rep. 294; *Hegaray* v. *New York*, 13 N. Y. 220; *Nashville* v. *Ward*, (Tenn.) 16 Lea, 27; *State* v. *Ross*, 24 N. J. L. 497;

Morris v. *Lone Star Chapter No. 6*, 68 Tex. 698, 5 S. W. Rep. 519; *Dodge* v. *Williams*, 46 Wis. 100; *Nobles* v. *Hamline*, 46 Minn. 316, 48 N. W. Rep. 1119; *People* v. *Western Seamen Friends Society*, 87 Ill. 246. This suit cannot be maintained by the plaintiff because, since the institution of the suit, the property was sold to the Grand Forks Deaconess Hospital. Jurisdiction will be exercised by the court only in behalf of parties interested in the transaction or subject-matter of the proceeding which it is sought to enjoin, and one who has no personal interest in the matter is not entitled to relief. High on Injunctions, 1177; *Smith* v. *Brittenhan*, 109 Ill. 540.

WALLIN, J. The object of this action is to cancel taxes assessed in 1898 against a certain lot, and bulding thereon used as a hospital, and situated in the city of Grand Forks. Nearly all the facts, and all which we deem to be important, are uncontroverted. It is admitted that in the month of December, 1897, the plaintiff purchased the premises in question, and that the title thereto was conveyed to the plaintiff at that time; that the plaintiff continued to be the sole and individual owner of the property until the month of December, 1899, when she sold the same, and conveyed the title to the purchaser. It is further conceded that during the whole of the year 1898 the plaintiff alone, through an agent, who was her husband, carried on and administered the hospital situated on the premises, and that no other business was done on the premises. The plaintiff furnished and paid for the supplies for the hospital, and she alone bore the financial loss which resulted from operating the hospital during the year 1898. The only fact which seems to be disputed is whether the plaintiff did or did not carry on the hospital during the year in question for charitable purposes and none other. Plaintiff's contention is that she carried on the hospital exclusively for charitable purposes, and that she had no intention to derive any individual emoluments from the hospital, and that she did not in fact do so. She further contends that said hospital, during her administration thereof, was a purely public charity. For the purposes of the case, we shall accept the plaintiff's theory of the facts as above stated, and this will call for a solution of the question—one of pure law—whether any law exempts from taxation a hospital, and the land upon which it is erected, when the same is conducted solely by one individual, who owns the same, and who operates it for public charity exclusively.

It it elementary in the law of taxation that all property situated within the boundaries of a state is subject to taxation by the sovereign authority, and that a party who claims that particular property is exempt from taxation has the burden of pointing out the law which exempts the same. It is also well settled that laws which exempt property from taxation will receive a strict construction. It is the plaintiff's contention that the property is exempt from taxation by the terms of section 1180 of the Revised Codes of 1899. Said

section declares that certain property enumerated therein shall be exempt from taxation, and subdivision 6 of the section, upon which plaintiff relies, reads as follows: "All buildings belonging to institutions of purely public charity, including public hospitals, together with the land actually occupied by such institutions, shall be exempt." A careful reading of subdivision 6, in our opinion, plainly shows that the legislature did not intend, in enacting this subdivision, to exempt any and all real property which is or may be used exclusively for charitable purposes. It is evident from the language employed that the lawmakers intended to carefully discriminate as between charities, and to exempt from taxation only such as are (1) of a public character, and (2) such as belong to "institutions of purely public charity." Applying the provisions of subdivision 6 to the conceded facts of this case, it at once becomes apparent that the property involved is not exempt under subdivision 6. Concede that the property was used exclusively for charitable purposes, and, further, that the charity was purely a "public charity," still it is not exempt under the statute, for the reason that during the time in question the property belonged to, and was operated by, the plaintiff as an individual, and did not belong to any "institution" whatsoever. It is not the province of the courts to comment upon the wisdom or expediency of statutory provisions, and hence we are not called upon to say whether the limiting and qualifying clauses of subdivision 6, to which we have called attention, are wise or unwise in their policy. It is enough to say that the language of the subdivision is plain and unambiguous in its meaning. The building and land of the plaintiff are not exempt for the reason that the same do not belong to any "institution." It will be conceded that an individual or natural person cannot, under any definition of the term "institution," be described as an "institution." Hence property owned by one individual cannot, within the meaning of the statute, be property "belonging to an institution."

But, apparently in anticipation of the construction which we have here placed upon subdivision 6, counsel for the appellant takes the position in their brief that such a construction would render subdivision 6 unconstitutional, under the provision of a clause found in section 176 of the state constitution, which reads as follows: "And the legislature shall by a general law exempt from taxation property used exclusively for school, religious, cemetery or charitable purposes." The argument of counsel is that, under the broad terms of the constitution, the legislature is required to exempt all property used "exclusively" for "charitable purposes," and that the limitations found in subdivision 6 of the statute are wholly absent from the language employed in the organic law of the state. This may be conceded without proving that the plaintiff's property is exempt from taxation either under the provisions of the constitution or those of the statute; nor does this conclusion, in our judgment, require us to rule that the statute in question is unconstitutional. The constitution does not, in the clause we have

quoted, purport to exempt any property from taxation. On the contrary, the clause under consideration lays a command upon the legislative assembly, and requires that body, by general law, to exempt certain property from taxation, among which is property used exclusively for charitable purposes. This clause, therefore, is clearly not self-executing. Its very terms look forward to and require ulterior action upon the part of the lawmaking branch of the government. In commenting upon similar constitutional provisions, Judge Cooley in his treatise says: "Sometimes the constitution in terms requires the legislature to enact laws on a particular subject, and here it is obvious that the requirement has only a moral force. The legislature ought to obey it, but the right intended to be given is only assured when the legislation is voluntarily enacted." See Cooley, Const. Lim. (5th Ed.) p. 99. This rule of construction has been applied by this court. See *State* v. *Swan*, 1 N. D. 5, 44 N. W. Rep. 492; *Roesler* v. *Taylor*, 3 N. D. 546, 58 N. W. Rep. 342. It is sometimes difficult to determine whether a given constitutional provision is or is not intended to be self-executing, but no such difficulty will be encountered in the construction of the section under consideration. Clauses are found in this section which are obviously self-executing, while others are clearly not so. For example, the language of the constitution is direct and imperative when reference is made to property owned by the state or a county. The instrument declares that such property "shall be exempt from taxation." On the other hand, as we have already pointed out, the constitution has commanded the legislature to enact a general law exempting certain other property from taxation, among which is that devoted exclusively to charitable uses.

It may possibly have been the legislative purpose, in enacting the general exemption law embraced in section 1180, supra, to fully comply with this constitutional mandate; but we are not at liberty to indulge in mere conjecture as to what was intended. Our duty is to fairly construe the language actually employed by the legislature, and from it determine the legislative intent. In doing so, we reach the conclusion, as has been seen, that the legislature did not intend to go as far as the language of the constitution required it to go. The legislature, by its language, has not exempted from taxation any and all property devoted exclusively to charitable uses, but has, on the contrary, only exempted so much thereof as belongs to "institutions" which dispense public charity. But, in exempting only a part of the property which is or may be devoted to charitable uses, there has been no violation of any inhibition found in the organic law. The constitution required the legislature to exempt what is has exempted; but the lawmaking body has not perhaps gone to the full extent required by the very broad terms employed in the clause we have quoted from section 176 of the state constitution. It is certainly clear to our minds that, notwithstanding the fact that the legislative branch has not seen fit to execute the constitutional mandate to the full measure intended, such

omission cannot operate to annul a statute which does execute the mandate, but only in part. Besides, if the statute is unconstitutional, it is obvious that no exemption can be claimed under it. Our conclusion is that the property described in the complaint was not exempt from taxation during the year 1898. The judgment below must be affirmed. All the judges concurring.

(84 N. W. Rep. 577.)

A. F. KUHNERT *vs.* ERASMUS D. ANGELL.

Opinion filed December 4, 1900.

Negligence—Liability of Agent.

This is an action to recover damages for injuries to a team of horses, which were received in a barbed-wire fence at a point where said fence crossed a trail upon which the team was being driven, which trail had previously been in common use. The fence inclosed certain lands owned by a nonresident, whose agent defendant was for the purpose of leasing and collecting rent. It is *held*, under the facts stated in the opinion, that defendant's control of the premises where the injury occurred was not broad enough to render him liable for its safe condition.

Default of Subagent.

The landowner directed the defendant to have the fence in question erected, and included in his directions a provision for guard rails where the accident occurred. Defendant employed a subagent to erect the fence in accordance with such instructions. The latter failed and neglected to put on the guard rails. It is *held*, under section 4348, Rev. Codes, which provides that "the original agent is not responsible to third persons for acts of the subagent," that the defendant is not liable for the injury resulting from the negligence of such subagent.

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

Action by A. F. Kuhnert against Erasmus D. Angell. Judgment for defendant. Complainant appeals.

Affirmed.

John E. Greene, for appellant.

C. E. Bradley and *Arthur B. Lee*, for respondent.

YOUNG, J. Plaintiff is seeking to recover damages for injuries to a team of horses, received on the night of July 13, 1898, in a barbed-wire fence, while being driven from Harwood to Fargo. The fence in question inclosed a tract of meadow land, and had been but recently built. It consisted of three strands of barbed wire, and was built directly across a trail which had been traveled by the public for a considerable time. The injury occurred while the team was following this trial. The case has been tried twice in the District Court, and this is the second appeal to this court. At the first trial, plaintiff sought to recover under section 7550, Rev. Codes, which provides that "every person who shall knowingly

and willfully * * * build or place a barbed wire fence across any well traveled trail, which has been the usual and common route of travel for not less than one year prior to the commission of the offense; without placing on the outside of the top tier of barbed wire on said fence, a board, pole or other suitable protection, to be at least sixteen feet in length, shall be guilty of a misdemeanor, * * * and shall be liable for all damages to person or property by reason of the same." Plaintiff prevailed and recovered a verdict. Subsequently, however, defendant moved for a new trial. This was granted by the trial court, and the order granting it was affirmed by this court. See *Kuhnert* v. *Angell,* 8 N. D. 198, 77 N. W. Rep. 1015. When the case went back to the District Court, plaintiff obtained leave to amend his complaint. He now seeks to recover entirely independent of the liabilities imposed by said section 7550, supra, and upon the express ground that defendant was guilty of negligence in connection with the construction of the alleged dangerous obstruction. The complaint alleges "that on or about the 1st day of July, A. D. 1898, the defendant negligently and carlessly constructed, or caused to be constructed, across said road, a barb-wire fence, substantially built, with three cedar posts set in the ground, and three strands of wire securely fastened thereto, and he negligently and carelessly failed and neglected to place any guards upon either side of said fence, or any obstruction of any kind in said highway on either side of said fence, or provide any means whatever to notify the persons traveling said highway of the existence of said fence, or the danger that existed by reason thereof; that said fence so constructed as aforesaid, without any protection or means provided for warning travelers, rendered the travel of said highway dangerous, and persons and teams traveling thereon were liable to be seriously injured by said fence, all of which the defendant well knew." At the close of the case a verdict was directed for defendant on the ground that the evidence failed to show negligence on the part of the defendant. Judgment was entered in defendant's favor, and plaintiff appeals therefrom.

The only error assigned which we deem it necessary to consider is the order directing a verdict for defendant. Our inquiry, then, is as to whether there was any evidence before the jury tending to establish actionable negligence on the part of the defendant. On this point we may say that the evidence differs in no important particular from that contained in the record on the former appeal. The land on which the fence in question was located was owned by one Hunt, a nonresident. It was without buildings or other substantial improvements. Defendant is in the real estate business in the city of Fargo. For several years he had been Hunt's agent for leasing said land and collecting the rent. Some time in 1898 Hunt instructed defendant to have the fence in question constructed for the purpose of inclosing a portion of the meadow land. Hunt's plans for the fence corresponded with the fence actually built, with the single exception as to guard rails. Guard rails were to be

provided where it crossed the trail where the accident occurred. In pursuance of such request defendant employed one Stenso to build the fence; and his instructions to the latter covered the building of a fence in every way corresponding with the directions of his principal, and including the provision for guard rails. Stenso constructed the fence, but, in violation of his contract, and also of express direction from defendant, failed and neglected to provide guard rails or any other means of warning the traveling public of danger where the fence crossed the trail in question. It will be seen that defendant did no affirmative act in creating the alleged dangerous obstruction. He neither constructed it nor caused its construction. His entire connection with the erection of the fence was limited to his employment of Stenso, and the purpose of that employment was the construction of a lawful fence, with guard rails. These considerations compelled us to hold on the former appeal that the defendant was not liable under the statute, viz: section 7550, supra; for, under the undisputed evidence, he did not knowingly and willfully place or cause to be placed across the trail the alleged dangerous obstruction. The willful act was that of Stenso alone. Neither do we reach a different conclusion on the present appeal, wherein defendant's liability is predicated upon negligence. The theory of appellant's counsel is that defendant's agency was broad enough to render him personally responsible for the safe condition of the premises, and accordingly liable for injuries suffered through an unsafe condition thereof. In support of this rule of liability the following cases are cited: *Baird* v. *Shipman*, 132 Ill. 16, 23 N. E. Rep. 384, 7 L. R. A. 128; *Mayer* v. *Building Co.*, 104 Ala. 611, 16 South. Rep. 620, 28 L. R. A. 433; *Campbell* v. *Sugar Co.*, 62 Me. 552. The doctrine of these cases is expressed by the court in *Baird* v. *Shipman*, supra, in the following language: "An agent of the owner of property, who has the complete control and management of the premises, and who is bound to keep them in repair, is liable to third persons for injuries resulting to the latter, while using the premises in an ordinary and appropriate manner, through the neglect of said agent. And the agent cannot excuse himself on the plea that his principal is liable. It is not his contract that exposes him to liability to third persons, but his common-law obligation to so use that which he controls as not to injure another." The facts in the case at bar do not bring defendant within the rule of liability as laid down in the foregoing cases, for several reasons: First. The rule as laid down is applicable to buildings which are under the exclusive control of agents who are charged with the duty of attending to repairs, whereas, the property here involved is unoccupied land. Second, in the case under consideration the defendant did not have complete control and management of the premises. His authority was limited to leasing and collecting rent, and did not extend to making improvements, such as building the fence in question. The cases differ, also, in this: that in each of these cases the person claiming damages for injuries was either a

tenant or person lawfully on the premises, to whom a duty was expressly due, whereas in the present case the defendant was a trespasser at the time of the injury. Under the facts of this case, it is clear that defendant's general relation to the premises did not make him responsible to either his principal or to third persons for their safe condition.

The only remaining question, then, is whether defendant, by reason of having employed Stenso, is responsible for his negligence. This must be answered in the negative. The general rule of law is that an agent is not responsible for the negligence or want of skill of a subagent employed by him, where such employment was necessary to the transaction of the business intrusted to him, and he has used reasonable diligence in his choice as to the skill and ability of the subagent. *Tiernan* v. *Bank* (Miss.) 40 Am. Dec. 83; *Baldwin* v. *Bank* (La.) 45 Am. Dec. 72; *Conwell* v. *Voorhees,* 13 Ohio, 523, 42 Am. Dec. 206. In *Barnard* v. *Coffin,* 141 Mass. 37, 6 N. E. Rep. 364, 55 Am. Rep. 443, the court said that the principle which runs through the cases is that if an agent employs a subagent for his principal, and by his authority, express or implied, then the subagent is the agent of the principal, and is directly responsible to the principal for his conduct, and, so far as damage results from the conduct of the subagent, the agent is only responsible for a want of due care in selecting the subagent. The doctrine of these cases is also embodied in the statutory law of this state. Section 4348, Rev. Codes, provides that "a subagent lawfully appointed represents the principal in like manner with the original agent, and the original agent is not responsible to third persons for the acts of the subagent." The rule of law embraced in the section just quoted exonerates defendant from liability. He had authority to employ some one to build the fence. The work to be done was of the commonest kind, and did not require skill or peculiar fitness, and in employing Stenso he intrusted the erection of the fence to a person competent for the purpose of his employment. That was the extent of his duty, and, there being no breach of duty to his principal or to the public, he cannot be charged with negligence.

We have not found it necessary to determine whether the construction of the fence in question was, under the peculiar circumstances of this case, actionable negligence, so as to render those legally responsible for its condition liable for damages caused thereby. Our decision is confined to the single question of defendant's liability, and we have assumed, merely for the purposes of this case, but without deciding the question, that the construction of the fence in the place and manner narrated constituted actionable negligence. The cases are numerous, however, holding that, while barbed wire may be lawfully used for fencing purposes, nevertheless conditions may exist which render its use dangerous, and render the persons responsible for its construction or neglected condition liable for damages resulting therefrom. *Carskaddon* v. *Mills,* 5 Ind. App. 22, 31 N. E. Rep. 559; *Sisk* v. *Crump,* 112 Ind. 504, 14

N. E. 381, 2 Am. St. Rep. 213; *McFarland* v. *Lillard,* 2 Ind. App. 160, 28 N. E. Rep. 229; *Lowe* v. *Guard,* 11 Ind. App. 472, 39 N. E. Rep. 428; *Gould* v. *Railroad Co.,* 82 Me. 122, 19 Atl. Rep. 84; *Loveland* v. *Gardner* (Cal.) 21 Pac. Rep. 766, 4 L. R. A. 395. Also, 12 Am. & Eng. Enc L. (2d Ed.) 1039, and cases cited. The judgment of the District Court is affirmed. All concur.

(84 N. W. Rep. 579.)

JOHN H. WISHEK *vs.* CHRISTIAN BECKER.

Opinion filed December 5, 1900.

County Judge—Malfeasance—Action to Remove—Parties—Complaint.

When this action was instituted the defendant was an incumbent of the office of county judge of the county of McIntosh, N. D., and held said office by virtue of an election thereto. Defendant's original title to said office is not in question in this action, nor does the complaint allege that the plaintiff has a special interest in the result of this action which is peculiar to himself. The sole object of the action is to remove the defendant from said office. As grounds of action, the complaint charges the defendant with the forgery of a promissory note; also with divers acts of malfeasance, crime and misdemeanor in office; also with gross incompetency. A preliminary motion was made in the District Court to dismiss the action upon the ground that that court was without jurisdiction of the subject-matter of the action. This motion was denied. *Held,* that this ruling was error.

Allegations of Complaint.

The complaint omitted to aver that the defendant had usurped or intruded into said office, or was unlawfully holding or exercising the powers of the same. Nor does the complaint allege that the defendant had done or suffered any act which, "by the provisions of law," operated to work a forfeiture of the office or to create a vacancy therein. *Held,* that the action does not lie under the provisions of chapter 24 of the Code of Civil Procedure, for two reasons: (a) That a private person who has no special interest in the result of the action which is peculiar to himself cannot institute an action in his own name under said chapter; (b) that the complaint did not state a cause of action under said chapter.

Procedure.

Construing section 5741, Rev. Codes 1899, *held,* that said section deals with procedure only, and the said section must be so construed as not to enlarge the grounds of action or the remedies which were obtainable by the quo warranto proceeding which existed prior to the enactment of said section.

Action Not Brought in Name of Individual.

Held, further where the object of the suit is only to remove the defendant from office upon some or all the grounds of removal enumerated in the constitution and statutes, that a civil action, under chapter 24, does not lie in any case, unless facts are alleged showing that the special remedies provided for removals from office, under the Codes of Civil and Criminal Procedure, are inadequate for the purpose. Removals from office in this state may be made by the various methods elaborated for the purpose in the constitution and

statutes of the state. These methods are exclusive, unless it shall appear by the complaint, in an action brought under chapter 24, supra, that some of the causes of removal enumerated in section 5743 of that chapter are set out as grounds of action; nor can such an action be brought by an individual in his own name, under chapter 24, unless the complaint shows that the plaintiff has a special interest in the action.

Statute Not Self Executing.

Sections 361, 362, Rev. Codes 1899, construed. *Held* that, when construed together, said sections provide, in effect, that the removals from office contemplated by the same can be effected only "in the manner provided in the Codes of Civil or Criminal Procedure." Neither of said sections attempts to provide a procedure, nor are either of the same self-executing.

Action For Removal Not Brought in Name of County.

Section 362 cannot, under existing laws, be enforced literally, because the several remedies for removals from office, as expressly provided in the Codes of Civil and Criminal Procedure, will not, under any circumstances, permit an action to remove an officer to be instituted in the name of a county, nor in the name of an individual, unless the averments in the complaint state a cause of action arising in favor of an individual, under the provisions of chapter 24 of the Civil Code.

Appeal from District Court, McIntosh County; *Winchester,* J., presiding by request.

Action by John H. Wishek against Christian Becker, county judge. Judgment for defendant. Plaintiff appeals.

Affirmed.

A. W. Clyde, for appellant.

L. T. Boucher, for respondent.

WALLIN, J. This is a civil action brought by the plaintiff to remove the defendant from the office of judge of the County Court of the county of McIntosh. The District Court, sitting without a jury, and after a trial of the action upon its merits, made and filed its findings, including findings of both law and fact, and thereby fully exonerated the defendant from the various charges against him, as set forth in the complaint. Pursuant to such findings, judgment was entered in the trial court dismissing the action, with costs. From such judgment the plaintiff has appealed to this court, and demanded a retrial here of certain questions of fact, which are specified in the statement of the case.

It is undisputed that the defendant, after holding said office of county judge for the two terms next preceding, was re-elected, and, after qualifying therefor by taking the official oath and giving a bond, entered upon the discharge of the duties of said office for the term commencing on the first Monday in January, 1899; and it further appears that the defendant, when this action was instituted, was, and ever since has been, an incumbent thereof.

The evidence transmitted to this court is voluminous, but, in the

view which we have taken of the case, it becomes unnecessary to consider the evidence. The record discloses the fact that a preliminary motion was made in defendant's behalf to dismiss the action upon the ground that the trial court was without jurisdiction of the case, the subject-matter, or the person of the defendant. This motion was denied, and an exception was preserved to such ruling. The jurisdiction of the trial court over the subject-matter of the case and over the defendant's person was likewise challenged by the answer of the defendant.

We regard the legal question presented by the motion to dismiss, involving, as it does, the question of jurisdiction, as being vitally important and decisive of the case. The action was commenced by the service of a summons and complaint, and was tried below under the statute governing the procedure in cases tried in the District Court without a jury. Section 5630. The complaint charges the defendant with the commission of a felony, viz: that of forging a promissory note; and further alleges that the defendant, while holding said office, has been guilty of misconduct, malfeasance, and misdemeanor in office by divers acts, which are set out in detail; and finally charges as a ground of action that the defendant is grossly incompetent to discharge the duties or exercise the powers of said office. The complaint does not attempt to allege any fact or facts tending to show that the plaintiff has any special interest in removing, or causing the removal, of the defendant from said office which is peculiar to himself, nor is there an allegation in the complaint that the plaintiff has any special interest in the action as against the defendant. There is neither allegation nor claim to the effect that any other person than the defendant has any right, title, or claim to said office; but, on the contrary, the complaint shows affirmatively that the defendant was lawfully installed in said office, and now exercises its powers, by virtue of his election by the people, and his qualification for the office in manner and form as the law directs. It is nowhere alleged in the complaint that any of the acts or omissions of the defendant which are set out as grounds of action are of such a character as to work a forfeiture of said office under the provisions of any law. On the contrary, the grounds of the action, as set out in general terms in the complaint, are such grounds of removal from office as are enumerated in sections 361, 7824, 7838, Rev. Codes. And the relief demanded is simply that the defendant be removed from office, and that the costs of the action be awarded to the plaintiff. Upon these averments of fact, the broad question arises whether a private person, not having any special interest in the action which is peculiar to himself, may, at his election, institute a civil action to remove a county officer from his office, and do this without the sanction or co-operation of any other person whomsoever or of any official. If this can be done, it certainly constitutes an innovation upon the

practice, and that, too, of a startling nature. Our attention has not been called to any case reported in the adjudications which lends its sanction to any such practice, in the absence of express statutory permission to do so. But counsel for the appellant cited sections 361, 362, Rev. Codes 1899, as direct authority in support of the right of a private person to bring an action in his own name to remove from office. It must be conceded that section 362, standing alone, and construed without regard to other provisions of the Codes relating to removals from office, tends to sustain the counsel's contention. But a well-settled rule of construction requires the courts to construe a given statute with reference to, and in connection with, all other provisions of the statute law bearing upon the same subject-matter. Conforming to this familiar rule, we are required to examine other sections of the Codes relating to the matter in question. Sections 361-364 are found in the Political Code, and neither of said sections undertakes to provide any legal machinery or manner of procedure whereby an action to remove an officer can be either commenced or conducted when commenced. On the contrary, section 361 declares, in terms, that the removal from office on the grounds named in said section shall be accomplished "in the manner provided in the Codes of Civil or Criminal Procedure." This language is plain as to its requirements, so far as the procedure is concerned in this class of cases. Its mandate is that the procedure to remove an officer must be found either in the Code of Civil Procedure or in the Code of Criminal Procedure.

This statutory provision is the same, in substance, as those found in section 1388, Compiled Laws, and it may be well to consider just here what provisions were made under the Compiled Laws for the removal of county officers. Turning, first, to the Code of Civil Procedure (Comp. Laws, §§ 5345-5361), we learn, by section 5345, that "the remedies formerly attained by the writ of *scire facias*, the writ of *quo warranto*, and proceedings by information in the nature of *quo warranto*, may be obtained by civil actions under the provisions of this chapter." This substitutionary remedy, however, did not enlarge the scope of the relief attainable by the special proceeding, which was swept away by this section. On the contrary, the relief in the form of a civil action is, in terms, limited to such as was previously attainable under the provisions of the same chapter of the Code, viz: chapter 26; and this chapter, at the time the Laws of 1887 were compiled, embraced all the provisions found in the Civil Code relating to, or providing in any manner for, the removal of officers from office.

The inquiry, therefore, is whether, under this chapter, an action could lawfully have been instituted by a private person in his own name, or by county commissioners in the name of the county. This question, in our opinion, should receive a negative answer, under section 5348, Comp. Laws, as to an action to remove a person who had intruded into or usurped an office, or who unlawfully held or exercised an office, or against an officer who had "done or suffered

an act which, by the provisions of law," operated to work a forfeiture of his office. No such action could lawfully be brought by a private person in his own name, nor by county commissioners in the name of the county. Section 5348 explicitly required that all such actions should be brought by an official representative of the territory, viz: by a "district attorney," and moreover, should be brought in the name of the territory. It is true that a person having a special interest in the question to be determined could be named as a co-plaintiff with the territory, but this permissive feature of the statute does not militate in the least against the proposition that such actions could not be brought by or in the name of either a private person or a county.

Turning, now, to the Code of Criminal Procedure, as it existed in 1887, we discover that Code also elaborated a manner of procedure whereby certain officers, including county officers, could be judicially removed from office. Sections 7080, 7095, Comp. Laws. But said Criminal Code required that an action of this character should be instituted in the form of a written accusation presented by a grand jury; and, further, that such action should be prosecuted by an impartial public prosecutor, viz: by a district attorney. This Code also made provision for the removal of officers as a part of the punishment prescribed in certain cases after a regular trial and conviction was had under the statutes regulating the procedure in criminal actions proper. But nothing can be clearer than the fact that in the Compiled Laws of 1887 no provision was made in the Criminal Code whereby an action to remove an officer could be commenced either in the name of a county or a private person.

This review of the Code provisions relating to the judicial removal of officers, as embraced in the Compiled Laws, constrains this court to conclude that the broad declaration found in section 1388, Comp. Laws, to the effect that an action to remove an officer could be brought either in the name of a private person or in the name of a county, was emphatically in the nature of a promise made in the ear only to be broken to the hope. No such action could be brought in 1887, either under the Civil or the Criminal Code then existing, as we have seen that another section declared, in effect, that the "proceedings" in such actions should be governed by the Civil or Criminal Code. Section 1388 is certainly not self-executing. Such provision does not purport to prescribe the procedure which is to govern any such action as it authorized to be brought. It therefore was, in 1887, an incongruous and nonenforceable statutory provision, and the same may be said with equal truth, and with the same emphasis, with respect to section 362, Rev. Codes 1899. Looking at the law as embraced in the Revised Codes of 1895, we find that the legislature by that Code made provision whereby a private person is enabled to institute a civil action in his own name, under the circumstances set out in chapter 24 of the Code; but no provision is made therein, or elsewhere, in that Code, which authorizes, or which, in our judgment, will permit, an action to be brought by

county commissioners in the name of a county to remove an officer from office, or to declare a forfeiture of an office.

But the plaintiff in the case at bar has wholly failed to bring himself within the provisions of chapter 24 of the Revised Codes, and this for two independent reasons: First, the complaint shows affirmatively that the defendant is lawfully in possession of his office by virtue of being elected thereto and qualifying therefor, and hence the complaint necessarily shows negatively that the defendant has neither intruded into nor usurped said office, or that he unlawfully exercises its powers; and nothing of the kind is claimed. Nor does the complaint allege that the defendant has done or omited to do any act which, under section 5743, subd. 2, operates, *ipso facto*, to forfeit the office. Nowhere does the complaint state that the defendant has been convicted of any felony, or of any offense involving moral turpitude, or a violation of his official oath, so as to bring the case under the provisions relating to creating vacancies in office, as found in section 359, Rev. Codes. Nor is it alleged that either or all of the acts set out as grounds of action operate under any provisions of law to which reference is made to work a forfeiture of office, without a previous conviction in a criminal action. It is true that, under certain provisions of law, particular acts done or omitted by an officer operate to work a forfeiture of office in advance of, and without regard to, a conviction and sentence in a criminal action. This class of acts furnishes original grounds of action, under said section 5743. This distinction is pointed out in *State* v. *Wilson*, 30 Kan. 661, 2 Pac. Rep. 828, and cases cited. But, as has been said, the complaint in this case places no ground of forfeiture under any provision of law. Nor has the plaintiff set out any facts showing that he is entitled to be inducted into the office, which allegations would be essential in an action brought by a private person, under chapter 24. See section 492, Mechem. Pub. Off. We have seen that, under the amendments introduced by the Codes of 1895, a private person may bring an independent action in his own name, under chapter 24, under the circumstances set out in the amended Code. See section 5742. But this plaintiff is not in a position to avail himself of the new and important privilege conferred by said section. Plaintiff omits to allege that he has any "special interest in the action" as against the defendant. See section 5743, Rev. Codes 1895, 1899. This omission is clearly fatal, inasmuch as it appears that the action can be regarded only as a civil action brought to remove a county officer in the name of an individual plaintiff, who is an intermeddler, and has volunteered to champion the rights of the state or the public in a case where he has no special interest in the action or in the results of the action. Chapter 24, as amended, does not lend any sanction to an action so brought. An action to declare an office vacant, or to oust an intruder, is primarily and historically an action instituted by the sovereign authority, and, in the absence of statute, no such action can be prosecuted by a private person in his own

name, who fails to show a special interest in himself as against the defendant. This proposition has the support of a decided weight of authority. We cite only a few cases. See *Barnum* v. *Gilman*, 27 Minn. 466, 8 N. W. Rep. 375. In the case of *Vrooman* v. *Michie*, 69 Mich. 42, 36 N. W. Rep. 749, Mr. Justice Campbell, speaking for the court, used the following language: "No private citizen has any right to compel an officer to show title until he has shown his own right in the first place to attack it. In such a controversy it is manifest that a plea showing the relator has no rights is as appropriate as one setting up title in the respondent." See *Miller* v. *Town of Palermo*, 12 Kan. 21; *State* v. *Stein*, 13 Neb. 529, 14 N. W. 481; *State* v. *Boal*, 46 Mo. 528. But in this connection it is very important to discriminate as between actions brought by a citizen and taxpayers to vindicate a public right. Under a decided weight of modern authority, this can be done in many cases, and such is the established rule in this state. But actions brought under chapter 24 of the Code of Civil Procedure are exceptions to this rule, and made such by the terms of section 5743, as above explained. But in this case the complaint would be insufficient, under the more liberal general rule, for the reason that it omits to state that the plaintiff is either a citizen of the state or a taxpayer therein; but this fault could have been cured by amendment, and does not, therefore, go to the jurisdiction.

But, secondly, this action will not lie because it appears affirmatively by the complaint that it was not brought under chapter 24 of the Civil Code, but was distinctively brought to remove the defendant from office upon statutory grounds of removal. The grounds of the action are grounds of removal from office *eo nomine*, as set forth in the constitution and statutes of the state. See Const. § 197; Rev. Codes, § § 361, 7824. As has been said, the relief demanded is only that the defendant be removed from said office, with costs of the action. Therefore the grounds of action and the prayer for relief alike denote the theory of the action entertained by the plaintiff, and also the specific purpose of the suit; and this presents the legal question whether a civil action will lie, under the general provisions of the Code of Civil Procedure, in the name of a private person, to remove a county officer from office, on the special grounds enumerated in the statute, in any case where the right to remove is not based upon the ground that the defendant has intruded into or usurped the office, or unlawfully exercised its powers, and where no facts are stated tending to show that the defendant has done or suffered an act which operates to forfeit his office under express provisions of law. We are satisfied, under well-settled legal principles, that such an action will not lie in this state, and we place this ruling primarily upon the general ground that the legislature has devised particular modes and methods of removing all public officers of this state, and which modes and methods, in our opinion, are exclusive. See Rev. Codes, § § 110, 136, 7796-

7838, inclusive. The special legislation machinery for removing officers includes, among others, removals by the governor, removals by impeachment, removals by a criminal action based upon an accusation presented to the District Court by a grand jury, and, finally, a removal by a civil proceeding of a summary nature conducted in the District Court. It is significant, too, that none of these modes of removal can be resorted to without the co-operation of some representative of the public, and this harmonizes with the primary rule governing such actions at the common law. In removals by judicial proceedings, under these statutes, the public is represented by the state's attorney, and, unless a jury is waived, no removal can be accomplished by such proceedings without the intervention of a jury. And just here it may be proper to note the fact that the defendant demanded a jury trial, and the same was denied in the District Court. The further fact is significant that, under the legislative methods relating only to removals from office, no judgment can extend to a fine, but is limited either to a removal with the costs of the action, or to such removal coupled with a clause disqualifying the accused from holding office. If the rule should be established in this state that a private individual having no special interest in the matter may, without let or hinderance from any officer or public representative, institute a civil action to remove an officer upon the grounds of removal enumerated in the constitution and statute, it follows, of course, that such a removal from office may be accomplished, not only by diverse methods, but also without any of the safeguards which the law is careful to throw around such officer, including the right of trial by jury. A civil action, under the Code, is not to be tried by a jury, except in the cases named in the Code of Civil Procedure, and these do not include an action to remove an officer. The practical results of such a holding, in our opinion, would very likely be that all actions thereafter commenced for the removal of officers would be civil actions, to the exclusion of those actions and proceedings which have been especially elaborated by the lawmaker to accomplish the same result. We cannot lend our sanction to any such unjust and absurd conclusion as that would be suggested. Besides, it is well settled that *quo warranto* will not lie when the causes of removal are prescribed by the statute, if the statute also prescribes a special mode of removal, which is adequate to the purpose. See *State* v. *Mc Lain* (Ohio Sup.) 50 N. E. Rep. 907; *State* v. *Dowland*, 33 Minn. 536, 24 N. W. Rep. 188; *State* v. *Hixon*, 27 Ark. 398; *Tarbox* v. *Sughrue*, 36 Kan. 225, 12 Pac. Rep. 935.

Counsel for the plaintiff has omitted to cite any sections of the Code particularly relied upon by him as governing the procedure which is to be had in this action. True, counsel says the action itself is brought under sections 361, 362, Rev. Codes; but in this connection counsel neglects to call the attention of this court to specific statutory provisions which govern actions brought under sections 361, 362. Counsel cites chapter 24, relative to *quo warranto*

remedies; also section 5181 of the Revised Codes, which abrogates the pre-existing forms of action, and the distinctions formerly existing between actions at law and suits in equity, and declares that one action, called a civil action, shall be resorted to in all cases for the protection of private rights and the redress of private wrongs. But in this connection the learned counsel has failed to advise this court as to the practical matter whether this action is to be governed in fact by chapter 24, or, on the other hand, whether we are to be guided by any clues relating to procedure which are suggested by the terms employed in section 5181. Counsel declares that neither chapter 24 nor section 5181 are restrictive in their terms, but this suggestion of counsel lends little aid to this court in solving the practical question of the remedy. We have seen that neither section 361 nor 362 undertakes to provide any legal machinery whereby actions can be instituted by a private person or in the name of a county, and also that whatever actions are to be brought pursuant to said sections must be conducted under provisions found in the Codes of Civil and Criminal Procedure. We have further ascertained that no provisions are found in any part of the Code of Civil Procedure which sanction any practice or procedure whereby a private suitor, who has no special interest in the action, may in his own name institute a civil action to oust an officer from his office, and it is transparently clear that the Criminal Code affords no such right. From this it follows, as already remarked, that section 362 is a dead letter, not self-executing, and incapable of practical enforcement. It must be conceded that there is no express inhibition found in section 5181 of the Revised Codes, or elsewhere in the Code of Civil Procedure, which in terms prevents the bringing of civil actions in the name of a county or of an individual for the purpose of ousting an officer on purely public grounds, and in the absence of private interests. Nevertheless, we are compelled to hold that such an inhibition is necessarily implied, and this for reasons already sufficiently explained.

In reaching our conclusions in this case, we have been influenced to a degree by the consideration that actions to remove public officers from the earliest times have been uniformly brought in the name of sovereign authority, and that, too, by the direct intervention of the official representative of such authority. Originally, such actions were brought with reference to the public interests alone, to the exclusion of merely private rights or claims. It is true that under modern statutes, which have been enacted chiefly to subserve convenience, private persons, having special and personal interests to protect, are permitted to join as co-plaintiffs in such actions. This state has gone a step further by enacting a statute which allows an action of this character to be instituted by an individual in his own name in cases where the plaintiff has a special interest in the action. But, in our opinion, the legislation of this state, when construed as a whole, evinces an unmistakably policy to conform to

the common-law theory of actions which are brought solely to protect public interests by removing officials from office. All statutes in this state which are enacted expressly to provide the legal machinery which is to control removals made by the courts carefully retained the safeguards which existed at common law, and which are best adapted to the protection both of the officer and the public, including the right of trial by jury. Nor have we overlooked the case of *Minnehaha Co.* v. *Thorne* (S. D.) 61 N. W. Rep. 688, which is a South Dakota case, and based upon the statute as it appears in the Compiled Laws. The grounds upon which we place our decision in this case seem not to have been presented in that case; but counsel and court alike assumed that section 1388, Comp. Laws, was enforceable, and that there were provisions in the Code of Civil Procedure specifying the manner in which such an action, instituted solely in the interest of the public, might be brought and prosecuted by a private person or by a county. Our investigations, however, have served to convince us that no such provisions exist, and, if there be any reasoning in the opinion of the learned Supreme Court of South Dakota that conflicts with our views, we can only express our regret, while adhering to our conclusions. Our conclusion is that this action will not lie, and that the District Court erred in denying the preliminary motion to dismiss the same. The judgment of dismissal should be affirmed, with costs of both courts to the defendant. It will be so ordered. All the judges concurring.

(84 N. W. Rep. 590.)

JOHN H. WISHEK *vs.* CASSIUS C. HAMMOND.

Opinion filed December 5, 1900.

Appeal—Acceptance of Benefits.

While it is a general rule that a party cannot appeal from a judgment after he has to any extent accepted the benefits thereof, yet, where a decree consists of two distinct parts, the receipt of benefits under one portion will not bar an appeal from the other portion, where such appeal cannot in any manner affect that portion under which the benefits were received.

Dissolution of Partnership—Division of Assets.

Where a decree dissolved a partnership between the parties to the action, and directed the division between them of certain specific partnership assets, and also gave one partner a money judgment against the other for a certain amount, but in no manner made such judgment a lien upon the share of the assets belonging to the debtor partner, and the specific assets were subsequently divided as directed, and afterwards the debtor partner appealed from the money judgment, the other party cannot be heard to say that by the division he was deprived of the right to have his judgment declared a lien upon the share of the partnership assets belonging to the debtor partner, under section 4377, Rev. Codes 1899. He lost that right when he failed to secure it under his decree.

Contract to Secure Public Office and Divide Salary—Void.

A provision in a partnership contract by which the parties agree to procure the appointment of one partner to a public office, and that the fees arising from such office shall inure to the benefit of the firm, comes within the prohibition found in sections 6911, 6912, Rev. Codes 1899, and is void.

Judgment Modified.

Judgment below modified on certain questions of fact discussed in opinion.

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

Action by John H. Wishek against Cassius C. Hammond. From the judgment, both parties appeal.

Modified.

A. W. Clyde, for plaintiff.

L. T. Boucher, for defendant.

BARTHOLOMEW, C. J. The motion to dismiss the defendant's appeal must be denied. It is based upon the proposition that appellant has accepted a benefit under the judgment, and thereby waived his right of appeal, or estopped himself from exercising such right. The action was in equity for the dissolution of a partnership and an accounting. The plaintiff and defendant had been partners in the real estate business for some years. It appears that, when the action was brought, appellant was in possession of the assets of the firm, consisting of notes and accounts and an amount of money. The decree dissolved the partnership, and directed that the notes and accounts be equally divided between the parties; and, if they could not agree upon a division, then such assets were to be sold by the sheriff, and the proceeds divided. The respondent also recovered a money judgment against the appellant for the sum of $866.99. Subsequently the parties met and amicably divided the notes and accounts, and each received his share in severalty. Thereafter appellant gave notice of appeal from the judgment, and he asks to have certain specified issues of fact retried. Cases of this character come to this court for trial de novo, but the appellant may specify in his statement what particular issues of fact he desires to have retried, where he does not desire a retrial of all the issues, and in such cases all the issues not so specified shall be deemed properly decided by the trial court. Rev. Codes 1899, § 5630. In this manner a party may, in effect, appeal from only a part of a judgment or decree. In this case one of the contentions of the parties related to the disposition of the sum of $1,134.44, which had been received as commissions for the sale of certain Northern Pacific Railroad lands. Appellant claimed one-half of said sum. Respondent claimed that the sale of railroad lands was an individual deal of his own, and did not enter into the partnership transactions. The court held with respondent. Appellant asks a retrial of that question of fact. He also asks a retrial of a question of fact relating

to the payment of certain rent, wherein he claims he should have received a credit for $50, which was denied. No other matters are specified; hence all other questions of fact involved were, for the purposes of this appeal, correctly decided by the trial court. It is clear that a retrial of these questions can in no manner affect the decree below, so far as it related to the division of the notes and accounts. It can affect the amount of the money judgment, and that only. In *Tyler* v. *Shea,* 4 N. D. 377, 61 N. W. Rep. 468, this court had occasion to discuss the questions here involved, to some extent. The general rule that a party may not accept the benefits of a judgment, and afterwards appeal therefrom, was fully recognized; but it was also shown that a party who had recovered benefits under a judgment might subsequently appeal from a part of the judgment, where his appeal could in no manner affect that portion of the judgment under which the benefits were received. We there said: "It is the possibility that his appeal may lead to a result showing that he was not entitled to what he had received under the judgment appealed from that defeats his right to appeal. Where there is no such possibility, the right to appeal is unimpaired by the acceptance of benefits under the judgment appealed from." And again: "But if it be possible for him to obtain a more favorable judgment in the appellate court, without the risk of a less favorable judgment from a new trial of the whole case there or in the lower court, then the acceptance of what the judgment gives him is not inconsistent with an appeal for the sole purpose of securing, without retrial of the whole case, a decision more advantageous to himself." See cases there cited, and also *Goodlett* v. *Investment Co.,* 94 Cal. 297, 29 Pac. Rep. 505; *McIntyre* v. *Bank,* 59 Hun, 536, 13 N. Y. Supp. 674; *Hayes* v. *Nourse,* 107 N. Y. 578, 14 N. E. Rep. 508; *Souder's Appeal,* 57 Pa. St. 498. It is sought, however, to make the distinct portions of the decree interdependent, by claiming that respondent had a right under section 4377, Rev. Codes 1899, to have his money judgment declared a lien upon appellant's portion of the partnership assets, and that by the division the appellant has received his share of the assets freed from any such lien. It is enough to say that the decree below, which, in so far as it is not appealed from, is conclusively presumed to have properly adjudicated the equities between these parties, gave no such lien, but ordered a disposition of the firm assets that was hopelessly inconsistent with any such lien. The assets were as free from lien before division as after. It may be true that before division respondent might have appealed, and had such a lien declared by this court; but, if he saw proper to waive that privilege by dividing the assets, if any benefit accrued to appellant it was by reason of the waiver, and not under the judgment. Doubtless the division of the assets precluded each party from thereafter appealing from the entire decree, but not from the money judgment. It may be urged that respondent would not have consented to such division had he not understood that it

was an acceptance of the entire decree, and that no further litigation was to be had, and that the case presents an estoppel *in pais*. Such may have been the views of respondent, but there is nothing to show that appellant shared those views. The right of appeal is always favored. It may be waived by contract, but such contract must be in writing, based upon a sufficient consideration, and filed in the case. *Mackey* v. *Daniel*, 59 Md. 487; *Dawson* v. *Condy*, 7 Serg. & R. 366. It may be waived by conduct, but the intention to waive must be unmistakable. *Jonhson* v. *Clark*, 29 La. Ann. 762; *Sloane* v. *Anderson*, 57 Wis. 128, 13 N. W. Rep. 684, 15 N. W. Rep. 21; *Hixon* v. *Oneida Co.*, 82 Wis. 515, 52 N. W. Rep. 445. The motion is denied.

Turning now to the case upon the merits, we find that it is a double appeal. Each party has appealed, or attempted to appeal, from the money part of the judgment. The defendant, having first perfected his appeal, will be designated as appellant herein. Certain issues were made in the pleadings. These were narrowed at the trial by the proofs, and still further limited in the findings made by the trial court. The record before us is not a model in any respect. We have experienced difficulty in determining just what questions of fact are before us. Particularly is this true of the case presented by plaintiff's appeal. In his abstract he presents 17 so-called questions of fact, covering 4 printed pages, to which he expects this court to respond. None of them presents in any clearly defined manner any issue of fact made by the pleadings or covered by the testimony, or specifically found by the trial court. And yet indirectly they bear upon the question of the amount of the money judgment. We shall therefore assume, for the purposes of the case, that they are sufficient to enable us to review the questions of fact raised by the pleadings, bearing upon the amount of the recovery, and in so far as they were ruled adversely to the plaintiff by the trial court. We have already stated the questions which the defendant desires to have retried. The partnership agreement between these parties is dated January 2, 1895, and designates respondent as party of the first part and appellant as party of the second part, and recites as follows "They are to do conveyancing; make proofs, contests, and filings upon government lands; make loans on real estate for companies and private parties; collect land interest and make foreclosures of real estate mortgages; in fact, do a general collecting business. * * * They are to do a general abstracting of title business in the name of said second party, the bonds for the same to be furnished by both parties. They are to procure the appointment of said second party as commissioner of the United States Court, and all money which may arise from proofs made and other business transacted by said commissioner is to be equally divided. They are to have their office in the building owned by the said party of the first part, and are to pay him the sum of $100 per year for the first year for rent, and as may be agreed

upon after the first year." The complaint claims the sum of $500 was received by the defendant after October, 1, 1896, for taking and certifying in his official character, either as United States Court commissioner or as clerk of the District Court, proofs which were placed before him by the firm, and for doing other partnership business, which said sum has not been accounted for by defendant. No finding upon this point appears among the findings made by the trial court. We find no evidence that defendant received any money whatever from partnership business that he has not accounted for, unless it be for final proofs, as above specified. It appears that pursuant to the provision in the contract, and chiefly at the instigation of respondent, the appellant was appointed United States Commissioner in the spring of 1895. It should be stated that under the contract the firm business was transacted in the name of J. H. Wishek, that being respondent's name. This arrangement, as we understand it, was for the purpose of allowing the proofs in the firm business to be done before the appellant, as such court commissioner. Prior to October 1, 1896, some final proofs, affidavits, etc., were made before such commissioner, and the fees arising therefrom were treated as firm assets. But the greater part of the proofs made by the firm were made before the clerk of the court until that official resigned, some time in the summer of 1896. As we understand the record, there was an appointee to fill that position on or prior to October 1, 1896, and at the ensuing general election appellant was elected to that office. But after the date last named it does not appear that any fees for final proofs made before appellant, whether as commissioner or clerk, were treated as firm assets. We find from a memorandum opinion of the trial court, which is in the record, that the court did not recognize any right of the firm to such fees, and in this the court was clearly right. The office of clerk of the District Court came to appellant months after the partnership was formed. So far as the record shows, it was in no manner in contemplation when the partnership contract was executed. Any emoluments arising therefrom would, of course, be the individual property of appellant, unless he agreed to turn them in as firm earnings. The undisputed testimony of both parties is directly opposed to this. He absolutely refused, when solicited by respondent, to do anything of the kind. The contract provided that the parties should procure appellant's appointment as court commissioner, and that the fees, as such, should become partnership assets. This provision of the contract is prohibited by express statute (sections 6911, 6912, Rev. Codes 1899), and is therefore void. It is also void as against public policy. Throop, Pub. Off. § 50; Mechem, Pub. Off. § 351. As both parties are here claiming under other provisions of the contract, we do not stop to investigate the effect of this void provision upon the whole contract, but accept the practical construction of the parties, to the effect that the contract may be stripped of the void provision, and yet stand as a valid contract. Plaintiff is entitled to

nothing under this first claim in his complaint. Nor do we find him entitled to anything under claims numbered 4, 5, and 6, beyond what was allowed in the trial court. These are the only claims that were ruled in whole or in part against plaintiff, and it follows that upon his appeal the judgment of the trial court must be affirmed.

The firm, during its existence, occupied office rooms in a building belonging to respondent, and for which he seeks in this action to recover certain rent. The contract fixed the rental for the first year at $100, and left it to be adjusted thereafter. The firm was in existence from January 2, 1895, until May 15, 1897. The trial court allowed the rental for the entire time of 2 years, 4 months, and 13 days at the rate of $100 per year, making appellant's portion thereof $118.43, which amount is included in the judgment against appellant. This was clearly an oversight, as the complaint only claimed rent from January 2, 1896, and both parties testify that the rent for the first year was paid. The judgment must be reduced $50 by reason of this error.

But the principal contention in this case, and that to which three-fourths of all the testimony was directed, relates to the sum of $1,134.45 received by appellant as commissioner for the sale of Northern Pacific Railroad lands. Respondent insists that this money is his individual property, while appellant insists that it is firm property. No objection is made to plaintiff's recovery in this form of action. The trial court found in favor of plaintiff on this issue, and the one-half of said amount which had been retained by appellant is included in the judgment of the lower court. We reach a different conclusion. The burden was upon plaintiff. True, the partnership contract mentions no such business, and for the very sufficient reason that no such business was then possible in that locality. The railroad lands were not on the market until May or June following. Before that time a few persons had requested the members of the firm to write letters for them, making applications for lands. But in so doing they acted entirely for such parties, and neither member of the firm represented the railroad company in any manner before the lands were placed on the market. When that was done, however, they obtained blanks, and began taking applications to purchase said lands, although they obtained no contract of agency until in May, 1896. But that they expected and desired to get such contract at all times after the lands were on the market, and that they expected such contract would be a firm contract, and that the business would be firm business, is too clear for doubt; and this is true even if we disregard appellant's positive testimony. Respondent testifies: "My procuring the agency began in 1895." "That was after our partnership." When asked if he did not consult with appellant before making the agency contract relative to the commissions to be charged, he answered: "Yes; yes, indeed." He was then asked: "So he understood in 1895 that you were to get a contract to sell these lands for the firm, and that the business was

to be done by the firm?" And he answered: "That was the understanding, exactly." He further said: "We would have done the business for one per cent. We very anxious to do it." Respondent undertakes to avoid the force of this by saying that after he obtained the contract he told appellant that he had agreed to get photographs of different houses, and have them lithographed and put out in a book, and that he had hired a Mr. Miles to do the work, and that there would be expenses incurred in getting the business fixed, and that thereupon appellant said he would have nothing to do with it, and respondent said he would take the business himself. Appellant swears positively that no such conversation ever occurred. Giving the parties equal credibility, respondent must fail, as he had the burden. But there is much in the record that corroborates appellant. It appears that the expenses contemplated in getting out the book were to be paid by the railroad company, and not by the firm. It appears that no such book was ever gotten out, and none of the alleged expenses were ever incurred. There is no provision in the written contract of agency for any such thing. Further, it is undisputed that a portion of these commissions came from applications that had been taken before there was any agency contract in existence. And still more convincing is the undisputed fact that appellant's relation to the railroad land business continued just the same after the contract was received as before, and respondent testifies that appellant continued to do more of the work, perhaps, than he (respondent) did. There is much more in this testimony that we think corroborates appellant, but we shall not follow it further. We are clear that the sale of railroad lands was intended to be and was a part of the firm business, and the commissions received therefrom were firm assets. No question of law is raised upon this branch of the case. It follows that the judgment for the sum of $866.99 should be reduced by the sum of $50, by reason of the inadvertence in computing the rent, and by the further sum of $567.22, being the one-half of the commissions received for the sale of railroad lands, and money judgment should be entered in favor of plaintiff and against respondent for the remainder, to-wit: the sum of $249.77; and the District Court of McIntosh county will modify its judgment accordingly. Defendant will recover his costs in this court upon both appeals. Modified and affirmed. All concur.

(84 N. W. Rep. 587.)

ALPHEUS BOYD *vs.* HENRY W. WALLACE, *et al.*

Opinion filed December 15, 1900.

Judgment—Res Judicata.

One who is not a party defendant on the record in an action, but who participates in the defense, and has an interest in the matter in controversy in the action, and participates in the defense for the

protection of such interest, and not as representing the interest of the defendant of record, and where it is known to the plaintiff that such party so participates for the protection of his own interest, is bound by the decree rendered in the action.

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

Action by Alpheus Boyd against Henry W. Wallace and E. A. Taylor. Judgment for defendants, and plaintiff appeals. Affirmed.

W. J. Mayer and *Cochrane & Corliss,* for appellant.

Bosard & Bosard, for respondents.

BARTHOLOMEW, C. J. This is an action to determine adverse claims to real property. Plaintiff stands upon a naked legal right. He cannot adduce one equitable consideration to support a decree in his favor. In 1889 he received patents from the general government for two quarter sections of land in Pembina county. Some time thereafter he mortgaged each quarter section for the sum of $1,000. He failed to pay any interest upon these mortgages, and in due time they were foreclosed and the land sold under the foreclosure, and in the fall of 1896 the time for redemption from such sales was about to expire. Plaintiff was unable to procure a loan upon the land of a sufficient amount to enable him to redeem. In this condition he applied to the defendant Wallace, whose financial standing was evidently better, and requested him to take a deed of the land, and negotiate a loan thereon for an amount sufficient to redeem the land. Plaintiff at that time represented that it would take about $2,300 to redeem from the foreclosure sales. As an inducement to Wallace, plaintiff also agreed that Wallace might hold the land as security for a debt owing by plaintiff to Wallace, and another debt owing by plaintiff to a brother of Wallace. The proposition was accepted, and on November 23, 1895, plaintiff, Alpheus Boyd, and his wife, Lucy A. Boyd, executed and delivered to the defendant Wallace a warranty deed for said land, but no claim is made that said deed was not taken as security as aforesaid. Investigation disclosed that a much larger amount than plaintiff had represented was required to clear the title to the land so that another incumbrance could be placed thereon It appears that the taxes had not been paid on the land, and there was a large amount due for taxes, and there were also judgments against plaintiff. Wallace negotiated a loan upon the land for $2,650, but a further amount was required to clear the title, which said amount was advanced by Wallace from his own funds, and the sum so advanced, together with the debts owing to Wallace and his brother, amounted to the sum of $977.55. In May, 1896, the parties again came together to adjust their matters. There is some conflict as to what occurred at this time, but we state the facts as we find them from the evidence. Plaintiff made objections to the amount claimed by Wallace, insisting that it was too large, and objected to giving any notes for

such sum; but Wallace stated, in effect, that if any mistake had been made it would be corrected. Thereupon the sum was divided into two notes, maturing at different times. These notes were signed by Lucy A. Boyd, the plaintiff's wife, and at plaintiff's request Wallace executed to Lucy A. Boyd a contract for a deed for said land upon payment of said notes; the deed to be subject to the incumbrance which Wallace had put upon the land for plaintiff's benefit. This was in effect a substantial compliance with the original understanding. There is no clear reason disclosed why the contract was given to Mrs. Boyd, unless it was because other persons were pressing plaintiff. There is nothing in the suggestion that plaintiff refused the contract because Wallace sought thereby to ignore the security feature of the original transaction. The contract was in express recognition of that feature. Plaintiff testifies that he insisted that, when the deed should be given, it must be given to him. If that be true, then the wife became the trustee for her husband. This is not unreasonable. There is no pretense that the wife had any property interest in the land, or that she had any independent property. The land belonged to the husband. He was the real party in interest. If, however, for his own convenience he requested to have the contract made in the name of his wife in fulfillment of the obligation of Wallace to him, he cannot repudiate or ignore the contract thus made. After said contract was given, Wallace transferred the notes secured thereby to his co-defendant, Taylor, and also conveyed the land to Taylor, subject to the contract with Lucy A. Boyd. The said notes not being paid at maturity, Wallace and Taylor, as plaintiffs, brought an action against Lucy A. Boyd to foreclose the contract, and such proceedings were had therein that a decree was entered directing the land to be sold to satisfy the amount due upon said notes. The land was regularly sold pursuant to said decree, and bought by the defendant Taylor, who in due time received a sheriff's deed therefor. On the trial of the case at bar, plaintiff relied upon his patent title. Defendant Taylor relied upon said sheriff's deed. It is clear that if plaintiff is not bound by the decree in the case of Wallace and Taylor against Lucy A. Boyd, then he is the owner of the land, subject to the mortgage (warranty deed in form) given to Wallace. But the trial court held that he was bound by such decree, and such holding receives our unqualified approval. It must be remembered that this plaintiff was the real party in interest as defendant in that case, and that, while Lucy A. Boyd was the party named in the contract, she was the nominal party only, holding simply as a naked trustee for her husband, and that the beneficial property rights sought to be foreclosed were the rights of Alpheus Boyd, and that the plaintiffs in that action must have so known. No doubt, Alpheus Boyd would have been a proper party defendant in that action, but he may be bound nevertheless. The evidence shows that such case was pending for some time, and the defendant at different times was

represented by four different attorneys, each and all of whom were employed by this plaintiff. Lucy A. Boyd consulted with none of the attorneys, and gave no directions for the conduct of the case. The answer in that case was drawn under the directions of this plaintiff. It sets forth the same matters that would have been pleaded had Alpheus Boyd been a defendant on the record. It states that the contract running to Lucy A. Boyd was for the benefit of Alpheus Boyd, and that it was made in pursuance of the agreement entered into on November 23, 1895, when the so-called warranty deed was given to Wallace, and was a part of that agreement. It asserts that, when said contract was made, Alpheus Boyd was not indebted to Wallace in the sum specified in the notes secured by the contract, or in any sum. This plaintiff procured continuances in that case upon his own application. He resisted the appointment of a receiver upon his own affidavit. He testified as a witness for the defense. In short, he conducted the case in all respects as he would have done had he been named as defendant, and the answer showed that he was the only party who had any beneficial rights therein to be defended. These conditions existed: (1) He participated in the defense of that action; (2) he was interested in the very matter in controversy in that action; (3) he participated in such defense for the protection of his own interests, and not as representing any interests of Lucy A. Boyd; (4) it was fully known to the other party to the action that he defended for the protection of his own rights, because the answer so disclosed. That he is bound by the decree, under such circumstances, has been too often decided to require further discussion. See *Stoddard* v. *Thompson*, 31 Ia. 80; *Valentine* v. *Mahoney*, 37 Cal. 389; *Harvie* v. *Turner*, 46 Mo. 444; *Stanford* v. *Lyon* (N. J. Err. & App.) 7 Atl. Rep. 869; *Society* v. *Manchester* (R. I.) 23 Atl. Rep. 30; *Cramer* v. *Manufacturing Co.*, 35 C. C. A. 408, 93 Fed. Rep. 636; *Brady* v. *Brady*, 71 Ga. 71; *Association* v. *Rogers*, 42 Minn. 123, 43 N. W. Rep. 792; *Williams* v. *Cooper* (Cal.) 57 Pac. Rep. 577. The decree of the trial court is in all things affirmed. All concur.

(84 N. W. Rep. 760.)

F. W. REYNOLDS *vs.* JOSIAH STRONG.

Opinion filed April 15, 1901.

Chattel Mortgage—Validity—Description.

A chattel mortgage upon the future earnings of a threshing rig, which describes the engine and separator by naming the manufacturers thereof and giving other suitable description of power and size, and names the owner and operator of such rig, and the period when and the county where such future earnings are to accrue, is not void because it omits to state the number of such engine and separator, and the names of the persons against whom such future earnings are to accrue.

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

Action by F. W. Reynolds against Josiah Strong. Judgment for plaintiff. Defendant appeals.

Affirmed.

Coger & Creswell, for appellant.

Mortgages of the earnings of a threshing machine are not valid. *Minneapolis Machine Co.* v. *Skau*, 10 S. D. 636, 75 N. W. Rep. 199; *Sanwich Mfg. Co.* v. *Robinson*, 49 N. W. Rep. 1031. The description was insufficient in that it did not name the person against whom the earnings were to accrue. *Minneapolis Machine Co.* v. *Skau*, 10 S. D. 636, 75 N. W. Rep. 199. Nor should the mortgage be a dragnet covering the whole county. *Muir* v. *Blake*, 57 Ia. 655, 11 N. W. Rep. 621; *Sykes* v. *Hannawalt*, 5 N. D. 335, 65 N. W. Rep. 683. There is no means pointed out in the mortgage of discovering what the net earnings of the machine may be, or any criterion for measuring the same. Third parties are under no obligation to exhaust every possible means of information in an endeavor to interpret a description. *Speery* v. *Clark*, 76 Ia. 506, 41 N. W. Rep. 203. A principal may be charged upon a written contract entered into by an agent in his own name, within his authority, though the name of the principal does not appear in the instrument and was not disclosed, and the party dealing with the agent supposed that he was acting for himself. *Briggs* v. *Partridge*, 64 N. Y. 357; *Waddill* v. *Sebree*, 88 Va. 1012.

Burke & Vick, for respondent.

Future earnings may be mortgaged. §§ 4701, 4705, Rev. Codes. And the owner and operator of the threshing rig may mortgage its future earnings. *Sykes* v. *Hannawalt*, 5 N. D. 335, 65 N. W. Rep. 682; *Sandwich Mfg. Co.* v. *Robinson*, 85 Ia. 569, 89 N. W. Rep. 1051, 14 L. R. A. 126. If the description in the chattel mortgage will enable third persons, aided by inquiries that the instrument suggests, to identfy the property, it is sufficient. 1 Cobbey on Chattel Mortgages, §§ 155, 179; 5 Am. & Eng. Enc. L. 956; Jones on Chattel Mortgages, § 55. The description in the mortgage alone does not identify the party; it only furnishes the means for the identification. *Wilson* v. *Rustad*, 7 N. D. 330; *Union Nat. Bank* v. *Oium*, 3 N. D. 193. It is not necessary that the mortgage should describe the person owing the accounts mortgaged. *Davis* v. *Pitcher*, 65 N. W. Rep. 1005; *Smith* v. *McLean*, 24 Ia. 332; Jones on Chattel Mortgages, § 55, 5 Am. & Eng. Enc. L. 956. Defendant had constructive notice by the filing, and actual personal notice of the mortgage before paying his claim. The filing of the mortgage alone was sufficient notice. §§ 4733, 4734, Rev. Codes; *Hostetter* v. *Brooks*, 4 N. D. 357; *Grand Forks Nat. Bank* v. *Minneapolis & Nor. Elev. Co.*, 6 Dak. 557; *Sykes* v. *Hannawalt*, 5 N. D. 335. And even if the description in the mortgage were so indefinite that the recording thereof did not give constructive notice, nevertheless it was

good as to the defendant, who had actual notice of its existence, and the intent as to the property which it was designed to include. *Plano Mfg. Co.* v. *Griffith*, 75 Ia. 162. The question as to whether the mortgage is against public policy is for the legislature and not for the courts. *Bank* v. *Mann*, 2 N. D. 455, 51 N. W. Rep. 946; *Hostetter* v. *Brooks Elev. Co.*, 4 N. D. 357, 61 N. W. Rep. 49.

YOUNG, J. The single question presented for determination on this appeal is the validity of a certain chattel mortgage upon the future earnings of a threshing rig. Plaintiff is the owner of the mortgage by assignment. The mortgagor did threshing for the defendant during the threshing season of 1899. The amount of his threshing account was $125.50. The plaintiff seeks to recover thereon, and bases his right thereto upon the mortgage in question. The defense attacks the validity of the mortgage, and payment of the account is alleged. The mortgage in question was duly filed in the office of the register of deeds of Pembina county, wherein the threshing rig was situated and operated, and where the above account accrued. In addition, the defendant had actual notice of the existence of the mortgage prior to making payment. The case was tried in the District Court without a jury. Plaintiff prevailed. Defendant appeals, and requests a trial de novo in this court. The evidence upon which the case was submitted in the trial court consisted of a written stipulation of facts, none of which are in dispute, and no further reference to them is necessary. Confessedly, the entire case hinges on the question of the validity of the chattel mortgage. If it is valid, the plaintiff is entitled to recover; otherwise, not. The opinions of the courts as to the validity of mortgages of future earnings are not in harmony. In this jurisdiction, however, the question is settled in favor of the validity of such mortgages. In *Sykes* v. *Hannawalt*, 5 N. D. 335, 65 N. W. Rep. 682, this court held that "it is competent for the owner and operator of a threshing rig' to mortgage the future earnings thereof." In reaching that conclusion the court was largely controlled by the statute authorizing the creation of liens upon after-acquired property. Comp. Laws, § 4328 (Rev. Codes, § 4680). The Iowa rule, also, is that future earnings may be the subject of a valid chattel mortgage. See *Manufacturing Co.* v. *Robinson*, 83 Ia. 567, 49 N. W. Rep. 1031, 14 L. R. A. 126, and note. The contention of defendant in this case is not that such mortgages are invalid because upon after-acquired property, but that this particular mortgage is void "because the description of the subject-matter thereof is vague and uncertain." It is urged that the failure to give the numbers of the engine and separator is a fatal omission, rendering the description of the threshing rig, from the operation of which the earnings mortgaged were to accrue, entirely insufficient. This objection is not well founded. The description in a mortgage is for the purpose of identifying the property, and the sufficiency thereof must be determined by the character of the property sought to be included in the mortgage. It

does not appear that either the engine or the separator had numbers, and that it was possible to so describe them; but, however that may be, they were sufficiently described otherwise. The separator is described as "one Gaar Scott 40x58 separator, complete, Shop No. ——," and the engine as "one Buffalo Pitts 16 H. P. traction portable engine complete, Shop No. ——." The name of the owner and operator is given, and the county of Pembina and state of North Dakota are named as the place where it is to be operated, and where the earnings mortgaged are to accrue. No doubt, the insertion in the mortgage of the numbers of the engine and separator, if they were numbered, would have made the description more certain. But the description given in the mortgage was in itself, in our judgment, entirely sufficient to enable third persons to identify the property, when aided by such inquiries as were suggested by the mortgage itself, and that is all that is required. 5 Am. & Eng. Enc. L. (2d Ed.) 956. As was said by this court in *Bank* v. *Oium*, 3 N. D. 193, 54 N. W. Rep. 1034: "Whenever a description is challenged as insufficient, we are to inquire whether the creditor, after inspecting the instrument, and aided by the inquiries it suggests, could ascertain what property was intended to be mortgaged." As to this mortgage, as we have seen, the data contained in it made certain the ascertainment of the property intended to be covered by it.

It is further contended that the mortgage is void "because the persons against whom the earnings are to accrue" are not named. This contention seemingly has support in the language of the majority opinion in *Manufacturing Co.* v. *Robinson*, supra, and also in *Machine Co.* v. *Skau* (S. D.) 75 N. W. Rep. 199. An examination of these cases, however, discloses that there were other and controlling grounds for the decisions, and we are not entirely satisfied from the language used by the learned courts that they meant to hold that it is essential to the validity of a mortgage upon the future earnings of a threshing rig that the persons against whom they are to accrue should be actually named. However that may be, such is not our view. We have held that future earnings may be mortgaged. It is not possible to state in advance who the persons are who will owe the accounts. To impose such a statement is to require the impossible. As stated by Beck, J., in his dissenting opinion in *Manufacturing Co.* v. *Robinson*, supra, "The opinion defeats the rights of the holder of the mortgage upon a ground which could not have been provided against." The mortgage under consideration specified the threshing outfit from which the mortgaged accounts were to accrue by naming the manufacturers of both the engine and separator. It named the owner and operator of the rig, and designated the period of time when, and the place where, the accounts were to accrue. A more complete description of future earnings does not seem possible, and in this respect we therefore hold the mortgage is not open to the objection made. The mortgage involved in this case differs in many respects from the one considered in

Sykes v. *Hannawalt*, 5 N. D. 335, 65 N. W. Rep. 682. That case turned upon the fact that the mortgage had not been filed. It is true, the court in its opinion in that case said that "the following description, to-wit: 'all and singular the earnings of the aforesaid rig,' would not cover the earnings of the men and teams." The language quoted was not necessary to a decision of the question involved in that case. However, it has no application to the case at bar, for there is no controversy as to what the mortgage we are considering covered. Counsel for appellant, in his brief, after reviewing its various provisions, correctly states that it covers "all the threshing accounts, and the whole thereof." The element of uncertainty which may have existed in the Sykes case as to the portion of the threshing accounts mortgaged is not in this case. Judgment affirmed. All concur.

85 N. W. Rep. 987.)

WILLIAM H. SANDERSON *vs.* W. H. WINCHESTER, JUDGE.

Opinion filed April 15, 1901.

Certiorari—Application—Party Interested.

Section 6099, Rev. Codes, relating to applications for writs of certiorari, provides that "the application must be made on affidavit by the party beneficially interested." *Held*, that an application for a writ to review an order of a district judge directing the destruction of certain gambling devices, alleged to have been made without, or in excess of, jurisdiction, which application shows that the applicant transferred his entire interest in such gambling devices to another, and has no interest therein at the time of making the application, is not made by "the party beneficially interested," within the meaning of said section.

Application of William H. Sanderson for a writ of *certiorari* directed to W. H. Winchester, judge of the Sixth Judicial District. Writ denied.

Miller & Miller, for plaintiff.

Cochrane & Corliss, and *Oliver D. Comstock*, attorney general, for defendant.

YOUNG, J. Application is made to this court by one William H. Sanderson, requesting the issuance of a writ of *certiorari* directed to Hon. W. H. Winchester, judge of the Sixth Judicial District, and requiring him to certify to this court the proceedings taken before him wherein an order was made for the destruction of certain gambling devices, to-wit: a roulette table, wheel, chips, etc., for the purposes of reviewing such order, which it is alleged was made without authority of law, and in excess of jurisdiction. The writ must be denied, and on grounds which do not relate to the jurisdiction of the district judge to make the order complained of. Section 6099, Rev. Codes, provides the method by which the writ of *certiorari*

may be applied for. It requires that "the application must be made on affidavit by the party beneficially interested." The appliaction before us is made by William H. Sanderson, and is on his affidavit. The affidavit, however, shows affirmatively that he is not the party beneficially interested, in this: that it sets out in detail facts showing that prior to the making of the order for the destruction of such gambling devices he sold the same to one E. J. Berry, for value, and executed and delivered a bill of sale therefor. The facts as to the sale and ownership are also corroborated by the affidavit of Berry attached to the application. The application thus shows affirmatively that the applicant has no interest in the gambling devices which he seeks to save from destruction, and is not beneficially interested, within the meaning of the statute, and is not, therefore, entitled to apply for the writ. Writ denied.

WALLIN, C. J., did not sit at the hearing of the application or participate in the decision. MORGAN, J., concurs.

(85 N. W. Rep. 988.)

WILLIAM N. COLER, *et al vs.* ALFRED COPPIN, *et al.*

Opinion filed April 17, 1901.

School Township—Liability for Debts—Division.

A school township organized under chapter 44 of the Laws of 1883 became by such organization ipso facto liable for the debts of the old districts whose territory was included in such township.

Mandamus to Compel Payment of Judgment.

When a judgment is obtained against such a township on an indebtedness of a school district, and subsequent to the entry of such judgment the township is divided into two school districts, the judgment creditor may proceed to enforce such judgment against such districts, and each will be required by mandamus to levy a tax sufficient to pay its pro rata share of such indebtedness, based upon the amount of its taxable property.

Appeal from District Court, Richland Count; *Winchester,* J.

Action by William N. Coler and others against Alfred Coppin and others for a writ of mandamus to compel the payment of a judgment held by claimants against defendants as directors of Dwight and Ibsen school districts. From a judgment granting the writ, defendants appeal.

Affirmed.

W. E. Purcell, for appellants.

This court is bound to notice that this case has connection with and grows out of one formerly decided by this court. 3 N. D. 249. All questions involved in this proceeding have been adjudicated against the plaintiff by this court. The District Court has acted upon such adjudication and the parties themselves have adopted and

acted upon it, and we are all estopped from reinvestigating it. 1 Herman on Estoppel, 115; *Bank* v. *Gilman,* 3 S. D. 171; *Ben* v. *Shoemaker,* 74 N. W. Rep. 249; *Kramer* v. *Kohn,* 76 N. W. Rep. 937; *Martin* v. *Hunters,* 1 Wheat. 355. The records on the former appeal in this action may be looked into for the purpose of ascertaining what facts and questions were before the court. *Bank* v. *Gilman,* 3 S. D. 171; *McKinely* v. *Tuttle,* 42 Cal. 571; *Little* v. *McAdams,* 38 Mo. App. 187; *Donner* v. *Palmer,* 51 Cal. 629; Subd. 14, § 5713d, Rev. Codes. The Supreme Court has no power to review its former conclusions in the same case. *Dyer* v. *Ambleton,* 19 S. W. Rep. 574; *Brown* v. *Crown,* 3 Ky. 451; *Burwell* v. *Bergwyn,* 105 N. C. 507; *Gaines* v. *Latta,* 148 U. S. 228; *Baxter* v. *Brooks,* 29 Ark. 173; *Martin* v. *Laffland,* 18 Miss. 317. Such questions are only reviewable on rehearing, and a court has no power to review them on a second appeal. *Reid* v. *West,* 70 Ill. 479; *Bell* v. *Woodward,* 47 N. H. 539; *Wyndom* v. *Cobb,* 74 Ia. 709; *McDonald* v. *McKinnon,* 104 Mich. 428.

John L. Pyle, and *McCumber, Bogart & Forbes,* for respondent.

There is no question of the power of the legislature to impose upon a new municipality, which included all or a portion of the territory of the old municipality, liable for the debts of the old corporation, where the property of the latter is turned over to and received by the former under the law. *Mt. Pleasant* v. *Beckwith,* 100 U. S. 514; 1 Dillon's Mun. Corp. 63; *State* v. *Lake City,* 25 Minn. 404; *City of Winona* v. *School District No. 82,* 40 Minn. 13, 41 N. W. Rep. 539; *DeMattos* v. *City,* 29 Pac. Rep. 933; *Laramie County* v. *Albany County,* 92 U. S. 307; *Schriber* v. *Langdale,* 29 N. W. Rep. 547; *Knight* v. *Ashland,* 21 N. W. Rep. 65, 70; *State* v. *Clevenger,* 43 N. W. Rep. 243, 20 Am. St. Rep. 677 and note. Coler School District was absorbed in the Coler School Township under the provisions of chapter 44, Laws 1883, and by section 144 the township assumed and became liable for the district debt.

FISK, District Judge. This is an appeal from a judgment rendered by the District Court of Richland county directing the issuance of a peremptory writ of mandamus compelling the officers of Dwight and Ibsen school districts to levy a tax upon the property of the districts to pay their pro rata share of certain judgments recovered against Dwight school township. This litigation has been before this court twice before, and for a full statement of the facts see opinion of Corliss, J., in 3 N. D. 249, 55 N. W. Rep. 587, 28 L. R. A. 649, and 7 N. D. 418, 75 N. W. Rep. 795. In the first appeal it was strenuously insisted by counsel for Dwight school township that there was no liability, upon the ground, among others, that, as the indebtedness to collect for which an action was commenced was incurred by school district No. 22, Dwight school township, which was organized under Chap. 44 of the Laws of 1883, and

which included within its boundaries the old district No. 22, and certain other districts, did not become liable until there had been a settlement between the several old districts included within such school township. He contended that, until the old districts adjusted their differences between themselves and the new school township, the new school township organization was not completed, and hence that no liability attached. In other words, that settlement between the several old districts within the school township created by the law of 1883 was a condition precedent to the absolute liability of the newly-created school township. This court, upon that appeal, overruled this contention, holding that such settlement was not a condition precedent to the organization or liability of the school township, and affirmed the judgment of the District Court holding the township liable. See 3 N. D. 249, 55 N. W. Rep. 587, 28 L. R. A. 649. Subsequently, and upon application of defendants' counsel, this court attempted to modify said judgment by directing that a provision be inserted therein as follows "This judgment is to be enforced subject to the provisions of sections 136-141, chapter 44, Laws 1883, the debt on which it is rendered being a debt subject to equalization as therein provided." This modification was directed under the belief that the judgment creditors could not compel the levy of a tax by the defendants until such creditors had secured an equalization of taxes under the statute. This was clearly erroneous, as these sections have no relevancy to the question at all, and the attempted modification is without any force or effect whatever. As said by Corliss, J., in 7 N. D. 421, 75 N. W. Rep. 796: "The sections of the statute subject to which we said the judgment must be enforced have no relevancy whatever to the question of the enforcement of such judgment; and the clause inserted in our judgment, was mere idle surplusage." Under the provisions of section 144 of said chapter 44, Laws 1883, all debts of the old districts were assumed by and became the debts of the new school township, and all judgments recovered against the latter upon such debts should be enforced the same as any other judgments against such townships. It follows, therefore, that the plaintiffs have an unqualified judgment against Dwight school township which they are entitled to collect in the usual manner. The entry of such judgment was a final adjudication as to the liability of such school township, and upon affirmance by this court all controversy as to such liability was thereby forever foreclosed. But, even if this were not so, we would unhesitatingly approve the reasoning, and reassert the doctrine enunciated in the first opinion of this court upon this branch of the case as reported in 3 N. D. 249. 55 N. W. Rep. 587, 28 L. R. A. 649, and we expressly disapprove and overrule the language used in the opinion in 7 N. D. 418, 75 N. W. Rep. 795, in so far as it conflicts with these views. What was said in the latter opinion upon this subject could not change the law of the case as settled in the first action; and, furthermore, such language was purely *obiter*

dicta, as we held that there was no appeal, the order attempted to be appealed from not being a final order. Counsel for appellants presents a very plausible argument in support of his position, but the fallacy thereof consists in the fact that he builds his entire argument upon a false premise. He asserts that the judgment as modified by this court provides for its payment only in a certain manner, and that this, whether right or wrong, is the law of the case, etc. It stands with exactly the same force and effect as though no modification had been attempted. The clause attempting to modify it was wholly meaningless and nugatory, and hence every one must treat the judgment as an unconditional judgment for the payment of money to be enforced as all judgments are enforced.

This disposes of all questions raised by appellants except one, which we will now briefly consider. After the liability of Dwight school township was fixed by judgment, the territory originally constituting such school township was divided into two civil townships. By this division two new school districts were by law created, and they are known as "Dwight" and "Ibsen" school districts, respectively. Both immediately organized themselves into school corporations, and both were made parties, and answered in this proceeding. Each, by the act of incorporating, became liable for its proportionate share of the indebtedness of the old township. The trial court apportioned such indebtedness according to the taxable property in each district, but counsel contends that the court had no right to do this, and that such apportionment should not be based upon the taxable property, and he refers to those provisions of the law relating to settlements between districts and the levy of an equalization tax to adjust such differences. We must overrule this contention, as we are convinced that each district should be required to levy a tax to pay its just proportion of the indebtedness of the old district according to the proportion of its taxable property. In other words, the entire taxable property which was formerly included in the school district is liable for the payment of this indebtedness, and by dividing the township each new district would be liable to such pro rata share of the indebtedness as the amount of its taxable property bears to the entire indebtedness, and the new districts thus formed would be left to adjust between themselves all differences as to their assets and liabilities. The creditors have no concern with their adjustment of such differences. Some courts have gone to the extent of holding that each new district is liable, and may be required to pay the entire indebtedness of the old district, and then look to the other district or districts for contribution. *Plunket's Creek Tp.* v. *Crawford,* 27 Pa. 107; *Hughes* v. *School Dist.,* 72 Mo: 643. In the Missouri case it was held that where, by statute, a municipal corporation is abolished, and several new ones are created in its stead, and no provision is made as to the payment of existing debts, each of the new corporations is liable for them all; and in the latter case it was held that on the division of a township

each fraction remains liable for the whole debt owing by the old township, and that, if one pays the whole amount, it lays the foundation for contribution. We are clearly of the opinion that these school districts are each liable for at least their proportionate share of these judgments according to their taxable property, and that their officers may be required by mandamus to levy a tax sufficient to pay the same. Finding no error, the judgment of the District Court is affirmed.

MORGAN, J., being disqualified, Judge Fisk of the First Judicial District sat by request.

(85 N. W. Rep. 988.)

A. E. CLENDENNING *vs.* M. E. HAWK.

Opinion filed April 26, 1901.

Agent to Lease Cannot Let to Himself.

An agent clothed with authority to lease the lands of his principal is not authorized to lease the same to himself. Such authority extends to leasing to third persons, and a lease attempted to be made to himself, in reliance upon such agency, is wholly unauthorized, and without force or legal effect as a contract.

Ratification of Acts of Agent—Rights of Third Parties.

The rule that a principal may validate the unauthorized acts of his agent by ratification, so as to make them valid from their inception, is modified by the proviso that such ratification cannot affect the rights of third persons which have intervened prior to such ratification.

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

Action by A. E. Clendenning against M. E. Hawk. Verdict for defendant, and plaintiff appeals.

Reversed.

Benton, Lovell & Holt, for appellant.

Tilly & McLeod, for respondent.

YOUNG, J. This is an action to recover damages for the alleged conversion of a quantity of grain upon which plaintiff claims to have had a mortgage. The case has been tried twice in the District Court, and this is the second appeal to this Court. At the first trial a verdict was directed by the Court for the defendant. A motion for new trial was made and overruled. The order overruling the motion was reversed upon appeal to this Court. See *Clendenning v. Hawk,* 8 N. D. 419, 79 N. W. 878. A new trial was had, and a verdict was returned by the jury for the defendant. Plaintiff again moved for a new trial. His motion was denied, and this appeal is from the order denying such motion. The motion is based upon alleged errors of law occurring at the trial, relating both to the

admission of evidence and to the instructions, as well as upon the alleged insufficiency of the evidence. The last ground, namely, the insufficiency of the evidence, is the only one we shall consider, inasmuch as it is entirely decisive in appellant's favor. It is agreed that but a single ultimate fact is involved, and that is the ownership of the grain upon which plaintiff claims to have a mortgage. Plaintiff contends that it is established by undisputed evidence that it was owned by Keep, the maker of the mortgage. The defendant contends that the jury were warranted in finding that it was owned by her husband, W. J. Hawk, and that it was not, therefore, covered by plaintiff's mortgage. This presents the only question in the case. It is conceded that all other elements necessary to a recovery by plaintiff are established by undisputed evidence. Reference, therefore, will only be made to such evidence as bears upon this one question. For a more complete statement of facts, see the opinion in the former appeal.

Plaintiff's chattel mortgage covered three-fourths of the grain to be grown in 1896 upon section 25, in township 140, range 55, in Cass County. The mortgage was given by J. M. Keep, and was duly filed in the office of the register of deeds of Cass County. The land described in said mortgage was owned by Enoch Noyes, Samuel A. Reynolds, and Mrs. J. R. Bond, all of whom were nonresidents. They styled themselves as the "Maryland Land Company." Keep, the mortgagor, was their tenant, and was in possession of said land under a written lease from the owners thereof, which lease gave him the entire and exclusive possession from November 1, 1895, to November 1, 1896. The lease contained none of the special and peculiar provisions by which such instruments are now generally incumbered. It provided that as rent for the premises Keep should deliver at the elevator at Buffalo, N. D., one-fourth of the grain grown thereon. The owners reserved a right to re-enter in case of default in paying such rent. Keep prepared the land for crop, seeded it, harvested and threshed the grain, and delivered one-fourth of it at Buffalo, as provided in the lease above referred to, and in due time it was sold, and the proceeds remitted to the owners of the land. The grain in controversy is the remaining three-fourths. If these were the only facts, it would be readily conceded that Keep owned the grain in question, and that it was covered by the mortgage.

What are the facts upon which the alleged ownership of Hawk is based? They are few. A large amount of evidence was introduced by the defendant for the purpose of showing that her husband, W. J. Hawk, who she alleges was the owner of the grain in question, was the agent of the owners of the land for leasing purposes. This is flatly contradicted by the owners, but, for the purpose of this decision, it may be conceded that he had the power to make leases as claimed. It is upon an alleged exercise of this assumed agency that his alleged ownership of the grain in controversy is

based. But before considering this we will refer to an individual transaction between Hawk and Keep, the legal effect of which appears not to have been clearly understood, either at the former or present trial. It appears that on May 14, 1896, a written contract was entered into between Keep, the tenant, and defendant's husband, with refernce to the crop in question, a portion of which crop was then seeded. This document names "W. J. Hawk, agent," as the first party, and J. M. Keep, as the second party. By its terms Keep agreed "to cultivate and crop, during the year 1896," the land in question; "to do all the work; haul the seed from whatever place the first party shall direct; sow, harvest, and thresh and deliver all of said grain at Buffalo, N. D., in due and proper season, at his own cost and expense, * * * in the name of the first party." Hawk agreed therein to pay to Keep the sum of four dollars per acre for all land cropped. The instrument also contained the following provision: "First party [Hawk] can have power to enter upon the premises and take possession of same and complete this contract himself, or by agent, at any time the second party should fail to do the work in a good and farmlike manner, and in proper season." The subscriptions to the instrument were "W. J. Hawk, Agent of First Party," "J. M. Keep, Second Party." Keep denies that this contract ever became operative, for reasons which we need not now consider. The character of this contract, and its effect upon the lease then existing and in force between Keep and the owners of the land, were considered on the former appeal. We said: "This is clearly a contract between Keep and defendant's husband. Whether it was consummated, and what its legal effect was, as between the parties thereto, it is not necessary for us to discuss; for it is plain that, under any construction, it could not alter or supersede the lease of December 6, 1896, made by the owners of the land. The ownership of the grain in question is to be determined by the contract in force at the time it came into existence. That, as we have seen, is the original lease, which, as between the parties, has not been in any way affected by the subsequent arrangements of those who were not immediate parties thereto." There is no pretense or claim that in making this contract Hawk was acting as agent for the owners of the land, so as to make it their contract, and thus bind them to its terms. On the contrary, its existence was not made known to them until after the grain was in the elevator at Buffalo, when they promptly disclaimed any responsibility therefor. Hawk himself, even, does not claim that he made it for his principals, but expressly declares that he was acting for himself. Neither does he claim that any act has been done by way of ratification to make it the contract of the owners of the land. The instrument thus stands in the record before us just as it did in the former appeal, as an individual transaction between Hawk and Keep in itself without force and virtue to supersede or alter the contract of lease between Keep and the owners of land under which the former was in possession. Not only was this contract ineffective to avoid the lease, but

it was in fact unattended by any change in Keep's relation to the land. He remained in possession and proceeded with his farming operations just as though no such document was in existence. Hawk did not take possession of the land, and by the terms of the instrument was not entitled to enter, until a default had occurred, which it appears never took place. But had Keep let Hawk into possession, apparently it would not have made any difference; for the rule is that "if a tenant permits a third person to occupy the premises, in the absence of any recognition by the landlord, it is equivalent to his personal occupancy, and is followed by the same consequences." *Bacon* v. *Brown,* 9 Conn. 334.

So far the facts are substantially the same as in the former appeal, and our construction is ruled by our former decision. One proposition, however, is now presented which was not then urged or considered. It is that Hawk, by virtue of his agency for the owners of the land for leasing purposes at or about the time he made the cash contract with Keep, leased the land to himself; in other words, that he, as agent for the owners and on their behalf, made a contract with himself individually, whereby for them he transferred to himself the right to possess and use the land in question for the cropping season of 1896. No such pretended lease was disclosed to his principals. Neither does it appear that at any time he has named the duration or terms of such alleged lease to himself, so that it is doubtful whether the mere statement that he leased the land to himself could in any event rise to the dignity of a contract. His statement appears to be his construction of his acts, and is perhaps to be attributed to the exigencies of the complicated situation in which he finds himself, rather than as a declaration that he actually took steps to lease the land to himself. We may assume, however, that so far as he had power, he did lease to himself. The question at once arises, had he such power? Can a person occupy the double positions of agent of one party to a contract, and be himself the other party to it? In other words, can a person be at the same time a vendor and vendee, or lessor and lessee, in the same transaction? The principle is the same in either case, for the agent stands in the place of his principal. Clearly not. The positions are conflicting, incompatible, and impossible. Their interests are adverse, rendering the union of the dual powers impossible in one person. If this were the first time the question had arisen, we should not hesitate for an answer. There is, however, an unbroken line of authorities on the question. The principle is stated in 4 Kent, Comm. 438, as follows: "A person cannot act as agent for another, and become himself the buyer. He cannot be both buyer and seller at the same time, or connect his own interest in his dealings as an agent or trustee for another. It is incompatible with the fiduciary relation. *'Emptor emit quam minimo potest; venditor vendit, quam maximo potest.'* The rule is founded on the danger of imposture, and the presumption of the existence of fraud inaccessible to the eye of the Court. The policy of the rule is to shut the door against

temptation, and which, in the cases in which such relationship exists, is deemed to be, of itself, sufficient to create the disqualification." This Court adopted and applied the rule in *Anderson* v. *Bank*, 5 N. D. 80, 64 N. W. 114, wherein it was held that an agent to sell notes could not sell them to himself, and that such attempted purchase was in itself illegal and void. The rule, and the reasons therefore are well stated by *Rapallo*, J., in *Dutton* v. *Willner*, 52 N. Y. 312, in the following language: "It is a well settled and salutary rule that 'a person who undertakes to act for another in any matter shall not, in the same matter, act for himself.' It is only by a rigid adherence to this simple rule that all temptation can be removed from one acting in a fiduciary capacity to abuse his trust, or seek his own advantage in the position which it affords him. One consequence of a violation of the rule is that the agent must, at the option of his principal, account to him for any profit he may have made by the transaction. It matters not how fair the conduct of the agent may have been in the particular case, nor that the principal would have been no better off if the agent had strictly executed his power, nor that the principal was not in fact injured by the intervention of the agent for his own benefit. If the agent deals with the subject matter of his agency, or, by departing from the instructions of his principal, obtains a better result than could have been obtained by following them, the principal can claim the advantage thus obtained, even though the agent may have contributed his own funds or responsibility in producing the result. The rule which places it beyond the power of the agent to profit by such transactions is founded upon considerations of policy, and is intended not merely to afford a remedy for discovered frauds, but to reach those which may be concealed; and also to prevent them, by removing from agents and trustees all inducements to attempt dealing for their own benefit in matters which they have undertaken for others or to which their agency or trust relates." The following authorities show the firmness with which the principle has been adhered to by the Courts: *Bain* v. *Brown*, 56 N. Y. 285; *Michoud* v. *Girod*, 4 How. 554, 11 L. Ed. 1076; *Iron Co.* v. *Sherman*, 30 Barb. 553; *Moore* v. *Moore*, 5 N. Y. 256; *Gardner* v. *Ogden*, 22 N. Y. 332, 78 Am. Dec. 192; *Clute* v. *Barron*, 2 Mich. 192; *Dwight* v. *Blackmar*, 2 Mich. 330, 57 Am. Dec. 130; *Moore* v. *Mandlebaum*, 8 Mich. 433; *People* v. *Township*, 11 Mich. 222; *Powell* v. *Conant*, 33 Mich. 396; *Copeland* v. *Insurance Co.*, 6 Pick. 198; *Ruckman* v. *Berkholz*, 37 N. J. Law, 437; *White* v. *Ward*, 26 Ark. 445; *Fry* v. *Platt*, 32 Kan. 62, 3 Pac. 781; *Stewart* v. *Mather*, 32 Wis. 344; *Butcher* v. *Krauth*, 14 Bush. 713; *Pratt* v. *Thornton*, 28 Me. 355, 48 Am. Dec. 492; *Matthews* v. *Light*, 32 Me. 305; *Parker* v. *Vose*, 45 Me. 54; *Banks* v. *Judah*, 8 Conn. 145; *Church* v. *Sterling*, 16 Conn. 388; *Sturdevant* v. *Pike*, 1 Ind. 277; *Kerfoot* v. *Hyman*, 52 Ill. 512; *Cottom* v. *Holliday*, 59 Ill. 176; *Mason* v. *Bauman*, 62 Ill. 76; *Hughes* v. *Washington*, 72 Ill. 84; *Tewksbury* v. *Spruance*, 75 Ill. 187; *Francis* v. *Kerker*, 85 Ill. 190; *Shannon* v.

Marmaduke, 14 Tex. 217; *Scott* v. *Mann,* 36 Tex. 157; *Mechem,* Ag. §§ 455, 462. See, also, *Davis* v. *Hamlin,* 108 Ill. 39; *Valette* v. *Tedens,* 122 Ill. 607, 14 N. E. 52; *Grumley* v. *Webb,* 44 Mo. 444; *Gower* v. *Andrew,* 59 Cal. 119, 43 Am. Rep. 242.

It is urged, however, that this alleged lease was validated by a subsequent ratification by the owners of the land. It is sufficient, for the purpose of determining this case, to say that no acts of ratification are claimed to have occurred prior to the delivery of the grain to defendant's elevator, at which time plaintiff's mortgage interest had attached. It is an elementary principle that the ratification of an unauthorized act will not operate retrospectively to the prejudice of third persons. This principle will be found declared in § 4318, Rev. Codes, which reads: "No unauthorized act can be made valid retroactively to the prejudice of third persons without their consent." It is entirely clear that the ratification of this unauthorized lease, if it was ratified, could not affect the rights of plaintiff, which rights had become fixed long prior to the time the acts relied upon show ratification occurred. The claim of title in Hawk has, then, no foundation in the evidence or in the law. On the other hand, it appears that the lease by virtue of which Keep possessed and cultivated the land was in no way affected by the transaction to which we have referred. He did not surrender the written lease itself by virtue of which he entered into possession. Neither did he abandon or surrender possession of the land. On the uncontroverted facts, he was, as matter of law, the owner of grain grown on said land. Had plaintiff requested a directed verdict in his favor, it would have been error to have denied such motion. No motion, however, having been made, we are not permitted to direct the entry of the judgment in plaintiff's favor to which he is entitled, but are confined to reversing the order denying the motion for new trial. The District Court will reverse its order, and grant a new trial. All concur.

(86 N. W. Rep. 114.)

DANIEL PATTERSON *vs.* A. L. PLUMMER.

Opinion filed May 2, 1901.

Sales—Failure to Deliver—Damages.

The measure of damages recoverable for a breach of an agreement to deliver personal property, where the contract price has not been paid, is fixed by section 4085, Rev. Codes, at the excess, if any, of the value of the property to the buyer, over the amount due on the purchase price.

Presumptive Value—Price at Which Could be Replaced.

Section 5010, Rev. Codes, which provides that the value of property to a buyer is deemed to be the price at which an equivalent thing could within a reasonable time thereafter be bought in the nearest market, is inapplicable as a means of estimating the value of property which in itself, or through an equivalent, has no market value.

Value of Bank Stock—Burden of Proof.

Section 5012, Rev. Codes, which provides that the value of a written instrument is presumed to be that of the property to which it entitles the owner, so far as it is applicable to certificates of stock in a national bank, fixes the presumptive value of such stock at its par or nominal value, and the evidence to show a greater value is upon the person asserting it.

Report of Bank Officers to Comptroller—No Evidence of Value of Stock.

The written report of the officers of a national bank to the comptroller of the currency, made pursuant to section 5211. Rev. St. U. S., does not purport to give the actual or estimated value of the bank's property, and is incompetent, alone, as a basis from which to deduce the actual value of the bank's stock.

Verdict Properly Directed.

It is *held* in this case that a verdict was properly directed for defendant on the ground that no damages had been proved; further, that error was not committed in excluding evidence.

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

Action by Daniel Patterson against A. L. Plummer. Judgment for defendant, and plaintiff appeals.

Affirmed.

W. E. Purcell and P. G. Swenson, for appellant.

Plummer offered and agreed to sell three hundred and fifty-three shares of stock to Patterson at one hundred and thirty-five dollars per share. Patterson gave him a check for the amount. Plummer could not read it without his glasses and Patterson read the check to Plummer, told him it was in payment of three hundred fifty-three shares of stock, and asked Plummer to transfer the stock to him. Plummer made no objection to the check. These facts must be considered in connection with the surrounding circumstances. *Blood* v. *Fargo Elev. Co.*, 1 S. D. 71; *Pearson* v. *Post*, 2 Dak. 220; *Miller* v. *May*, 5 S. D. 468. There is no denial in the answer of the facts in the complaint, wherein it is alleged that Plummer offered and agreed to sell three hundred fifty-three shares of stock. The number of the shares is therefore admitted by the answer. The plaintiff is entitled to an explicit denial of every material allegation of the complaint or to an admission of its truth, either by direct statement or by silence. 2 Estee's Pl. 3171; *Brown* v. *Scott*, 25 Cal. 189; *Racouillat* v. *Rene*, 32 Cal. 450; *Gay* v. *Winter*, 34 Cal. 153. The failure to deny a material averment is an admission of the facts contained in such averment. 2 Estee's Pl. 3172; *Burke* v. *Company*, 12 Cal. 408; *Blankman* v. *Vallejo*, 15 Cal. 638; *Patterson* v. *Ely*, 19 Cal. 18. Defendant having admitted the agreement in his answer, is precluded from afterwards contesting the fact that the agreement was made. *Howard* v. *Throckmorton*, 48 Cal. 482; *Spangel* v. *Reay*, 47 Cal. 608; *Nation* v. *Cameron*, 2 Dak. 347. Patterson's letter, his testimony and tender of the check were sufficient offer and acceptance to make a binding contract. *Olson*

v. *Sharpless,* 55 N. W. Rep. 125; *Mauring* v. *Lyon,* 72 N. W. Rep. 72; *Hurley* v. *Brown,* 98 Mass. 545; *Meade* v. *Parker,* 115 Mass. 413; *New England Etc.,* v. *Stanford,* 165 Mass. 328; *Tice* v. *Freeman,* 15 N. W. Rep. 674; *Singleton* v. *Hill,* 91 Wis. 51. Patterson's oral acceptance of this written offer was sufficient. Brown on Statute of Frauds, 345. The tender of the check was sufficient, no objection being made to it. § 3815, Rev. Codes; 25 Enc. L. 908 & note; 916 & note; *McGrath* v. *Greneger,* 39 At. Rep. 415; *Walsh* v. *Association,* 14 S. W. Rep. 722; *Gradle* v. *Warner,* 140 Ill. 123; *Henderson* v. *Cass County,* 107 Mo. 50. The value of choses in action is presumed to be the amount apparently due upon them. *Anderson* v. *Bank,* 6 N. D. 497. Plaintiff's damage is fixed by statute. § § 4985, 5012, Rev. Codes. The Court erred in directing a verdict. *Carson* v. *Gillette,* 2 N. D. 255.

John Carmody, for respondent.

The offer of Plummer to sell his stock to Patterson at most was an alternative one, an offer to buy or to sell. Patterson would have to accept either proposition within a reasonable time and let Plummer know which of the offers he accepted. This he did not do, hence the minds of the parties never met. *Graff* v. *Buchanan,* 48 N. W. Rep. 915; *Talbot* v. *Pettigrew,* 13 N. W. Rep. 576; *Lincoln* v. *Guy,* 164 Mass. 573, 42 N. E. Rep. 95; *Hough* v. *Brown,* 19 N. Y. 111; *Frazer* v. *Small,* 13 N. Y. Supp. 468; *Thompson* v. *Will,* 3 N. Y. Supp. 931. Plaintiff introduced evidence on the trial tending to prove the allegation he now alleges that defendant admitted in his answer. He cannot raise this point for the first time in the Supreme Court. *Racouillat* v. *Rene,* 22 Cal. 450. It is immaterial upon what ground the trial court directed a verdict in favor of the defendant. If the defendant on the whole record was entitled to a directed verdict, it must stand. *Hillsboro Nat'l Bank* v. *Hyde,* 7 N. D. 400, 75 N. W. Rep. 781; *Paulson* v. *Nichols & Sheppard Co.,* 8 N. D. 606, 80 N. W. Rep. 765; *Miller* v. *Oakwood, Twp.,* 84 N. W. Rep. 556.

YOUNG, J. Plaintiff seeks to recover damages from the defendant for the breach of an alleged contract by the latter to sell and transfer to him 353 shares of the capital stock of the Hillsboro National Bank, at an agreed price of $135 per share. It is alleged in the complaint that said shares were in fact of the value of $165 each. Damages are alleged in the sum $10,590, which is the excess of the alleged actual value of said 353 shares over the price agreed upon in the alleged contract. The defense interposed is twofold: First, that there was in fact no contract to sell; second, that, even if there was plaintiff sustained no damage. At the close of plaintiff's testimony, counsel for defendant moved the Court for a directed verdict. This motion was granted, and the jury, pursuant to the Court's direction, returned a verdict for defendant. Judg-

ment was thereafter entered dismissing the action and for costs. Within the statutory period, plaintiff caused a statement of case to be settled, embracing all of the evidence introduced at the trial, and a specification of the errors which he relies upon in his appeal from the judgment.

The direction of the verdict for defendant is assigned as error. It is urged "that, upon all the evidence in the case, it should have been submitted to the jury." The record discloses that the trial court in granting the motion relied upon two of the several grounds upon which the motion was made. These were: First, failure to prove the existence of a contract to sell; second, no damages shown. In reviewing this assignment, we find it unnecessary to consider the first ground referred to, namely, the question as to the existence of the contract, for the reason that an examination of the evidence has led us to the conclusion that the order of the trial judge in directing the verdict of which complaint is made was entirely proper upon the second ground before referred to, which is that plaintiff failed to prove damages. The existence or nature of the contract need not, therefore, be discussed; for it is conceded that a recovery, in any event, could not be sustained in the absence of proof of damages. Plaintiff's contention is that he established the damages alleged in his complaint by competent evidence, and that the direction of a verdict for defendant was therefore erroneous. The merit of this appeal turns upon this contention. Is there any competent evidence of damages? The measure of damages recoverable for the breach of a contract such as that we are now considering is provided by § 4985, Rev. Codes, which reads: "The detriment caused by the breach of a seller's agreement to deliver personal property, the price of which has not been fully paid in advance, is deemed to be the excess, if any, of the value of the property to the buyer over the amount which would have been due to the seller under the contract, if it had been fulfilled." In the case at bar, defendant agree to pay $135 per share for 353 shares, or the total sum of $47,655. The measure of recovery, then, is the excess of value, if any, of said stock above the purchase price, no part of which has been paid. There is no controversy as to the foregoing being the correct measure of damages applicable to this case. That is conceded by counsel for both parties. The real question in the case, and upon which it hinges, is as to the proper method of proving the value of the stock. How is the value of the stock to the buyer to be proved? On this counsel disagree. Counsel for defendant urges that the value of the stock in question could only be proved by evidence of the market value of the stock of this bank at the time of the breach of the alleged contract to transfer, or by the market value of shares in some other bank, and in support of this view relies upon § 5010, Rev. Codes, which provides that, "in estimating damages, except as provided by § § 5011 and 5012 [which have no application here], the value of property to a buyer or owner thereof deprived of its possession is deemed to be the price at

which he might have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his possession and at such time after the breach of duty upon which his right to damages is founded as would suffice with reasonable diligence for him to make such purchase." The rule thus provided is just and equitable, in that it gives to the buyer the benefit of his bargain, and as to such property as has a market value it is controlling; but a cursory examination of the section will show that it has no application to property which is without a market value, and that is this case. The evidence does not disclose a single sale of the stock of this bank at any time. Its stock was not on the market. The defendant owned 353 of the 500 shares of the capital stock, and the plaintiff owned a large portion of the remaining shares. It was not only not on the market, but there were not even private sales made. It is idle, therefore, to refer to market value as a necessary method of estimating the actual value of this stock. It had no market value. And it is equally idle to assert that, in the absence of a market value for this particular stock, plaintiff must show the market value of its equivalent, namely, the value of stock of other banks. There can be no equivalent intrinsically, and none in fact, unless it be of the same value; and that begs the question. The section relied upon refers to property which in itself or through an equivalent has a market value, such as cereals, produce, and such stocks and bonds as are the subject of daily sales in the open market. Furthermore, proof of market value is merely one way of proving actual value. And the rule making market value proof of actual value applies only when an article or its equivalent has a market value. Counsel for respondent cite *Bullard* v. *Stone*, (Cal.) 8 Pac. 17, in support of their contention that market value of the stock in question must be shown under the section last quoted, which is identical in language with the statute which the California Court had under consideration. The case is not in point. The property involved was wheat, which had a market value, and it plainly came under the measure laid down by the statute. No cases have been, or, in the nature of things, can be, found, holding that the rule relied upon is applicable to property which has no market value.

What, then, is the rule for ascertaining the value of stock which is shown to have no market value? Counsel for appellant urge that it is ascertained by proving what they call its "book value," and it is wholly upon certain evidence as to the so-called book value, to which we will now refer, that the contention is based that damages have been proved. No other evidence was offered as to the value of the stock. Plaintiff called the cashier of the bank—one J. E. Larsham—as a witness on his behalf. This witness identified an original written report made by him as cashier, and verified by his oath, and attested by three directors, to the comptroller of the currency pursuant to § 5211, Rev. St. U. S., which report purported to show in detail the financial condition of the bank, as provided by said section, as of date December 2, 1899, which was approxim-

ately the date of the contract in question. This document, which is known in the record as "Exhibit 6," was placed in evidence over the objection that it was incompetent, and not the proper method of proving the value of the stock. Plaintiff's theory as to the proper method of proving damages is made clear by the language of counsel in offering the exhibit referred to, which we now quote: "Exhibit 6 is offered in evidence for the purpose of showing the value of the stock of the Hillsboro National Bank on the 2nd day of December, 1899, in connection with the testimony of Mr. Larsham." The testimony of Larsham related to the making of the report, and to some extent, as explanatory of its contents. He did not—neither did any other witness—testify as to the actual value either of the stock or of the assets of the bank. This witness and others called by plaintiff deduced from the figures contained in said report what is termed the "book value" of the stock. This was obtained by adding together the capital stock, the surplus, and undivided profits, as shown by said report, and dividing the total by 500, the total number of shares of stock of the bank. There is no dispute that on this basis, if it is a competent method of ascertaining the value, the stock was in fact of the actual value of $164 per share, as alleged by plaintiff. The claim that this report is competent evidence to establish the value of the bank stock on the date of the alleged contract is necessarily based upon two propositions: First, that the report itself proves the value of the property owned by the bank; second that each shareholder in said bank was entitled to one five-hundredth part of such property, or its value, for each share owned. Counsel's contention is that "under the provisions of § 5012, Rev. Codes, each share of bank stock of this bank is entitled to one five-hundredth part of all the property of the bank. That, at the book value, amounts to one hundred sixty-four dollars a share." It is apparent that, if either of these propositions are not sustained, this theory of proving value which we are considering must fall. And it matters not which position is erroneous. The result is the same. If there is no evidence as to the property owned by this banking corporation, or evidence of the value of such property, it matters not that each share is entitled to its proportion, no value of the property having been shown. Counsel for appellant rely upon § 5012, Rev. Codes. This section is as follows: "For the purpose of estimating damages the value of an instrument in writing is presumed to be equal to that of the property to which it entitles the owner." It is urged that under this section the stock in question is presumed to have had a value equal to the so-called book value. This contention cannot be sustained. In the first place, the proposition that a holder of stock in a national bank is absolutely entitled to any of the property of the corporation is not correct. It is true, a stock certificate gives to the owner a right to participate to some extent in the affairs of the corporation; to receive dividends, if there are any; and to share in the ultimate distribution of the property after the obligations of the corporation are discharged. Coupled

with it, also, is the liability to assessments. It would be more appropriate to say that the certificate entitled the owner to the rights of a stockholder, rather than to specific money or chattels belonging to the corporation. The section referred to is a common one. So far as we have ascertained, it has been applied only to instruments which upon their face entitle the holder to specific sums of money or specific property, such as promissory notes, drafts, warrants, and mortgage debts. See *Survey* v. *Wells, Fargo & Co.*, 5 Cal. 124; *Fogarty* v. *Finley*, 10 Cal. 239, 70 Am. Dec. 714; *Zeigler* v. *Wells, Fargo & Co.*, 23 Cal. 179, 83 Am. Dec. 87; *Holt* v. *Van Eps*, (Dak.) 46 N. W. 689; *Cosand* v. *Bunker*, (S. D.) 50 N. W. 84; *Grigsby* v. *Day*, (S. D.) 70 N. W. 881. But even if the section is applicable to certificates of bank stock, it does not aid plaintiff's contention. As we have seen, it entitles the holder only to a shareholder's right, and to no specific property owned by the corporation. What is the presumptive value of the right represented by a share of stock in a national bank, if the statute is applicable? Clearly, it is the par value of the stock, of $100. That represents the original investment, and is the face or par value of the shares into which the capital stock is divided. The rule as laid down by the authorities is that where a presumption as to the value of stock is permitted, it is that it is worth par, and the burden is on the party who wishes to establish a different value to do so by competent evidence. See Appeal of Harris (Pa.) 12 Atl. 743; *Vail* v. *Reynolds*, 118 N. Y. 297, 23 N. E. 301. In 2 Suth. Dam. 390, the author says: "Stocks, like promissory notes, have a nominal value, expressed in dollars or pounds sterling; and, as we have seen, on a breach of a contract for the delivery or transfer of stock, recovery is based on the market value, if it has such. In the absence of that evidence of value, other circumstances must be resorted to, and its nominal value will perhaps be accepted where there is no proof." The nominal or par value of the stock in question was $35 per share less than the plaintiff agreed to pay for it. What evidence has been offered to show that it had an actual value greater than its par value? None whatever. No testimony was introduced to show the actual value of the stock, and no evidence as to the actual value of the corporation. The report of the cashier to the comptroller is not evidence of the value either of the property or the stock. It does not purport to give an estimate of the value of either. It is apparent that it was not within the scope or purpose of the report to declare upon the actual values of the various items of property owned by the corporation, and it does not do so. It is also apparent that the sum deduced from such reports as book value are purely arbitrary, and have no reference to actual value. This can be seen at once by considering that the actual value of the stock would necessarily rise or fall with changes in the actual value of the property of the corporation, but the book value would not change. It would remain fixed and entirely unresponsive to conditions rendering the assets of the bank highly valuable or entirely worthless. Not only does the report itself show

that it does not furnish a standard for measuring actual value, but it also appears in the testimony of plaintiff's witnesses that the so-called book value does not represent actual value. Neither have any authorities been presented sustaining appellant's views as to the probative value of the report. It is true, the report does not contain an estimate of the value of certain real estate, but this is but a small fraction of the bank's assets. Whether the report was admissible for any purpose, we need not discuss or determine. It is sufficient to say that it did not furnish evidence of the value of the assets, or data from which the actual value of the stock could be deduced.

W. L. Carter, a witness for plaintiff was asked this question: "Q. Will you please state to the jury how you determine the value of bank stock?" An objection to the question was sustained, and this is assigned as error. It is urged that it was the jury's duty to determine the value of the stock, and that it was highly desirable that they should have a rule to govern them. This is true, but the rule called for was one of law, belonging to the province of the court, and not of fact, to emanate from witnesses. The objection was properly sustained.

Neither was it error to sustain the objection to the further questions propounded to this same witness wherein he was asked to give his estimate of the value of the stock in controversy, basing his estimate upon the cashier's report before referred to, and his general knowledge of the reputation of the managers of the bank. As we have seen, this report afforded no basis for determining the actual value of either the assets of the bank or its stock.

It may be asked whether a recovery can be had at all when the stock has no market value, and, if so, how the value is to be shown. As to this there is no doubt. In 2 Cook, Corp. § 581, the author correctly states the rule as follows: "The fact that the shares of stock have no known market value will not prevent recovery where the actual value is ascertainable in an action to recover damages. The value may be shown by showing the value of the property and business of the corporation." See case cited in note. In 2 Suth. Dam. 378, a more general rule is stated, as follows: "If the article in question has no market value, its value may be shown by proof of such elements or facts affecting the question as exist. Recourse may be had to the items of the cost, and its utility and use. And opinions of witnesses properly informed on the subject may also be given in respect of its value." It appears that plaintiff pursued none of the methods referred to, but relied entirely upon the report of the cashier, which, as we have seen, afforded no proof of value whatever. The verdict was therefore properly directed.

Other errors are assigned, but inasmuch as plaintiff must fail in any event, by reason of failure to prove damages, such errors become unimportant, and will not, therefore, be further referred to. Judgment affirmed. All concur.

(86 N. W. Rep. 111.)

ALBERT E. SHEETS *vs.* JOHN A. PAINE.

Opinion filed May 4, 1901.

Tax Deed—Validity—Sufficiency of Description.

This action was brought to foreclose a mortgage upon lands situated in Nelson county, described as follows: The S. ½ and the N. W. ¼ of the S. W. ¼ of Section 18, and the N. W. ¼ of the S. W. ¼ of Section 19, all in township No. 150 N., of Range 58 W The defendant, Paine, answered the complaint, and alleged title in himself to the lands under a tax deed issued pursuant to a tax sale for taxes of 1890. The tax deed is regular on its face, and is in the form prescribed by section 7, Chap. 100, Laws 1891. None of the land was attempted to be described in the assessment book of 1890, except as follows: In the column of said book headed "Description," and opposite the name of the owner, the following letters and figures are written: "S. E. 4 S. W. 4. W. 2 S. W. 4,"—which letters and figures were opposite the figures "18" in the assessment book, in the section column. Under the owner's name were certain ditto marks, and opposite these, in the column headed "Description," were the following letters and figures: "N. W. 4 N. W. 4." And these were followed by the figures "19" in the section column. There was no town or range stated opposite these letters and figures in the assessment book; nor was there an attempt to indicate, either by figures or ditto marks, in what town or range said sections 18 and 19 were situated. Against objection, defendant offered oral evidence tending to show that the lands were in fact situated in township 150 of range 58. *Held*, that the description was fatally defective, and could not be cured by oral evidence. The assessment was totally void, and the defect in the description was one going to the ground work of the tax, and jurisdictional. The tax deed in question, which is based on a sale for said taxes of 1890, is void.

Redemption Certificates—Liens.

Certain tax receipts and redemption certificates offered in evidence, and referred to in the opinion, and which were given to defendant by the county treasurer, do not operate as liens upon the land in question. The payments made by the defendant to the treasurer for which said tax receipts and redemption certificates were issued were volunteered, and were not made at a time when the defendant had any title to or interest in the land.

Appeal from District Court, Nelson County; *Fisk*, Dist. J.

Action by Albert E. Sheets against John A. Paine. Judgment for plaintiff. Defendant appeals.

Affirmed.

Newton & Smith, for appellant.

Templeton & Rex, for respondent.

WALLIN, C. J. In this action judgment was entered for the plaintiff in the Court below after a trial without jury. The defendant, Paine, alone appeals from said judgment to this Court, and in the statement of the case a trial anew is demanded in this Court of the entire case. The action is brought to foreclose a mortgage covering certain real estate situated in the county of Nelson, in this state, and

described as follows: "The south one-half and the northwest quarter of the southwest quarter of section eighteen, and the northwest quarter of section nineteen, all in township 150 north, of range 58 west, containing 160 acres, more or less." The complaint alleges that the defendant, John A. Paine, claims some title or interest in said lands, or lien thereon, under and by virtue of certain tax sales, tax certificates, and tax deeds. The defendant, Paine, answers the complaint and alleges ownership in himself of the lands described in the complaint. Defendant bases his claim of ownership upon a certain tax deed issued to defendant by the county auditor of Nelson county, dated the 20th day of June, 1895, and which is in the form prescribed in § 7 of Chap. 100 of the Laws of 1891; and the deed is based upon an assessment of the lands made, or attempted to be made, in the year 1890. The answer sets out, secondly, a tax certificate describing the land, based upon a tax sale made in December, 1892, for the taxes of 1891. This certificate is based upon an attempted assessment of the land made in the year 1890. The answer also sets out a redemption certificate describing the land, based on a redemption made by the defendant from a tax sale for the taxes charged against the land for the year 1892. The answer next sets out that the defendant paid the taxes charged against the land for the year 1893, and took a receipt from the county treasurer of Nelson county for such judgment. The answer further states that said defendant paid the taxes on the land for the year 1894, and took the treasurer's receipt therefor. The answer also states that the lands were sold for taxes levied thereon in the year 1895, and were struck off to said defendant, and that the defendant received a tax certificate based upon such sale, and still holds and owns the certificate. It is further alleged that the defendant purchased said lands, and received and now holds a tax certificate issued on said sale, which is based upon the taxes charged against said lands in the year 1896. The answer further avers that defendant paid the taxes assessed against the lands for the year 1898, and took a tax receipt therefor, which he now holds. The defendant prays for affirmative relief as follows: First, that the action be dismissed; second, that the defendant be adjudged to be the owner in fee of said land; and, finally, if the Court shall determine that the defendant is not the owner in fee of the lands, that an accounting of said taxes be had, and the amount thereof, with interest and penalty, be added thereto, and that such aggregate be adjudged to be a lien upon the land prior to and superior to any lien of the plaintiff. It is conceded that the mortgage sought to be foreclosed in this action is the first lien on the lands in question, unless the tax deed and tax certificates and receipts as set out in the answer are superior to the mortgage lien, and no point is made in the appellant's brief which does not relate to the tax proceedings.

The defendant's tax deed is regular upon its face, but the plaintiff claims that said deed is void for want of assessment; and in support of this contention the plaintiff put the assessment book for the year

1890 in evidence, from which it appears that none of the lands in question were attempted to be described in the assessment of that year, except as follows: Under the heading "Name of Owner" we find the name "Andrew Lewis." Against this name, and in the column headed "Description," we find the following letters and figures: "S. E. 4 S. W. 4 W. 2 S. W. 4." Again, under the name of "Lewis," there are no ditto marks, thus: " " And opposite these, and directly under said letters and figures, are found, in the column headed "Description," the following letters and figures: "N. W. 4 N. W. 4." These letters and figures, under the repeated decisions of this Court, are entirely insufficient as descriptions of land upon which title can be built up under the laws governing tax proceedings. See *Power* v. *Larabee,* 2 N. D. 141, 49 N. W. 724; *Power* v. *Bowdle,* 3 N. D. 107, 54 N. W. 404, 21 L. R. A. 328, 44 Am. St. Rep. 511; *Keith* v. *Hayden,* 26 Minn. 212, 2 N. W. 495; *Kern* v. *Clarke,* 59 Minn. 70, 60 N. W. 809.

But there is another defect in the assement of 1890 which is equally fatal. The land is situated in congressional township 150 of range 58, but this fact does not appear on the face of the assessment book, but is omitted therefrom. In the form or blank upon which the assessment is made there are columns headed "Township" and "Range," but the same do not contain either figures or ditto marks. Opposite the name of the owner of the lands in question the spaces in said columns are blank. At the top of the column, under the word "Township," "150" is written in figures; and, under the word "Range," "58" is written in figures. Below these figures ditto marks are made against all descriptions of land, down to and including the description next preceding said name of Andrew Lewis. There is a blank space next above the name of Lewis, in which there are neither figures nor ditto marks, indicating either town or range; and, as we have said, the same omission occurs opposite the name of Lewis. It is impossible, therefore, to determine by an inspection of this assessment either town or range in which the lands in question are situated. The assessment shows possibly that Andrew Lewis owns lands in sections 18 and 19 in Nelson county, but it wholly fails to identify the particular sections, because, as has been shown, the town and range being omitted, the particular sections cannot be located by any data furnished by the assessor. To cure this glaring omission in the assessment, the defendant, against objection, introduced oral evidence tending to show that the lands opposite the name of Andrew Lewis were in fact located in congressional township numbered 150 of range 58. This evidence was wholly incompetent to supply a radical defect in description in an assessment. An assessment of land is required to be written in a public record, and all subsequent steps in the process of laying the tax relate back to such written description. This rule is no longer open to debate in the courts of this state. In *Power* v. *Bowdle,* supra, this Court said: "There can be no such thing as a parol assessment of land. The law requires a definite record, and no other evidence of the assessment

is competent." To this it may be added that the rights of a purchaser at a tax sale are fixed at the time of his purchase, and his title depends upon the validity of the proceedings had anterior to the purchase. Nor can his rights be enlarged by any evidence introduced to supply fatal omissions which constitute defects which are fundamental and jurisdictional to the tax. This Court has held, in harmony with an overwhelming weight of authority, that an assessment of land under the revenue system of this state is a vital element in laying a tax upon the land, and that its omission is fatal to a tax. This rule is so inflexible that it has been applied to cases where the statute has barred an action to annul a tax deed. The statute of limitations does not operate in a case where the land has never been assessed. See *Roberts* v. *Bank,* 8 N. D. 504, 79 N. W. 1049; *Sweigle* v. *Gates,* 9 N. D. 538, 84 N. W. 481. Nor can a tax deed based upon a void assessment be made conclusive by any recitals contained in the deed. This would be beyond legislative power, and would constitute an arbitrary confiscation and transfer of property in defiance of constitutional guaranties surrounding vested rights in property. In the leading case of *Marx* v. *Hanthorn,* 148 U. S. 172, 13 Sup. Ct. 508, 37 L. Ed. 410, the Court said: "It is competent for the legislature to declare that a tax deed shall be *prima facie* evidence not only of the regularity of the sale, but of all prior proceedings and of title in the purchaser; but the legislature cannot deprive one of his property by making his adversary's claim to it, whatever that claim may be, conclusive of its own validity, and it cannot, therefore, make the tax deed conclusive evidence of the holder's title to the land." See, also, *Strode* v. *Washer,* 17 Or. 50, 16 Pac. 926; *Railroad Co.* v. *Galvin,* (C. C.) 85 Fed. 811. In this state and many others the rule has become a settled rule of property that a valid assessment of land, evidenced by a record officially made, is an essential prerequisite to a valid tax, and that its omission is a jurisdictional defect fatal to the tax. See case above cited. Appellant's counsel cites § 72, Chap. 132, Laws 1890, and argues that the deed can only be attacked upon grounds named in said section as grounds upon which a tax sale can be attacked. The tax sale and certificate are not directly assailed in this case. The certificate has merged in the deed and has been surrendered, and defendant stands on a tax deed. He has no rights which are assured by the certificate. But the certificate issued on the sale would, upon grounds already stated, be as worthless and inoperative as the deed, and, upon the proof in this case, would therefore be ineffectual as a lien if no deed had been issued. Appellant's counsel contends that only matters prescribed by the constitution of the state are jurisdictional to a tax. Without conceding the soundness of this contention, we are quite willing to let the organic law speak as to any point made in this case. Section 174, in terms, recognizes the necessity of an assessment as a basis of taxation. This same section requires the legislature to "provide for raising revenue," and § 179 provides that all property shall be assessed "in the manner prescribed by law." These provisions

not only presuppose an assessment (i. e. an official valuation) of property, as preliminary to a tax levy thereon, but they call upon the legislative assembly to provide by law the way and manner of raising the necessary revenue. The legislature of the state has proceeded to execute the mandate of the constitution by the enactment of revenue laws, and in the case at bar no claim is made that any part of the revenue law is repugnant to the constitution. No feature of the revenue law is or can be more fundamental to a tax than that requiring an assessment as a basis for taxation. Nor can any assessment of real estate be made or conceived of under our statutes which does not include a description of the land to be assessed. In this case we shall hold that the assessment in 1890 of the lands involved is void for want of a description of the lands. It must follow, and we so hold, that the tax deed set out in the defendant's answer is void *ab initio,* and this because it rests upon a void assessment. The taxes of 1891 rest upon the assessment of 1890, and hence, for reasons already given, the same were never valid taxes. The sale and the tax certificate issued thereon are void, and said certificate is therefore not a lien upon the lands in suit. It is beyond the power of the legislature to either transfer land or incumber it by a lien under the pretense of a sale for delinquent taxes in a case where no valid tax has been assessed or levied. See authorities supra.

Taxes were again charged against the lands, based upon an alleged assessment of 1892, upon which a sale was made in 1893. The defendant redeemed the lands from such sale, and now asks that the sum paid to make such redemption be charged as a lien upon the lands superior to plaintiff's mortgage. But the defendant had no right to make such redemption or to pay such taxes, other than the rights which he acquired under the tax deed and tax certificate which have been considered and held to be worthless. The defendant therefore was, as to these lands, a mere volunteer. He may have paid the taxes and redeemed the land in good faith, but this does not change his legal relation to the land; nor does such good-faith payment enable the Court in this action to fasten a lien upon the lands superior to the plaintiff's mortgage lien. Defendant's remedy, if any, is against the county. See *Roberts* v. *Bank,* 8 N. D. 504, 79 N. W. 1049; *McHenry* v. *Bret,* 9 N. D. 68, 81 N. W. 65. The defendant offered a tax receipt in evidence given by the county treasurer for taxes on the land for the year 1894. The evidence was objected to and was incompetent for the reasons and upon the grounds last above set out. Such taxes were paid by a stranger to the land.

The lands were again struck off to defendant at a tax sale in the year 1896 for the taxes charged against them in 1895, and the certificate of sale was put in evidence, and defendant claims that the certificate operates as a lien superior to plaintiff's mortgage. The taxes of 1895 were levied upon an assessment made in 1894. The assessor's book for 1894 was put in evidence, and it shows that the attempted description of the land found there omits to state or show,

by either figures or ditto marks or otherwise, what township or range the land is in. In brief, the columns headed "Township" and "Range" in said book are wholly blank from top to bottom. This assessment was sought to be bolstered up by oral evidence to the effect that the lands in question, and attempted to be described in said book as parcels, were in fact situated in congressional township numbered 150 of range 58. The evidence was incompetent, for reasons already advanced in this opinion. Said tax certificate is wholly void, and the same does not operate as a lien upon the lands. It rests upon a void tax.

Again, the lands were struck off to the defendant for taxes attempted to be assessed against them in the year 1896. This certificate is in evidence, and defendant claims that it constitutes a lien upon the lands. But the assessment in 1896 is defective and void for the same reason last above stated; viz: that the assessor, in attempting to describe the lands in the assessment book of 1896, omitted to state in any manner the township or range in which they are located. The assessment is therefore void for want of a proper description of the lands. The certificate must fall with the assessment.

Defendant paid the tax of 1898, but in doing so he was a volunteer; and, upon the authority already cited, he can gain no rights by a volunteer payment of taxes.

Our conclusion is that the defendant did not acquire either a title to or a lien upon the land by reason of the tax deed or the tax certificates or tax receipts put in evidence. The judgment of the trial court must be affirmed. All the judges concurring.

(86 N. W. Rep. 118.)

PEDER SOLY *vs.* GUDBJORN AASEN, *et al.*

Opinion filed May 2, 1901.

Fraudulent Conveyances—Action to Set Aside—Creditors.

S. commenced an action against the defendants, stating as a cause of action in his complaint that one of the defendants had conveyed certain lands to the other defendant with intent to defraud plaintiff, and prevent him from collecting out of such lands a judgment recovered by him against one of said defendants, which said judgment had not been rendered when such conveyance was made, although suit had been commenced against one of said defendants for damages for tort, to-wit, criminal conversation with S.'s wife, such suit resulting in obtaining such judgment. *Held*, that S. was a creditor, within the meaning of section 5052, Rev. Codes.

Evidence Sustains Judgment.

Evidence reviewed, and *held* to establish that such conveyance was fraudulent as to plaintiff.

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

Action by Peder Soly against Gudbjorn Aasen and Knud G. Aasen. Judgment for plaintiff. Defendants appeal.

Affirmed.

Cochrane & Corliss, for appellants.

Spencer & Sinkler, for respondent.

MORGAN, J. This is an equitable action, brought to set aside a certain deed given by the defendant Gudbjorn Aasen to his father, Knud G. Aasen, as without consideration, fraudulent, and void so far as the plaintiff's judgment is concerned, and to subject the lands conveyed by such deed to the plaintiff's judgment described in the complaint. The answer denies that such deed was fraudulent and alleges that such lands had been actually owned by defendant Knud G. Aasen since 1890, and further alleges that the son had never had any interest in such lands. The case has been appealed to this court by the defendants, who demand a retrial of the entire case.

The evidence discloses that the plaintiff, Peder Solv, brought an action against the defendant Gudbjorn Aasen in the District Court of Pembina county on the 21st day of June, 1898, alleging in his complaint as a cause of action against said defendant for damages that said defendant had been guilty of criminal conversation with plaintiff's wife. Issue was joined in such action by the service of an answer, followed by a trial, resulting in a judgment in favor of the plaintiff, entered on July 16, 1899, upon which judgment an execution was issued, and returned wholly unsatisfied. The deed sought to be set aside was executed and delivered on December 13, 1898, after the action was commenced, but before verdict or judgment. It is claimed by appellants' attorneys in their brief that the plaintiff was not, on the date of transfer referred to, a creditor of the defendant, within the meaning of § 5052, Rev. Codes, but that he simply had an unliquidated claim for damages for a tort. Said § 5052 reads as follows: "Every transfer of property or charge thereon made, every obligation incurred and every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands is void against all creditors of the debtor," etc. Section 5048 provides: "A creditor within the meaning of this chapter is one in whose favor an obligation exists by reason of which he is or may become entitled to the payment of money." The construction contended for by counsel for appellants is too strict and technical, in view of the reading of these sections, considered in connection with the purposes of their enactment,—that of preventing and remedying frauds. In view of such purpose, § 5052 should be liberally and beneficially construed. The construction contended for does not give effect to all the words of the section, and seems to disregard, or fails to give any meaning to, the words "or other person of his demands." Such a construction as contended for would limit its evident purpose, and tend to destroy its usefulness. The following cases are in point, and against the construction contended

for: *Schaible* v. *Arden*, 98 Mich. 70, 56 N. W. 1105; *Day* v. *Lown*, 51 Ia. 364, 1 N. W. 786; *Petree* v. *Brotherton*, 133 Ind. 692, 32 N. E. 300; *Bongard* v. *Block*, 81 Ill. 186; *Pierstoff* v. *Jorges*, 86 Wis. 128, 56 N. W. 735, 39 Am. St. Rep. 881. "The term 'creditors' as employed in the statute is not used in its strict technical sense, but has been construed liberally, and includes all parties who have demands, accounts, interests, or causes of action for which they might recover any debt, demand, penalty, or forfeiture. Such are the interests which the statute says shall be protected, and consequently persons having such interests must be included within its provisions." 8 Am. & Eng. Enc. Law (2d Ed.) 251. In order to understand the merits, more of the facts must be narrated. In 1890, Knud G. Aasen bought the land in suit, giving his note and mortgage for the purchase price. He paid the notes and mortgage in July of that year, the amount being $675. He paid this purchase price out of moneys received by him from Norway, amounting to about $1,000. It is a matter of dispute whether this money was his money or Gudbjorn's. The letter in which the draft payable to Knud G. Aasen was inclosed referred to the draft as "your part of the estate," the son's name not being mentioned so far as the draft was concerned. It is beyond question that the money comes from the estate of Mrs. Knud G. Aasen's father or mother. Mrs. Knud G. Aasen had been dead since 1879, leaving no children except the defendant Gudbjorn. When the land in suit had been paid for under the original purchase in 1890, Knud G. ordered the deed made out to his son Gudbjorn, and it was so deeded. His reason for having it deeded to his son is given by him as follows: "What made me deed it to him in the first place was because I didn't have but one son, and I thought he is to have what is left after me anyhow, he might as well have the deed then as any time." He had other land, the deed being in his own name. At the date of the original deed Gudbjorn was 14 years of age. The defendants have lived together ever since, and worked this land and another place together; the father always taking the proceeds, and paying the taxes, the same as though it were his own land. There is credible testimony amply establishing that statements were freely made by Knud G. and Gudbjorn that the money that came from Norway was Gudbjorn's, and statements have been made by them frequently since that this land belonged to Gudbjorn. We consider such statements more reliable than contrary testimony given by them at present, when there is a strong interest manifested to demonstrate that the land belongs to the father in order to avoid the judgment against the son. His explanation for having the deed made to his son is not satisfactory. His having it deeded to his son was an unusual and extraordinary provision for the son, and not consistent with the facts except on the theory that the money coming from Norway was for his son, and that the land was purchased with such money. He had no debts to avoid, and all his other property was retained in his own name. Why he should change his

mind after nine years, and desire this land to be deeded to him, is not satisfactorily explained, except on the theory that they wished to save it from any judgment that might be obtained in the suit that was then commenced. This suit was talked over between father and son just before the deed was given. True, the father then advanced the son some money on the day the deed was delivered, with which the son was to pay his lawyers. But the father does not claim that such money was a consideration for the deed. He says it was not. He says that he wanted the deed of the land because the land was his. The consideration for the deed was stated in the deed to be $1,500. Why the consideration for this deed was expressed at that or any sum when he was receiving it, as he claims, as a matter of right, is not attempted to be explained. He paid his son, during the time these suits were pending, over $700; but he had the use and profits of the land since 1890, and it is not unreasonable to believe that he owed the son that much and probably more. On the question of taking the deed on December 13th the father says: "I never asked him for a deed until he got into trouble. I don't know whether I would have wanted the deed back if my son had not got into trouble." The circumstances seem conclusively to point to the fact that the deed was given because the suit was pending, and for no other purpose. Such is our positive opinion. No other conclusion can reasonably follow a careful review of the whole evidence. The deed was therefore fraudulent so far as plaintiff's judgment was concerned, and given with intent to evade it when rendered. Judgment affirmed. All concur.

(86 N. W. Rep. 108.)

UNITED STATES SAVINGS & LOAN CO. *vs.* RODERICK D. MCLEOD.

Opinion filed May 2, 1901.

Appeal—New Trial—Statement—Evidence—Certificate—Conclusiveness.

In this action plaintiff recovered a judgment after a trial without a jury. Defendant caused a statement of the case to be settled, in which a trial anew in this court is demanded. The trial judge appended a certificate to the statement to the effect that the same embodied all the evidence and exhibits offered at the trial. At the trial, among other evidence offered and received were certain written documents, eight in number, which were respectively identified as exhibits. None of said exhibits were incorporated in the statement, nor did the same contain a copy or purported copy of said exhibits, or either of the same. The statement did embrace a reference to said exhibits, respectively, which was sufficiently specific to identify same, but as to some of the same no attempt was made in the statement to give even a version of their contents in a condensed form or at all. *Held*, that the evidence offered at the trial was not embodied in the statement as required by section 5630, Rev. Codes 1899, and that for this reason a trial anew in this court cannot be had in this action.

Under Section 5630 All Evidence Must be Embodied in Statement of Case on Appeal.

Under said section all the evidence offered must be embodied in the statement, and this without reducing the same to a narrative form or condensing the same; nor is the trial judge, in settling a statement under said section, authorized to strike redundant, irrelevant, and useless matter therefrom.

Judges Certificate Not Conclusive.

The certificate appended to a statement by the trial judge to the effect that the same embodies all the evidence is sufficient to establish the fact prima facie, but the same is not conclusive.

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

Action by the United States Savings & Loan Company against Roderick D. McLeod. Judgment for plaintiff, and defendant appeals.

Affirmed.

Tilly & McLeod, for appellant.

Benton, Lovell & Holt, for respondent.

WALLIN, C. J. This action was tried in District Court without a jury, and judgment was entered in that court in favor of the plaintiff. Defendant has appealed to this court from such judgment, and in the statement of the case demands a trial anew in this court. Respondent's counsel move in this court for an affirmance of the judgment basing their motion upon the record. A statement of the case was settled in the District Court, to which statement the trial judge has appended a certificate to the effect that the statement contains "all the evidence offered, exhibits introduced, and proceedings had in the District Court," to the making of which certificate, however, an exception was taken by plaintiff's counsel, and the same was brought up on the record.

In support of the motion to affirm the judgment, counsel calls the Court's attention to the record, and particularly to certain exhibits, viz. Exhibits A, D, E, 67; also to Defendant's Exhibits D, E, and L. An examination of the record shows that said exhibits were offered and received in evidence at the trial, and the record discloses the further fact that none of the said exhibits are embodied in the statement of the case; nor does the statement embrace a copy, or a purported copy, of any of said exhibits. Each of the exhibits is referred to in the statement of the case, and the references are sufficient to identify the exhibits, and to indicate their character in a general way. In the case of some of the exhibits a reference is made to their contents, and a version is given of the substance of their contents, but this is not true of all of them. For example, all that is found in the statement about Exhibit E offered in evidence by the defendant is the following: "Defendant's Exhibit E is a prospectus issued by the United States Savings & Loan Company of St. Paul, dated July, 1893." Exhibit E, embracing this prospectus, is twice

referred to in the brief of appellant's counsel, and the attention of the Court is invited to a careful consideration of the same, as bearing upon the merits of the controversy. The record, as has been shown, falls short in some cases of showing, even in a condensed form, the substance of the contents of certain exhibits; and therefore the statement would, in our judgment, be insufficient as a statement of the case, if it were prepared under § 5467, Rev. Codes, which section has reference to statements framed in jury cases. But that section is not controlling in cases tried to the Court, except as to the formal matters of time and manner. In court cases the contents of the statement, its "structure and component parts," must conform to the requirements of § 5630, Rev. Codes 1899. Tested by the requirements of the section last cited, the statement in the case at bar is obviously insufficient. In this case counsel demand a trial *de novo* in this court, and in such cases the language of § 5630 is as follows: "But if the appellant shall specify in the statement that he desires to review the entire case all the evidence and proceedings shall be embodied in the statement." This section, unlike that which it amended, does not require or permit the reduction of the evidence to a narrative form. Much less does it allow an abridged version of the evidence to be substituted for the evidence itself. Nor does the section governing this class of cases sanction or permit the practice of incorporating in a statement the substance of the reporter's notes; nor does it authorize the trial court, in settling a statement, to strike from the same all irreleveant, redundant, and useless matter. These requirements are found in § 5467, but the same are omitted from § 5630, Rev. Codes, 1899. This court in *Bank* v. *Davis*, 8 N. D. 83, 76 N. W. 998, which was a court case, and one in which a retrial in this court was demanded, declined to retry the case, and in so doing said: "As has been seen, this cannot be allowed to the appellant, for the reason that it does not appear that all of the evidence is certified to this court, and it does appear affirmatively that only a version of the evidence offered at the trial is embraced in the statement of the case. This omission in the record precludes a trial of the entire case *de novo* in this court, and renders an affirmance of the judgment necessary." The construction of the statute as given in the case cited has been steadily adhered to by this court and frequently applied in latter cases. See *Erickson* v. *Kelley*, 9 N. D. 12, 81 N. W. 77. See, also, *Vassau* v. *Campbell*, (Minn.) 81 N. W. 829. In both of the cases last above cited it was held, in substance, that the certificate of the trial judge appended to the statement, to the effect that the same embraced all the evidence offered at the trial, was sufficient *prima facie*, but it was not conclusive in any case where the record itself showed to the contrary. The evidence offered at the trial not being before this court, we shall be compelled to grant the motion to affirm the judgment, and it will be so ordered. All the judges concurring.

(86 N. W. Rep. 110.)

SECOND NATIONAL BANK OF WINONA *vs.* JAMES SPOTTSWOOD, *et al.*

Opinion filed May 7, 1901.

Negotiable Paper—Payment to One Not in Possession.

The maker of a negotiable promissory note, who pays the same to a person who has not the note in his possession and is without authority to collect it, does so at the peril of having to pay it again in case it has been transferred to an innocent holder; but in case the person so receiving payment thereafter pays the proceeds to the holder of the note, and the same is received by him, such payment is as effectual to discharge the debt as though paid direct to such holder.

Pledgee of Negotiable Paper Receiving Proceeds.

A pledgee of a negotiable promissory note, who has received the proceeds of a collateral note and applied the same upon the debt secured by such collateral note, in ignorance of the fact that the sum so received and applied was the proceeds of such note, and has not altered his position by reason of such ignorance, cannot thereafter enforce the payment of such collateral note.

Defense of Payment.

In an action on a promissory note, the evidence is examined, and found to sustain the defense of payment.

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

Action by the Second National Bank of Winona, Minn., against James Spottswood and others. Judgment for defendants. Plaintiff appeals.

Affirmed.

C. J. Murphy, for appellant.

Where the maker of a note pays same to original payee after transfer thereof to a third party supposing the payee is still the owner of the note he cannot be relieved on the ground that there was an ostensible agency in the payee to act for the transferee of the note. *Murphy* v. *Beard*, 38 N. E. Rep. (Mass.) 32; *Hollingshead* v. *Stuart*, 8 N. D. 40; *Stolzman* v. *Wyman*, 8 N. D. 108. As a general rule possession of a negotiable instrument is sufficient to authorize payment to the party in possession; and payment to a party not in possession of such paper is at the peril of the maker. *Stolzman* v. *Wyman*, 8 N. D. 108, and authorities cited. Fact that holder of a negotiable note fails to notify maker at maturity or demand payment in no manner affects the holder's rights. *Hoffacker* v. *Bank*, 23 Atl. 579. Fact that a party may have attended to collection of notes put up as collateral in a prior similar transaction to the one involved does not prove agency in last transaction. *Smith* v. *Kidd*, 68 N. Y. 160, S. C., 23 Am. Rep. 157; *William* v. *Walker*, 2 Sand. Ch. 325; *Corey* v. *Hunter*, 84 N. W. Rep. 570, 10 N. D. 5, and cases cited; *Burchard* v. *Hull*, 74 N. W. Rep. (Minn.) 163; *Dexter*

v. *Morrow,* 79 N. W. Rep. (Minn.) 394. A presumption cannot be based upon a presumption; but must be based upon an established fact. *Lawson's Law of Presumptive Evidence,* Rule 118; *Douglass* v. *Mitchell,* 36 Pa. St. 440; *Richmond* v. *Aiken,* 25 Vt. 324; *Ellis* v. *Ellis,* 58 Ia. 720. Pledgee of a note as collateral may recover from maker whether paid by maker to pledgor or not. *Williams* v. *Bank,* 20 Atl. Rep. 191; *Griswold* v. *Davis,* 31 Vt. 390. If payment of negotiable note is made without requiring its production it is at the peril of the payer having to pay over again. *Avery* v. *Swords,* 28 Ill. App. 202; *Wheeler* v. *Guild,* 37 Mass. 545. Where payment of negotiable notes is made to pledgor in a suit by the maker thereof it must be made to appear that payment was made with authority of pledgee, or subsequently ratified by him, otherwise he is entitled to recover. *City Bank* v. *Taylor,* 14 N. W. Rep. (Ia.) 128; *Mayo* v. *Moore,* 28 Ill. 428.

Bosard & Bosard, for respondent, cited no cases.

YOUNG, J. Action on a promissory note. The defense interposed is payment. The case was tried in the District Court without a jury. Judgment was ordered and entered for the defendants. Plaintiff appeals from the judgment, and requests a review of the entire case in this Court.

The question of payment is the only fact involved. This will be made plain as we proceed with a statement of the facts. On December 13, 1895, the defendants James Spottswood and Sarah Ann Spottswood, his wife, residents of Cavalier, in this state, executed and delivered their joint negotiable promissory note, dated on that day, for $600, to the Winona Manufacturing Company, a Minnesota corporation, the payee named therein, whose principal and sole place of business was at Winona, in that state, whereby they promised to pay to said Winona Manufacturing Company the sum of $600 on December 1, 1896, with 10 per cent. interest thereon from the date of its execution. This note, which is the note in suit, was given for a loan of $600. It was secured by a real estate mortgage. Payment was guaranteed by A. L. and T. A. Miller, the other defendants herein. All dealings of these defendants relating to this note, covering the negotiations for the loan, the execution of the note and mortgage, and the alleged payment, were with one S. W. McLaughlin. McLaughlin was president of the Winona Manufacturing Company, but had his home and office in the city of Grand Forks, in this state. C. N. McLaughlin had charge of the business at Winona. On March 10, 1896, the Winona Manufacturing Company borrowed $10,000 from the Second National Bank of that city, the plaintiff herein, and executed its note to plaintiff for such sum. To secure the payment of such loan it pledged as collateral security and delivered to plaintiff a number of promissory notes, aggregating in amount about $15,000, given by persons residing in this state, among which was the note now in suit. The note is negotiable, and was

properly indorsed to the pledgee by the Winona Manufacturing Company before maturity. No question exists as to the right of plaintiff to recover unless it has been paid. The facts upon which defendants rely to show payment are not disputed. The only question is whether they constitute payment. On January 19, 1897, which was a month and a half after the note became due, the defendants, through A. L. Miller, in response to written demands made both upon the makers and guarantors by S. W. McLaughlin, paid the same to him in full, and took his receipt therefor. A satisfaction of the real estate mortgage was delivered to Miller within a few days thereafter, but the note was not, and never has been, delivered. It was not in McLauglin's possession, and has not been since March 10, 1896, when it was pledged to the plaintiff as collateral security. About a month after receiving the money, McLaughlin informed Miller, for the first time, that the note was up as collateral security, and promised to get it, which promise was subsequently repeated on two different occasions, but was never kept. The note was from the date it was received, namely, March 10, 1896, in the continuous possession of plaintiff at Winona until sent to its attorneys for collection in the fall of 1897. On the facts thus far stated it is entirely clear that the plea of payment is not sustained. Payment to McLaughlin under such circumstances would be merely a payment to a stranger. He was not even the original payee, but, had he been, the result would have been the same; for the law is well settled that payment to the payee of a negotiable promissory note, who has transferred it to an innocent holder, is at the peril of having to pay it again to the person to whom it may have been transferred. See *Hollinshead* v. *John Stuart & Co.*, 8 N. D. 35, 77 N. W. 89; *Stolzman* v. *Wyman*, 8 N. D. 108, 77 N. W. 285 and cases cited. The facts in this case clearly distinguish it from the cases just referred to. In the above cases the notes had not been paid to the holders thereof or their agents, and the question in each case was whether the innocent purchaser or the maker of the note should bear the loss arising from payments to unauthorized agents who had misappropriated the funds. We very properly held that the owners could recover; for they had neither received payment, nor authorized the parties who got the money to act for them in collecting it. In the present case we find from the evidence in the record that the proceeds of the note in suit, which was paid to McLaughlin, were in fact paid by him to the plaintiff, and duly credited upon the debt it secured. Under these circumstances it is not important to determine whose agent he was in receiving the money; for, if it was paid to plaintiff,—and we find it was,—it discharged the debt, regardless of any lack of authority in McLaughlin to receive payment for plaintiff. It is true, the cashier of the plaintiff bank testifies that the note has not been paid; but his statement to that effect is merely an inference, and is overborne by facts which are not in dispute. It appears, and is shown conclusively, that no payments were at

any time made to plaintiff on the $10,000 loan by the Winona Manufacturing Company, the maker thereof. Something like $7,000 in all was paid on it, however, at different times, and every dollar of it was paid by S. W. McLaughlin. On February 20, 1897, he paid $1,000. This payment was just a month after Miller paid him the amount due on the note in suit. There can be no doubt, upon the facts as they appear in the record before us, that the $1,000 payment included the $666.70 he had received from Miller, for there was no other source from which it could reasonably come. Appellant's counsel argue that the payment was from his own private resources, and was not the proceeds of this and other collateral notes. The circumstances are all against that contention. McLaughlin was not the maker of the $10,000 note, or of any of the several renewal notes which were secured by the collateral. The debt to the bank was evidenced by the notes of the Winona Manufacturing Company, and McLaughlin individually did not owe the bank a dollar. The only obligation resting on him was either to return the money he had received from Miller, or to pay it over to plaintiff, and thus discharge the note in suit, as he had undertaken to do when he received it. That he took the latter course is shown, we think, by his subsequent payment of the $1,000. It may be that the specific money was not transmitted, and it doubtless was not, and it may be, too, that he temporarily appropriated the proceeds of the note to his own use; but that is not important, for it appears that he thereafter personally paid to the plaintiff a greater sum at a time when there was no legal duty upon him, other than to account to plaintiff for the proceeds of the collateral notes which he had collected.

It is urged that no disclosure was made by McLaughlin when he paid the $1,000 that it embraced the proceeds of the Spottswood note. On this the record is silent. McLaughlin, the one witness who could have narrated the facts as they occurred, was not called by either party. Neither has the officer of the plaintiff bank thrown any light upon McLaughlin's relation to the collection of this and other collateral notes, or furnished any information as to how the $1,000 or other payments were made by him,—whether in currency or by draft; whether with or without instructions as to the source from which it came, or place to be applied. All that is before us is the bare fact that $1,000 was paid on February 20, 1897; that it was not paid by the Winona Manufacturing Company; that it was paid by McLaughlin; that it was applied on the debt due the bank, and was not applied on the note in suit, or any other of the collateral notes. It is true that the cashier testifies that the plaintiff did not know that defendants claimed that their note was paid until the fall of 1897, after it had been sent with other notes to plaintff's attorney at Grand Forks for collection. This was almost a year after it was due. Up to that time it appears that no steps whatever had been taken by the officers of the bank as to collecting any of the collateral notes. Whatever had been done had been done by McLaughlin.

But was it necessary, under the circumstances as they are shown to have existed, for McLaughlin to designate to plaintiff the source from which he got the $1,000 to entitle these defendants to the benefit of their payment? We know no rule of law or business imposing such a requirement. The defendants paid the entire amount due on the note to McLaughlin. He paid it to the plaintiff, and it was properly credited on the debt secured. Plaintiff was not prejudiced by McLaughlin's failure to state that $666.70 of the $1,000 was the proceeds of the note in suit. Had he so stated, or had defendants paid their money to the plaintiff personally, the debt to plaintiff would have been reduced by the same amount that it was actually reduced by the payment made through McLaughlin, and no more. Defendants would have cancelled their note by such payment, and that is all they ask in this action; and, upon every principle of justice, it would seem they are entitled to that relief. Plaintiff's position is that it can retain the proceeds of the collection which it received through McLaughlin, and on the ground that it did not know that the money came from the note in suit, enforce payment again, even though it has already had the entire benefit of a prior payment. This contention is not sustainable upon any ground. Had McLaughlin diverted the money to another purpose,—applied it on a personal debt or the debt of another,—or had the bank altered its position innocently, believing that the $1,000 payment was made by the Winona Manufacturing Company from its own resources, and not from funds derived from the collateral notes, the case would be entirely different. But, as has already been shown, there was no diversion or misapplication. Plaintiff stands in the same relative position that it would have been in had defendants paid their note direct, instead of through McLaughlin.

The question involved in this case is an anomalous one. So far as we are able to learn, there is only a single case in which an appellate court has passed upon it, and the conclusion there announced is in entire harmony with our views. The case is *Coleman* v. *Jenkins*, 78 Ga. 605, 3 S. E. 444, in every way similar in its facts to the case at bar. Jenkins owed a note of $135, secured by a real estate mortgage to Palmer. Palmer owed Coleman & Co. $2,700. Palmer pledged Jenkins' note to Coleman & Co. to secure his indebtedness. Jenkins, believing that Palmer still owned the note, paid him in full in cotton. Palmer converted the cotton into money, and remitted the proceeds, "not separately, but in a check for a larger sum," to Coleman & Co., to apply on his debt, which was done. Palmer did not inform Coleman & Co. that he had collected anything from Jenkins, and he had no authority to collect the note. Coleman & Co. undertook to foreclose the Jenkins mortgage. The defense was payment, as in this case. The defense was sustained by the Superior Court, and also by the Supreme Court, in an opinion from which we quote at some length, as follows: "The question is whether the payment to Palmer in cotton, together with his re-

mittance to Coleman & Co. of the proceeds of the cotton so paid, discharged the debt as between Jenkins, the mortgagor, and Coleman & Co., the holders of the note and mortgage. It will be perceived that there was no new credit given to Palmer in consequence of this collateral. There was no increase of the debt for which it was pledged to Coleman & Co., but that debt remained the same, except in so far as it was reduced by the proceeds of this very collateral, together with other payments made by Palmer. If, therefore, Coleman & Co. had known that this money came from Jenkins, they would have made precisely the application of it that they did make. It would have gone to reduce Palmer's debt to them, as it did go. The only difference is that, had all the facts been known, they would have credited to Jenkins as well as to Palmer. The collateral was pledged on the debt as a whole, and not to secure any particular part of it; and the payment was applied in the reduction of the whole debt, and did not leave Coleman & Co. less secure as to any particular part of it than they were before. Moreover, there is no suggestion that the money derived from sale of the cotton was less than the full amount of the debt Jenkins owed. And all this money was covered by the check remitted by Palmer to Coleman & Co. * * * When one gets his due ignorantly, if he is not hurt by his ignorance, it is the same as if he acted with knowledge. Thus, where a negotiable promissory note was transferred before maturity as collateral, and was afterwards paid off in property, not to the holder, but to the payee, who collected without authority, and who, after converting the property into money, transmitted the proceeds to the holder as his own money, and the holder applied the same to the secured debt only, not applying it also to the collateral, and not knowing that he was dealing with a fund derived from the collateral, this was a discharge of the collateral debt, notwithstanding such ignorance on the part of the holder."

In the case at bar the trial court found that the note in suit was paid. That finding is, in our judgment, sustained by the evidence and the judgment of the District Court is accordingly affirmed.

MORGAN, J., concurs.

WALLIN, C. J., (*concurring*). I agree with the majority of the Court that the judgment should be affirmed, but am not wholly satisfied with the reasoning upon which the majority base their conclusion. An examination of the evidence has failed to satisfy me that the money paid to McLaughlin by the signer of the note was ever in fact paid over to the plaintiff. But, in my opinion, the evidence, when considered in its entirety, tends at least to show that McLaughlin was plaintiff's agent for the collection of the note, and there is no evidence whatever in this record to combat this conclusion. The fact of agency being shown,—and I think that it is shown,—it becomes immaterial to inquire whether the funds paid over to the agent were or were not transmitted to the principal.

(86 N. W. Rep. 359.)

SAMUEL A. JAMES *vs.* LEWIS BEKKEDAHL.

Opinion filed May 9, 1901.

Sale—Breach of Warranty—Damages.

Defendant purchased ladies' gloves under a special warranty that, if they were not satisfactory or if they ripped, they should be returned to the plaintiff, who would furnish new ones. Five pairs were returned to defendant by customers as not satisfactory, the defendant having sold them to customers under a similar warranty. The defendant sent the five pairs to the plaintiff, who repaired them and sent them back to defendant, and he retained them without objection, and again sold them. The customers returned other gloves to defendant as not satisfactory, but he did not send them back to plaintiff, claiming it would be useless. *Held*, that the defendant could not counterclaim his damages by reason of a breach of the warranty as to gloves not returned by him.

Conditions Precedent.

It is competent for parties to contract what course shall be pursued in case of a breach of a warranty, and when conditions are required to be performed by the buyer, as part of the contract, in case of such breach, the buyer must comply with such conditions before he can claim damages by reason of such breach.

Evidence Sustains Findings.

Men's gloves were sold by sample. Evidence examined, and *held*, that such gloves were the equal of the samples in quality and workmanship.

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

Action by Samuel A. James, doing business as S. A. James & Co., against Lewis Bekkedahl. Judgment for plaintiff. Defendant appeals.

Affirmed.

P. G. Swenson, for appellant, cited *Laybourne* v. *Seymour*, 54 N. W. Rep. 941; *Jones* v. *Strode*, 41 S. W. Rep. 562.

John Carmody, for respondent.

Appellant could not retain the gloves and claim damages for breach of contract. The warranty required him to return the gloves that did not give satisfaction. This he did not do. *Plano Mfg. Co.* v. *Root*, 3 N. D. 165, 54 N. W. Rep. 924; *Fahey* v. *Esterly*, 3 N. D. 220, 55 N. W. Rep. 580; *Ducker* v. *Cochrane*, 92 N. C. 597; *Lowe* v. *Ross*, 56 N. W. Rep. 528; *Russell* v. *Murdock*, 44 N. W. Rep. 237; *King* v. *Tousley*, 19 N. W. Rep. 859; *Nichols* v. *Knowles*, 18 N. W. Rep. 413; *Minnesota Thr. Mfg. Co.* v. *Hanson*, 3 N. D. 81, 54 N. W. Rep. 311. The burden of proof was on defendant to show a breach of warranty. *Plano Mfg. Co.* v. *Root*, 3 N. D. 165, 54 N. W. Rep. 924. A finding based upon conflicting evidence will not be disturbed on appeal. *State* v. *McKnight*, 7 N. D. 444, 75 N. W. Rep. 790; *Axiom Mining Co.* v. *White*, 72 N. W. Rep. 462. Defendant by

retaining the gloves and selling them waived his right to complain of the defects. *Morse* v. *Moore, 22* At. Rep. 362.

MORGAN, J. Plaintiff has sued the defendant to recover a judgment for the value of certain gloves sold to him in July, 1899. The answer admits the sale of the gloves, but alleges as a counterclaim that the ladies' gloves so sold were sold under a special warranty, and that the men's gloves were sold to be as good in quality as samples shown at the time of the sale. The answer further alleges that there was a breach of the express warranty in the sale of the ladies' gloves, as well as a breach of the implied warranty in the sale of the men's gloves, to his damage. Plaintiff denies the allegations of the counterclaim by a reply. Plaintiff recovered a judgment on a trial to the Court, a jury having been waived. From such judgment defendant appeals, demanding a retrial of the entire case.

The facts as to the ladies' gloves are not in dispute, and are as follows: Plaintiff's salesman called upon the defendant at Hilsboro and sold him the ladies' gloves under these conditions or representations: That in case these gloves did not give satisfaction, or if they ripped, they should be returned to the plaitiff, to be replaced by new ones. The gloves were delivered to the defendant, who sold them to his customers under the same warranty or representation under which he purchased. These representations are admitted by the attorneys to constitute a warranty. Five pairs were returned to the defendant by customers as not satisfactory, the defendant forthwith sending them back to the wholesale house with a request to send new pairs "or credit our account." The plaintiff cleaned and repaired these returned gloves and sent them back to the defendant, who sold them to his customers without making any complaint to plaintiff that new pairs were to be returned. Several pairs more were returned by defendant's customers as not satisfactory. These he did not return to the plaitiff, although he gave his customers new ones in place of those returned. He states as his reason for not returning these to the plaitiff that it would have been useless, inasmuch as he had not sent new gloves in place of those that he had previously returned. In not returning them, he did not fulfill the requirements of the contract or warranty under which he purchased. That he should return them when returned to him as not as represented was a mandatory undertaking devolving on him by the terms of sale. He had no option. To bring himself within the terms of sale, he must perform all the conditions required of him. It is not open to question that in most cases of warranty the purchaser may retain the property after discovery of qualities in it constituting a breach of the warranty, and still be permitted to set up a breach of the warranty, but this case does not come within the general rule. Under the facts of this case, we hold that he was under obligations to return these gloves before he can counterclaim for damages by reason of defects in them. To return each pair of gloves when returned to him was a component, unconditional part of the contract,

concerning which the plaintiff had the right to insist on his complying with; and it is clearly apparent that the plaintiff would be placed at a disadvantage by being forced to pay damages by reason of the gloves not being as warranted, rather than supply new ones. He therefore had a right to have the defendant strictly comply with the contract of warranty. It was not incumbent on the defendant, perhaps, that he should have returned the repaired gloves, but he should have returned the ones thereafter returned to him by customers before he can justify his not doing so by the plaintiff's failure to comply with the purchase contract. When he did not return the repaired gloves, nor make any complaint because new gloves had not been sent, the plaintiff had a right to believe that sending the gloves back to him repaired and cleaned was satisfactory to him. Authorities are not wanting to sustain this construction of this contract, but it will be sufficient to cite the language of this court in *Manufacturing Co.* v. *Hanson*, 3 N. D. 81, 54 N. W. 311, viz.: "We regard it as well settled that where an express warranty is upon condition, or when some duty is devolved upon the purhcaser by the terms of the warranty, such condition must be fulfilled or such duty performed before advantage can be taken of any breach of such warranty." See, also, cases cited in that opinion; *Parks* v. *Tool Co.*, 54 N. Y. 586; *Love* v. *Ross* (Iowa) 56 N. W. 528. The trial court allowed the defendant damages on account of the failure of the plaintiff to furnish new gloves in place of the five pairs returned as not satisfactory.

The men's gloves were sold and bought on inspection of samples, and the gloves to be received under the sale were thereby warranted to be equal in quality to the samples. § 3973, Rev. Codes. They were discovered not to be equal to the samples soon after their receipt, but no notice given or complaint made to the plaintiff of that fact, nor did he know that defects were claimed until suit was brought. Upon this question of the quality of the samples we are convinced, from a consideration of all the evidence, that the gloves sold by sample have not been shown by the defendant to have been inferior to the samples exhibited. Three of the defendant's witnesses examined the samples from which these gloves were sold, and also examined the gloves that were sent the defendant, and they each testify that the gloves sent were of like quality with the samples. Their examination of the samples and of the gloves sent was close and careful,—much more so than the examination given by the defendant to the samples. The defendant's testimony is not in the least corroborated as to the quality of the gloves or samples. He kept them until this suit was commenced, without complaint, after he knew they were not equal in quality to the samples, as he claims. This seems quite convincing that they were equal to the samples in quality and workmanship. He also claims that some of the gloves were not of the sizes ordered. If true, this entitled him to no damages, as none were attempted to be proven as to this claimed

defect. He simply says that these were not worth as much as the sizes ordered. We conclude that the trial court did not commit any error on the trial of the case. Affirmed. All concur.

(86 N. W. Rep. 226.)

C. S. DEVER *vs.* GEORGE L. CORNWELL, *et al.*

Opinion filed May 9, 1901.

Tax Levy Void—Action to Quiet Title.

Statutory action to quiet title to land situated in the county of Richland. The complaint alleges ownership in fee in the plaintiff, and that defendants claim some interest in the land adversely to the plaintiff. Defendant Cornwell answered, and denied the plaintiff's ownership, and alleges title in fee in himself. To sustain his claim of ownership, the plaintiff put in evidence a tax deed describing said land, issued upon a tax sale made by the treasurer of said county in 1896 for taxes charged against the land in 1895. Said deed was regular upon its face, and in the form prescribed by section 1268, Rev. Codes 1895, except that the deed was not executed by the county treasurer, and was executed and issued by the county auditor. After introducing the deed, plaintiff rested his case. The evidence in the record shows that the county tax of 1895 was not levied in specific amounts, and that the commissioners attempted to levy said tax by percentages, and that the tax of 1895 was extended on the tax list, and based on said attempted levy by percentages. *Held*, construing section 48, chapter 100, Laws 1891, that said attempted tax levy was without authority of law, and that the county tax based on said attempted levy was illegal, and wholly void. The county treasurer was without jurisdiction to sell the land for said taxes, and the tax deed based on such sale was void from the beginning.

Once a Week for Three Successive Weeks—Construed.

Said tax sale is governed by section 1255, Rev. Codes 1895. The notice of sale was published as follows: First, on September 17, 1896; again. on September 24, 1896. The last publication was made on October 1, 1896. The sale took place on October 5, 1896. Excluding the date of the first publication, the notice was published only 18 days before the sale. *Held*, that this notice was insufficient under the statute. Section 1255 requires a publication "once a week for three consecutive weeks preceding the sale." This language means that the publication must continue for and during three full weeks of seven days each, a total period of twenty-one days, preceding the sale. Finlayson v. Peterson, 5 N. D. 587, 67 N. W. Rep. 953, 33 L. R. A. 532, followed. The defect in the publication was jurisdictional, and the deed is void for this reason also.

Validating Void Levy—Constitutional Restriction.

The legislature, subsequent to such pretended sale, attempted to validate said attempted levy of county taxes in 1895. See chapter 99, Laws 1897. Section 1 reads: "That the levy of taxes as made in the various counties for the year 1895 is hereby legalized and made valid for all intents and purposes the same as if made in conformity to the law then in force." *Held*, that said act of validation can operate only upon uncollected taxes based on said levy. It does not purport to do more than validate the levy. It does not undertake to validate any tax sale, or to give effect to any void tax deed. If it did do so,

the act would be unconstitutional. It is beyond legislative power to transfer title to land by declaring that void deeds shall be valid conveyances of title. The tax deed in question is neither cured nor affected by the validating statute.

Evidence Considered.

Evidence and pleadings considered, and *held* that plaintiff wholly fails to sustain his allegation of ownership in fee, and hence cannot maintain this action; nor is plaintiff in a position to require the defendant Cornwell to vindicate his title, as alleged in the answer. Plaintiff omitted to allege that he was in possession, nor does the evidence show that he was ever in possession. In this class of actions the parties on both sides are confined to their allegations, and cannot, except by consent, show any right or title other than that alleged. Plaintiff, having failed to sustain his allegation of ownership, must fail in this action.

Deed by Auditor.

Whether the tax deed in suit is void on its face because the same was issued by the county auditor, is not decided.

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

Action by C. S. Dever against George L. Cornwell and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Curtiss Sweigle, and *McCumber, Bogart & Forbes*, for appellant.

At the time of the tax sale, October, 1896, § 1268 of the Rev. Codes was in force. Plaintiff's deed follows the form prescribed by this section excepting that the deed is executed by the auditor and not by the treasurer. It is elementary that the law in force at the time of the sale governs. Black on Tax Titles, § 795; *Roberts* v. *First Natl. Bank*, 79 N. W. Rep. 1049, 8 N. D. 504. The law giving a tax deed certain force as evidence cannot be repealed, and the force the deed had as evidence be taken away. Blackwell on Tax Titles, § 844; *Marx* v. *Hawthorn*, 30 Fed. Rep. 579; *Smith* v. *Cleveland*, 17 Wis. 573. The only change made or that could be made by § 92, Revenue Law 1897, was this requirement that the auditor should execute all tax deeds to persons entitled thereto under prior revenue laws. The revenue law of 1899 did not prescribe any form for deeds to be executed under it, hence Chap. 155, Laws 1899, was enacted which provides that the auditor may issue deeds on former sales in the form therein prescribed. A retrospective effect will not be given a statute unless the legislative intent that it shall so operate is clearly manifest. *Gage* v. *Stewart*, 127 Ill. 207, 19 N. E. Rep. 702; Blackwell on Tax Titles § 1052. There is no policy of law that forbids the vendee in possession to buy an outstanding title to the premises and assert it against his vendor, otherwise it might be asserted by the owner, or a stranger might buy it and it would be lost to both. *Bright* v. *Rochester*, 7 Wheat. 548, *Jackson* v. *Johnson*, 15 Am. Dec. 433; *Green* v. *Dietrich*, 114 Ill. 636. Defendant is not entitled to attack plaintiff's title, although in possession. *Hordway* v. *Cowles*, 25 Pac. Rep. 569; *Picquat* v. *City*, 64 Ga. 254; Desty on Taxation, 904; *Lebannon Mining Co.* v. *Boxers*, 5 Pac. Rep. 601.

Proof of possession must be accompanied by some evidence of title. Sedg. & Wait. on Trial of Title, 718; *Douglas* v. *Raffin*, 16 Pac. Rep. 783. Where legal title held by plaintiff in ejectment is only opposed by naked possession by defendant, plaintiff is entitled to recover. *Shaffer* v. *Matzen*, 3 Pac. Rep. 95; *Jackson* v. *LaMoure Co.*, 46 N. W. Rep. 447, 1 N. D. 238.

W. E. Purcell, (S. & O. Kipp, of counsel), for respondent.

At common law a tax deed is evidence of its own existence upon proof of the due performance of all preceding requisites in the tax proceedings. Without such proof it is not evidence at all. Cooley on Taxation, 517. The tax deed in question was executed under § 92, Revenue Law of 1897, which does not provide that the deed shall be evidence of anything. Conceding that a purchase at tax sale is a contract between the state and the purchaser, and that the statutes in force at the time, which affect the contract rights of the parties enter into and are a part of the contract, yet remedial forms and rules of evidence do not form part of the contract. The purchaser was not entitled to a tax deed in the form prescribed by § 1268, Rev. Codes. Such section is unconstitutional in that it attempts to make the tax deed conclusive proof of title. Cooley Const. Lim. 453. The tax deed having been issued under this void statute no rights can be claimed under it, and the common law rule prevails. *Dawson* v. *Teeter*, 77 N. W. Rep. 997; *Stoudemire* v. *Brown*, 48 Ala. 699; *Davis* v. *Minge*, 56 Ala. 121. The tax levy was void because made by percentages and not in specific amounts. *Wells County* v. *McHenry*, 7 N. D. 246, 74 N. W. Rep. 241. The county tax levy was void when the sale was made, invalidating the sale so that it could not be rendered valid by an act of the legislature. *Cromwell* v. *McLean*, 123 N. Y. 474, 25 N. E. Rep. 932; *Daniels* v. *Watertown*, 29 N. W. Rep. 673; *Zeigler* v. *Flack*, 54 N. Y. Sup. Ct. 69; *Hopkins* v. *Mason*, 61 Barb. 469; *Forster* v. *Forster*, 129 Mass. 559. The notice of sale was not published for twenty-one days prior to the sale, as required by § 1255, Rev. Codes, and is void. *Marx* v. *Hawthorn*, 30 Fed. Rep. 579; *Marx* v. *Hawthorn*, 148 U. S. 172; *Nor. Pac. Ry. Co.* v. *Galvin*, 85 Fed. Rep. 811; *Roth* v. *Gilbert*, 123 Mo. 29, 27 S. W. Rep. 528; *Baumtagur* v. *Fowler* 82 Md. 631; *Wambole* v. *Foot*, 2 Dak. 1; *Mather* v. *Darst*, 82 N. W. Rep. 407; Cooley on Taxation, 482, 483. A tax deed is not *prima facie* evidence of jurisdictional requisites. *Dawson* v. *Peter*, 77 N. W. Rep. 997. Under § 106, Act of 1897, the tax purchaser was required to give notice of expiration of time of redemption before taking his deed, notwithstanding the sale was made under an earlier and then repealed enactment. *Curtis* v. *Whitney*, 13 Wall. 68; *Herrick* v. *Niesz*, 47 Pac. Rep. 414; Black on Tax Titles, § 329; *Gage* v. *Stewart*, 127 Ill. 207, 19 N. E. Rep. 702; *Ouhallan* v. *Sweeney*, 79 *Cal.* 537, 21 Pac. Rep. 960; *Coulter* v. *Stafford*, 56 Fed. Rep. 564; Jaggard on Taxation, 548. The tax deed is not evidence of the due giving of this notice. Black on Tax Titles, § 452; *Miller*

v. *Miller*, 31 Pac. Rep. 249; *Reid* v. *Thompson*, 9 N. W. Rep. 331. *Herrick* v. *Niesz*, 47 Pac. Rep. 414; *Strode* v. *Washer*, 17 Ore. 50; *Hickox* v. *Tallman*, 38 Barb. 608; *Howard* v. *Monck*, 64 N. Y. 262. Plaintiff alleged ownership and failed to prove it. Having no interest in the land he is not prejudiced by the judgment declaring defendant the owner. *Myrick* v. *Coursalle*, 32 Minn. 153, 19 N. W. Rep. 736. White, while in possession under the executory contract by which he agreed to pay all taxes, could not acquire a tax title against his vendor. Black on Tax Titles, § 293. Possession is *prima facie* evidence of the highest estate in property. Newell on Ejectment, 367; Sedg. & Wait. on Trial of Title, § 717.

WALLIN, C. J. This action was tried by the District Court without a jury, and a judgment was entered in that court dismissing the action Plaintiff has appealed to this court from the judgment, and demands a trial anew of all the issues in this court. The complaint alleges that the plaintiff is the owner in fee simple of certain real estate described in the complaint; that the defendants claim some interest in or title to said real estate, which is adverse to the plaintiff's title. The nature of the defendants' claim of title to the land is not indicated by the complaint, but the prayer of the complaint is to the effect that the title be adjudged to be quieted in the plaintiff. The answer embraces a general denial, and also alleges title in fee simple in the defendant Cornwell. The action is strictly a statutory action, and was instituted under the provisions of Chap. 30 of the Code of Civil Procedure. The plaintiff's claim of ownership and title rests solely upon a certain tax deed which was offered in evidence by the plaintiff. This evidence was objected to for several reasons, among which were the following: First, that the same was incompetent to show title, because it showed upon its face that it was executed and issued by an officer not authorized by law to execute or issue the same; and, second, that it did not appear on the face of the deed, and was not the fact, that a notice of the expiration of the period of redemption was given prior to the delivery of the deed. The tax deed shows that the same was issued by the county auditor of Richland county on the 7th day of October, 1898, upon the surrender of a certificate of tax sale bearing date the 5th day of October, 1896, which certificate was issued by the county treasurer of Richland county on the date last stated, and the same evidenced a tax sale of the lands in controversy made by said treasurer on the 5th day of October, 1896, for the sum of $18.12, which sum was the amount of delinquent taxes charged against said land for the year 1895. The deed recites that the period of redemption had expired, and that the lands had not been redeemed from said sale; that the land was legally liable to taxation; and that said taxes for 1895 had been legally assessed and levied. The deed was framed strictly in conformity to the form of deed embraced in § 1268 of the Rev. Codes of 1895, except that the same was issued under the hand of the county auditor of Richland county, and the same was

not issued or signed by the treasurer of the county, as required by said § 1268. In this court it is contended in behalf of the respondents that the deed is wholly void, because the same was not issued by the county treasurer, as required by § 1268. On the other hand, counsel for the appellant contend that, inasmuch as the deed was issued upon a tax sale made in 1895, while said § 1268 was in force, he is entitled to that form of deed which the statute then prescribed, and that such a deed was contracted for when the purchaser bid off the land. In support of this contention the appellant's counsel cite § 92 of Chap. 126 of Laws of 1897, and insist that this section fully authorized the county auditor to issue the deed and issue any tax deed which a purchaser was entitled to have issued under the laws in force when the land in question was sold at tax sale.

The questions presented by these contentions of counsel are interesting to the profession, and are by no means devoid of difficulty; but, as will hereafter appear, it is unnecessary, in disposing of the present case, to determine whether the county auditor could or could not lawfully issue the deed which was issued, or whether the same, when issued, was evidence of title, or conclusive evidence of the facts recited upon its face. In our judgment, these questions need not be considered in the present case, because in disposing of the case this court will assume, without deciding upon the face validity of this deed, that the same possesses all the validity which it would have had if it had been issued by the county treasurer, instead of the auditor, and so issued while § 1268 of the Rev. Codes of 1895 was in force, and unrepealed. This assumption, for the purposes of this case, is favorable to the appellant, and goes as far as the appellant's counsel can ask. Assuming, then, for the purposes of the case, that the deed is regular on its face, and that it constitutes *prima facie* evidence of title in the plaintiff, we proceed to consider whether evidence aliunde, which we find in the record, is sufficient to destroy the deed as a conveyance of title. In this investigation we shall have occasion to discuss only that part of the evidence which relates to the county levy of the tax of 1895, and that which has reference to the notice upon which the land was sold for the tax of that year. With respect to the county levy, it appears from the evidence the commissioners' record that the following attempted levy was made on July 12, 1895, and that no other county levy was made in that year in the county of Richland. The record is as follows: "On motion the following tax levy for 1895 was made by the board: For county general fund, 6 mills; for county sinking fund, 5-10 mills; for county road and bridge, 5-10 mills,—total, 7 mills." It further appeared by the testimony of the deputy county auditor that in making up the county tax list for 1895 taxes were expended upon this levy based on the percentages above set out. No attempt was made by the county commissioners of Richland county in 1895 to levy a county tax in specific amounts, as required by § 48 of Chap. 100 of the Laws of 1891, which section was then in force, and con-

trolled the levy. The statute which authorized the levy and prescribed the mode and manner of the levy was completely ignored, and the commissioners, instead of conforming to the law, proceeded to make a pretended tax levy in a manner not authorized by law. In so doing the commissioners acted without authority of law, and in the teeth of express statutory provisions. The attempt to levy the county tax for 1895 was, therefore, abortive. No such tax was levied. This court had occasion to so rule in *Wells Co.* v. *McHenry*, 7 N. D. 246, 74 N. W. 241, which was a case of a county tax, where the levy was in percentages, and was not in specific amounts. In the course of the opinion this court said: "At the time the pretended levy in question was made, a levy by percentages was not a levy at all. We have, therefore, a case of a failure to levy, and not a mere omission of some step in relation to a levy." And the court held in the case cited that a judgment for the county tax in question—that of 1890—could not be entered for said tax, because there was no such tax none having been levied. The case at bar comes squarely within the rule laid down in the case cited. It is elementary that a failure to levy a tax under a statute requiring a levy is a fundamental defect in tax proceedings, which destroys the ground work of the tax. No county tax being levied in fact, the auditor was without authority to extend a county tax upon the list, and the treasurer was without authority to collect any such tax by sale of land or otherwise. The defect is jurisdictional. In *Roberts* v. *Bank*, 8 N. D. 504, 79 N. W. 1049, this court said: "The jurisdictional defects will be found to include the nontaxability of the property, the absence of any assessment, the absence of any levy," etc. But appellant's counsel contends that this void tax levy has been completely cured and validated by subsequent legislation, and cites Chap. 99 of the Laws of 1897 to sustain this contention. Section 1 of said chapter reads as follows: "That the levy of taxes as made in the various counties for the year 1895 is hereby legalized and made valid for all intents and purposes the same as if made in conformity to the law then in force." We see no constitutional objection to this statute, inasmuch as it does not, by its terms, transcend certain well-defined constitutional restrictions which measure all legislation designed to cure defects in tax proceedings. The law purports to validate only the tax levy. It does not attempt to validate any defective sale for taxes, whether made prior to the passage of the act or subsequent thereto. Much less does it attempt to interfere with vested rights by declaring that any tax deed based upon a sale for the delinquent tax of 1895, and which was void from the beginning, should be a good deed, and thereafter operate to transfer the title of the land described in the deed from its original owner to the holder of the tax title. The act of validation, therefore, can operate only upon such taxes as were uncollected at the time of its passage; and as to such taxes it purports to cure but a single step in the process of laying the tax, viz: the levy of the county taxes in the year 1895. So far as

the land in question is concerned, the county tax of 1895 had been paid, and the money received in the county treasury, long prior to the enactment of the curative statute relied on by the appellant. The land was sold for the 1895 tax in 1896 and the act was not passed until the year 1897. The validation of the county levy of 1895 therefore was wholly inoperative so far as this land is concerned. Besides, it is well settled that it is beyond the power of the legislative branch of the government to transfer the title of land by mere legislative fiat. The Supreme Court of the United States has tersely expressed this doctrine as follows: In speaking of legislative power, the court said: "It may, therefore, cure irregularities, and confirm proceedings which, without the confirmation, would be void because unauthorized, provided such confirmation does not interfere with intervening rights." See *Mattingly* v. *District of Columbia*, 97 U. S. 687, 24 L. Ed. 1098. In *Forster* v. *Forster*, 29 Mass. 559, the legislature attempted to cure void tax sales where the notice of sale was invalid under the law. The curative act was declared void, as infringing upon vested interests. The rule is the same where a sale of land is made by order of court in a proceeding in which the court was wholly without power to direct the sale. In such a case a statute subsequently passed to confirm the sale is inoperative and void. See *Maxwell* v. *Goetschins*, 29 Am. Rep. 242. The limitation of the legislative authority to cure defects in tax proceedings is as well settled as is the general right of the legislature to enact curative laws. See Cooley, Tax'n (2d Ed.) p. 298; *Cromwell* v. *Maclean*, 123 N. Y. 474, 25 N. E. 932; *Hopkins* v. *Mason*, 61 Barb. 469; *Daniells* v. *Watertown Tp.*, (Mich.) 28 N. W. 673. In the case last cited the Court said: "The difficulty in this case is, there has been a sale of property levied upon, and the rights of parties became vested, before the curative legislation took effect, and such rights cannot be interferred with in this manner." Further citations are deemed superfluous. The void tax deed is not transmuted by legislative decree into a valid deed, under the provisions of Chap. 99 of the Laws of 1897.

But the deed is absolutely void for another reason, and one equally cogent. The tax sale of 1896, upon which the deed is based, was an illegal sale, and the treasurer was without jurisdiction to make the same. Prior to said sale, no legal notice thereof had been given. Section 1255 of the Rev. Codes of 1895 governed the sale. Said section, so far as the same is material here, reads: "The treasurer shall give notice of the sale of real property by publication thereof once a week for three consecutive weeks preceding the sale in a newspaper in his county to be designated by the board of county commissioners." Defendant put in evidence the record of the procedings of the county board relating to the designation of a newspaper, which is as follows: "Motion made and seconded that the North Dakota Globe be designated, and it is hereby designated,

the paper to print the delinquent tax list." The printer's affidavit of publication, after search therefor, could not be found by the deputy auditor, who was its custodian; and after laying proper foundation for secondary evidence, the publisher of the North Dakota Globe was sworn as a witness, and testified to the effect that he was the editor and publisher of that newspaper during the year 1896; that in that year the delinquent tax list of 1895 was published in that newspaper as follows: "The first publication on September 17, 1896; the next, September 24, 1896; and the last, October 1, 1896. These were the only publications of the notice made that year. The sale took place on October 5, 1896. Excluding the day of the first publication, the notice was published for 18 days before the sale, and no longer. Was the publication sufficient? This question must receive a negative answer. It was published three times before the sale in the designated newspaper, but the same was not published "once a week for three consecutive weeks preceding the sale." The phrase "for three consecutive weeks" means during or throughout a period of 21 days, or a period of three full weeks of 7 days each. This construction of the same, or practically the same, language has been adopted by many courts, and has received the full sanction of this court. See *Finlayson* v. *Peterson*, 5 N. D. 587, 67 N. W. 953, 33 L. R. A. 532, and cases cited. In the Finlayson case the language construed was as follows: "For six successive weeks," while the language under consideration is, "For three consecutive weeks." But, in the connection in which the words "successive" and "consecutive" are respectively found, these terms are synonymous in meaning. These words are quite generally used interchangeably. See Webst. Dict. The publication of the notice was, therefore, insufficient, and gave no authority to sell. It is well settled that a tax sale made without giving the prescribed notice is fatally defective, and that a deed otherwise regular and valid is worthless if the same is issued pursuant to a sale based on an illegal notice. The courts of many states, as well as this state, have so held repeatedly. See *Roberts* v. *Bank*, supra; also, *Sweigle* v. *Gates*, 9 N. D. 538, 84 N. W. 481. See authorities collected in Cooley, Tax'n (2d Ed.) p. 484, note 2. Where the notice of sale is substantially insufficient for any reason, it matters not that the statute declares that the tax deed shall be conclusive and shall convey title. Such statutes are unconstitutional, and, if upheld, would operate to transfer title to real estate without due process of law. See the following cases as illustrative of this rule: *Marx* v. *Hanthorn*, (C. C.) 30 Fed. 579; Id., 148 U. S. 172, 13 Sup. Ct. 508, 37 L. Ed. 410; *Roth* v. *Gabbert*, 123 Mo. 29, 27 S. W. 528; *Baumgardner* v. *Fowler*, 82 Md. 631, 34 Atl. 537; *Wambole* v. *Foote*, 2 Dak. 1, 2 N. W. 239; *Mather* v. *Darst*, (S. D.) 82 N. W. 407.

The plaintiff, in his complaint, alleges ownership of the land in fee simple, without setting out the source of his title; nor does the complaint attempt to allege that plaintiff is, or ever has been, in posses-

sion of the land. At the trial some evidence was offered touching the possession of the land. It appears that one Herman Hoyt had farmed the land continuously for many years under a contract of purchase with the defendant Cornwell. That contract, up to the time of the trial, had not been cancelled, either by agreement of the parties thereto or by the judgment of any court; but there is some evidence that Hoyt made some arrangement with Curtiss Sweigle, the attorney for the plaintiff, concerning a crop to be raised on the land. But the terms of this agreement are not stated; nor is there any evidence that the plaintiff was in any wise a party to, or concerned in, such arrangement as was made with Sweigle, nor is there any pretense that the arrangement with Sweigle was concurred in or known to the defendant Cornwell, who alleges ownership of the land. Certain evidence was introduced under objection to show that the defendant Cornwell was and is the owner of the land. Plaintiff's counsel contend that for certain technical reasons such evidence was incompetent. But we are of the opinion that plaintiff, under the evidence, has not only signally failed to sustain his allegations of ownership and title, but has also failed to show any estate in, title to, or possession of the land involved. Under the evidence the plaintiff is a stranger to the premises, and without interest therein, either at law or in equity. It appearing by the evidence that the plaintiff has no title or interest in the land, and having failed either to allege or prove possession of the land, the plaintiff cannot maintain this action. *Jellison* v. *Halloran*, 40 Minn. 485, 42 N. W. 392; *Herrick* v. *Churchill*, 35 Minn. 318, 25 N. W. 129; *Myrik* v. *Coursalle*, 32 Minn. 153, 19 N. W. 736; *Merrill* v. *Dearing*, 47 Minn. 137, 49 N. W. 693; *Wheeler* v. *Paper Mills*, 62 Minn. 429, 64 N. W. 920. The cases cited from Minnesota were all statutory actions to quiet title. In *Merrill* v. *Dearing* the Court lays down the rule that, where the complaint alleged ownership in fee in the plaintiff, he would not be permitted to show an equitable interest only in the land. In *Stuart* v. *Lowry*, (Minn.) 51 N. W. 662, this rule was applied to a defendant. In *Myrik* v. *Coursalle* the Court said: "The plaintiff must allege in his complaint, and, in case of contest, show upon the trial, some title to the land; otherwise, he does not put himself in a position to attack the claim of any other person to the same. In *Wakefield* v. *Day*, 41 Minn. 344, 43 N. W. 71, the Court, referring to the burden resting on the plaintiff in this class of actions, said: "It was necessary for him to prove the title or interest claimed by him, in order to maintain his action." Under these authorities the plaintiff was not in a position to call upon the defendants to show at the trial that their title to the land was a good title, and all evidence introduced at the trial to vindicate the defendant's title was therefore superfluous. As against the plaintiff, the defendants were entitled to have their title quieted at least to the extent of an adjudication that the plaintiff had no title to or interest in the land as against the defendants. The plaintiff, having failed to show that he has in any

manner paid a valid tax upon the lands in question, is, aside from other considerations, in no position to ask a court to give him a judgment against the defendants for money paid as for taxes. Our conclusion is that the judgment of the trial court was proper, and it will therefore be affirmed. All the judges concurring.

(86 N. W. Rep. 227.)

STATE *ex rel* JACOB SUNDERALL *vs.* WILLIAM MCKENZIE, *et al.*

Opinion filed May 11, 1901.

Ministerial Duties of Canvassing Board.

In this state the duties of county canvassing boards are ministerial, and not judicial.

Vote Canvassed as Returned.

The object and purpose of the canvass made by such board is to determine the result of the election as shown by the official returns of such election, and not to determine judicially who received the most votes in fact. In case the official returns do not truly recite the votes as cast, the remedy provided for those who are aggrieved is by contesting the election.

"Tally List" Not Part of Returns.

In canvassing the result of an election, such board is limited to a consideration of the official returns which are required by law to be sent in by the officers of the election precincts. These include the precinct poll books and the certified statements of the election made by the precinct officers, but do not include "tally lists."

Official Statement of Votes Cast.

It is *held* in this case that the county canvassing board properly refused to consider certain tally sheets or lists which were found in the poll books, for the purpose of varying the votes as shown to have been cast by the official statements of the election of such precincts, and that the District Court was in error in issuing a peremptory writ of mandamus compelling said board to do so.

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

Application by the State, on the relation of Jacob Sonderall, for a writ of mandamus against William McKenzie and others. Judgment for plaintiff. Defendants appeal.

Reversed.

Jeff M. Myers, for appellant.

The board of election canvassers are ministerial officers whose duty it is to receive the returns from the precincts and declare results as shown by the face of the returns. 10 Enc. L. (2 Ed.) 746. And such canvassing board has no power to go beyond the returns. McCreary on Elections, § 81; Payne on Elections, § 603; *McCoy* v. *State*, 36 At. Rep. 81; *People* v. *Hilliard*, 29 Ill. 413; *Franklin Co.* v. *State*, 24 Fla. 55; *Moore* v. *Kissler*, 59 Ind. 152;

People v. *Circott*, 97 Am. Dec. 141; *Attorney General* v. *Board*, 31 N. W. Rep. 539; *McQuade* v. *Ferguson*, 51 N. W. Rep. 1071; *Taylor* v. *Taylor*, 10 Minn. 107; *State* v. *Canvassers*, 31 Pac. Rep. 536; *State* v. *Canvassers*, 31 Pac. Rep. 879; *State* v. *Tanzey*, 32 N. E. Rep. 750; *Smith* v. *Lawrence*, 2 S. D. 185, 49 N. W. Rep. 7; *Page* v. *Letcher*, 39 Pac. Rep. 499; *State* v. *Trimbell*, 41 Pac. Rep. 153; *State* v. *Canvassers*, 36 Wis. 498. Canvassing boards have neither judicial nor quasi-judicial, but solely ministerial powers. Section V Const. N. D. 85; § 547, Rev. Codes, 1899. It follows therefore unless the tally lists, whereon votes cast by the female voters were tallied, were a part of the returns to be sent to the county canvassing board, such board had no right to consider their contents. The tally list is not made a part of the poll book or returns. Sections 492, 495, 486, 487, 525, 256, Rev. Codes. And notwithstanding the tally list was forwarded by the local board as a part of the returns, it cannot in fact become a part of the legal returns. *Mayo* v. *Freeland*, 10 Mo. 392; *State* v. *Trigg*, 72 Mo. 365; *State* v. *Barstow*, 4 Wis. 567. The statute impliedly forbids the keeping of a separate tally list for women's votes. § 522 Rev. Codes. And when the separate tally sheet was kept and certified up it should have been rejected by the canvassing board. *Smith* v. *Lawrence*, 2 S. D. 185, 49 N. W. Rep. 7; *Dalton* v. *State*, 3 N. E. Rep. 695. Assuming that the tally list was properly a part of the returns then upon the record, whether the vote found in the women's tally list should or should not have been added to those included in certain of the statements, presented a problem for the judgment and determination of the canvassing board. Mandamus will not lie to interfere with the exercise of such judgment. § 6110, Rev. Codes; High on Extraordinary Remedies, § 42; *State* v. *Carey*, 2 N. D. 36, 49 N. W. Rep. 164; *Heintz* v. *Moulton*, 7 S. D. 272, 64 N. W. Rep. 135; *Commissioners* v. *Commissioners*, 24 O. St. 401; *Reddick* v. *People*, 82 Ill. App. 85; *People* v. *VanCleave*, 55 N. E. Rep. 698. Where the duties of the canvassing board are ministerial and they are not authorized to hear evidence, mandamus will not issue to compel them to count votes unless their legal duty so to do is unequivocal. *Clark* v. *Board*, 126 Mass. 282; *State* v. *Randall*, 35 O. St. 64; *State* v. *Higgin*, 76 Mo. App. 319; *Dent* v. *Board*, 32 S. E. Rep. 250. The evidence of the local election officers was erroneously received by the trial court. *Dalton* v. *State*, 3 N. E. Rep. 685.

John H. Fraine, for respondent.

The fact that a ministerial officer performed his duties according to his judgment, is of no avail if the duties are not correctly performed. *State* v. *Foster*, 38 O. St. 599. Tally lists, poll books and blanks for election returns are sent by the auditor to the election precincts. § § 492, 495, Rev. Codes. The returns are made on these blanks and certified statement showing the number of votes cast for each person for each office. § 525, Rev. Codes. Such statement and

one of the poll lists are delivered to the county auditor, and by implication the certified statement becomes *prima facie* evidence of the facts recited. § 527, Rev. Codes. To canvass the returns means the same as to canvass the votes. *Bowler* v. *Eisenhood,* 1 S. D. 500; *Clark* v. *Tracy,* 64 N. W. Rep. 291; *People* v. *San Salito,* 104 Cal. 500; Exparte Mackey, 15 S. C. 332; *Hudson* v. *Solomon,* 19 Kan. 160; *State* v. *Marston,* 6 Kan. 524; *Russell* v. *State,* 11 Kan. 524. A return is merely the record or report of official proceedings had. The necessities of the case make it *prima facie* evidence, but unless expressly made so by statute it is never conclusive. *State* v. *Marston,* 6 Kan. 524; *Russell* v. *State,* 11 Kan. 308. Where it is evident from the returns that they do not disclose the correct state of affairs, it is the duty of the board to scrutinize, inquire and examine in order to ascertain correctly for whom the votes were cast, and the number of the same. For this purpose they may send for the ballots themselves. § 526, Rev. Codes. And from a count of the ballots determine the truth of the matter. As between the ballots themselves and the copies of the polls, the ballots are controlling. *Hudson* v. *Solomon,* 19 Kan. 180.

YOUNG, J. This is an appeal from a judgment rendered in mandamus proceedings by the District Court of Walsh county commanding the defendants and appellants, who constitute the county canvassing board of that county, and who as such were charged with the duty of canvassing the election returns in the year 1900, to canvass and count certain votes for the office of county superintendent, which it is alleged they omitted and refused to count in canvassing the returns for that office. The plaintiff, Sonderall, and one Ben Tronslin were opposing candidates for that office at the November, 1900, election. The canvass made by the board gave plaintiff, Sonderall, 2,159 votes, and Ben Tronslin 2,188 votes, or a majority for the latter of 29 votes. This canvass was made solely upon the certified statements of the election returned to the county auditor by the several election boards of the election precincts into which the county was divided, and it is not disputed that it correctly declared the result as shown by such certified statements. The plaintiff's claim is that as to 12 precincts these certified statements are false, and do not correctly represent either the total number of votes cast for the office of county superintendent or the correct vote of either of the candidates. It is claimed that in these 12 precincts there were, in all, 258 votes cast by women voters for the office of county superintendent, and that none of these votes were counted or included in the certified statements of the election returned to the county auditor by the precinct officers, which statements, as we have before seen, constituted the sole basis of the canvass made by the defendants. Plaintiff's further claim is that 161 of these votes were cast for him, and the remaining 97 for Tronslin, and that it was the duty of the board to add these excluded votes to those actually certified in the statements, and to declare the result as determined by such

addition. This, if done, would give plaintiff, 2,320 votes and Tronslin 2,285, or a majority of 35 for the former. Plaintiff made demand upon the board that these votes be counted and included in their canvass, and for a certificate of election. The board refused, and these proceedings were instituted by plaintiff to compel a canvass which should include the votes alleged to have been illegally excluded. It is the contention of plaintiff's counsel that it was the legal duty of said board to canvass and count such votes as requested, for the reason that the fact that they were cast as alleged was made to appear officially by certain tally lists or tally sheets which were found in and attached to the poll books of the several precincts, and returned to the county auditor along with the statements of the election, all of which were before the canvassing board. It is claimed that these tally sheets constitute parts of the returns, and are proper documents to be considered in determining the result of the election. These tally sheets have printed in one column the names of all of the various candidates to be voted for at that election. On the right of the names appear check marks obviously made to show the number of votes cast for the persons opposite whose name they appear. The totals of such marks appear at the extreme right. To illustrate the difference between the result of the election as shown by the tally sheets and that shown by the certified statements in these 12 precincts, we need refer to the facts in only one of them. The rest are similar in every way, except as to the number of votes involved, and that number is undisputably the number we have before stated. We will take the precinct of Forest River township. Two poll book were delivered to the election officers of this precinct, and the same were returned to the county auditor after the election. One was the male poll book and the other for women voters. In the male poll book are listed in numerical order the names of 68 male voters; in the female poll book, the names of 18 female voters. The tally sheets or lists to which we have referred are in the poll books, and physically annexed thereto. The tally sheet in the male poll book for this precinct has 49 tallies after the name of Jacob Sonderall, and 16 after that of Tronslin. The female tally sheet has 13 tallies after plaintiff's name, and 4 after Tronslin's. On the basis of the tally sheets, plaintiff received 62 votes and Tronslin 20 votes in this precinct. We turn now to the "Statement of Election," which is a separate document executed by the precinct officers over their signatures, certifying to the result of their canvass of the ballots cast at this precinct as to every office or proposition voted upon. This document recites: That "there were sixty-five (65) votes cast for superintendent of schools, for which Jacob Sonderall had forty-nine (49) votes. Ben Tronslin had sixteen (16) votes. * * * That the foregoing is a correct statement of the total vote cast at said election for each and every office mentioned therein, and that the above named persons received the number of votes set opposite their respective names," etc.

Briefly stated, the question, and the sole question, in this case is whether the statements of election, or the tally sheets found in the poll books, govern the canvassing board in the performance of their duties. If the board could only consider the statements of election, then their canvass was both regular and correct, and the judgment of the District Court in this case was erroneous. If, on the other hand, the tally lists constituted a part of the returns, and were properly before the board as furnishing a basis for their canvass, then there was a legal duty resting upon the board to consider them. A solution of this question can only be reached by reference to certain provisions of the Revised Codes relative to elections. By § 527 the duty is laid upon the county canvassing board, after its organization, to open the returns and canvass the same and make abstracts of the votes. Section 547, among other things, provides that "all returns shall be received and the votes canvassed and a certificate given to the person who may by such returns have the greatest number of votes." It is entirely plain from the language of the sections just quoted that the duty enjoined by law upon said board was to canvass the returns, and to declare the result as determined by such canvass. What constitute the returns is the important question in this case. A reference to § 526 will show that the only documents which are authorized or required to be returned by the precinct officers are one copy of the official statement of the election and one copy of the poll book, together with the oaths of the inspectors and clerks, all properly sealed. Section 525 governs the method by which the canvass of ballots is made by precinct officers, and also provides for making the statement of the election to which reference has been made. It reads as follows: "The inspectors shall as soon as the count is completed publicly announce the result thereof, specifying the whole number of votes cast for each office and for each candidate respectively; also the number of votes cast for and against each proposition voted for at such election. They shall immediately prepare in duplicate a statement in writing setting forth at length, in words and figures, the whole number of votes cast for each office and the names of all the persons for whom such votes were cast, together with the number of votes cast for each person; also the number of votes cast for and against each proposition voted upon at such election which statement they shall certify to be correct." It accordingly appears that the precinct poll book and the statement is all that is required to be sent to the county auditor, barring all reference to the ballot boxes and keys, which are of no importance on the question we are here considering. Neither is there any duty laid upon the precinct election officers to make any official record of their proceedings in connection with the election elsewhere than in the poll books and in the statement of the election. There is no provision of law authorizing or requiring either the making or the return of a tally list, and an examination of the several sections which refer to poll books shows that it constitutes no part thereof. See § 495. This

section, after providing the form and contents of such poll books, provides that the county auditor shall prepare the same, and deliver two copies thereof to the sheriff for each precinct; that the sheriff shall deliver the same to the inspector, who shall on the day of election deliver them to the clerks. The only entries required to be made therein are those referred to in §§ 486 and 487, which require an entry of the oaths administered to the inspector, judges, and clerks, and the names, in numerical order, of all persons voting to be entered therein by the clerks. It is true, § 492 in defining the duties of the county auditor preliminary to the election, makes reference to a "tally sheet." This section provides that at the time of distributing the ballots he shall "cause to be delivered to the several inspectors, the necessary number of blank forms of poll books and also blanks for the election returns, with the proper captions, forms of oaths and forms of certificate and tally sheets necessary to carry out the provisions of this chapter." This is the only place in the entire election law where such a paper is referred to. In this state of the law, can it be said that the tally sheets under consideration, which found their way into the auditor's office, annexed to the poll books, constitute a part of the official returns? We are clear that they do not, and that, so far as the duties of the canvassing board are concerned, they cannot be considered. They are not required by law to be kept or returned, and are entirely unofficial. They are not certified to by any one as correct, and it is not known by whom they were made. The fact that the auditor is required to provide blank tally sheets does not make them parts of the returns. The documents constituting the returns are described elsewhere. The purpose in furnishing the tally sheets was, without doubt, merely to provide a convenient place for noting the votes, for the purpose of computation as they were canvassed. That canvass, as we have seen, is required to be made by the inspector and judges, and the result announced publicly, and then committed to the written statement of the election. This statement and the poll book are the only documents constituting the returns, and the canvass by the county canvassing board is plainly confined thereto. In this connection it may be proper to say that it was not the duty of the canvassing board to ascertain who was in fact elected to the office of county superintendent. Neither was it the duty of the District Court to investigate that question in these proceedings. On this point see the opinion of this Court in *State* v. *Callahan,* 4 N. D. 481, 61 N. W. 1025. The duty of the board was confined to an examination of the official returns and a canvass of the same, and a declaration of the result of such canvass. The board is required to act upon the official returns only, and not upon matters lying outside of them. If the returns are false,—and in this case it would seem they were, through the innocent mistake of the precinct officers in not including the women's vote in their official statement of the election, they could have been overturned by appropriate proceedings to contest the

election. But, until the *prima facie* character of the official returns is destroyed in proper judicial proceedings, they determine the result. In *People* v. *Board of Canvassers of Chemung Co.*, 126 N. Y. 392, 27 N. E. 792, a question arose as to whether the record of votes as contained in the statement proper, such as we have, or the written record on the ballots required by the laws of that state to be attached to such statement, should control in the canvass. The board canvassed the votes as shown by the writing on the ballots attached. The Court of appeals held that this was improper, and that the board was confined to the record contained in the statement, and could not go outside of it. In the course of its opinion the Court, speaking through O'Brien, J., said: "The question is whether the board of county canvassers, in thus canvassing and certifying the vote, performed the duty imposed upon them by law. It was not their duty to ascertain which of the candidates was in fact elected, not even which of them in fact received the greatest number of votes in the Sixth district, but simply to determine from the documentary evidence before them, furnished by the action of the inspectors, and upon which alone they could act, the number of votes given for each candidate, respectively, for representative in congress. This document from which the canvassers are required, in a ministerial capacity, to estimate and certify the vote, is called in the statute a 'statement'; and this controversy arises from what appears to be an honest difference of opinion between the learned counsel who have presented the case as to the true scope and meaning of that word. On the one hand it is argued that, when there is a conflict between the writing on the attached ballots and that inserted in the body of the paper, the board, in canvassing the vote is bound by the latter, while, on the other hand, it is insisted that the attached ballots and the writing thereon are a part of the statement, and it is within the power of the board to estimate and certify the true vote from them. The question thus becomes one purely of construction. * * * An intelligent and consistent administration of our statutes relating to the canvass of the vote by county canvassers requires that when there is conflict in this respect they shall be bound by some rule that is reasonable and certain, and not subject to variation according to the discretion of each board. In my opinion, the writing in the body of the certificate expressing the result of the count by the inspectors at the close of the polls, and publicly announced by them and certified under their official certificates to be correct, must prevail over any contrary result that can be obtained from the writing on the ballots. The words written into the paper by the inspectors must be deemed to express the actual and correct result of their count. They are precise and certain, and to the effect that a certain number of votes were given for a person therein named for a designated office." In the above case it will be noticed that the writing on the ballots was authorized unofficial by law to be made, and was a part of the return. Never-

theless it was held not admissible to contradict the statement. The present case is far stronger, for, as we have seen, the tally sheets are entirely unofficial writings. The general rule is that the board of canvassing officers are ministerial officers only, whose duty is to receive the returns from the various precincts, and declare the results as shown by the face of the returns. Some states have given them limited judicial powers. See 10 Am. & Eng. Enc. Law, 746, and authorities collated. No such power has been given in this state, and their duties are entirely ministerial. As to this, counsel agree.

Counsel for plaintiff calls attention to that portion of § 526 which relates to the custody of the ballot boxes. Said section requires the inspectors to retain the ballot boxes in safe custody for a period of 60 days next after the election, and further requires that it shall be the duty of such inspectors to cause the same to be safely delivered to the county auditor, upon the written notice of the board of canvassers, at any time during said period. It is urged that the above provision contemplates a scrutiny and canvass of the ballots themselves by the board when necessary to ascertain the true number of votes cast for each candidate. It is true, the purpose of authorizing the board to have the ballot boxes brought in is not entirely clear, but, so far as it can be ascertained, it is merely to provide an additional safeguard for their custody in case of probable contests, by removing them from the custody of the inspectors to the safer custody of the county auditor, where they can be more safely guarded, and the character of the ballots contained therein thus be preserved as the best evidence of the vote actually cast. No authority is given to the board to open the box and canvass the ballots, and no such power can be inferred from the mere existence of the right to have the boxes sent to the auditor. The present case furnishes an instance where it would have been proper for the board to order the ballot boxes of the 12 precincts in question into the custody of the auditor, to safeguard plaintiff's rights in case he should desire to challenge the result of the canvass of the official returns by a contest and appeal to the ballots for proof of his claims.

In his brief, counsel for respondent states that "the issue before this Court at this time is whether or not a candidate for public office shall receive all the votes cast for him, or whether he should be deprived of some votes, and perhaps his election, as in this case, by reason of the negligence, fraud, ignorance or inadvertence of local election boards," and states that his right to the remedy by mandamus is based upon this general principle,—that it is the general purpose of the law "that the will of the people, as manifested by the votes, should be obeyed." As to the issue involved, counsel is mistaken. The issue, and the only issue, is as to the duty of the canvassing board in relation to the canvass. Was it their duty to act entirely upon the official returns, or could they go outside of them, and declare a result determined by a resort to other evidence? We have seen they could not. It is true, the purpose of the entire election

law is, as stated by counsel, to carry into effect the actual votes cast; and to this end various safeguards are thrown about the conduct of elections, and almost every avenue of fraud and mistake is closed by suitable provisions. One of these is that the votes shall be publicly canvassed by the precinct officers, the result of the vote for each person voted for publicly announced, and such result embodied in a written statement signed by such officers, showing in words and figures the number of votes cast for each candidate. This statement is the highest evidence of the precinct canvass, and constitutes the sole evidence upon which the county canvassing board is required to act. But the returns of the precinct officers, while conclusive upon the county canvassing board, are not conclusive upon parties interested. The ballots themselves, if properly preserved, may be appealed to to impeach the official returns and to establish the true vote. But this appeal is not to election officers, charged only with ministerial duties, but to the District Court, which is expressly clothed with complete authority to determine such contests. The remedy provided for challenging the result of an election, which is claimed to be incorrectly determined by the election officers, is by a contest instituted in the District Court under the provision of § 563 and succeeding sections. That remedy is ample, and this Court, while regretting the apparent hardship of this particular case, declines by judicial fiat to confer upon canvassing boards a power which the legislature has not given. For the reasons stated, the District Court was in error in directing the board to canvass and count the votes upon the tally sheets, and its judgment is therefore reversed. All concur.

(86 N. W. Rep. 231.)

CARL LINDBLOM *vs.* CHRISTIAN SONSTELIE.

Opinion filed May 15, 1901.

Exceptions to Charge—Time of Taking—Extension.

Under the provisions of sections 5298 and 5722, Rev. Codes, a district judge has power to extend the time within which exceptions to a charge may be taken, either before or after such time has elapsed; but such extension should be granted only upon good cause shown, and in furtherance of justice.

Instruction—Exemplary Damages.

A certain instruction concerning exemplary damages examined, and *held* erroneous, as invading the province of the jury.

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

Action by Carl Lindblom against Christian Sonstelie. Verdict for plaintiff. From an order granting a new trial, plaintiff appeals. Affirmed.

Spencer & Sinkler, for appellant.

The exceptions to the Court's charge were not filed in time. Therefore any errors in the charge cannot be considered. § § 5432, 5433, Rev. Codes; *Leach* v. *Hall,* 66 N. W. Rep. 69; *Colby* v. *McDermont,* 6 N. D. 496; *Bush* v. *Nichols,* 41 N. W. Rep. 608; *Bailey* v. *Anderson,* 61 N. W. Rep. 134, 61 Ia. 149; *Mason* v. *Ry. Co.,* 25 N. W. Rep. 144; *Harrison* v. *Charlton,* 42 Ia. 573; *Hallenbach* v. *Garst,* 65 N. W. Rep. 417; *Edwards* v. *Cosgro,* 42 N. W. Rep. 362. The Court can only enlarge the time for taking exceptions upon good cause shown. § 5722, Rev. Codes. And then not after the time originally limited for the act has expired. *McGillicuddy* v. *Morris,* 65 N. W. Rep. 14; *Moe* v. *Ry. Co.,* 54 N. W. Rep. 715; *St. Croix Lumber Co.* v. *Pennington,* 11 N. W. Rep. 497; *McDonald* v. *Beatty,* 9 N. D. 293, 83 N. W. Rep. 224. The instruction held erroneous by the trial court, and on which the new trial was granted, was not erroneous because it did not state that the jury must find malice, fraud or oppression before they could give exemplary damages. The Court in its instructions set out the allegations of the complaint, told the jury that before they could find damages at all they must find that the carnal intercourse took place as alleged in the complaint. Substitute the allegations of the complaint for the words "as alleged in the complaint" and the instruction is impregnable. *Britton* v. *St. Louis,* 25 S. W. Rep. 366; *Sherwood* v. *Ry. Co.,* 33 S. W. Rep. 774; *State* v. *Scoll,* 19 S. W. Rep. 89; *Taylor* v. *Iron Co.,* 34 S. W. Rep. 584; *Jenks* .v *Lumber Co.,* 66 N. W. Rep. 234; *People* v. *Jackson,* 92 Ill. 441; *Illinois Central Ry. Co.* v. *Harris,* 44 N. E. Rep. 498. The Court has a right to assume in his charge a fact proven. *Watson* v. *Degman,* 54 Cal. 278; *People* v. *Phillips,* 70 Cal. 61; *Hughes* v. *Monley,* 24 Ia. 499; *Thompson* v. *Brannon,* 40 S. W. Rep. 914. Exemplary damages may be given in every case of criminal conversation when plaintiff is not a party to the procurement of the act. *Mathes* v. *Mazett,* 30 Atl. Rep. 434, 8 Enc. L. 272; *Long* v. *Boe,* 17 So. Rep. 719; *Ross* v. *Leggett,* 28 N. W. Rep. 697; *Johnson* v. *Disbro,* 10 N. W. Rep. 79; *Cornelius* v. *Hambey,* 24 Atl. Rep. 515; *Johnson* v. *Allen,* 5 S. E. Rep. 668; *Stumm* v. *Hummel,* 39 Ia. 483, 5 Enc. L. 21; 9 Enc. L. 835; *Coryell* v. *Colbaugh,* 1 Am. Dec. 192; *Grable* v. *Margrave,* 38 Am. Dec. 88; *McAuley* v. *Burkhead,* 55 Am. Dec. 428; *Russell* v. *Chambers,* 31 Minn. 56; *Yundt* v. *Hartrunft,* 41 Ill. 9.

E. Smith-Peterson, for respondent.

The exceptions to the Court's charge were filed within twenty days after the sixty days stay of proceedings had expired; and at the time of hearing the motion for new trial the time was enlarged by the Court upon showing. § 5298, Rev. Codes. Where the Court of its own motion charges the jury on the question of damages, such instruction must correctly state the law with all necessary qualifications. 11 Enc. Pl. & Pr. 216. The facts proven did not constitute defendant a malicious tresspasser to be mulcted in exemplary dam-

ages. *Outlander* v. *Ormans*, 26 S. W. Rep. 1103; *Cook* v. *Wood*, 76 Am. Dec. 677. When there is evidence tending to prove a fact having an important bearing upon the case, though contradicted, an instruction is erroneous which ignores the existence of such fact and takes it from the consideration of the jury. *Chicago Etc. Co.* v. *Tilton*, 87 Ill. 547; *Caldwell* v. *Center*, 30 Cal. 539, 89 Am. Dec. 131; *Adams* v. *Caprin*, 83 Am. Dec. 556; *Gallagher* v. *Williamson*, 83 Am. Dec. 114, 23 Cal. 31; *Boffter* v. *Rogers*, 52 Am. Dec. 680; *Potts* v. *House* 50 Am. Dec. 329; *Stoeton* v. *Frye*, 45 Am. Dec. 138; *Frich* v. *Bergen*, 89 Ind. 360; *Carpenter* v. *Bank*, 119 Ill. 352. An instruction assuming a fact as proven, upon which there is contradictory evidence, is fatal to the verdict. *Baltimore Etc. Co.* v. *Woodruff*, 59 Am. Dec. 72; *McKenzie* v. *Bank*, 65 Am. Dec. 369; *Western Union Tel. Co.* v. *Cooper*, 10 Am. St. Rep. 772; *Gulf Ry. Co.* v. *Brentford*, 23 Am. St. Rep. 377; *Jones* v. *Towne*, 2 N. W. Rep. 473; *Faber* v. *Ry. Co.*, 13 N. W. Rep. 902; *Hand* v. *Langlan*, 25 N. W. Rep. 122; *Rapp* v. *Giddings*, 57 N. W. Rep. 237. The mere fact that an act may have been wrongful and injurious does not justify exemplary damages in the absence of actual malice or wanton indifference to the rights invaded. *Scemen* v. *Feeney*, 19 Minn. 79; *Carli* v. *Transfer Co.*, 20 N. W. Rep. 89; *DuLaurans* v. *Ry. Co.*, 15 Minn. 49; *Lyles* v. *Perron*, 51 Pac. Rep. 332.

MORGAN, J. The plaintiff has brought this action for the recovery of damages against the defendant, alleging in the complaint that the plaintiff maliciously alienated the affections of defendant's wife from him, and wrongfully deprived him of the comfort, society, and assistance of his wife, thus causing him great distress of mind and damages. The issues were tried before a jury, resulting in a verdict for the plaintiff for the sum of $1,000. This verdict was set aside by the Court upon a motion for a new trial upon the ground that one instruction given to the jury was prejudicially erroneous. The plaintiff has appealed from the order granting a new trial. Such appeal is sought to be sustained upon two specifications of error pertaining to the making of the order granting a new trial, viz.: That such instruction was not erroneous, but was a correct statement of the law applicable to that branch of the case; and, second, that such instruction was not excepted to by the defendant within the time fixed by the statute for so doing, and that the Court had no authority, under the statute, to allow an exception to the giving of the instruction to be taken and settled after the time allowed by the statute during which it may be done had elapsed. To enable us to be understood as to the last of these specifications of error, it will be necessary to narrate the facts that transpired in the case from the rendition of the verdict up to the granting of the motion for a new trial. Immediately after the rendition of the verdict, a stay was granted for 60 days for all purposes except for the entry of judgment. This stay was granted on June 23d. The charge, in writing, was filed with the clerk on June 30th. On July 15th there

was a change of attorneys, the present attorney for the defendant having been employed in place of the one that appeared for the defendant at the trial. This substituted attorney ordered a transcript of the evidence immediately after being employed, which was not furnished him until August 28th,—more than 60 days after the verdict was rendered. On September 6th exceptions to the charge of the Court were filed in the office of the clerk of court, which was 6 days after the stay had expired. On September 29th a statement of the case was settled by the trial judge, based upon a stipulation of the attorneys. This statement of the case contained specifications of error relating to the giving of the instruction complained of, but such statement contained no reference to the effect that such instruction had been excepted to. On November 28th an order was made, after notice, and an argument thereon by the respective attorneys for the parties, allowing such exceptions to be settled, and made a part of the statement of the case, with the same force and effect as though they had been taken and filed within the time prescribed by law. This order was based upon the affidavit of the defendant's attorney setting forth the facts and reasons by virtue of which he claimed that his failure to file such exceptions was excusable. The plaintiff excepted to the making of this order, and insists that under the provisions of the Code the court had no authority to amend the statement by allowing exceptions to the charge to be settled when they had not been taken in time. The question is, therefore, squarely presented to us for a decision whether the trial judge has any discretion to extend the time during which exceptions to the charge may be filed, either by an order made before or after such time has expired. Section 5432, relating to the giving and refusing of instructions, provides that the trial court may submit his instructions in writing to counsel before they are read to the jury; and, when this is done, he may require such counsel to then and there designate exceptions desired, and thereafter no other exceptions than those designated shall be allowed. The statement of the case on this appeal does not inform us whether the charge was in writing or not, nor whether it was submitted to the attorneys for examination before it was read. From the fact that the charge was not filed until seven days after the verdict, we infer that it was an oral charge. Section 5433, Rev. Codes, provides that, when the charge is an oral one, it may be excepted to within 20 days from the filing of the same with the clerk. Section 5298, Id., provides that "the Court may likewise, in its discretion and upon such terms as may be just, allow an answer or reply to be made or other act to be done, after the time limited by this Code, or by an order enlarge such time," etc. Section 5477 provides that "the court or judge may upon good cause shown in furtherance of justice extend the time within which any of the acts mentioned in § § 5467 and 5474 may be done, or may, after the time limited therefor has expired, fix another time within which any of such acts may be done." Section 5722 provides that "the time

within which any proceedings in an action must be had after its commencement, except the time within which an appeal must be taken, may be enlarged upon an affidavit showing grounds therefor by a judge of the court. The affidavit or a copy thereof must be served with the order or the order may be disregarded." From these provisions it will be observed that they give power to the courts in general terms, and in some instances in reference to special matters, to extend the time within which proceedings to be taken or acts to be done may be done in furtherance of justice. The only exception stated to this right is the right to appeal. The statutes of Wisconsin contain a section almost identical to the provisions of § 5722, above cited. The Supreme Court of that state has held that under that section exceptions to findings of fact may be allowed after the time fixed for filing them has passed. *Board* v. *Pabst*, 64 Wis. 244, 25 N. W. 11. Under the practice in many states, exceptions to the charge must be made as soon as it is read, and courts hold that no exception is available to a party if made thereafter; and the reason for this is obvious. The purpose of an exception under that practice is to apprise the trial court that an error is claimed, that he may have an opportunity to correct it before the jury retires. The courts, therefore, for very good reasons, hold with strictness under that practice that exceptions must be noted as soon as the charge is delivered, and that, if not then done, such exceptions will not be considered on appeal. *Mallett* v. *Swain*, 56 Cal. 171. Under our Code the party desiring to except to instructions given in an oral charge has 20 days within which to do so under all circumstances. It therefore follows that the reason for strict adherence to the rule that exceptions shall be taken to a charge as soon as delivered, and before the jury retires, does not apply. No purpose is subserved, enabling the trial court to correct any errors, or prejudice or disadvantage ensues to the prevailing party, if the charge is not excepted to until after the 20 days have expired. The only objection that suggests itself to such extensions is that delays might be caused by which appeals would be retarded, to the injury of litigants with meritorious causes of action that ought to be spedily determined. The matter of extensions can be regulated by trial courts so that less injury would follow from extensions for good causes shown than would follow from a construction of the prvisions of the Code denying the right to such extensions in all cases. For these reasons we hold that the provisions of §§ 5298 and 5722, supra, are broad enough to, and do, empower the court, for good cause shown, and in furtherance of justice, to extend or enlarge the time for filing exceptions to instructions either before or after the time prescribed has elapsed. In this case the respondent showed good grounds for not excepting to the instruction within the time allowed, by an affidavit, the contents of which were not contradicted; and the trial judge acted within the discretion vested in him in making an order enlarging such time.

The instruction thus excepted to is as follows: "If the jury believe from the evidence that the defendant did have carnal intercourse with the wife of the plaintiff, as alleged in the complaint herein, your verdict should be for the plaintiff in such sum as you believe from the evidence will compensate him for the injury and damage he has suffered by reason of being deprived of the society, services, and comfort of his wife, if he was so deprived of any of them, and the distress and anxiety of mind occasioned thereby, including the mental suffering from the dishonor of the marriage bed, and the loss of the affection of the wife, in such an amount as you shall think, from all the evidence, the plaintiff is entitled to, to compensate him for such matters, to which you may add such amount for exemplary damages or punitive damages as you may think right." This instruction was excepted to for the reason that it assumed that the defendant was liable for exemplary damages. In other words, it is claimed that the jury should have been instructed in terms that, if the defendant was actuated by fraud or malice, then they might, in their discretion, assess exemplary damages. The instruction does not state to the jury the purpose of assessing such damages, nor does the charge elsewhere do so. They were simply told that exemplary damages might be added in such an amount as they deemed right, without giving the jury any rules to guide them in view of the evidence as given. Exemplary damages may be assessed when the defendant has been guilty of oppression, fraud, or malice, actual or presumed. § 4977. The amount of such exemplary damages in cases of this kind would necessarily vary according to the facts proven. Such damages would not be the same in cases where the offense is flagrant as in cases where the offense is shown to have been committed under circumstances of mitigation. The jury should have been instructed in terms that exemplary damages are to be assessed only when fraud or malice, actual or presumed, exists in the case, and that the amount of such damages should be assessed after weighing all the evidence, incriminating or mitigatory, in order to determine the amount. The jury should not have been left to construe the meaning of the words "malice" and "exemplary damages" as they saw fit, without any guidance from the court. The fact that in other parts of the charge they had been instructed as to the allegations of the complaint did not cure this omission. The instruction also assumes that the defendant suffered mental distress, and that he had also lost the affection of his wife, on account of the defendant's actions. Whether he had suffered in any way, or whether he had lost his wife's affections, on account of defendant's actions, were contested questions on the trial, and should have been left to the jury as facts to be determined by them. Some of these criticisms on the charge refer to matters wherein the court failed to instruct the jury. Such failure to instruct would not be ground for setting aside a verdict, unless a proper instruction em-

bodying these omissions was asked to be given in lieu of the faulty one. We are satisfied that the instruction as to exemplary damages was an invasion into the province of the jury, and took away from them the discretion given them by the statute. Affirmed. All concur.

(86 N. W. Rep. 357.)

FIRST NATIONAL BANK OF LANGDON *vs.* THOMAS H. PRIOR, *et al.*

Opinion filed May 22, 1901.

Parole Agreement by Mortgagee.

A prior or contemporaneous oral agreement, made by a mortgagee or his agent, that upon payment of two notes the mortgage would be released, is not admissible in evidence when the mortgage provided absolutely that it should be security for four notes.

Authority of Agent to Compromise.

A general agent, having charge of a bank's collections, has no authority to compromise or settle claims for a less sum than due, by virtue of such general agency to collect alone.

Payments.

Certain findings of the trial court reviewed, and *held* not sustained by the evidence.

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

Action by the First National Bank of Langdon against Thomas H. Prior and Emma Prior. Judgment for plaintiff, and defendants appeal.

Modified.

J. C. Monnett, for appellants.

The true consideration for an instrument may always be shown by parol testimony, notwithstanding there is a consideration expressed in the instrument itself. *Bank* v. *Snyder*, 44 N. W. Rep. 357; *Boller* v. *Sacks*, 33 N. W. Rep. 862; *Kickland* v. *Wooden Ware Co.*, 31 N. W. Rep. 471; *Cutler* v. *Steele*, 53 N. W. Rep. 521; *Dicken* v. *Morgan*, 7 N. W. Rep. 145; *Keefe* v. *Briggs*, 20 N. W. Rep. 91; *Fraley* v. *Bentley*, 1 Dak. 25, 46 N. W. Rep. 506; *Perkins* v. *McAuliffe*, 81 N. W. Rep. 645; *Landgan* v. *Iverson*, 80 N. W. Rep. 1051; *Hayes* v. *Peck*, 8 N. E. Rep. 234; *Tucker* v. *Tucker*, 13 N. E. Rep. 710; *Chapin* v. *Dobson*, 78 N. Y. 80; *Walker* v. *Haggerty*, 46 N. W. Rep. 221; *Palmer* v. *Roath*, 49 N. W. Rep. 590. It is always competent to show by parol that the obligation of an instrument has been discharged by a parol agreement collateral thereto. *Crossman* v. *Fuller*, 17 Pick. 171; *Julliard* v. *Chaffee*, 92 N. Y. 531; *Harrington* v. *Samples*, 30 N. W. Rep. 671; *Gould* v. *Elgin*, 26 N. E. Rep. 497; *Collins* v. *Stanfield*, 38 N. E. Rep. 1091; *Kane* v. *Cortesy*, 2 N. E. Rep. 874; ***Singer Mfg. Co.*** **v.**

Forsythe, 9 N. E. Rep. 372; *Rockemah* v. *Improvement Co.*, 44 N. E. Rep. 990; *Becker* v. *Knudson*, 56 N. W. Rep. 192; *Fleischman* v. *Ver Does*, 82 N. W. Rep. 757; *Berdman* v. *Goodell*, 9 N. W. Rep. 900. The settlement of a controversy always constitutes a good consideration. *Canham* v. *Mfg. Co.*, 3 N. D. 229, 55 N. W. Rep. 582; § 4336, Rev. Codes; *Lindley* v. *Lupton*, 76 N. W. Rep. 1037; *Mason* v. *Beach*, 55 Wis. 607. One who receives and retains the beneficial results of a contract made in his behalf by another cannot deny the authority of the person making it, and is deemed to consent to all the obligations arising from such contract. *Lull* v. *Anamosa Bank*, 81 N. W. Rep. 784; § § 3865, 4339, Rev. Codes; *Union Nat. Life Ins. Co.* v. *Kirchoff*, 27 N. E. Rep. 90; *Hawkins* v. *Bank*, 49 N. E. Rep. 957; *Thomas* v. *Bank*, 58 N. W. Rep. 943; *Phillips* v. *Bank*, 35 N. E. Rep. 982; *Hartley State Bank* v. *McCorkell*, 60 N. W. Rep. 197; *Anderson* v. *Johnson*, 77 N. W. Rep. 26; *State School F. Co.* v. *School Dist.*, 77 N. W. Rep. 62; *Meehan* v. *Forester*, 58 N. Y. 278; *Johnson* v. *Investment Co.*, 68 N. W. Rep. 383; *Hughes* v. *Ins. Co.*, 59 N. W. Rep. 112; *Gardner* v. *Warren*, 17 N. W. Rep. 583. The fact that a contract made by a national bank is ultra vires as contrary to the national banking act, cannot be set up as a defense to an action arising out of such contract. *Merchants Nat. Bank* v. *Hanson*, 21 N. W. Rep. 849; *Bank* v. *Mathews*, 98 U. S. 621; *Voltz* v. *Nat. Bank*, 42 N. E. Rep. 69; *Kelly* v. *Newbury Port*, 6 N. E. Rep. 745; *Prescott* v. *Butler*, 32 N. E. Rep. 909. A party who makes a contract through an agent takes the contract subject to all the instrumentalities employed by the agent in its consummation, and to all the conditions attached to it. § 3865, Rev. Codes, *Wyckoff* v. *Johnson*, 48 N. W. Rep. 837; *Bank* v. *Bank*, 80 N. W. Rep. 48; *State Bank* v. *Kelly*, 80 N. W. Rep. 520; *People's State Bank* v. *Francis*, 8 N. D. 369, 79 N. W. Rep. 853; *Railway Co.* v. *Schuyler*, 34 N. Y. 30; *First Nat. Bank* v. *Redpath*, 81 N. W. Rep. 623; *Fairchild* v. *McMahon*, 34 N. E. Rep. 779; *Union Trust Co.* v. *Phillips*, 63 N. W. Rep. 903. If a deed not properly acknowledged, and therefore not entitled to record, is in fact recorded, such record is not admissible in evidence. *Ann Arbor Sav. Bank* v. *Ellison*, 71 N. W. Rep. 873; *Wambole* v. *Foot*, 2 Dak. 1; *Saginaw* v. *Tennant*, 68 N. W. Rep. 1118; § 3269, Comp. Laws. In selling the chattel mortgaged property the requirements of the statute were not complied with and the foreclosure amounted to a conversion by the mortgagee. *Best Brewing Co.* v. *Pillsbury*, 5 Dak. 62, 37 N. W. Rep. 763; *North Dakota Elev. Co.* v. *Clark*, 3 N. D. 26, 53 N. W. Rep. 175. The mortgagor is not estopped from disputing the foreclosure and taking advantage of irregularities in the sale by reason of his having bid at such sale. *Kidder* v. *Aaron*, 72 N. W. Rep. 893; *Canning* v. *Harland*, 15 N. W. Rep. 492; *Weaver* v. *Peasely*, 45 N. E. Rep. 119; *Holcomb* v. *Boynton*, 37 N. E. Rep. 1031; *Irrigation Co.* v. *Lashmet*, 81 N. W. Rep. 617; *Cloud* v. *Malvin*, 75 N. W. Rep. 645; *Spencer Co.* v. *Papack*, 70 N. W. Rep. 748; *Scroggin* v. *Johnson*,

64 N. W. Rep. 236; *Eshenberry* v. *Edwards,* 24 N. W. Rep. 570; *School Twp.* v. *State,* 49 N. E. Rep. 961

J. M. Bartholomew, for respondent.

To the extent of defeating the legal operation of the instrument according to the purpose therein designated parol evidence of an additional or different consideration is not admissible in this case. The bold claim is made that a part of the consideration for a mortgage, that on its face recites that it is given to secure four promissory notes, was the parol agreement of the mortgagee that it should stand as security for two of said notes only. In other words, the operation of the instrument was defeated *pro tanto* by the parol agreement and less than one-half the interest which it purported to pass did in fact pass by the instrument. This principle once established no written contract can be made that may not be defeated by parol testimony. *Kirkland* v. *Menasha Wooden Ware Co.,* 68 Wis. 34; *Chapin* v. *Dobson,* 78 N. Y. 81; *High* v. *Peck,* 30 Cal. 280; *Hendrick* v. *Crowley,* 31 Cal. 472; *McCrea* v. *Purmont,* 16 Wend. 473; *Palmer* v. *Roath,* 49 N. W. Rep. 590. An agent for the collection of commercial paper has no implied powers. He cannot release the debt in whole or in part, nor can he compromise it in any manner. *Melvin* v. *Insurance Co.,* 80 Ill. 465; *McHaney* v. *Schenk,* 88 Ill. 357; *Carver* v. *Carver,* 53 Ind. 241; *Powell* v. *Henry,* 27 Ala. 612; *McCormick* v. *Machine Co.,* 72 Ind. 518; *Whittington* v. *Ross,* 8 Ill. App. 239; *Fellows* v. *Northrup,* 39 N. Y. 122; *Graydon* v. *Patterson,* 13 Ia. 258; *Hurley* v. *Watson,* 68 Mich. 531; *Pitkin* v. *Harris,* 69 Mich. 133; *Rodgers* v. *Bass,* 46 Tex. 506; Mechem Agy. § 376. The certificate of acknowledgment was in due form. Section 505 Comp. Laws, then in force, required that full faith and credit be given to such certificate. The following section made it a misdemeanor for a notary to make a certificate of acknowledgment of a party who did not appear before him. The presumption arising from the certificate had not been assailed when the record was offered in evidence. The objection was not broad enough to cover the point now raised. The bare oath of a party in contradiction of the facts certified is not sufficient to overthrow the acknowledgment. *Johnson* v. *VanVelsor,* 43 Mich. 219; *Phillips* v. *Bishop,* 35 Neb. 487; *Barker* v. *Avery,* 36 Neb. 599; *Insurance Co.* v. *Nelson,* 103 U. S. 544; *Russell* v. *Baptist Theological Union,* 73 Ill. 337; *Barrett* v. *Dows,* 104 Mo. 549; *Bailey* v. *Landringham,* 53 Ia. 722; *Smith* v. *Alice,* 52 Wis. 337.

MORGAN, J. This action was brought to foreclose a certain real estate mortgage executed to the National Bank of North Dakota by the defendants, who are husband and wife, on the 18th day of November, 1890, which said mortgage was duly assigned to the plaintiff in August, 1894. It was given to secure four promissory notes executed by the defendant Prior and one William Dew. Dew is not a party to this action. He was jointly interested in the pur-

chase of the sheep for the purchase price of which these notes were given. The notes were originally given for the sum of $1,417.50, with 12 per cent interest. Two of the notes have been fully paid. The sum of $390.51 has been paid on the third note, and the fourth is wholly unpaid. The defendants have interposed an answer and a counterclaim also. Upon such complaint, answer, counterclaim, and reply the issues to be tried may be summarized as follows: In their answer the defendants allege that the sum of $161 has been paid, for which they have received no credit. They also allege in their answer that the mortgage in suit should be satisfied for the reason that, when the same was given, the agent of the National Bank of North Dakota, who sold the sheep to them, orally agreed that whenever the first two notes were paid the mortgage then given on the defendants' homestead would be released by said bank, and surrendered to defendants; that said bank, in January, 1893, agreed in writing with said defendants that, whenever they would pay $200 on the notes in suit, said bank would release and surrender said mortgage, which it has failed to do, although such payment has been made. In the counterclaim the defendants further allege that the plaintiff wrongfully converted to its own use 200 sheep, 1 cow, and 800 pounds of wool belonging to the defendants; that such conversion of said property was in consequence of an attempted foreclosure of a chattel mortgage on said property, which foreclosure was illegal and void. The District Court rendered a judgment in favor of the plaintiff for the sum of $436.12. From this judgment defendants have appealed, demanding a retrial of the entire case in this court. The District Court found the foreclosure of the chattel mortgage invalid, and allowed the defendants $380 as damages on such counterclaim. The plaintiff does not attack the finding declaring such foreclosure invalid in this court. Such finding will, therefore, be considered by us as having been made in accordance with the evidence.

We will first consider the claim made that, when these notes were given, the agent of the National Bank of North Dakota agreed with the defendant Prior that, when the first two notes were paid, the mortgage in suit would be satisfied, and delivered up to the defendants; that is, that the bank would rely on the chattel mortgage as security for the last two notes when the first two were paid. It may be admitted that the agent of the bank, who conducted the negotiations as to the sale of the sheep and the taking of the securities, made such an agreement; and for the purposes of this question it may also be admitted that he had express authority to make such agreement. It is not claimed that such agreement was in writing, nor is it claimed that the notes are other than absolute, unconditional promises to pay the amounts therein mentioned at fixed times, and the mortgage unqualifiedly recites that it was given to secure the four notes therein described. The question, therefore, arises whether such an agreement, made just before or at the time

the notes and mortgage were executed, can be enforced in favor of the defendants without violating the well established principle that all prior or contemporaneous oral stipulations are merged in the written instruments thereafter signed, and that testimony concerning such oral stipulation is inadmissible as tending to contradict or vary the express terms of such written instruments. That oral stipulations cannot be successfully relied on as defenses against the express terms of the writings is not denied by appellants' counsel as a general proposition of law, but he claims the principle does not apply, so far as proof of the consideration is concerned, and claims this oral stipulation should be enforced, as it was an additional consideration for the giving of the real estate mortgage, and the one that alone induced defendants to execute such mortgage. That a different or additional consideration to the one expressed in the instrument may be sometimes shown, is fully sustained by the authorities. *Hendrick* v. *Crowley*, 31 Cal. 472. Such authorities, however, hold that the principle that a different or additional consideration may be sometimes shown is sustainable as an exception to the general rule that written contracts cannot be varied or contradicted by oral agreements made at or before the execution of the written contracts, and deny the application of such exception in all cases where such oral proof of such additional consideration is inconsistent with the terms of the written instrument, or tends to defeat its operation in whole or in part. *Kickland* v. *Wooden Ware Co.*, (Wis.) 31 N. W. 471; *Chapin* v. *Dobson*, 78 N. Y. 74, 34 Am. Rep. 512. Whether the oral agreement proposed to be shown in this case pertained to the consideration of the contract, as testified by the defendants, or pertained to the contract generally, is immaterial in the view we have taken of the matter. In either event, we should hold that proof of the oral agreement could not be received, because the oral contract would annul the mortgage absolutely so far as two notes are concerned. As soon as the first two notes would be paid, the mortgage ceased as security for the last notes. The mortgage provided otherwise. The proposed oral agreement was inconsistent with the terms of the mortgage. It varied and contradicted its terms. It defeated its operation so far as two notes are concerned. It in no way was a collateral undertaking to the mortgage, but concerned the very essence of the security, and embodied a new contract directly antagonistic to the provisions of the notes and mortgage. It proposed to limit the operation of the mortgage so that it would be security for two notes only, when in terms it is security for four. We cannot give effect to the proposed agreement, and hold that evidence concerning it was inadmissible for the reasons given. None of the numerous cases cited by appellants are based on a similar state of facts. They are adjudications holding that a different or additional consideration may be proven when the operation of the written instrument would not be defeated, or they are cases holding that the modification of the written contract pertained to a collateral under-

taking not inconsistent with the terms of the written instruments. *Bank* v. *Lang*, 2 N. D. 66, 49 N. W. 414, and cases there cited.

During the trial of the action the giving of the mortgage sued on was established by proof of the record of it in the office of the register of deeds. Upon the receipt of such record in evidence, defendant's attorney moved to strike out such record for the reason that the mortgage had not been acknowledged by the wife before a notary public or other officer. The attorney claims that, the land mortgaged being defendant's homestead, and the mortgage not having been acknowledged, it was wrongfully recorded, rendering such record of the mortgage inadmissible for any purpose. Upon the face of the mortgage its execution purported to have been acknowledged by both husband and wife before a notary public, who signed a certificate of acknowledgment regular in form. Neither the wife nor the notary were witnesses in the case. The mortgage was given in 1890, when § § 2451 and 3269, Comp. Laws, were in force. These sections did not require an acknowledgment of a conveyance of a homestead by the husband and wife to be acknowledged, except for the purpose of having the same recorded. The signing of the same joint instrument by the husband and wife was sufficient to convey title simply. In this case no proof was required to show that the wife had signed the mortgage, as her signature to the mortgage was expressly admitted in the answer. Her husband also testified that she signed it. It is, therefore, not necessary to decide whether the record of the mortgage in this case was properly received in evidence; nor is it necessary to decide whether the husband's testimony that his wife did not acknowledge the mortgage overcame the probative force of the certificate of acknowledgment.

In January, 1894, the agent of the National Bank of North Dakota entered into an agreement in writing with the defendant Prior that such bank would release and surrender to said Prior the mortgage on the homestead whenever he would pay the sum of $200 to said bank. He now claims that the plaintiff cannot recover on such notes, for the reason that he (defendant) has paid such $200 pursuant to such agreement. The proof of such payment is of the most unsatisfactory character, and renders the fact of such payment very doubtful. Conceding that there has been a payment of said sum, and conceding that there was a consideration for such agreement sufficient to support it, still the agreement cannot be enforced in this case. The agent who made such agreement gave testimony on the trial in the form of a deposition. In such deposition he testifies that he was, in 1892, the general agent of the National Bank of North Dakota, and had charge of its collections. His authority as such agent was not further defined, and whether he was such agent in 1893 does not appear. His authority to compromise or settle claims is not conferred by virtue of an authority to collect, and none can be implied in this case. It has been decided in this state that, "in the absence of circumstances showing a contrary pur-

pose on the part of the owner, the agent or subagent has authority to receive only cash in the making of the collection." *Bank* v. *Johnson*, 6 N. D. 180, 69 N. W. 49. The cases cited by the appellant to sustain a contrary doctrine are not parallel with this case. In the cases cited by him the agents either had express authority to compromise claims, or the proceeds of the settlement made by the agent were paid to the principal, who retained them with full knowledge of the facts under which such proceeds were paid by the debtor to the agent. See, also, Mechem, Ag. § 376, and cases there cited.

The trial court found that the payment of the sum of $161 had not been made by the defendants, as claimed in the answer. This finding is challenged by the defendants as not supported by the evidence. This contention of the defendants must be sustained. The facts in regard to this item are practically undisputed, and are as follows: The defendant and one Dew purchased 300 sheep of the National Bank of North Dakota on November 18, 1890, and gave these four notes, secured by chattel mortgage, to the bank for the same sum for which the real estate mortgage involved in this suit was given. These notes were then held by the Cavalier County Bank for collection. This bank also had a note and mortgage against these same parties in its own favor. These mortgages each covered the wool that had been sheared from sheep upon which these mortgages were liens. The wool that was covered by the mortgage owned by the Cavalier County Bank and the wool that was covered by the mortgage belonging to the National Bank of North Dakota was shipped together, but in such a way that the proceeds were kept separate so far as amounts were concerned. This wool was shipped, and by direction of the owners the proceeds were sent direct to that bank. Before the proceeds were received by the bank, the defendants expressly directed that $261 of the money received from this wool should be indorsed on the notes in suit, and the balance on the notes owned by the Cavalier County Bank. The bank was so directed, also, after the receipt by the bank of the draft. This fact is amply shown. The cashier does not deny such direction nor admit it, but says that he has no independent recollection of such direction. There was much controversy over this indorsement, but the cashier refused to indorse the $261 on these notes in suit, and only indorsed $100 of such proceeds on these notes. The evidence overwhelmingly shows that the defendants had the right to have the indorsement made as directed by them, and such indorsement should have been made. The cow that was covered by the chattel mortgage described in the counterclaim was sold at private sale without defendants' consent. The defendants are therefore entitled to be allowed a credit for the value of the cow, shown by undisputed evidence to have been $35. The appellants claim that the trial court found the value of the sheep to have been less than the evidence actually showed that they were worth at that time in the market. The court found their value to have been $1.60 per head. We have carefully examined all

the evidence bearing on this point. On neither side is the evidence of the value of the sheep at that time of very satisfactory character. In view of the fact that the evidence is of such character, we conclude not to disturb the finding of the trial court in this respect. The circumstances were such that he had better opportunities for determining this matter than we have, in view of the condition of the record. The finding that they were of the market value of $1.60 is sustained, in view of the evidence, and in view of the conditions existing when they were sold.

We are asked to modify the conclusion of the trial court allowing the cost of procuring a transcript of the evidence for the use of court and counsel in the court below to be taxed as a proper disbursement. The evidence is silent as to the conditions under which this allowance was made. We therefore presume that such allowance was proper and legal. The trial court is therefore ordered to modify its judgment by allowing a credit on the notes in suit of the sum of $35 on September 22, 1894, and a further credit of $161 on July 31, 1892, amounting, with interest computed, to a total credit on the judgment rendered of $368.65. The appellants will recover their costs and disbursements in this court. Modified and affirmed. All concur.

(86 N. W. Rep. 362.)

OLE C. TEINEN, *et al vs.* SUSAN A. LALLY, *et al.*

Opinion filed May 25, 1901.

Nuisances.

A privy is not a nuisance per se, but may become so under some circumstances. The question whether it is a nuisance is a question of fact.

Statement of Case—Review.

Where, in an action to abate such nuisance, the trial court, sitting without a jury, has found that it is not a nuisance, such finding cannot be reviewed by this court, in the absence of a statement of case containing all of the evidence offered in the trial court, and a demand for a retrial, as required by section 5630, Rev. Codes.

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

Action by Ole C. Teinen and Minnie Teinen against Susan A. Lally and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Smith Stimmel, for appellants.

A. G. Hanson, for respondents.

YOUNG, J. Action to abate an alleged nuisance. The parties to this action occupy residences situated upon adjoining lots in block 32, in Keeney & Devitt's Second addition to the city of Fargo. The alleged nuisance consists of a privy, which the defendant Susan A.

Lally caused to be constructed on lots owned by her, to be used in connection with two dwelling houses thereon situated, which dwelling houses are occupied by the other defendants as tenants. The complaint describes the location of the objectionable structure, with reference to plaintiff's residence, and alleges that it is an offense to decency, and that it destroys the comfort of plaintiffs' home. The answer places in issue only the offensive character of the structure, and the allegation that it constitutes a nuisance. The case was tried to the court without a jury, under § 5630, Rev. Codes. The trial court found that it was not a nuisance, and directed the entry of a judgment for defendants. Plaintiffs appeal from the judgment.

We are limited, by the record presented on this appeal, to a consideration of the single question whether the findings made by the trial court sustain the judgment appealed from. The issues of fact are not here for trial *de novo*. A statement of the case is contained in the record which embraces all the evidence offered in the trial court, but it contains neither a demand for a retrial of the entire case nor of any particular fact. Under these circumstances, we are without authority to retry all or any of the facts in issue. *Bank* v. *Davis*, 8 N. D. 83, 76 N. W. 998; *Erickson* v. *Bank*, 9 N. D. 81, 81 N. W. 46; *Ricks* v. *Bergsvendsen*, 8 N. D. 578, 80 N. W. 768; Hayes v. Taylor, 9 N. D. 92, 81 N. W. 49; *Mooney* v. *Donovan*, 9 N. D. 93, 81 N. W. 50.

From an examination of the findings contained in the judgment roll, it appears that the trial court expressly found that the privy of which plaintiffs complain is not a nuisance. Such structures are common accessories to well ordered residences, and are not nuisances per se. They may become so under some circumstances. But the question whether a privy is a nuisance is a question of fact to be determined on the evidence in each case. *Douglas* v. *State*, 4 Wis. 387; *Smith* v. *Russ*, 17 Wis. 234, 84 Am. Dec. 739; *People* v. *Carpenter*, 1 Mich. 273. In *Hart* v. *Mayor*, etc., 3 Paige, 218, it was said that "the question of nuisance or no nuisance is always a question of fact." See, also, *Com.* v. *Colby*, 128 Mass. 91; *Pilcher* v. *Hart*, 1 Humph. 524. The trial court having found that the privy in question is not a nuisance in fact, the judgment for defendants followed necessarily, and the same must be affirmed; and it is so ordered. All concur.

(86 N. W. Rep. 356.)

STATE *ex rel* FRED B. MORRILL *vs.* MELVINA MASSEY.

Opinion filed May 29, 1901.

Criminal Contempt—Procedure.

Criminal contempt proceedings, construing sections 7605, 5942, Rev. Codes 1899. *Held*, that the procedure in contempt trials, as laid down in section 5942, does not govern in cases arising under the statute relating to intoxicating liquors. The latter trials are governed by the special proceedings, as prescribed in section 7605.

Order in Contempt—Appealable.

Any final order in a contempt case, which adjudges that the defendant is guilty, is appealable to this court, under section 5954, Rev. Codes 1899.

Statement of Case—Review of Evidence.

On such appeal, where a review of the evidence is sought, a statement of the case must be settled as in jury cases, but this court in such cases sits as a court of review for the correction of errors.

Newman Law Not Applicable.

Section 5630 of the Revised Codes of 1895 has no application to any contempt case, and this court cannot sit in such cases to try the case anew.

Conviction Sustained.

Evidence examined, and *held*, that the record embraces competent evidence legally tending to sustain the conviction, and hence the conviction is sustained.

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

Contempt proceedings by the State of North Dakota, on the relation of Fred B. Morrill, state's attorney, against Melvina Massey. From a judgment of conviction, defendant appeals.

Affirmed.

J. W. Tilly, for appellant.

Emerson H. Smith, State's Atty., and *Geo. W. Newton*, Asst. State's Atty., for respondent.

WALLIN, C. J. This is a contempt proceeding arising under § 7605, of the Rev. Codes of 1899. The record shows that appellant, after a trial in the District Court, was convicted of the offense of a criminal contempt of court, and was sentenced to confinement in the penitentiary for a period of one year. From such judgment defendant has appealed to this court. The record contains a statement of the case embracing the evidence and proceedings had in the trial court. A trial anew in this court, under § 5630, Rev. Codes 1895, is demanded in the statement; but such trial cannot be accorded. Section 5630 governs the proceedings in a civil action tried in the District Court without a jury, and has no reference to a proceeding instituted to punish a criminal contempt of court. Such proceedings are summary criminal proceedings, and are in no sense civil actions. See *Noble Tp.* v. *Aasen*, (N. D.) 86 N. W. 742. Nor does the fact that a proceeding instituted to punish a criminal contempt, which arises out of a violation of an injunction issued in a civil action, change the character of the proceeding. In the absence of a statute authorizing appeals in criminal contempt cases, no appeal will lie. Such was the rule at common law. *Tyler* v. *Connolly*, 65 Cal. 28, 2 Pac. 414. But in this state, under the statute, any final order of conviction in a contempt case may be reviewed in the Supreme Court. Section 5954, Rev. Codes 1899. On appeal this court is authorized to review all the proceedings and

evidence, but the statute confers no authority upon this court to try the proceeding anew, and, without express authority to sit as a trial court, the functions of this court, as an appellate tribunal, are limited to a review of the record for the correction of errors.

The section authorizing an appeal in contempt cases provides for the settlement of a statement of the case, as in jury cases, and where a review of the evidence is sought the appellant is required to specify particulars wherein the evidence is deemed to be insufficient. In this case proper specifications are inserted in the statement, and hence the evidence is before this court for review as to its sufficiency to sustain the conviction. Sitting merely as a court for the review of errors, our inquiries will be limited, as to matters of fact, to the question whether there is competent evidence in the record which tends to establish the guilt of the accused. To this inquiry we shall be compelled to give an affirmative answer.

Appellant was charged with the offense of contempt of court in this: that she violated an injunctional order issued in this action, and served upon her, on the 8th day of January, 1898. The injunctional order contains a description of a certain city lot situated in the city of Fargo, and the appellant, her agents, servants, clerks, and employes, were by the terms of the order restrained and enjoined, during the pendency of the action, and until the further order of the court, from using, or permitting to be used, said lot, or the buildings situated thereon, as a place where intoxicating liquors are or may be sold, bartered, or given away as a beverage, or as a place where persons are or may be permitted to resort for the purpose of drinking intoxicating liquors. The record discloses the fact that prior to the commencement of the present contempt proceeding, but subsequent to the service of said injunctional order upon the appellant, and on the 30th day of December, 1898, the appellant was arraigned in the trial court, and was then and there convicted of the offense of contempt of court, and such offense, as in the present proceeding, consisted of a violation of the terms of said injunctional order. In the present case the appellant was convicted on the 26th day of June, 1900, and the sentence imposed was that prescribed by § 7605, Rev. Codes, 1899, for a second offense. The fact of a former conviction is not disputed, and the same is in no manner challenged by counsel. The sole contention in this court is that the evidence is insufficient to support the conviction. Every member of this court has read the evidence with care, and we are unanimously agreed that the record embraces competent evidence reasonably tending to support the charge. As before stated, this court in this class of cases does not sit as a trial court, and hence our duty is limited to a review only for the correction of errors. We recognize the fact that the punishment inflicted, especially for a second offense, is very severe, but this is a matter which appeals only to legislative discretion. The fact of the severity of the punishment in cases arising under the prohibitory liquor law, while it should

operate to make the trial court doubly careful in weighing the testimony adduced in such cases, does not operate to change the rule governing this court when sitting only as a court of review. The rule in this class of offenses is not different from that which governs in criminal actions proper, where the accused is found guilty by a jury. Moreover, we are of the opinion that in this class of cases, where the evidence is squarely conflicting, much weight should be given to the conclusions reached by the trial court upon questions of fact. That court sees the witnesses, and observes their manner of testifying and demeanor while on the stand. This great advantage in sifting evidence and arriving at the truth we do not have.

In this case no question of practice is raised, but we deem it advisable to call attention to the fact that the procedure in this class of criminal contempts is governed by the special provisions found in § 7605, Rev. Codes 1899, and hence the general procedure as laid down in § 5942, Id., is not applicable. See *Noble Tp.* v. *Aasen*, 10 N. D. —, 86 N. W. Rep. 742. The judgment will be affirmed. All the judges concurring.

(86 N. W. Rep. 225.)

STATE *ex rel* WILLIAM E. MARTIN *vs.* CHARLES BRADLEY.

Opinion filed May 7, 1901.

Liquor Nuisance—Abatement—Action by Citizen.

Section 7605, Rev. Codes, provides that the attorney general, his assistant, state's attorney, or any citizen of the county where a liquor nuisance exists, or is kept or is maintained, may maintain an action in the name of the state to abate and perpetually enjoin the same. *Held*, that a citizen of a county in which such nuisance exists may maintain an action in the name of the state to abate it without any authority or consent from the state's attorney or attorney general to bring the same.

Employment of Private Counsel.

Such citizen may employ his own attorney, and bring such action in the name of the state, without authority from the state's attorney or attorney general.

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

Action by the state, on the relation of William E. Martin against Charles Bradley and John S. Nelson. From an order denying a motion for judgment, plaintiffs appeal.

Reversed.

Bosard & Bosard, for appellants.

No appearance for respondent.

MORGAN, J. This appeal is from an order denying a motion for judgment in an action brought under the provisions of § 7605, Rev.

Codes. The action was brought in the county of Morton, by the state, on the relation of William E. Martin, a citizen, to abate a nuisance alleged in the complaint to have been there maintained by Charles Bradley, by keeping a place where intoxicating liquors were kept for sale and sold unlawfully by him, on certain premises described in the complaint. The summons and complaint were personally served on the defendants, but neither of them has appeared in the action in any manner. At the expiration of 30 days from the time of the service of the summons and complaint on the defendants, the attorneys for the plaintiff made and filed an affidavit that no answer, demurrer, or appearance had been made by the defendants in the action, and applied to the court for judgment. This application for judgment was accompanied by testimony in the form of a deposition to substantiate, and which did substantiate, the allegations of the complaint. Such application for judgment was regular in every respect, and but one ground for denying the motion for judgment is set forth in the order denying the motion.

There was no appearance on behalf of the defendants at the hearing of such motion, nor has there been any appearance on their behalf at any stage of the proceedings in the action. This motion for judgment was denied on the sole ground that the action was not brought in the name of, or at the relation of, the state's attorney of Morton county, or of the attorney general of the state, or either of their assistants, and was not brought by or with the consent or authority of either of them. It was denied for the reason that the action was brought by the state on the relation of William E. Martin, a citizen, represented by his own attorneys, appearing without any authority or consent from the state's attorney of Morton county or of the attorney general of the state. The plaintiff has appealed from the order denying the motion for judgment for the abatement of the nuisance alleged and established, and urges that any citizen can maintain such an action without permission or authority or consent from any of the officers of the state. A decision of this question will depend upon, and is controlled by, the provisions of the Code relating to the bringing of actions for the abatement of nuisances of this kind, under § 7605, Rev. Codes. The provision of the Code applicable in determining the question of the right of a citizen to maintain an action such as this is the following: Section 7605, relating to this particular question, provides: "The attorney general, his assistant, state's attorney, or any citizen of the county where such nuisance exists or is kept or is maintained, may maintain an action in the name of the state to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the action in the usual manner of granting injunctions, except that the affidavit or complaint or both may be made by the state's attorney, attorney general or his assistant upon information and belief. * * * In case judgment is rendered in favor of the plaintiff

in any action brought under the provisions of this section the court or judge rendering the same shall also render judgment for a reasonable attorney's fee in such action in favor of the plaintiff and against the defendants therein, which attorney's fee shall be taxed and collected as other costs therein; provided, if such attorney is the state's attorney, such attorney's fee shall be paid into the county treasury as in § 7603 provided." From this provision we are to determine whether a citizen may bring an action of this nature to abate and perpetually enjoin a nuisance created by a violation of the provisions of § 7605, Chap. 63, Rev. Codes. By that section a place where intoxicating liquors are sold, or kept for sale, or where persons are permitted to resort for the purpose of drinking intoxicating liquors, in violation of any of the provsions of said Chap. 63, is expressly declared to be a common nuisance.

The complaint shows that William E. Martin, the relator, is a citizen of the county of Morton, in this state. Under the provisions of said § 7605, the following persons are, by express language, permitted to maintain actions of this kind, viz.: The attorney general or his assistant, the state's attorney of the county, and any citizen of the county. They are empowered to maintain the action without any conditions or restrictions. Neither one of them is required to perform any act as a condition preliminary to the right to maintain such an action. Each of such persons is authorized to bring the action unconditionally, without the concurrence of any of the other persons mentioned in the section. The state's attorney and attorney general may bring the action and verify the complaint on information and belief. But a citizen bringing such an action on his own responsibility is not permitted to verify the complaint or affidavits on information and belief. The action is a civil action, governed, in a general way, by the same procedure as other civil actions in which injunctions are granted at the commencement thereof. A distinguishing feature from other civil actions in which injunctions are granted is that this action is maintained in the name of the state. The state permits its name to be used in bringing the action. This is because the action is of a public nature, and for the benefit of the public. It is to the interest of the public that such nuisances be abated. In such actions the relator has no personal interest in the action, except such interest as the public generally have. The language of this section is explicit that any citizen of the county may maintain such an action. Its language could not be more direct, positive, or unambiguous. There is a reason why citizens should have the right to bring such actions. Circumstances may arise and do arise, when it is necessary that the citizen shall exercise the right to bring such an action, or the law will not be enforced. It was for this reason that the terms of the statute do not confine the bringing of such actions to the representatives of the state alone. This right was conferred upon citizens to meet emergencies that

would render the law practically useless without it. The provisions of § 7605 relating to attorney's fees, and the provisions of § 7603 relating to costs, also indicate that such an action may be maintained by a citizen without the consent of the state's attorney or the attorney general. We therefore hold that any citizen of the county where a nuisance exists can maintain an action in the name of the state to enjoin and abate it, under § 7605, without the concurrence, authority, or consent of the state's attorney or the attorney general, and that he may employ his own attorneys to prosecute such an action.

This same question has been before the Supreme Court of Iowa many times. That court has uniformly held that a citizen may maintain an action to enjoin and abate a nuisance, such as is described in the complaint, without the authority or consent of the state's attorney of the county, and may employ his own private counsel to prosecute the action of abatement. The statute of Iowa bearing upon this question is almost identical in language with our own statute pertaining to this subject. *Littleton* v. *Fritz,* 65 Ia. 488, 22 N. W. 641, 54 Am. Rep. 19; *Conley* v. *Zerber,* 74 Ia. 699, 39 N. W. 113; *Maloney* v. *Traverse,* 87 Ia. 306, 54 N. W. 155; *McQuade* v. *Collins,* (Iowa) 61 N. W. 213. See, also, *State* v. *Sioux Falls Brewing Co.,* (S. D.) 50 N. W. 629, where the right of a citizen to maintain such an action is upheld under a statute identical with ours. The question involved on this appeal has been determined upon the statute in force in this state prior to the enactment of Chap. 178, Laws 1901, relating to the duties of state's attorneys.

The question whether the county would be liable, in any event, for the costs in actions brought by citizens without authority from the state's attorney, is not involved nor decided on this appeal. The order appealed from is reversed, and the cause remanded to the District Court, with directions to said court to proceed to a determination of the action on the merits. All concur.

(86 N. W. Rep. 354.)

HENRY MCGUIN, *et al vs.* JOSEPH E. LEE, *et al.*

Opinion filed April 23, 1901.

Deeds—Stipulation for Re-conveyance.

M. and wife executed and delivered to L. a warranty deed of lands partly owned by the wife and partly by M., in consideration of the release and taking up of certain secured and unsecured debts of M., and the leasing to M. of such lands for farming purposes. M. received a written lease of such lands from L. at the same time the deed was given, M. and wife retaining possession. Such lease contained a special provision that L. would reconvey such lands on payment of a fixed sum at a fixed time, such sum being the sum total of such debts. *Held,* that such stipulation to reconvey on conditions did not constitute the deed presumptively a mortgage.

Unconditional Transfer—Estoppel.

M.'s wife held the title to part of such lands in her name, the other being their homestead. She delivered a deed to such lands through a notary to L. unconditionally, L. not since having notice of any intention on her part to convey such lands contrary to that expressed in the deed. *Held*, that she cannot claim such deed to be a mortgage as against L., who acted upon and relied upon it as an absolute deed.

Evidence Insufficient to Show Deed a Mortgage.

Evidence examined, and *held* not to sustain the contention that such deed was a mortgage.

Evidence Required to Show Deed a Mortgage.

Held, further, that in an action to have such deed declared to be a mortgage plaintiffs must show the deed to be a mortgage by evidence clear, specific, satisfactory, and convincing. The rule in Jasper v. Hazen, 58 N. W. 454, 4 N. D. 1, 23 L. R. A. 58, followed.

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

Suit by Henry McGuin and wife against Joseph E. Lee and others to have a certain deed construed to be a mortgage. From a judgment in favor of defendants, plaintiffs appeal.

Affirmed.

Templeton & Rex, for appellants.

As to Mrs. McGuin the so-called deed must be held to be a mortgage. The intent at the time of the delivery of the deed governs. Where a husband and wife make a conveyance absolute in terms of property belonging to the wife, the husband conducting the negotiation with the grantee, the intent of the wife in delivering the deed governs as to the nature of the transaction. If she understood the deed was security for her husband's debt, the transaction is a mortgage, whatever may have been the intention as between the husband and his creditor before the instrument was delivered. Jones on Mtgs., § 324; *Davis* v. *Brewster*, 59 Tex. 93; *Regan* v. *Simpson*, 27 Wis. 355; *Gilbert* v. *Deshon*, 107 N. Y. 324. Defendants Williams and the Fargo Loan Agency are in no better position than Lee. Plaintiffs were in the actual possession of the premises at the time of the transfer to them, and notice of plaintiff's rights was imputed to them. *O'Toole* v. *Omlie*, 8 N. D. 444. The inadequacy of the consideration and the embarrassed circumstances of the grantors strongly support the theory that the transaction was a mortgage. *Reed* v. *Reed*, 75 N. W. Rep. 264; *Huscheon* v. *Huscheon*, 12 Pac. Rep. 410; *Macauley* v. *Smith*, 132 N. Y. 524, 30 N. E. Rep. 997; *Book* v. *Beasley*, 40 S. W. Rep. 101; *Caldwell* v. *Melvedt*, 61 N. W. Rep. 1091; *Gilchrist* v. *Beswick*, 10 S. E. Rep. 371; *Cobb* v. *Day*, 17 S. W. Rep. 323. The retention by Lee of the notes constitutes most potent evidence in support of plaintiff's contention. *Schierl* v. *Newburg*, 78 N. W. Rep. 761; *Ferris* v. *Wilcox*,

51 Mich. 105, 16 N. W. Rep. 252. The agreement to pay interest on the consideration named in the deed establishes to a certainty that the transaction was a mortgage. *Voss* v. *Eller*, 109 Ind. 260, 10 N. E. Rep. 74; *Murphy* v. *Calley*, 1 Allen, 107; *Bearss* v. *Ford*, 108 Ill. 16. A lease seems to be a common resort to strengthen the apparent legal title when taken merely as security. *Hoile* v. *Bailey*, 17 N. W. Rep. 322. But notwithstanding a lease was taken back the transaction was nevertheless a mortgage transaction. *Steele* v. *Bond*, 28 Minn. 267; *Wright* v. *Bates*, 13 Vt. 341; *Regan* v. *Simpson*, 27 Wis. 355; *Robb* v. *Vos*, 155 U. S. 13; *Boatright* v. *Peck*, 33 Tex. 68; *Rogers* v. *Davis*, 59 N. W. Rep. 265; *Haggerty* v. *Brower*, 75 N. W. Rep. 321; *Grand Order of Odd Fellows* v. *Menlin*, 5 At. Rep. 544; *Guither* v. *Clark*, 8 At. Rep. 544; *Lounsberry* v. *Norton*, 22 At. Rep. 153; *Mears* v. *Strobach*, 40 Pac. Rep. 621. The court in similar cases have considered the whole evidence and determined the effect of the entire transaction. *Horn* v. *Keteltas*, 46 N. Y. 607; *Carr* v. *Carr*, 52 N. Y. 257; *Meyer* v. *Elev. Co.*, 80 N. W. Rep. 189; *Nightingale* v. *Barens*, 47 Wis. 389; *Pico* v. *Cuyas*, 47 Cal. 180. In many states it is held that a deed and contemporaneous agreement to reconvey on payment of the amount of the indebtedness owing by the grantor to the grantee is conclusively presumed to be a mortgage. *Clark* v. *Landon*, 51 N. W. Rep. 357; *Watkins* v. *Williams*, 31 S. E. Rep. 388; *Kelley* v. *Leachman*, 29 Pac. Rep. 849; *Snow* v. *Pressey*, 20 At. Rep. 78; *Copeland* v. *Yoakum*, 38 Mo. 350; Gunn's Appeal, 10 At. Rep. 498; *Weisham* v. *Hocker*, 54 Pac. Rep. 464; *Frey* v. *Campbell*, 3 S. W. Rep. 368. In other jurisdictions where a deed is executed and an agreement to reconvey given back as part of the same transaction, presumptively the deal is for security and not an absolute sale. *Mears* v. *Strobach*, 40 Pac. Rep. 621; *Keithley* v. *Wood*, 38 N. E. Rep. 149; *Crosby* v. *Buchanan*, 1 So. Rep. 898. When the evidence leaves the mind of the court in doubt the transaction should be held a mortgage. *Jeffrey* v. *Robbins*, 167 Ill. 375; *Rockwell* v. *Humphrey*, 15 N. W. Rep. 394; *Book* v. *Beasley*, 40 S. W. Rep. 101; *Niggeler* v. *Mauvin*, 34 Minn 118, 24 N. W. Rep. 369; *O'Toole* v. *Omlie*, 8 N. D. 444.

Cochrane & Corliss, for respondents.

The most convincing proof is required to overthrow the most solemn of all written instruments—a deed of real property. 1 Jones on Mtgs., § 355; *May* v. *May*, 42 N. E. Rep. 56; *Burgett* v. *Osborne*, 50 N. E. Rep. 206; *Jasper* v. *Hazen*, 4 N. D. 1. Where it appears that the parties to the deed, absolute on its face, intended an absolute sale, with simply the right to re-purchase the land and takes a bond for reconveyance containing no condition which might stamp the transaction as a mortgage, such intention must control, and the instrument be declared a deed. 1 Pingree on Mtgs., § 90; *Dignan* v. *Moore*, 26 Pac. Rep. 146; *Conway* v. *Alexander*, 7 Cranch, 218; *Henley* v. *Hotaling*, 41 Cal. 22; 1 Jones on Mtgs., § 256.

Where the grantor has in terms, declared that his sole right is that of an option to re-purchase, the same degree of evidence to overthrow the writing and show that the transaction was a mere mortgage should be required of him as when he attempts to overthrow the terms of a deed absolute on its face. 1 Jones on Mtgs., § § 260, 261; 1 Pingree on Mtgs., § 99; *Wallace* v. *Johnstone*, 9 Sup. Ct. Rep. 245. It is not at all important that the price at which the grantor is to have the right to repurchase is exactly equal to the amount of the debt specified by the conveyance of the land to the grantor. *Vance* v. *Anderson*, 45 Pac. Rep. 816; *Rue* v. *Dole*, 107 Ill. 275; *Robertson* v. *Company*, 76 N. W. Rep. 736; 15 A. & E. Enc. L. 785; Jones on Mtgs., § § 265, 267; *Tygrett* v. *Potter*, 29 S. W. Rep. 976; *Great Western Mfg. Co.* v. *Bank*, 50 Pac. Rep. 941. The really controlling question in this class of cases is, whether the debt is or is not extinguished. 15 A. & E. Enc. L. 780, 781, 785; 2 Pom. Eq. Jur. § 1195; 1 Jones on Mtgs., § § 258, 265, 267, 269; *Wallace* v. *Smith*, 25 At. Rep. 811; *Rue* v. *Dole*, 107 Ill. 275; *Burgett* v. *Osborne*, 50 N. E. Rep. 206; *Bacheller* v. *Bacheller*, 33 N. E. Rep. 24; *Henley* v. *Hotaling*, 41 Cal. 27. Inadequacy of price is not at all decisive in favor of the transaction being a mortgage. 15 A. & E. Enc. L. 781; *Story* v. *Springer*, 39 N. E. Rep. 572; *Rue* v. *Dole*, 107 Ill. 283; *Bogk* v. *Gassert*, 13 Sup. Ct. Rep. 738; *Carr* v. *Rising*, 62 Ill. 14. That the grantor in an absolute deed cannot have a decree adjudging it a mortgage on mere proof, however strong, that he had a secret undisclosed intention that the instrument should be merely a mortgage, the grantee appearing to have treated the instrument as an absolute transfer and altered his position on such assumption, is plain. 1 Jones on Mtgs. § 335; 1 Pingree on Mtgs., § 66; *Holmes* v. *French*, 9 Mo. 201; *Phoenix* v. *Gardner*, 13 Minn. 430; *Jones* v. *Jones*, 17 N. Y. Supp. 905; *Willson* v. *Parshall*, 29 N. E. Rep. 297; *Wallace* v. *Smith*, 25 At. Rep. 807; *Baxter* v. *Willey*, 31 Am. Dec. 623.

MORGAN, J. The principal issue in this case is raised by the allegations of the complaint, stated substantially as follows: That the plaintiffs, husband and wife, made and delivered to LaMoure & Lee, defendants, on March 7, 1894, a warranty deed of two quarter sections of land in Pembina county, one of such quarters owned by the wife, and the other the homestead of the plaintiffs. That such warranty deed was thus delivered to said defendants as security for certain debts due said defendants and as security for debts due to others, which debts were to be assumed and paid by defendants; which was not intended or understood by the parties thereto to be given as an absolute deed. The complaint demands that such deed be declared a mortgage upon payment of all sums intended to be secured thereby. An accounting is demanded, and other relief, not necessary to mention here. The answer denies that such deed was intended to be given as security, and alleges that it was given, and understood to be given, as an absolute deed. The trial

court found for the defendants. The plaintiffs appeal, and ask for a trial anew.

The evidence given on the trial is quite voluminous, but the following summary of it will suffice to give a correct understanding of the facts out of which this litigation has grown: Henry McGuin, one of the plaintiffs, and Judson LaMoure had business dealings from about 1883 up to date of the giving of this deed, on March 7, 1894, and during all this time McGuin was LaMoure's debtor. About this latter date Mr. McGuin was deeply involved in debt. On the lands in suit taxes were due and unpaid to the amount of $127.13. There were mortgage liens on the lands, amounting, with accrued interest, to $2,342.60. One of these mortgages, amounting, with interest, to $749.00, was being foreclosed. On these lands Mr. LaMoure held a second mortgage, originally given in 1890, amounting, with interest to March, 1894, to $1,151.60, which mortgage is included in the total of mortgages given above. Mr. McGuin also owed Mr. LaMoure and LaMoure & Lee unsecured debts amounting, with interest, to $289.82. He also owed Randall & Norton between $700 and $800, secured by chattel mortgage. In the winter of 1894 the $660 mortgage, amounting to $749, was about to be foreclosed. McGuin was anxious to avoid this foreclosure, and so was Mr. LaMoure, as such foreclosure would cut off his second mortgage, or make it necessary for him to redeem. He desired to avoid paying the costs of foreclosure of the $660 mortgage. So Mr. McGuin and Mr. LaMoure met, and talked over the situation. Mr. McGuin testifies as to this meeting as follows: "My first conversation was with Mr. LaMoure in the store at Neche, I think. I told him that Mr. Norton had made a proposition to me to pay my debts, and take a deed, and take half of the crop until it was paid,—until I paid off the debt, with 12 per cent interest. LaMoure said he would take it that way. I think that day and the day we made arrangements was the only time that I talked with Mr. LaMoure about the matter." As to what was said in the store on the day the deed was agreed upon, he said: "Why, Mr. LaMoure was to pay off what was against the places, and taxes, and he was to have a deed of the places, and I was to give him half of the crops. He was to have 12 per cent interest on his money. There was no conversation or agreement between us by which I was absolutely to convey either of these two quarter sections of land to Mr. Lee, or to Mr. LaMoure, or to LaMoure & Lee. They was to pay the taxes and everything, and he would keep the places for security until it would be paid." As to this meeting Mr. LaMoure testifies: "The result of the talk was that I agreed to take the places, and pay the indebtedness against the land; everything that was against the land I would pay, and did. The accounts of LaMoure & Co. against him were to be included in the whole business. Made a rough estimate of it here together, and I concluded it amounted to about $2,800; and I told him that was more than the land was worth; but I says, 'I can't afford to lose the $1,000 or $1,200.' After we got through talking, I went up with Mr. McGuin into the

store, and told Mr. Lee the agreement that we had made, which was that he was to deed me the land, and I was going to give him a lease of it that year under proper agreement; and he said it was pretty hard to be after losing his farm after working so hard. I told him there was nobody to blame but himself; but I says: 'Henry, I will tell you what I will do with you. I will give you a contract to deed you back this land this fall—this next winter, on the first of January following—for the amount I have put in it.' I got Mr. Lee to jot down the statement that I made, and it was read over to Mr. McGuin, and I says, 'That is the understanding, Henry,' and he says, 'Yes, sir.'" Mr. Lee, in his testimony as to this interview, corroborates Mr. LaMoure without any material variance. These three are the only witnesses that can testify as to what this agreement was. No others were present. Mr. McGuin's son testifies that Mr. Lee told him, in effect, in 1896, that this transaction was one for security only, but Mr. Lee positively denies having such conversation with the son. Mr. McGuin also testifies that Mr. LaMoure told him in 1897 that he should hurry up, and get his land back; but Mr. LaMoure denies such conversation. At the meeting in the store, when the memorandum was taken down for the purpose of having the papers drawn up, the total of the claims in favor of LaMoure & Lee, with the mortgage liens and taxes, was agreed to be $2,359.60. This did not include the $400 mortgage not yet due, but which was assumed by Mr. LaMoure in this agreement. It was also then agreed that the deed should be drawn in favor of Mr. Lee. The lease between Mr. Lee and Mr. McGuin for 1894 contains this special provision: "It is hereby further understood and agreed that, in the event of Henry McGuin paying to the said Joseph E. Lee the sum of two thousand three hundred and fifty-nine and no 100 dollars on or before the 1st day of January, A. D. 1895, then, and in such event, the said Joseph E. Lee agrees to sell to said Henry McGuin the land hereinbefore described, and to give him a warranty deed therefor; the understanding being that the said Henry McGuin will have the first chance to purchase said land for said price. And, in the event of said Henry McGuin failing and neglecting to purchase said land and paying said sum prior to January 1, 1895, then this lease to be void as to any sale or offer for sale of said land, but to be in full force and effect as to the lease and division of products of said farm, the understanding being that, in the event of said Henry McGuin failing to pay said sum prior to January 1st, 1895, that any offer for sale or agreement to sell is hereby considered to be void, and of no further virtue or effect, and that this agreement shall not be considered or held to be a contract for sale, but merely a lease of the land hereinbefore described." In 1895, 1896, 1897, and 1898, written leases were entered into between Mr. McGuin and Mr. Lee for the farming of the land by the former, but in neither of these years did the lease contain the special stipulation as to reconveying the land contained in the 1894 lease.

Settlements were made each year under each of these leases without a word being said by Mr. McGuin claiming or intimating that the deed was originally a mortgage; nothing said by him as to interest. If money was due Mr. McGuin under these settlements, he was credited with it on the books of Mr. Lee on store account or paid in cash, or his bill receivable paid, and not on the $2,359.60 consideration. If Mr. McGuin owed Mr. Lee on these settlements, he gave his note to him for such amount. Mr. Lee paid the taxes and kept the buildings insured during all these years, and these amounts were never considered or mentioned during these annual settlements. On February 13, 1899, Mr. McGuin wrote Mr. Lee as follows: "Dear Sir: I received yours of the 11th. Am very sorry that you have changed your mind about the places since I saw you, for I don't know where I can get a place at this time of year, for it takes quite a large stable to hold our stock. I wish you would change your mind, and let us have it this year, and give us longer time to look around. Please let us know, and oblige, yours, etc., H. McGuin." This letter was an answer to one sent him by Mr. Lee demanding possession of these farms.

The character of these two instruments, the deed and the lease, must be fixed by their own terms, considered in connection with the oral agreements, circumstances, and conduct of the parties at the time they were executed. What transpired prior to March 2d, or subsequent to the execution of these instruments, is to be weighed and considered for the purpose of aiding the court in ascertaining what the real intention of the parties was when these papers were executed. On March 2, 1894, we find Mr. McGuin in this condition: He was hopelessly in debt. His farms were heavily incumbered. One mortgage past due, on which foreclosure had been commenced. The other mortgages would be due in the coming fall. For two years his taxes had not been paid. Randall & Norton were pressing him. It does not appear, nor is it probable, that he could then procure a loan large enough to take up these pressing liens. From the outlook in March, 1894, it did not seem probable that he could secure the benefit of the crop of 1894, even if he could procure the seed in order to attempt to raise a crop. The defendants LaMoure & Lee offered him an opportunity by which he could receive the benefit of the crop of 1894 under a fair and reasonable arrangement by which he realized about $500 for his work during that season. By this arrangement LaMoure & Lee did not secure anything much better or different than they could have secured by other means. They had a second mortgage, and could have redeemed from the foreclosure of the prior mortgages, or procured assignments of them. By paying $1,318.13, practically in cash, they probably saved the $289.82, the unsecured indebtedness. We think the evidence of Henry McGuin is almost conclusively rebutted by that of LaMoure & Lee. The effort to weaken their testimony by showing that they have made statements inconsistent with the idea that there was a sale has failed. The defendants deny having made

such statements. We do not attach much importance to the fact that Mr. Lee, right after the deed was executed, wrote for an assignment, instead of a satisfaction, of the $660 mortgage. It seems to have been a mistake. Mr. Lee so states. The conduct of Mr. McGuin for nearly five years after the deed was given clearly indicates that he understood the deed to have been a sale. During all that time he dealt with Mr. Lee strictly in reference to crops; not a word in reference to paying any interest on the $2,759.60, concerning which he says he was to pay 12 per cent interest. When requested to quit the premises, he requested another year, that he might "look around for another place," and not a word in the letter that he considered the deed a mortgage. The conduct of Mr. Lee also shows clearly that the deed was intended as such. His bookkeeping shows it. His books show that the unsecured debts were canceled. The conduct of both Lee and McGuin shows directly that they both deemed the deed to have been nothing less than a sale, and that the debts, both secured and unsecured, were extinguished. True, the evidence of these liens was kept by Mr. Lee. Still he says that Mr. McGuin told him, upon being informed, that he could have them if he would call for them; told Lee "he could keep them." The $800 mortgage released by Mr. LaMoure when the $1,093.60 mortgage was given and called for by Mr. McGuin. The retention of these notes and satisfied mortgages by Mr. Lee under the circumstances has no controlling force with us to show that there was no extinguishment of this indebtedness. Trenholme's testimony to the effect that he figured on making a loan on this property, and figured on the amount of it with Mr. Lee, is relied on by plaintiffs as showing that Lee recognized McGuin's right to redeem subsequent to January 1, 1895. Mr. Trenholme's evidence on this point is very vague and uncertain in every respect. He says that the conversation was had "several years ago," and further says that the parts of such conversation claimed by plaintiffs to show inferentially that Lee recognized McGuin's right to redeem "may have been with McGuin." It is claimed that LaMoure & Lee were to receive interest on the consideration of the deed, and that stipulating for interest would be inconsistent with an extinguishment of the debt. That would be true if shown. In the first place, interest was never mentioned after March 2, 1894, not even by Mr. McGuin; none charged on Mr. Lee's books; none provided for in the special provision agreeing to reconvey on conditions in the first lease. Taken in its entirety, the testimony of Mr. LaMoure leads to the conclusion that nothing was meant to be said about interest during these negotiations, except a mention of interest on the money advanced to procure satisfaction of these mortgages as between Mr. LaMoure and Mr. Lee. In reviewing the whole evidence we find no facts or circumstances pertaining to the transactions that convince us that the lease containing the optional right of repurchase, or the oral evidence preliminary or subsequent to the deed, constituted the deed a mortgage. As we understand it, the evidence fairly considered,

shows that the intention of the parties was that it should be an absolute deed, and the indebtedness extinguished. After March 2d, it was not a loan. It had passed as such, and became an executed transaction, unless McGuin bought the land back by January 1, 1895. Having failed to do this his rights to the land passed from him under his deed joined in by the wife.

Appellants claim that, as to Mrs. McGuin, the deed must be held to be a mortgage, because the land in section 1 was her individual property, and that she never assented to the deed or lease. She did hold the title to this land in her name. It was given to her by her husband in 1884, "so that, if anything happened to him, she could have a place of her own." She never paid anything for it. Since that time the proceeds of this land have been used, just the same as the proceeds of the homestead have been used, for their mutual interests as husband and wife. But under the evidence we do not think it makes any difference in this case whether she knew of the lease, or authorized it, or assented to it or not. Nothing was ever said between Mrs. McGuin and these defendants as to either of these instruments, or any business relations between them and her husband leading up to the deed. She testifies that she signed this deed "to secure Mr. LaMoure." She does not state that she so stated to any one at the time of signing. That she signed to secure Mr. LaMoure is her present statement, that such was her intention then. She was asked what her husband told her when he talked with her about these matters? She says, "He told me he was going to have Jud fix it up," and she says he explained that "we will be so paying the debt by one-half crop payment." This was all that her husband said to her as to signing this deed. There is no evidence in the record tending to show that the defendants were ever informed, or had notice of any sort, that any such conversation had ever passed between her and her husband. It does not appear when her husband told her this,—whether before the conversation with Mr. LaMoure, or whether after such conversation, and before she signed the deed. She delivered the deed to the notary, who delivered it to Mr. Lee. She delivered it unconditionally after acknowledging it and informing the notary that she understood the nature of it. It is too late for her now to say that she signed the deed as security after delivering it under circumstances that led the defendants, LaMoure & Co. and others, to rely upon it as an absolute deed. She has failed to show by satisfactory and convincing evidence that she signed the deed as security. In view of all the evidence in the case, we think the contrary is shown. Having reached the conclusion that she signed and delivered the deed unconditionally, it is unnecessary for us to consider or discuss the question raised by counsel that her husband was not her authorized agent to execute the 1894 lease. We observe, in passing that the evidence strongly tends to negative the claim of counsel that she never knew of the leases or assented to them. In the first place, she does not testify that she did not know of them. For nearly five years the leases were in force. There

was an annual settlement under them between her husband and Lee. She admits that she was familiar with her husband's affairs. But it is unnecessary to discuss this phase of the evidence further, as she delivered the deed to the defendants, who could lease it to her husband without her sanction in any way. As bearing upon this question, see the following authorities: *Holmes* v. *Fresh,* 9 Mo. 201; *Wilson* v. *Parshall,* (N. Y. App.) 29 N. E. 297; *Phoenix* v. *Gardner,* 13 Minn. 430, (Gil. 396); *Wallace* v. *Smith,* (Pa. Sup.), 25 Atl. 807. The cases cited by appellant in support of his contention, viz:, *Ragan* v. *Simpson,* 27 Wis. 355, and *Gilbert* v. *Deshon,* 107 N. Y. 324, 14 N. E. 318, do not seem to us to be in point. In those cases the grantees in the deeds or conveyances had notice that the wife executed them as security, or for some special purpose.

It is claimed by plaintiff's counsel that the burden is on the defendants to show that these two instruments together constituted a sale of the land; in other words, that an agreement to reconvey on conditions, contemporaneously entered into with the deed, makes the transaction presumptively a mortgage. If such be the case, the effect is that parties competent to contract cannot make their own contracts. We think the following lays down the most approved principle as to this question: "There can be no question that a party may make a purchase of lands, either in satisfaction of a precedent debt or for a consideration then paid, and may at the same time contract to recover the lands upon the payment of a certain sum, without any intention on the part of either party that the transaction should be, in effect, a mortgage. There is no absolute rule that the covenant to reconvey shall be regarded either in law or in equity as a defeasance. The covenant to reconvey, it is true, may be one fact, taken in connection with other facts, going to show that the parties really intended the deed to operate as a mortgage, but, standing alone, it is not sufficient to work that result. The owner of the land may be willing to sell at a price agreed upon, and the purchaser may also be willing to give his vendor the right to repurchase upon specified terms; and, if such appears to be the intention of the parties, it is not the duty of the court to attribute to them a different intention. Such a contract is not opposed to public policy, nor is it in any sense illegal, and courts will depart from the line of their duties should they, in disregard of the real intention of the parties, declare it to be a mortgage." *Henley* v. *Hotaling,* 41 Cal. 22. See, also, *Conway's Ex'rs* v. *Alexander,* 7 Cranch. 218, 3 L. Ed. 321; *McNamara* v. *Culver,* 22 Kan. 460. This court has clearly laid down the rule that governs in this class of cases as to the burden of proof. The rule thus laid down is: "Hence courts have, with great uniformity, in this class of cases, required the proof that should destroy the recitals in a solemn instrument to be clear, satisfactory, and specific, and of such a character as to leave in the mind of the chancellor no hesitation or substantial doubt." *Jasper* v. *Hazen,* 4 N. D. 1, 58 N. W. 454, 23 L. R. A. 58. See, also, *Larson* v. *Dutiel,* (S. D.) 85 N. W. 1008, and cases there cited.

It is claimed that the consideration for the deed was inadequate, and should be considered as a circumstance tending to prove that the deed and lease constituted together a mortgage. Were it proven that the consideration was grossly inadequate to the value of the land, it would not be sufficient alone to constitute it a security transaction. That would be considered as one fact to be weighed in connection with all the others in the case, from which to gather what the real intention of the parties was at the time of the execution of these papers. On the question of value the evidence is conflicting. Disinterested witnesses give widely divergent opinions as to such value in March, 1894. Such opinions range from $3,400 to $5,000. The defendant LaMoure estimates its value then at $2,500, and the defendant Lee offered to sell it to Norton in April, 1895, for what he had put into it. It is quite conclusively shown that the place in section 13 was of somewhat inferior character. After considering all the evidence on this question of value, we are far from convinced that the price paid was grossly or manifestly inadequate. Our conclusion is that the plaintiffs have failed to substantiate their claim by that clear, specific, satisfactory, and convincing proof required in this class of cases. It follows that the judgment of the District Court must be affirmed. All concur.

(86 N. W. Rep. 714.)

J. I. CASE THRESHING MACHINE CO. *vs.* NELS OLSON.

Opinion filed April 26, 1901.

Chattel Mortgage—Execution—Witnesses.

In an action between mortgagee and mortgagor, *held*, that it is not necessary to show that the execution of a chattel mortgage was witnessed.

Substitution of New Debtor.

Evidence reviewed, and *held* not to establish that there was a substitution of a new debtor, and a release of the original one.

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

Action by the J. I. Case Threshing Machine Company against Nels Olson. Judgment for plaintiff. Defendant appeals.

Affirmed.

M. A. Hildreth, for appellant.

Turner & Lee, for respondent.

MORGAN, J. The complaint states a cause of action for the foreclosure of a chattel mortgage given, with several notes accompanying it, on August 17, 1898. Only two of the notes are involved in this suit,—one for $300 and one for $416. The others have been paid. The answer sets forth as a defense that the mortgage and notes were given in consideration of the sale by the plaintiff to the

defendant and one Anderson of a second hand threshing outfit, said Anderson, it is alleged, being the partner of the defendant in the purchase and operation of such threshing outfit. The answer further alleges that the plaintiff did, on July 15, 1899, for a valuable consideration, actually release said defendant from liability by virtue of his having executed such notes and mortgage, and did further agree to accept said Anderson in his stead as the one to whom it would solely look for payment of such notes and mortgage. The case was tried to the court without a jury, and judgment rendered in favor of the plaintiff. A trial *de novo* is requested here.

The only question of law urged by the appellant in his brief is that the plaintiff failed to prove that the mortgage admitted in evidence was properly executed. He claims that it is necessary to prove that the signing of the mortgage by the defendant was duly witnessed, and cites as authority for such a contention the case of *Keith* v. *Haggart*, 2 N. D. 18, 48 N. W. 432. That case is not in point. In that case the rights of third parties were involved. There can be no doubt that the formality of witnessing the execution of a mortgage is not contemplated by the statute, except as a prerequisite to filing, in order that it may become constructive notice to incumbrancers or purchasers of the property mortgaged. See § § 4733, 4738, Rev. Codes; Jones, Mortg. § 532. See, also, *Machine Co.* v. *Lee*, (S. D.) 57 N. W. 238, where this identical section (4738) is considered.

The trial court refused to find, on the request of defendant's attorney, that the plaintiff agreed to release said Olson from all liability on account of such notes and chattel mortgage, and that it agreed to accept said Anderson as the one responsible for the payment of them, in place of said Olson. It is claimed that the evidence sustains such a finding, and that it does not sustain any finding to the contrary. It is, therefore, necessary for us to review the evidence in order to determine what the truth is as to this contention. The facts briefly outlined, are that defendant and Anderson operated the threshing rig in partnership in the fall of 1898, and bought the rig as partners, although Anderson's name did not appear in the notes or mortgage. In the summer of 1899 Olson desired to sell the outfit to Anderson. Anderson and Olson saw the plaintiff's agent in regard to consenting to such a sale, and were informed that "it would be all right." Two weeks later Olson sold the machine to Anderson. After this sale they went to Fargo to see the plaintiff's agents. They then informed such agents that Anderson had bought the rig. Anderson here guaranteed the payment of the note to become due that fall by an indorsement on the back of it. Anderson does not claim that Olson was ever released from payment of the note or notes, but says there was talk concerning it at this interview. Olson says, in testifying on cross-examination as to this interview: "When Anderson and I came to the Case office together, I asked them to fix up the deal with Anderson, and take his notes, and give me mine. They would not do it." In other parts of his evidence he testifies to the

effect that he "understood that he was released," and "that they said they would take Anderson in my place." Such general statements or conclusions cannot be taken to overcome the positive denial by the witnesses for the plaintiff that such release was ever given, but was in fact refused. The testimony of Anderson squarely corroborates plaintiff's witnesses on this point. It is a significant fact in the case that Olson came to Fargo in October, 1899, and asked plaintiff's agents how much they had collected from Anderson, and then informed them that he had abandoned the machine, and left the state. Why he should interest himself as to the amount collected, if he was released, does not appear. We view his conduct on this occasion as strongly corroborating plaintiff's claim that he was never released from payment of the indebtedness. It is incomprehensible why the company should release Olson, who is financially responsible, and accept Anderson, who is irresponsible, and do so without any benefit accruing to it whatever. If the company was willing to release Olson, there is no reason shown why it would be unwilling to surrender his notes, which it refused to do. The defense of release from payment set up in the answer is an affirmative defense. It is sufficient to say that it has not been established by a preponderance of the evidence. Inasmuch as we reach the conclusion that the defendant had failed to establish any defense upon the facts, we do not consider other questions raised during the trial, but not mentioned in the brief. Judgment affirmed. All concur.

(86 N. W. Rep. 718.)

GEORGE E. NICHOLS *vs.* ANNIE TINGSTAD, *et al.*

Opinion filed June 16, 1901.

Mortgages—Foreclosure—Law in Force at Time Mortgage was Given Controls.

The defendant T. mortgaged land owned by him in 1899 to the Farmers' Trust Company, and subsequently, in the same year, gave a second mortgage on the same land to the Huber Manufacturing Company, which was assigned to plaintiff. Both mortgages contained powers of sale. The assignee of the Farmers' Trust Company mortgage foreclosed it by advertisement under a power of sale in 1895, which foreclosure was regular in all respects. There was no redemption from the sale under such foreclosure within a year from such sale, and a sheriff's deed was executed and delivered to the assignee of the purchaser under such sale in August, 1896. *Held*, that the rights of the mortgagor, mortgagee, and purchaser under such foreclosure sale, as well as the rights of subsequent incumbrancers, are to be determined by the provisions of Comp. Laws 1887, in force at the time the mortgages were given.

Redemption by Second Mortgagee Within Year.

Neither the second mortgagee nor its assignee could redeem from the sale under such foreclosure under such first mortgage as a matter of right, unless such redemption was made within a year from such sale.

Action to Reclaim After Time.

That an action to redeem from such sale under such first foreclosure cannot now be maintained as a matter of right, under such Compiled Laws, as no equitable grounds exist in favor of such right to redeem.

Rights of Purchaser at Foreclosure Under His Deed.

That under section 5437 of the Comp. Laws of 1887 a sheriff's deed to a purchaser under a valid foreclosure and sale conveys to such purchaser all the right, title, and interest which the mortgagor had in such lands at the date of the execution and delivery of such mortgage, free from any rights or liens under subsequent incumbrances.

Mortgagee Under Second Mortgage Charged with Notice.

That the mortgagor and subsequent mortgagee or incumbrancers of the property mortgaged are deemed in law parties to a foreclosure proceeding by advertisement under a power of sale, and are bound by such foreclosure, the same as though they were made parties, and served with process, in an action for the foreclosure of such mortgage.

Second Mortgagee is an "Assign" Within Statute.

That under a foreclosure under a power of sale under such laws a junior mortgagee is entitled to the surplus in the hands of the person making the sale, after satisfying the mortgage foreclosed on under section 5424, Comp. Laws 1887, providing that such surplus shall be paid to the "mortgagor, his legal representatives or assigns," a junior mortgage being included in the word "assigns."

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

Action by George E. Nichols against Annie Tingstad and others. From a judgment in favor of defendants. Plaintiff appeals.

Affirmed.

Newton & Smith, for appellants.

The sale and right of redemption under the power given in the mortgage contract is governed by the law in force at the time the mortgage is made, and at the time of the foreclosure, and so all the rights of the parties of such foreclosure sale must be determined. *Smith* v. *Greene*, 41 Fed. Rep. 455. The deed on foreclosure transfers only such estate or interest in the mortgaged property as the mortgagor had at the time of the execution of the mortgage or has acquired up to the time of the foreclosure. *McMillan* v. *Richards*, 9 Cal. 365, 70 Am. Dec. 655; *Trimm* v. *Marsh*, 54 N. Y. 599. The equity of redemption is a distinct estate from that which is vested in the mortgagee before or after condition broken. It is descendible, devisable and alienable like other interests in real property. *Clark* v. *Reyburn*, 8 Wall. 318, 324, 19 L. Ed. 354. The mortgagee has only a chattel interest. *Gardner* v. *Heartt*, 3 Denio 233; *Astor* v. *Hoyt*, 3 Wend. 603; *Runyan* v. *Mersereau*, 11 Johns. 554. The deed speaks from the time of its execution; and the time referred to in the statute is the time when the deed upon foreclosure by action is made and no other time. If the deed was intended to speak from the

date of the mortgage the statutes should have so specified. *Packer* v. *Ry. Co.*, 17 N. Y. 283, 298. The same rule applies to a master's sale, where the lien holders subsequent to the mortgage are not made parties, which applied to a sale upon foreclosure by advertisement under the Revised Statutes, and before provision was made for serving notice upon lien holders. *Rector* v. *Mack*, 93 N. Y. 492. In a foreclosure by action it is not the deed that divests the subsequent lien holders, but it is the judgment or decree. *Laverty* v. *Moore*, 32 Barb. 347; *Laverty* v. *Moore*, 33 N. Y. 658; *Tallman* v. *Ely*, 6 Wis. 244; *Craig* v. *Herzman*, 81 N. W. Rep. 288. The deed given upon a foreclosure by action is a complete bar against both the mortgagor and mortgagee as they are necessary parties—no other parties unless made defendants, but only as provided in the decree or judgment. *Newark Lime Co.* v. *Morrison*, 13 N. J. Eq. 133; *Laird-Norton Co.* v. *Herker*, 62 N. W. Rep. 104. A statutory foreclosure after the death of a mortgagor divests the interests of his heirs and persons claiming under them. *Reilly* v. *Philips*, 57 N. W. Rep. 780. The foreclosure by advertisement before the Rev. Codes of 1895 went into effect, was a limited foreclosure. It only foreclosed the mortgagor and his heirs, and persons claiming under such heirs. *American etc. Co.* v. *Ry. Co.*, 99 Fed. Rep. 313; *Vroom* v. *Ditnas*, 4 Paige Ch. 526; 3 Co-op. Ed. 545 & note; *Benedict* v. *Gilman*, 4 Paige, Ch. 58; 3 Co-op. Ed. 340 & note; *Carpenter* v. *Brenham*, 40 Cal. 221. A subsequent lien holder when he comes to redeem must pay, or if he brings an action to be permitted to redeem, must offer to pay the entire mortgage debt and interest, but not the costs, of a previous statutory foreclosure. *Bunce* v. *West*, 17 N. W. Rep. 179; *Gage* v. *Brewster*, 31 N. Y. 218; 2 Jones on Mtgs., § 1075; *Martin* v. *Fudley*, 23 Minn. 13; *Bruce* v. *Tilson*, 25 N. Y. 194; *Vanderkemp* v. *Shelton*, 11 Paige Ch. 28; 5 Co-op. Ed. 45; *Spurgin* v. *Adamson*, 18 N. W.Rep. 293.

John E. Greene, for respondent.

Where a first mortgage upon real estate has been regularly foreclosed by advertisement, the right of redemption of the second mortgagee is barred after the expiration of one year from the date of sale. §§ 5411 to 5429, Comp. Laws; *Hokanson* v. *Gunderson*, 56 N. W. Rep. 172; Wiltsie on Mortg. Foreclosure, 812.

MORGAN, J. This action was brought by the plaintiff to foreclose a mortgage on real estate given by the defendant John E. Tingstad to the Huber Manufacturing Company on November 21, 1889, and by it assigned to the plaintiff before the commencement of this suit. The complaint states the following facts, in substance: That on October 31, 1889, the said John E. Tingstad was a single person, and the owner of the land described in the mortgage attempted to be foreclosed in this action; that on said October 31, 1889, he executed and delivered to the Farmers' Trust Company his mortgage on said lands to secure the payment of $1,035, which said mortgage contained a power of sale duly authorizing said mortgagee to foreclose

said mortgage by a sale of the lands mortgaged, as provided by statute, in case of a default in the conditions of said mortgage; that said mortgage was duly assigned to one S. W. Landon on January 23, 1890, and was duly and regularly foreclosed by said Landon by advertisement under such power of sale on August 24 1895, and the premises mortgaged were on that day bid in and purchased at the sale under such foreclosure by one George H. Hollister, who received from the sheriff making the sale a certificate of sale of such premises in the form provided by law; that said Hollister duly assigned such sheriff's certificate of sale to the defendant John B. Lockhart on August 24, 1896; that there was no redemption from such sale by the defendant Tingstad, or any other person, during the year provided by law for such redemption, or at any other time; that on August 27, 1896, the sheriff of Cass county executed and delivered to said Lockhart a sheriff's deed of such premises, which deed was duly recorded in the office of the Register of Deeds of Cass county on August 29, 1896; that on said day the said Lockhart made and executed a warranty deed of said premises to the defendant Annie Tingstad, who, with her husband, John E. Tingstad, has been in possession of the same ever since said date. The complaint also sets forth other facts usually set forth in complaints for the foreclosure of mortgages, which it is not necessary to set forth here, and demands judgment for the foreclosure of such mortgage, and prays that an accounting be had of the rents and profits of said land as against the defendants in possession, and prays to be allowed to redeem from the foreclosure and sale under the Farmers' Trust Company mortgage, and offers to pay any sum found due upon the Farmers' Trust Company mortgage. The defendants John B. Lockhart, Annie Tingstad, and George G. French have appeared in the action, and demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action as against said defendants, each defendant raising the same question by such demurrer. The plaintiff has appealed to this court from the order sustaining such demurrer.

No question is raised in this court as to the regularity of the foreclosure under the Farmers' Trust Company mortgage, but it is conceded by the plaintiff that such foreclosure was regular in all respects. It will be seen that the mortgage in suit and the Farmers' Trust Company mortgage were executed and delivered while the Comp. Laws of 1887 were in force, and that the foreclosure of the Farmers' Trust Company mortgage was made while such Compiled Laws were in force. The question to be determined on this appeal must be determined from a construction of the provisions of such Compiled Laws relating to the rights of mortgagees under their mortgages, both before and after deeds have been issued upon foreclosures thereof. The precise question involved in the issue raised by the demurrer of the defendants is whether, under Comp. Laws of 1887, a junior mortgagee has the right to redeem from a foreclosure of a prior mortgage made under a power of sale contained

in such prior mortgage after one year has elapsed from the day of sale under such foreclosure of such prior mortgage, and after a deed has been issued to a purchaser under such foreclosure sale. In other words, did the Comp. Laws of 1887 give to a second or junior mortgagee the right to redeem from a foreclosure and sale under a power of sale in a first mortgage, after one year had elapsed from such sale, and a sheriff's deed had been delivered to the purchaser under such foreclosure,—such foreclosure being regular in every respect,—and no equitable grounds existing or urged in favor of such demand or claim to be allowed to redeem. The plaintiff broadly contends that a second mortgagee had such a right under such laws. To determine that question, reference must be made to the several provisions of the Comp. Laws of 1887 relating to foreclosure of real estate mortgages by advertisement under a power of sale contained therein. In referring to prior mortgages in this case, we refer to mortgages that are prior in fact and prior of record. Section 5420, Comp. Laws of 1887, provides what a certificate of sale of real estate sold under a power of sale contained in a mortgage shall contain, and provides that the officer or person making the sale shall file such certificate of sale in the office of the register of deeds, and that such certificate may be recorded in the office of the register of deeds as provided in case of a certificate of sale of real property sold under execution, "and shall have the same validity and force." A certificate of sale of real property under a power of sale contained in a mortgage has by this section, the same force and validity as a certificate of sale of real property sold under an execution. Section 5148 provides what force and validity is attached to such a certificate of sale of real estate under execution as follows: "Upon a sale of real property the purchaser is substituted to and acquires all the right, title, interest and claim of the judgment debtor thereto." Under this section a purchaser under a sale of real estate under execution acquires by virtue of the certificate of sale all the interest of the judgment debtor in the lands sold at the time that the judgment was docketed in the proper county and became a lien on said lands. The interest sold on such a sale is not his interest at the time of the sale, but the judgment debtor's interest in the lands at the time the lien of the judgment attached. Section 5428 provides as follows: "A record of the affidavits aforesaid, and a deed executed upon a sale of the real property, shall vest in the purchaser or person acquiring title thereto by redemption or otherwise, the same force and validity as the deed upon foreclosure by action provided in § 5437 of this Code." Section 5437 reads as follows: "Whenever any real property shall be sold under an order, decree or judgment of foreclosure, under the provisions of this chapter, the officer or other person making the sale must give to the purchaser a certificate of sale, as provided by § 5420; and at the time of the expiration of the time for the redemption of such mortgaged premises, if the same be not redeemed, the person or officer making the sale * * * must make to the purchaser

* * * a deed or deeds to such premises which shall vest in the purchaser * * * the same estate that was vested in the mortgagor at the time of the execution and delivery of the mortgage, or at any other time thereafter; and such deed shall be as valid as if executed by the mortgagor and mortgagee and shall be a complete bar against each of them, and against all the parties to the action in which the judgment for such sale was rendered," etc. Construing these two sections last mentioned together, it is beyond question that the deed issued by the officer or person making a sale under a mortgage containing a power of sale has the same force and validity and effect as a deed issued by the person making a sale under a foreclosure by action. What, then, is the effect of a deed under foreclosure by action, so far as persons acquiring liens on the premises between the date of the mortgage and the decree are concerned? If such subsequent incumbrancers are made parties to the foreclosure suit, their rights are determined by such action, and, their rights are foreclosed and barred by such action, excepting the right to redeem within one year after the sale. If they are not made parties, their rights are not foreclosed nor barred by such action. But we think that the rights of such subsequent incumbrancers under foreclosures by advertisement under a power of sale are determined by the first portion of said § 5437, and determined adversely to the contentions of the appellant. The effect of a deed thus given upon a foreclosure by advertisement under a power of sale is declared in this section to vest in the purchaser the same estate that was vested in the mortgagor at the time of the execution and delivery of the mortgage, or at any time thereafter. The meaning of this sentence seems so plain and evident that nothing can be added to it or suggested that will make it clearer. If the deed vests the purchaser with all the interest of the mortgagor at the date of the execution and delivery of the mortgage, it then necessarily follows that the interest or liens of subsequent mortgagors or incumbrancers are cut off and barred by the foreclosure, subject to the right of redemption within the time fixed by law. To limit the first part of § 5437 by a construction that the deed would vest in the purchaser the interest of the mortgagor at the time of the sale only, would be to disregard the language used, and substitute therefor other words of entirely different meaning. In this case the mortgagor, John E. Tingstad, is alleged to have been the owner of the land mortgaged on October 31, 1889, the date of the mortgage which was foreclosed. This was before the mortgage now owned by the plaintiff had been executed. Under the express language of said § 5437, the purchaser at the mortgage sale of August 24, 1895, acquired the same estate that was vested in the mortgagor on October 31, 1889, and no more; and that estate of the mortgagor was foreclosed, provided that no redemption followed the sale during the year. If the mortgagor's estate in said lands on October 31, 1889, was that of absolute ownership, then a deed under such a foreclosure would convey

to the purchaser an absolute ownership. If the mortgagor's estate in the lands on October 31, 1889, was a conditional or subordinate one, then the deed to the purchaser would convey to him such an estate as he had at the time of executing the mortgage only. The word "estate," as used in this section, means the mortgagor's right, title, and interest in the lands at the time of executing the mortgage. Let us suppose that the mortgagor, Tingstad, had sold this land after he gave the Farmers' Trust Company mortgage, and thus conveyed away all his interest in the land before the foreclosure. At the date of the sale under the foreclosure he would then have no interest in the land and if the interest acquired under a sheriff's deed is only the interest of the mortgagor at the time of the sale, then the purchaser would acquire no interest or estate at such sale, nor by virtue of a sheriff's deed based on such sale. Such cannot be the construction intended for this section. The deed relates back to the inception of the lien of the mortgage, and becomes operative as of the date of the mortgage.

In foreclosures by action none are affected by the decree except such persons as are made parties, and are served with process. But in foreclosures under powers of sale pursuant to published notice all persons acquiring interest in the land subsequently to the giving of the mortgage foreclosed are deemed in law parties to the foreclosure proceedings, and are bound thereby to the same extent as those persons who are made parties to a foreclosure action are bound by the decree. "When a regular sale is made under a power contained in the instrument, not only the mortgagor, but all persons claiming any interest in the equity of redemption by privity of estate with him, are considered as parties to the proceeding, and are precluded by it as fully as if they had been made parties defendant by regular subpoena in an ordinary foreclosure suit." *Powers* v. *Andrews*, (Ala.) 4 South. 263. As bearing somewhat on the question involved, this language of the Supreme Court of Minnesota in *Hokanson* v. *Gunderson*, 56 N. W. 172, is here quoted. "The purchaser succeeds to the equitable interest of the mortgagee, and, when no redemption is made, this interest draws to it the subordinate legal title of the mortgagor, and his title then stands under the mortgagee precisely as if the mortgage had been an absolute conveyance at its date; in other words, the mortgage ripens into a perfect title through the process of foreclosure. The purchaser is then only concerned with the state of the title at the date of the mortgage and the existence of liens affecting the rights of the mortgagee."

It is claimed that a foreclosure by advertisement under a power of sale contained in a mortgage, not followed by a redemption within the year allowed for a redemption, is effectual as a foreclosure of the senior mortgagee's lien only, and does not bar the rights of subsequent mortgagees, for the reason that § 5424 provides for the payment of any surplus remaining in the hands of the officer or person making the sale, after satisfying the mortgage, to the "mort-

gagor, his legal representatives or assigns." The claim that such surplus shall necessarily be paid to the mortgagor in place of a junior mortgagee cannot be sustained. The mortgagor, having executed a second mortgage upon the premises involved in this case after executing the Farmers' Trust Company mortgage, is deemed in law to have assigned such surplus to the second mortgagee, if there had been any. The word "assigns" is of sufficiently broad meaning, as defined by the authorities, to include a second mortgagee under such circumstances. *Nopson* v. *Horton,* 20 Minn. 268 (Gill. 239). "In the contemplation of equity, by the sale of the whole estate under foreclosure proceedings affecting and binding the junior mortgagee the land is converted into money, and, this fund being treated as a substitute for the mortgaged estate, the lien of the junior mortgage is transferred from the land to the surplus of the money arising from the sale. The rights of the parties as they before existed are not transposed by the sale, and the court will apply the fund in accordance with their rights as they existed in respect to the land." This principle is sustained by the following authorities: Jones, Mortg. § 1935; *DeWolf* v. *Murphy,* 11 R. I. 630; Douglass' Appeal, 48 Pa. 223; *Fowler* v. *Johnson,* 26 Minn. 338, 3 N. W. 986, 6 N. W .486; *Brown* v. *Association,* 34 Minn. 545, 26 N. W. 907; *C. Aultman & Co. v. Siglinger,* (S. D.), 50 N. W. 911.

It is further contended by the appellant that § 5411, Comp. Laws, conclusively shows that a junior mortgagee has the right to redeem from a foreclosure sale under a prior mortgage after the lapse of one year from the date of sale. This section gives to the mortgagor, upon a proper showing by affidavit, a speedy remedy to restrain the sale in case he has any defense or counterclaim to the mortgage then being foreclosed, and transfer all proceedings under such foreclosure to the District Court, where such alleged defense or counterclaim may be litigated the same as though an action had been commenced for the foreclosure of the mortgage. This section does not in any way affect or change any rights which a subsequent mortgagee may have had prior to the enactment of this section. It leaves his rights just as they were before its enactment. A junior mortgagee may still resort to a court of equity for any redress to which he was entitled before the enactment of this section in case of fraudulent conduct on the part of the prior mortgagee and the mortgagor detrimental to his interests under his mortgage, and may apply to the court for relief upon any other equitable grounds. And, in case judgment of foreclosure is rendered on the prior mortgage, his rights are again protected by his right to redeem from such judgment or sale. The provisions of § 5421, Comp. Laws, in our judgment, conclusively negative the right of subsequent mortgagees to redeem from a sale under a power contained in a mortgage after one year has elapsed from such sale. That section gives a creditor having a lien by judgment or mortgage the right to redeem from a

prior sale under a prior mortgage within one year from the day of sale under such prior mortgage. This limits the time of redemption to one year. When this statute prescribes that a subsequent mortgagee may redeem from a prior sale within one year, it would be ignoring its plain meaning to say that redemption might be made after one year had elapsed from the sale. When a statute prescribes the conditions under which the privilege of redemption from a valid foreclosure sale may be exercised, these conditions must be performed in the manner and within the time prescribed, or the privilege is lost. So far as the naked right to redeem from a valid foreclosure is concerned, independent of an action to redeem, based upon equitable considerations, the rule stated is without exception, as statutes permitting exemptions must be strictly followed to secure this privilege. Wilts. Mortg. Forec. § 1082; *Powers* v. *Andrews,* supra. We therefore hold that neither the plaintiff nor his assignor had the right to redeem from the foreclosure sale under the Farmers' Trust Company mortgage after one year from such sale, and that the District Court did not err, so far as this question is raised, in sustaining the demurrer. Careful consideration has been given to the authorities cited by the appellant. None of them are based on statutory provision such as are contained in the Compiled Laws of 1887. This is especially true as to the case of *American Loan & Trust Co.* v. *Atlanta Electric R. Co.,* (C. C.) 99 Fed. 313, principally relied upon by the appellant. The statutes of Georgia, on which that decision is based, are so radically different from the Compiled Laws of 1887, so far as redemption is concerned, that the decision throws no light on the question involved here.

The District Court ordered that the action be dismissed as to all the defendants. This should not have been done so far as the defendant John E. Tingstad is concerned, as a personal judgment may be obtainable against him for the debt set forth in the complaint. No judgment has been entered, however, and, as such order dismissing the action as to said defendant was undoubtedly a clerical inadvertence, it does not require a reversal of the order, as the main question involved and decided in this court and in the court below arose upon the demurrer. The mistake in the order can be hereafter corrected without any prejudice to any of the parties.

The District Court also ordered the plaintiff to pay $10 as costs of hearing on the argument of the demurrer, payment of the same to abide the final disposition of the case. If this was erroneous, and this item of costs is insisted on hereafter, it can be corrected when the costs are finally adjusted. The order sustaining the demurrer is affirmed. All concur.

(86 N. W. Rep. 694.)

SYDNEY S. EASTON *vs.* J. B. LOCKHART.

Opinion filed June 5, 1901.

Specific Performance—Conditional Land Contract—Performance—Failure—Possession.

Action for specific performance. Plaintiff, being desirous of purchasing a section of land belonging to the defendant, and not having the financial ability to do so, made a conditional agreement with D. as follows: D. agreed to loan plaintiff an amount sufficient to purchase the land, and, to secure said loan, would take a mortgage upon the land. This agreement was subject to the express condition that D. would not loan the money to plaintiff until certain attorneys employed by D. should examine the title, and after such examination advise D. that the title was satisfactory to them. Said attorneys, after making an examination, advised D. that the title was not satisfactory, and that the same was unmerchantable. The loan was thereupon refused, and has never been made. Pending the examination of the title, and before the attorneys had passed upon the same, the plaintiff and defendant entered into an oral agreement for the sale and purchase of the land as follows: Plaintiff agreed to purchase the land for $9,600 cash, and defendant agreed to sell the land for that amount and give good title; but it was expressly stipulated that the sale depended entirely upon the consummation of the loan from D., and it was clearly understood that the plaintiff could not and would not purchase the land unless he received the money from D. Upon this arrangement the defendant, who claimed to have a good title, permitted plaintiff to take possession of the land, and plaintiff took possession three days before the examination of the title was completed. Plaintiff broke the land and ditched it, and has ever since been engaged in cropping the land. The said improvements were valuable, but nearly all of them were made after the loan had been refused by D. Plaintiff by his complaint offered to pay into court the entire amount of the purchase price, to be kept by the court, and paid over to defendant upon his execution and delivery of a deed of warranty to plaintiff conveying a perfect title to the land. No part of the purchase money was ever paid into court. At the trial it appeared that plaintiff was financially unable to purchase the land from his own resources, and plaintiff omitted to show that he had entered into any binding agreement with any person for a loan with which to buy the land. The trial court adjudged that defendant should proceed to prosecute certain suits in equity in the circuit court of the United States and in the District Court for Cass county, with a view to the removal of certain clouds which the trial court found to exist upon the title to the land. The trial court further adjudged that, pending the determination of said suits to remove clouds upon the title, plaintiff should remain in the exclusive possession of the land, and so remain without paying the purchase money into court. *Held*, that the judgment of the court below must be reversed, for the following reasons: (a) Because the sale agreement, being conditional, and the condition never having been met, was an agreement which could not be specifically enforced in equity; (b) Because it was extremely inequitable to permit the plaintiff to remain in possession, without paying the purchase money into court, pending a litigation of indefinite duration and of uncertain result. To such a state of facts the maxim, "Who seeks equity must do equity," is clearly applicable.

Case Remanded for Further Adjudication.

For peculiar reasons, set out at length in the opinion, the case is remanded to the trial court for the adjustment of certain rights growing out of plaintiff's possession and use of the land in controversy.

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

Suit by Sydney S. Easton against J. B. Lockhart to enforce specific performance of a contract for the sale of land. From a decree in favor of plaintiff, defendant appeals.

Reversed.

Mills, Resser & Mills, for appellant.

Plaintiff failed to show himself entitled to a specific performance. He has never tendered the payment of the purchase money which is a condition precedent to performance, § 5031, Rev. Codes; Waterman on Specific Performance, § 438. The contract between Mears and Percival is the foundation for any claim that can be made under either of the other instruments. That contract is of no binding force because too indefinite and uncertain to be enforced. *Hedderly* v. *Johnson*, 42 Minn. 443. It is void for want of mutuality. *Berwind* v. *Williams*, 33 At. Rep. 358. The written promise of a purchaser at an execution sale of real estate to reconvey to the execution defendant, on payment of a specified sum by a day named, the latter not binding himself to make such payment, is a mere gratuity and confers no vested interest. *Mers* v. *Insurance Co.*, 68 Mo. 127; *Bernett* v. *Bisco*, 4 Johns. 235; *Wall* v. *Printing Co.*, 48 N. Y. Supp. 67; *American Cotton Oil Co.* v. *Kirk*, 68 Fed. Rep. 791; *Stiles* v. *McClellan*. 6 Colo. 89; *Cool* v. *Cunningham*, 25 S. C. 136; *Rafolovitz* v. *Tobacco Co.*, 23 N. Y. Supp. 274. There was no consideration for the contract. § 3871, Rev. Codes. A consideration which is neither prejudicial to the promisee, nor beneficial to the promisor, is insufficient to support the terms made thereon. *Ford* v. *Crushaw*, 11 Ky. 68; *Marks* v. *Banks*, 8 Mo. 361; *Black* v. *Black*, 7 Ia. 46. The Mears-Percival contract was surrendered and cancelled by agreement of the parties. § 3937, Rev. Codes; Addison on Contracts, § 175; *Boyce* v. *McColloch*, 3 Watts & Sargent 430; *Gorman* v. *Salisbury*, 1 Vernon's Ch. 239; Bishop on Contracts, § § 815, 174; *Robinson* v. *Bullock*, 66 Ala. 548; *Flanders* v. *Fay*, 40 Vt. 316; *Cummings* v. *Aldrich*, 3 Metc. 486; *Forbes* v. *Smiley*, 56 Me. 174. Defendant can prove such surrender and cancellation in this action, if the evidence is clear and distinct and of such a character as to leave no reasonable doubt in the mind of the court. *Murray* v. *Harway*, 56 N. Y. 337; *Spencer* v. *Thompham*, 22 Beavans, 557; *Emery* v. *Grocock*, 6 Madd. 41; *Spring* v. *Sanford*, 7 Paige 550; *Smith* v. *Death*, 5 Madd. 371; *Shroer* v. *Shroer*, 86 N. Y. 575; *Jackson* v. *Murray*, 17 Am. Dec. 53; *Edwards* v. *Van Bibber*, 1 Leigh 183; *Hedderly* v. *Johnson*, 42 Minn. 443. The grant from E. Ashley to Clarence T. Mears is void for want of

sufficient description. It does not state in what state or county the land is located. *Cochran* v. *Utt,* 42Ind. 267; *Murphy* v. *Hendricks,* 57 Ind. 593. Having informed Easton of the state of the title as to his contract and the judgments cancelling it, and offering him all the title defendant had, he, refusing to accept, cannot now bring suit to compel defendant to do anything more. *Mills* v. *Van Moorish,* 23 Barb. 125.

C. E. Leslie and *John Carmody,* for respondent.

A court of equity will not compel a purchaser to take doubtful title, or one which threatens litigation. *McCroskey* v. *Ladd,* 28 Pac. Rep. 216; *Townsend* v. *Goodfellow,* 41 N. W. Rep. 1056; *Michener* v. *Reinach,* 21 So. Rep. 552; *Daniel* v. *Shaw,* 44 N. E. Rep. 991; *Watts* v. *Waddle,* 6 Peters 391; *Jeffries* v. *Jeffries,* 117 Mass. 184; *Bowen* v. *Vickers,* 2 N. J. Eq. 520; *Vought* v. *Williams,* 24 N. E. Rep. 195; *Schriver* v. *Schriver,* 86 N. Y. 275; *Fleming* v. *Burnham,* 2 N. E. Rep. 905. A title open to a reasonable doubt is not a marketable one. *Wesley* v. *Eells,* 44 L. Ed. 810; *Adams* v. *Valentine,* 23 Fed. Rep. 1; *McPherson* v. *Smith,* 2 N. Y. Supp. 60; *Post* v. *Burnham,* 1 N. Y. Supp. 807; *Post* v. *Weill,* 11 N. Y. Supp. 807. A purchaser of immovable property cannot be judicially coerced to a doubtful title. *Beare* v. *Leonard,* 5 So. Rep. 257; *Irving* v. *Campbell,* 24 N. E. Rep. 821; *Holly* v. *Hirsch,* 43 N. E. Rep. 527; *Upton* v. *Maurice,* 34 S. W. Rep. 642; *Guild* v. *Ry. Co.,* 45 Pac. Rep. 82; *Aldrich* v. *Bailey,* 8 N. Y. Supp. 435; *McGrain* v. *Rundby,* 10 N. Y. Supp. 119; *Vaught* v. *Williams,* 24 N. E. Rep. 195; *Close* v. *Stuyvesant,* 24 N. E. Rep. 868; *Oakey* v. *Cook,* 7 At. Rep. 495; *Hickley* v. *Smith,* 51 N. Y. 21; *Walsh* v. *Barton,* 24 O. St. 28. It is the duty of the vendor to tender the vendee a safe title. *Lockhart* v. *Smith,* 16 So. Rep. 660; *Hero* v. *Block,* 11 So. Rep. 821; *Blanck* v. *Sadlier,* 47 N. W. Rep. 920; *Watson* v. *Coast,* 14 S. E. Rep. 249. Specific performance will not be decreed at the instance of the vendor unless his ability to make a good title is unquestionable, and in such case it is sufficient for defendant to show that the title is questioned. *Kellerman* v. *Building Co.,* 7 O. Dec. 408; *Bullard* v. *Butnell,* 49 N. Y. Supp. 666. It is not necessary to make a tender when the opposite party cannot or will not fulfill the terms upon which the money is to be paid. 22 A. & E. Enc. L. 1036; *Kerr* v. *Hammond,* 25 S. E. Rep. 337; *Tyler* v. *Plutzs,* 20 S. W. Rep. 256; *Veeder* v. *McMurry,* 70 Ia. 118; *Plummer* v. *Kelly,* 7 N. D. 88; *McPherson* v. *Fargo,* 74 N. W. Rep. 1057; *Brace* v. *Dolle,* 52 N. W. Rep. 586.

WALLIN, C. J. This is an equitable action brought to compel the specific performance of an alleged agreement to sell and convey a section of land which is described in the complaint, and situated in the county of Cass. The complaint alleges, in substance, that the plaintiff and the defendant entered into an agreement on May 28, 1898, whereby the plaintiff agreed to purchase, and de-

fendant agreed to sell, the land in question for the sum of $9,600, and that upon the payment of the purchase price the defendant agreed to execute and deliver to the plaintiff "a good and sufficient warranty deed to said premises, and was to furnish to the plaintiff said land free and clear of all incumbrances, and make the plaintiff a clear, good, valid, and merchantable title to all of said land; that at the date of entering into said agreement the land was wild land, and it was agreed that plaintiff should at once go into possession and improve the premises; that, pursuant to said agreement, plaintiff took immediate possession of the premises, and proceeded to make valuable improvements thereon, and in so doing the plaintiff has broken and backset the entire tract, and has disc-harrowed the same, and paid taxes thereon, and the said improvements are of great value. The plaintiff further alleges that he negotiated a loan with one A. L. Dalrymple for the entire purchase price of said land, with the understanding that such loan was to be secured by mortgage upon said premises, to be executed and delivered by the plaintiff to Dalrymple. The complaint further shows: "That after negotiating said loan, and after the plaintiff had entered into possession of said land and had broken the same, and when the plaintiff was about to pay the money for said purchase price to the said defendant, and receive his deed of said land, it was discovered that the defendant's title to said land was imperfect, that adverse claims and interests in and to said land were held or claimed by various parties, and that the title to said land was not then perfect in the said defendant; and the said title has not yet, as plaintiff is informed and believes, been perfected, or attempted to be perfected, in the said defendant. That the plaintiff hereby offers to pay into court the entire purchase price of said land, to-wit, the sum of nine thousand six hundred dollars ($9,600), to be held by the court until the defendant shall perfect his title to said land, and deliver to the plaintiff a good and sufficient warranty deed of said premises, free and clear of all incumbrances and adverse claims." The relief demanded is, in effect, that plaintiff be required to perfect his title to the land, and then execute and deliver to plaintiff a good and valid deed of warranty for the same upon plaintiff's payment of the purchase money, and, if title cannot be perfected, that the plaintiff recover of defendant damages as follows: (1) The value of said improvements; (2) the difference between the price agreed to be paid for the land and the actual value thereof, which difference is alleged to be $6,400; (3) for plaintiff's costs and for further relief. Defendant, by his answer, admits that he agreed to sell the land to plaintiff at the time and for the price as stated in the complaint, and that it was agreed that plaintiff should take possession as alleged in the complaint, and that plaintiff did take possession and break the land. The answer states "that the defendant has ever since the making of said contract been, and now is, ready and willing to perform his part of said contract to convey said land to the plain-

tiff by a good and sufficient warranty deed, and has frequently offered to perform said contract on his part, but the plaintiff has refused and neglected to perform said contract and to pay the purchase price in said contract, or any part thereof, and that ever since the making of said contract the defendant has had a good and sufficient title in fee simple to said premises, free and clear from all claims, demands, liens, or incumbrances whatsoever; and that the plaintiff at the time of making said contract, or prior thereto, was informed of the exact condition of defendant's title." Upon these allegations the parties went to trial before the court without a jury, and plaintiff recovered a judgment in the court below, from which defendant has appealed to this court, and a trial anew in this court is properly demanded.

The court below adjudged: First, that the defendant was not vested with a merchantable title to the land in suit; second, "that the defendant be required to perfect the title to said land within a reasonable time, by continuing at his own expense to final judgment the suit now pending in the circuit court of the United States for the District of North Dakota in which J. B. Lockhart is complainant and E. Ashley Mears and Clarence T. Mears are defendants, and by prosecuting in this court an action to remove the cloud on the title to said land caused by the following instruments, viz:" The judgment next proceeded to designate certain instruments as constituting clouds or incumbrances upon defendant's title, viz. a certain deed, mortgage, and contract. There are numerous other features of the judgment, which need not be set out, except that it was adjudged "that until such deed be given, or until such time as it is disclosed by the judgment of any court of competent jurisdiction that said title cannot be freed from all incumbrances and adverse interests, the plaintiff shall remain in possession of said land." The judgment clearly anticipates that the litigation to perfect title which the court directs to be instituted and carried on will be of some considerable duration, and to meet this situation the court directs as follows: "That on or before the 1st day of October, 1901, 1902, and 1903, if the matters here in dispute are not sooner settled, the plaintiff shall pay to the defendant in cash $672, the annual rental value of said land, which amount, in the event of a title being secured and transferred to plaintiff, shall be credited as a payment on the purchase price of said land; that, in the event of the inability of the defendant to pass the title to the plaintiff, he (the defendant) shall have judgment against the plaintiff for the sum of $672, the rental value of said property for the year 1899." There are other features of the judgment, including that for costs and disbursements, which need not be further mentioned.

An examination of the evidence and proceedings at the trial, as embraced in the record, discloses the fact that the chief contention of counsel in the case is, and has been, whether the defendant's title to the land in controversy was, when the agreement was made

and when the action was tried, a good, valid, fee-simple, and merchantable title. The plaintiff concentrated his testimony upon this branch of the case, and with such success that the trial court found that the defendant's title was not, when the agreement was made or at the time of the trial, a valid, merchantable title, and, upon such finding of fact, adjudged that the defendant should perfect his title by certain suits of an equitable nature to be prosecuted in the circuit court of the United States for the District of North Dakota and in the District Court for Cass county. In this court plaintiff's counsel places great stress upon this feature of the case, and cites authority in support of his contention that, the title having been shown to be not merchantable, a court of equity would necessarily refuse to enforce a specific performance of the contract until such time as the defendant had perfected his title. From the standpoint of this court, it will be unnecessary, for reasons hereafter to be stated, to determine whether the defendant's title was or is a merchantable title. It is undoubtedly well settled that a purchraser of land cannot be compelled to accept a deed and pay the price in a case where it appears that the vendor's title is so clouded by claims and demands that the same is not a marketable title. The cases are numerous sustaining this obviously just rule. In *Townshend* v. *Goodfellow*, (Minn.) cited with note in 3 L. R. A. 739 (s. c. 41 N. W. 1056), the court said: "Equity will not actively interfere to compel specific performance of a contract for the sale of land in favor of the vendor, if there is such uncertainty about the title as to affect its marketable value; and the court will not, in such case, compel its acceptance, and cast upon the purchaser the risk of litigation and the embarrassment of a questionable title." See *Spencer* v. *Sandusky*, (W. Va.) 33 S. E. 221; *McPherson* v. *Schade*, (N. Y. App.) 43 N. E. 527; *Vreeland* v. *Blauvelt*, 23 N. J. Eq. 485. But it is unnecessary to cite further adjudications in support of a rule which is entirely elementary. In this state the rule has been embodied in a provision of the Civil Code, which reads as follows: "An agreement for the sale of property cannot be specifically enforced in favor of a seller who cannot give to the buyer a title free from reasonable doubt." Section 5032, Rev. Codes 1899.

In our further discussion of the case we shall accept the plaintiff's version of the facts as disclosed by the evidence, and shall assume, without passing upon the point, that the defendant, when he entered into the sale agreement with the plaintiff, did not possess, and has not since acquired, a good, valid, and merchantable title to the land in question. Upon this assumption, it would follow that the defendant at no time has been in a position to invoke the powers of a court of equity to compel a specific performance of the agreement in his own favor. See authorities supra. But, to determine whether the plaintiff has ever been in a position to compel a specific performance, it becomes necessary to ascertain from the evidence exactly what the agreement was. In cases of this kind the precise terms of

the sale agreement are of capital importance. In the present action the court has no difficulty upon this feature of the record, because there is no dispute between the parties as to any feature of the sale agreement which is at all material. The agreement rests entirely in parol. No writing or memorandum embracing any of the terms of the agreement was ever made or signed by either of the parties. It appears that there were a number of conversations had by the parties in May, 1898, about a sale of the land. In most of these conversations only the plaintiff and the defendant were present, but in one of them the plaintiff's father was present, and took an active part in the negotiations. As to the terms of the agreement, plaintiff testified as follows: "I am the plaintiff in this action. I made a purchase of this land from Mr. Lockhart by verbal contract. It was closed by telegram. Exhibit A is the telegram. (Exhibit A offered in evidence, and received without objection.) The contract was not reduced to writing, except so far as it is contained in that telegram. I told Mr. Lockhart if he would give me a good and sufficient deed of the land, that I would pay him the price of it. I told him that I had to borrow the whole amount of money on the land from A. R. Dalrymple, and, if the title was not good, there was no use of talking about it. I told him I would give him $9,600 for the section of land, if he would give me a good title to it. I told him that I had to borrow the whole amount of the price, and it was necessary that the abstract should be correct. There was not any one spoken of in particular who should pass on the title. Afterwards I told him that Carmody & Leslie should examine the title. I told him to send his abstract to Carmody & Leslie to have it examined. That was some time in May, 1898,—last year. To Mr. Mills: It was before the telegram that we had this conversation. To the Court: We had the first conversation before the telegram. I told him to send the abstract to Carmody & Leslie at the time we first talked. To Mr. Leslie: There was a mortgage on the land. Mr. Lockhart had to see this man, the mortgagee, to see if he would accept his money, and he said, if he could get this man to take his money, that he would take $9,600 for the land, and that he would find out in a few days and let me know; if the man would accept his money, he would accept $9,600. I told him all right. I told him I was going to get the money from A. R. Dalrymple, and that I was going to borrow the money on the land, and the abstract would have to be good." The testimony of plaintiff's father as to the agreement is as follows: "(2) What was said? What was the contract? What was said between Mr. Easton and Mr. Lockhart? A. There was that Aylmer mortgage, there, and I think what was said by Mr. Lockhart was this: He said that he did not know whether Mr. Aylmer would take his money or not. And I says, 'Provided he will take his money, what will you discount it,—$15 an acre?' He says, I won't discount it anything;' and he says, 'I don't know whether I can get Mr. Aylmer to take his money or not.' I says, 'Mr. Lockhart, as I under-

stand, Sid will give you $9,600 cash for that piece of property, provided your title is all right;' and I says, 'The abstract has got to pass Mr. Carmody & Leslie and John Farrand. If they accept the title of that land, you can get your money tomorrow, as soon as you can make your deeds out.' Mr. Lockhart understood that. He says, 'I will have to send down to see if Mr. Aylmer will take his money. If he will take his money I will consider it a sale.' I told Mr. Lockhart that Sid had borrowed this money to pay him, and that he had to have a good tittle to borrow the money; that, if he could not get a good title, he could not borrow the money. I don't know whether Sid told him the same thing or not. Sid was in the room at the time, and heard the conversation between Mr. Lockhart and I; and he was to send Mr. Hooper to see if Mr. Aylmer would take his money. If he did, Mr. Hooper was to telegraph to him at once, and he was to telegraph us at once, so he could go on and go to breaking, and he did."

Conceding to the plaintiff the full benefit of all of this testimony, it appears that the parties entered into a conditional agreement whereby the defendant agreed to sell the land, and give a good and valid title thereto to plaintiff, upon receiving the purchase money, provided that a certain party living in the east would consent to accept the amount due on a mortgage which he held, and which was then an incumbrance on the land, and defendant agreed to promptly ascertain and report if the mortgagee consented to accept his money. We also discover that the agreement on the part of the plaintiff was entirely conditional. He did not agree to purchase the land absolutely and at all events. His agreement was to buy the land, and pay the stipulated price down in cash, provided that he succeeded in obtaining the necessary funds from one A. R. Dalrymple, who had agreed provisionally to advance sufficient money as a loan to pay for the land, and take security therefor upon the land. But this agreement was subject to the vital proviso that Dalrymple should, after an investigation which was then on foot, and was being made by Dalrymple's attorneys, Messrs Carmody & Leslie, accept and pass the title as a valid, legal, and merchantable title, and such a title as the attorneys of Dalrymple would approve, and advise Dalrymple to accept as security for the desired loan. It may be well to pause here and consider whether the agreement as above stated, when concluded, was of a character which could have been specifically enforced by either party as soon as it was made. This question, obviously, must receive a negative answer. The defendant did not agree to sell unless he could procure a release of the mortgage, and until that was done the agreement was not enforceable as against the defendant. On the other hand, the agreement of the plaintiff was also wholly conditional, and the condition was not one within plaintiff's own control, but was entirely a matter within the discretion of another person, through whom alone the plaintiff hoped to obtain the funds with which to complete his purchase, according to the

plaintiff's evidence. Both parties to the bargain fully understood that the plaintiff's ability to consummate the purchase depended entirely upon Mr. Dalrymple's willingness to make the loan, and his willingness hinged upon the result of a pending investigation of the title. It is therefore quite clear that the plaintiff was not, when the negotiations ended, in a position to compel specific performance upon defendant's part. At that time the plaintiff was confessedly without the necessary funds to pay for the land, and at that time Mr. Dalrymple was causing an investigation to be made of the title; and, under the evidence quoted, all parties understood that the loan would depend upon the result of such examination. Upon this state of facts, argument is certainly not needed to show that no court could legitimately enforce a specific performance, as against the defendant, until the plaintiff had met the obligations upon his part, which could be done only by tendering to the plaintiff the amount of the purchase money. This he did not do at or prior to the commencement of this action, and has not since done so, either in whole or in part. The contract, not being written, is one not enforceable in a court of law; but plaintiff's contention is that, under the facts in this record, the agreement is taken out of the statute, and has become enforceable in a court of equity.

The evidence shows that the plaintiff entered upon the land about June 1, 1898, and between that date and the 12th day of July, 1898, broke the entire section. Plaintiff took possession within a few days after receiving a certain telegram signed by the defendant and addressed to plaintiff, which bears date May 28, 1898, and reads as follows: "Deal closed. Go ahead and break section seventeen,"—which section is the land in controversy. The record is replete with evidence that both parties have attached great importance to this telegraphic message, but this court is unable to see its bearing upon the contract of sale. It did give plaintiff permission to enter upon the land and begin the work of breaking, but it went no further. True, it declared in terms that the deal was "closed." Still, this statement, in the light of the evidence, is of little significance. Both parties knew that the message simply meant that the mortgagee had consented to accept his money, and that the message was sent to apprise the plaintiff of that event, and for no other purpose, except to convey to the plaintiff the fact that the defendant was willing that plaintiff should enter upon the land. When the message was sent, and when it was received, both parties necessarily knew that the deal was not "closed," and that the telegram neither closed it, nor referred to any event which could operate to close the deal. When the message was sent and received, the deed had not been delivered or tendered; nor had the purchase money been paid over or tendered; nor had Mr. Dalrymple in any wise indicated that he was satisfied with the title, which his attorneys were then investigating, and upon which they had at that time not finally reported. These facts, despite the optimistic language of the telegram, demonstrate that the

deal was not at that date closed, and that the message did not operate to close the deal, or help in doing so. Nor does the evidence in the record show or tend to show that the deal was ever closed, or that it ever went beyond the point already indicated, viz. beyond the point of an offer to buy and sell the land upon the terms and conditions already stated. The firm of Carmody & Leslie, to whom defendant had previously sent an abstract of the title for examination, concluded their investigation of the title as early as June 3, 1898; and on that day Mr. Leslie visited Fargo, and then had in his hands certain drafts and checks which had been furnished by Mr. Dalrymple, and which aggregated the amount of the purchase money. Mr. Dalrymple in furnishing these drafts and checks, instructed his attorneys to pay the same over to the defendant and accept his warranty deed of the land in question; but Mr. Leslie was expressly required to assume the responsibility of passing upon the title, and his instructions were imperative to the effect that he should not pay over the consideration or accept the deed unless the title, in his judgment, was good, valid, and merchantable. Mr. Leslie absolutely refused to pay over the money or accept the defendant's deed. He testified in the case, and the effect of his testimony is that the defendant's title was very far from perfect, and that the same was weighted down by certain instruments upon the records which constituted clouds upon the title. This view of Mr. Leslie was adhered to in the court below, and strenuously insisted upon in his brief on file in this court, and there is evidence in the record tending to support this contention. There is no claim made in plaintiff's behalf that the clouds which Mr. Leslie found or claimed to find upon the title have ever been removed, and there is no claim that Mr. Dalrymple has at any time since June 3, 1898, changed his mind about the condition of the title, and has offered to consummate the loan to the plaintiff. The evidence all points clearly in the opposite direction. In the light of the evidence, the only conclusion which this court has been able to reach upon this branch of the case is this: The conditions of the purchase and sale of the land, as prescribed and insisted upon by the plaintiff himself, have never been met. Plaintiff has not only wholly failed to tender the consideration to the defendant, but has likewise completely failed to secure the money provisionally promised to him by Mr. Dalrymple. Not having performed on his part, the plaintiff for this reason is in no position to enforce specific performance of an agreement which he has himself failed to make good. It appears, moreover, that at no time could the defendant have enforced specific performance. The agreement was such that no sale was to be made unless the title tendered by defendant should be such as would pass muster with Dalrymple. It clearly appears that defendant's title did not do so. Under such an agreement defendant had no standing whatever to demand specific performance, and he makes no such demand, despite the fact that he claims that his title is a good and valid fee-simple title. Nor would

the case be different if defendant's title were shown to be flawless. That would not be enough. It would, under the agreement, be necessary to satisfy every scruple of the attorneys of Mr. Dalrymple; and if they should refuse, for no valid reason, to accept and pass the title, the defendant would be remediless, under the terms of the agreement. Plaintiff did not agree to purchase, except upon the express condition that the loan should be first made and paid over to him by Dalrymple. Such an agreement could not be enforced in equity at any time prior to the actual consummation of the loan, and this in the case at bar is tantamount to saying that equity will not specifically enforce the agreement. The rule is well settled that where a contract, for any reason, is incapable of being enforced as against one party it cannot be enforced as against the other. See *Luse* v. *Deitz*, 46 Ia. 205. See, also, *22* Am. & Eng. Enc. Law (1st Ed.) p. 339, and note 2.

But, in our judgment, there is another cogent reason why specific performance in plaintiff's favor should not be granted. The complaint states that plaintiff "offers to pay into court the entire purchase price of said land, * * * to be held by the court until the defendant shall perfect his title to said land." This action was commenced on the 12th day of August, 1898, nearly three years ago, and as yet the promise of the complaint has never been performed. No part of the consideration has been paid into court, or offered to be paid. The evidence warrants the conclusion that the plaintiff is without the ability to pay the purchase money out of his own resources, and there is no evidence that plaintiff has ever made any definite agreement for a loan with any person, except that tentatively made with A. R. Dalrymple, as before stated. The evidence fully justified the trial court in making the following finding of fact: "That plaintiff has not paid any sum into court, nor is he able to do so without borrowing the same; and there is no evidence in the case that will warrant a finding that he is able to borrow the amount of the purchase price of said premises for the purpose of paying the same into court to abide the event of favorable action on plaintiff's part." The deposition of A. R. Dalrymple was taken and read at the trial. His testimony was to the effect that he had at all times been ready and able to advance the amount of the purchase money, and was willing to do so whenever Mr. Leslie would pass the title. He further testified that he had at all times a deposit in a bank sufficient in amount to purchase the land, but there is no evidence that any sum had ever been set apart or kept by him as a special deposit for this purpose. Nor has plaintiff ever deposited any part of the purchase money in any bank as a fund to be used in paying for the land. The plaintiff has been in the exclusive possession of the land since about June 1, 1898, and during the years 1899 and 1900, and up to the present time, has been cropping the land. Upon the oral argument in this court it was stated by counsel for the appellant that A. R. Dalrymple had departed this life, and the truth

of this statement was not challenged. It therefore appears that the only person who has ever agreed to furnish plaintiff with funds to buy the land is no longer living; and the agreement which he made is obviously not a continuing agreement, nor such as will bind his heirs or legal representatives. True, the plaintiff testified to the effect that he would not have any difficulty in borrowing the money, but he failed to show any binding agreement of any person to lend him the necessary funds; and, as to his ability to borrow the purchase money, the trial court very properly found that he did not have such ability. Upon such conditions the trial court decreed a specific performance in plaintiff's favor, and directed that defendant should proceed to perfect his title, and, to this end, decreed that defendant should prosecute to determination a pending action in the circuit court of the United States, and also institute an action in the District Court for the county of Cass. It is, of course, impossible to forecast with certainty either the duration or the result of any such litigation as that upon which the defendant has been directed to embark; but that the same would be attended with the usual delays incident to lawsuits is highly probable, and that the litigation will be expensive to the defendant is practically certain. Meanwhile the trial court adjudged that the plaintiff should remain in the possession of the land, to the exclusion of the owner thereof. But what are to be the fruits of the proposed litigation? Let us suppose that the defendant will be successful in his lawsuits, and succeed in removing every cloud from the title to his land. What, then, are the defendant's rights? He certainly would then be entitled, in justice, to receive his purchase money on tendering his deed to the plaintiff. But what guaranty has the defendant that the purchase money will be forthcoming? None whatever. All the evidence points to the inability of the plaintiff to pay the price, and nothing appears showing that he can do so by a loan or otherwise. The promise of the plaintiff to pay the money into court has not been kept. Nor is this all. The plaintiff has never at any time agreed absolutely and at all events to buy the defendant's land. His agreement was wholly conditional, and events have demonstrated that the condition has not been met, and cannot now be met at any time. Hence, if the plaintiff should now at any time see fit to refuse to perform the agreement on his part, the defendant would be remediless. Upon such a state of facts, we can hardly conceive of anything more inequitable, than would be a decision allowing the plaintiff to remain in possession of the land pending the proposed litigation; and this without requiring him to deposit the purchase price in court, to be paid to the defendant upon a tender to plaintiff of a perfect title. We have seen that the contract was never such as could be enforced specifically; but if it were an absolute contract of sale, and reduced to writing, and complete in all its terms, a court of equity would not enforce it specifically if its enforcement should be inequitable, or would operate harshly as against the defendant This rule is briefly expressed

in 3 Pom. Eq. Jur. p. 488, as follows: "The contract and the situation of the parties must be such that the remedy of specific performance will not be harsh or oppressive." See note 1, and cases cited. The maxim that he who seeks equity must do equity is as applicable to cases brought for specific performance as to other actions for equitable relief. In *Rushton* v. *Thompson*, (C. C.) 35 Fed. 635, Brewer, J., said: "Courts not merely observe the words of the contract, but also have respect to the obligations of the golden rule, and that, unless plaintiff has done as he would be done by, it is useless for him to come into that forum where equity and good conscience reign supreme over the letter of the law." See *Datz* v. *Phillips*, 137 Pa. 203, 20 Atl. 426, and *King* v. *Hamilton*, 4 Pet. 311, 7 L. Ed. 869. In the case last cited the court voiced the maxim in the following language: "Where a party comes into a court of chancery seeking equity, he is bound to do justice, and not ask the court to become the instrument of inequity." Further on the court say: "A party, to entitle himself to the aid of a court of chancery for the specific execution of a contract, should show himself ready and desirous to perform on his part." Under the facts as detailed in this opinion, and in the light of the established rules and maxims of equity, we have no hesitation in holding, and do hold, that the plaintiff in this action has no standing whatever in a court of equity, and that this action cannot be maintained for specific performance.

But this conclusion leads up to other complications which have crept into the case in the course of a protracted litigation. The record shows that at defendant's request a receiver was appointed, and has performed certain services as such, and that he has received certain compensation, a part of which has been advanced by the defendant, and that the receiver has been discharged. It further appears that since judgment was entered below, and prior to an appeal to this court, the plaintiffs upon an order made by the trial court and dated September 4, 1900, paid $1,000 into court, to remain as security for the payment of any judgment that may finally be recovered against plaintiff in this action. The record further shows that the trial court, upon evidence offered in the case, ascertained the value of the plowing and ditching on the land as done by the plaintiff, and further found the annual rental value of the land. In view of these consideration, and the further fact that the plaintiff at the present time is cultivating a crop of grain now growing upon the premises, we have concluded that principles of justice, as well as the interests of the suitors, will be best subserved by retaining jurisdiction in equity to adjust the rights of the parties in the present action; and we think the court below, under all the surroundings of the case, should retain jurisdiction for this purpose. It is doubtful, perhaps, under strict principles applying to this class of cases, whether the plaintiff would be in a position to demand that the case should be retained in a court of equity for the purpose of

adjusting mere legal rights and enforcing mere legal remedies. Upon this point, see 3 Pom. Eq. Jur. § 1410, and note 1. Possibly this action was instituted in good faith by the plaintiff, but the fact remains that plaintiff was fully advised of all defects in the defendant's title long before the suit was started, and since its institution it is certain that plaintiff has manifested no disposition to perform equitable obligations resting upon him. The attitude of the plaintiff has been, from the first, to remain in possession, and enjoy rents, issues, and profits, without incurring any obligations, and without paying the purchase price into court. Let it be conceded that plaintiff took possession in good faith, and with no knowledge of the clouds upon defendant's title, and that, prior to receiveing any notice of defects in title, plaintiff did a few days' work (not exceeding three or four) in the way of breaking the land. For this work the law would give a full measure of redress,—not because the contract was valid at law, for it was not, but upon other grounds. See *Day* v. *Railroad Co.*, 51 N. Y. 583; *Fleckton* v. *Spicer*, (Minn.) 65 N. W. 926. But the court below will be in a better position than this court to adjust what remains to be adjusted as between the parties. We therefore shall direct as follows: First, that the trial court shall at once enter an order reversing the judgment already entered in the action; second, that in any final judgment hereafter entered in this action the defendant shall recover his costs and disbursements in both courts. It will be so ordered. All the judges concurring.

(86 N. W. Rep. 697.)

RALPH W. SHEPARD, *et al vs.* OLE K. HANSON.

Opinion filed May 17, 1901.

Action on Note—Directing Verdict.

It is error for a court, in the trial of an action on a promissory note, where several defenses are pleaded, to direct a verdict for the plaintiff on the sole ground that one of such defenses is not sustained, when there is substantial evidence to sustain any of the other defenses.

Guardian and Ward.

In an action by a guardian of the estate of minors, upon a promissory note which is in terms payable neither to such guardian nor to his wards, but to another person, and is not indorsed either generally or by special indorsement, the ownership of which is challenged by an express denial in the answer, it is *held*, under the evidence referred to in the opinion, showing that said note was delivered to the county court by the payee, who formerly had been guardian of the estate of said minors, to cover a shortage arising from his unlawful use of the trust funds, and that the same was accepted by said court, that title thereto is established in the wards. Whether such transfer operated in law to release such former guardian from liability is not involved or decided.

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

Action by Ralph W. Shepard and Fred L. Shepard, by guardian, against Ole K. Hanson. Judgment for plaintiffs, and defendant appeals.

Reversed.

M. A. Hildreth, for appellant.

Turner & Lee, for respondents.

YOUNG, J. This action is prosecuted by W. C. Resser, as guardian of the estate of Ralph W. Shepard and Fred L. Shepard, minors, to recover upon a promissory note for $154 executed and delivered by the defendant to Frank W. Hurline, on July 2, 1892. The note, by its terms, became due 90 days after the date of its execution. The complaint alleges that said note is, and at all times has been, the property of said minors, and that it is wholly unpaid. The answer places in issue the ownership of the note, and the averment of nonpayment by specific denials, and alleges that said note is, and at all times has been, the individual property of Hurline, the payee, and that it has been fully paid. For further defense to the recovery sought herein the answer sets forth three separate counterclaims, existing in defendant's favor, and against Hurline, the payee, arising out of certain business transactions had with him at or about the time the note matured, which was in the fall of 1892. The aggregate amount of these several counterclaims is considerably in excess of the amount of the note in suit, with interest added. The trial was to a jury. At the close of the testimony the court, upon motion of plaintiff's counsel, directed a verdict in plaintiff's favor for the full amount of the note and interest. Subsequently judgment was entered upon the verdict against defendant, from which he prosecutes this appeal. As preliminary to his appeal, counsel for appellant caused a statement of case to be duly settled, containing specifications of a large number of alleged errors, all of which are urged upon our consideration as grounds requiring a reversal of the judgment.

The fifty-fourth assignment of error, and the only one of the errors assigned which we have occasion to refer to, is that the trial court erred in directing a verdict in plaintiff's favor. This assignment must be sustained. The error is manifest. The motion was granted on the single ground that the undisputed evidence showed that the note in suit was the property of plaintiff's wards, and completely ignored all other defenses. It is true the question of ownership was directly in issue and was important, but it was only one of several defenses set forth in the answer. Evidence of a substantial nature was introduced in support of each of the other defenses, from which the jury would have been justified in sustaining them. The question of ownership of the note was not decisive, and the defendant was entitled to have the jury pass upon the evidence as to his other defenses.

It is true defendant was not entitled to an affirmative judgment

against plaintiff on the counterclaims, for the reason that they were not causes of action against either the plaintiff or his wards, but against Hurline, the payee. They were nevertheless proper defenses to a recovery by plaintiff, for the reason that the note in suit was not transferred to his wards until long after its maturity, and it is subject, therefore, to such defenses by this defendant as might have been interposed in a suit by the payee. 4 Am. & Eng. Enc. Law, 316, and cases cited. The exclusion of these defenses, therefore, was error, and renders a reversal of the judgment necessary.

In view of the fact that a new trial must be had, we deem it necessary to consider the question of the ownership of the note. Is it owned by Hurline, the payee, or is it the property of plaintiff's wards? The trial court properly, we think, held that, under the undisputed evidence, it belongs to the wards. If this was the only defense interposed, the directed verdict of which complaint is made would have been without error. The evidence on the question of title is not in dispute. The difficulty lies entirely in its construction. Counsel for plaintiff contends that it establishes title in the wards, while counsel for appellant claims that it does not show a transfer of title from Hurline, the payee. A statement of certain facts is necessary to an understanding of this question. Frank W. Hurline, who is the stepfather of the minors, was appointed guardian of their estate by the county court of Cass county on January 10, 1888, and duly qualified and acted as such guardian from and after the date of his appointment until March 28, 1809, when he resigned, and W. C. Resser, the plaintiff, was appointed to succeed him. The note in suit was given in payment of a balance due upon a former note which defendant had given to Hurline. Neither the present nor the former note were payable to Hurline as guardian, or to the wards by name or otherwise. Both were in terms payable to Hurline individually, and not in a representative capacity. The consideration for the notes did not come from the estate of the wards, but from Hurline individually. It consisted of certain personal property sold to defendant by the latter. The original note was surrendered to defendant when the note in suit was executed. Neither the original note nor the note in suit has ever been indorsed by Hurline, either by general or special indorsement. It continued in Hurline's possession until his resignation as guardian. There can be no doubt that, on the facts thus narrated, the note was owned by Hurline individually, up to the date of his resignation as guardian. The note was unindorsed, and the legal presumption that it was owned by the payee controls. *Tuttle* v. *Becker*, 47 Ia., 486; *Durien* v. *Moeser*, 36 Kan. 441, 13 Pac. 797; *Gano* v. *McCarthy's Adm'r*, 79 Ky. 400. See, also, *Shepard* v. *Hanson*, 9 N. D. 249, 83 N. W. 20, and authorities cited. This presumption was not overcome by any evidence tending to show a transfer prior to his resignation. The testimony of Hurline, which was introduced over defendant's objection, to the effect that the note belonged to the estate of the wards, was the present opinion of the wit-

ness, and a mere conclusion, and was inadmissible. The note spoke for itself, and the legal presumption of ownership by the payee could be overcome only by evidence. The fact that Hurline appears to have been both payee and guardian does not suspend the rule requiring evidence of a transfer in fact. The reason of the rule is well stated in *State* v. *Greensdale*, 106 Ind. 364, 6 N. E. 926, as follows: "If a guardian were permitted to assert that a note payable to him personally was that of his ward, then a way would be made easy to grave frauds, since it would be easy to assert that the money lost by the unfortunate investment was the ward's, and not the guardian's. On the other hand, if an investment of the ward's money should be made in the guardian's name, and should prove profitable, the guardian might readily claim it as his own, and thus deprive his ward of a right justly his. It is to prevent such wrongs that the law requires the guardian, when he invests his ward's money, to take notes in his trust capacity." Schouler, Dom. Rel. (4th Ed.) § 345.

There is evidence, however, which conclusively establishes the title to the note in suit in plaintiff's wards. It appears that Hurline during the period of his guardianship, by an unlawful and unwarranted use of the trust estate, became a defaulter to said estate in a large sum. On March 28, 1899, he presented his resignation as guardian to the county court of Cass county, and also a written petition wherein he recited the liability of himself and bondsmen arising out of the "condition of said trust estate and of the assets composing the same," and, for the purpose of settling such liability, tendered a warranty deed of certain real estate to said minors; also a bill of sale of certain personal property,—all of the estimated aggregate value of $8,000. The petition also recites that he has transferred "to said trust estate all notes, accounts, contracts and other evidences of debt, and all property which has been reported by said guardian as belonging to said trust estate, and all property belonging to said trust estate, and herewith makes delivery thereof to said county court for the sole use and benefit of said wards." The note in suit is clearly identified as included in such proposed transfer by reference to other documents on file in the county court. This offer of settlement was accepted by the county court by an order of record, from which we quote the following: "The court having fully considered said offer, and being fully advised of the law and the facts relative thereto, and it appearing from the evidence, and from the files and records herein, that the acceptance and approval of said offer * * * is for the best interest of said minors and said trust estate, and said guardian having delivered to this court, for the sole use and benefit of said minors, a good and sufficient warranty deed to said real estate, * * * and a bill of sale of said personal property, * * * and of all the notes, book accounts, and other evidences of debt, and all property belonging to said minors and said trust estate," etc. Then follows the court's order, which, among other things, in express terms accepts the offer

of settlement. The note was thereupon turned over to the present guardian. This written offer of settlement and the order of the county court are in evidence, and establish a transfer of the title of the note to plaintiff's wards as of the date of said order, namely, March 28, 1899. This is too clear for discussion. The note was Hurline's, and there was no restriction upon his power to transfer in the manner and form followed. Whether such transfer operated in law to entirely discharge him from liability to the wards for his defalcation is a question not involved in this case, and need not be discussed. That question would properly arise in an action instituted either by the present guardian, or by the minors upon reaching their majority, against Hurline to recover the estate intrusted to his care. The language of the court in the opinion on the former appeal (*Shepard v. Hanson,* supra), in denying a petition for rehearing, has no application to the facts as developed at the present trial. We were there considering whether a certain written report made by Hurline, and offered in evidence from the records of the county court, was competent evidence to show that the note was an investment made from the ward's funds. We very properly held that it was not, and that the evidence of investments was to be found in the order of the county court authorizing them. There is no such question now before us on this appeal; for, as we have seen, the note is not an investment, but was the individual property of Hurline, and was transferred to the estate to cover a defalcation. The mooted question as to whether the county court may ratify an investment made by a guardian without previous authority, so as to relieve the guardian from liability and bind the wards to the same, is not involved.

On the facts before us, it appears that the note was Hurline's individual property up to the date of his resignation, when he transfered it as before stated. This was long after it was due, and subsequent to the accruing of the defenses which are pleaded in the answer. It was error, therefore, to exclude such defenses from the consideration of the jury. Judgment reversed, and new trial ordered. All concur.

ON PETITION FOR REHEARING.

One point urged in the petition for rehearing filed by respondent's counsel requires brief mention. It is urged that during the progress of the trial in the District Court counsel for defendant expressly withdrew the defenses embraced in the three several counterclaims above referred to. It is apparent that such was the view of the trial court in directing the verdict for the plaintiff. The record was carefully considered on this question before the above opinion was written, and we then reached the conclusion that it was not counsel's purpose to withdraw the counterclaims so far as they constituted set-offs against plaintiff's demand, but only to the extent that they were urged as counterclaims proper for the purpose of securing an affirmative judgment against the plaintiff. This withdrawal was in obedience to our former opinion, wherein it was pointed out that they were not

causes of action against plaintiff, and would furnish no basis for an affirmative judgment. *Shepard* v. *Hanson*, 9 N. D. 249, 83 N. W. 20. But that as set-offs they were proper defenses is entirely clear, and it is not conceivable that counsel intended to abandon them for the only purpose for which they were available, and his language, while somewhat obscure in meaning, shows no such intention. But if we are mistaken in this, and the counterclaims were withdrawn for all purposes, the fact remains that the defense of payment was not withdrawn, and on this issue there was substantial evidence which required that it be submitted to the jury. See 18 Am. & Eng. Enc. Law, 203, and cases cited. Much confusion has attended the conduct of this litigation because of the condition of the pleadings. The action was originally commenced by F. W. Hurline, and the pleadings were all drawn in reference to the title of the case as instituted by him. Later, W. C. Resser was substituted as plaintiff, but no amendments of the allegations of the complaint or answer were made to conform to such substitution, with the result that the issues have been much clouded, both at the trials in the District Court and the appeals heard in this court. Before the case is again submitted to the District Court, both the complaint and answer should be reframed to conform to the changed conditions, and all uncertainty as to the issues to be tried eliminated. The petition for rehearing is denied. All concur.

(86 N. W. Rep. 704.)

S. KIPP, *et al vs.* E. D. ANGELL.

Opinion filed May 3, 1901.

Appeal—Affirmance—Insufficient Record.

This action was tried in the District Court without a jury, and from a judgment entered in defendant's favor the plaintiffs appealed to this court, and in the statement of the case the appellants have demanded a trial de novo in this court of all the issues in the case. A motion was made in this court to affirm the judgment upon the ground that certain documents offered in evidence in the District Court by the plaintiffs were not incorporated in the statement. It appeared, and was conceded, that said documentary evidence was offered at the trial, and that the same was omitted from the statement. Motion granted and judgment affirmed.

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

Action by S. and O. Kipp against E. D. Angell. Judgment for defendant, and plaintiffs appeal.

Affirmed.

J. E. Robinson, for appellants.

Newman, Spalding & Stambaugh, for respondent.

WALLIN, C. J. This action was brought to determine an adverse

interest in certain real estate described in the plaintiff's complaint. The case was tried below without a jury, and resulted in the entry of a judgment in the defendant's favor. From such judgment the plaintiffs have appealed to this court, and in the settled statement of the case the plaintiffs have demanded a retrial in this court of all the issues in the case.

When the case was called in this court, a motion was submitted in behalf of the respondent to affirm the judgment of the court below. The grounds of said motion, as stated in the moving papers, are as follows: "Now comes the respondent, and moves the court upon the record and proceedings herein to affirm the judgment of the District Court, for the reason that the statement of the case contained in the record shows upon its face that it does not contain all the evidence offered upon the trial material to the questions raised by appellants upon this appeal, and affirmatively shows upon its face that in place of such evidence it does contain a statement of counsel, substituted therefor, as to the nature and effect of such evidence." In the brief submitted upon the motion by counsel for the respondent the attention of the court is directed to certain matter appearing in the statement of the case, which matter is as follows: "The plaintiffs then offered in evidence the verification which the assessor attached to the assessment book of the town of Berlin for the year 1886 for the purpose of showing that the assessor failed to attach to said book an affidavit as required by statute. From said book it appeared that the assessor subscribed a document in the form of the affidavit prescribed by section 1551 of the Comp. Laws, and that the subscription and jurat were as follows: 'Thomas Spencer, Assessor. Subscribed and affirmed before me, this 30th day of June, 1886. S. M. Edwards.' That said jurat was not signed officially, and it fails to show that said S. M. Edwards was an officer authorized to administer an oath. And from said book it appears that no other affidavit was attached to the assessment book. The defendant objected to this evidence as irrelevant, incompetent, and immaterial. * * * The plaintiff then offered in evidence the tax list of Cass county for the year 1886,—that is, the tax list of the town of Berlin, in Cass county, —for the purpose of showing that the warrant annexed to the same was not under seal. And from an inspection of said list it appears that no warrant is annexed to the same under the seal of the county commissioners of Cass county, or under any seal whatever. The defendant objected to this evidence as incompetent, irrelevant, and immaterial. * * * The plaintiffs then offered in evidence the newspapers, which have been produced from the office of the county treasurer, so far as the same pertains to the land in question, for the purpose of showing that in publishing said tax list for the year 1895 the land in question was described as follows: 'Und qr nw qr 25 141 50.' Objected to as incompetent, irrelevant, and immaterial, and for the reason that no foundation has been laid for its admission. That is the exact description as given in said newspaper. The plaintiffs offered

in evidence the tax list as published for the year 1886, pertaining to the property in question, which is therein described as follows, opposite the name of W. H. Berry: "¼ int of n hf sec 25 t 141 5 50." The above and foregoing matter, which we have copied verbatim from the statement of the case, shows that at the trial in the District Court certain documents and papers relating to the validity of alleged taxes upon the land in question were offered in evidence in plaintiffs' behalf, and that when such offers were made counsel for the respondent interposed certain objections to such evidence, which objections were noted and brought upon the record. These excerpts from the record show also, that when such evidence was offered, counsel for the plaintiffs who tried the case below made certain statements concerning the purpose for which the evidence was offered by him, and also statements in which counsel assumed to state what facts the documents offered in evidence did show and prove. These statements of counsel are preserved in the record, and they constitute a part of the proceedings had at the trial, and as such they are now properly before this court for consideration. Nor do counsel for respondent seek to exclude these statements of plaintiffs' counsel from the record; but the contention is that these statements do not rise to the rank of evidence, inasmuch as they were not given under oath, nor were they offered as testimony at the trial. The evidence actually offered, as shown by the record, consists of the following items: (1) The verification attached to a certain assessment book; (2) the tax list of the town of Berlin, in Cass county, for the year 1886; (3) certain newspapers, so far as their contents pertain to a description of the land in question; (4) the tax list, as published in the year 1886, as pertaining to the description of the land in question. It is conceded that said documentary evidence is omitted from the statement of the case, and that the same is not embraced in the record transmitted to this court. Nor is it pretended that this evidence was omitted from the statement pursuant to any stipulation of counsel. In opposing the motion to affirm, appellants' counsel contended that said statements made by him as to the evidence, when the same was introduced, as to its probative force and effect, were made in open court, and in the presence of the defendant's counsel, and hence that the same, in the absence of any countervailing testimony, must be regarded as establishing the facts as claimed by appellants' counsel. This contention is clearly untenable. The rights of litigants with respect to controverted matters of fact are to be determined by testimony, and it would be a travesty upon the administration of the law to determine the facts upon the mere statements of counsel made at the trial touching the effect of the evidence offered, when the evidence itself is excluded from the record, and is never seen by the court which is to ultimately determine the facts. This court sits in this class of cases as an appellate court only, and hence it can consider only such testimony as was submitted below, and regularly sent to this court. See *Christianson* v. *Association*, 5 N. D. 438, 67 N. W. 300, 32

32 L. R. A. 730. But appellants' counsel also contends, in effect, that the evidence excluded from the statement is not at all necessary to a proper determination of the case, because, as counsel argues, the evidence which is found in the record will enable this court to make a proper disposition of the case upon its merits, and this without reference to any fact or facts established by that part of the evidence which has been excluded from the statement. But this theory of counsel would require this court to try cases anew, not upon all the evidence offered and proceedings had in the trial court, but upon such parts of the evidence only as counsel for the appellants may wish to submit to this court. Any such rule would manifestly be in the very teeth of plain statutory provisions to the contrary. See § 5630, Rev. Codes 1899. This court is therefore compelled, though with great reluctance, to grant the motion to affirm the judgment, and such will be the order of this court. All the judges concurring.

ON PETITION FOR REHEARING.

Appellants file a petition for rehearing in this case, which must be denied. In connection with the petition, appellants' counsel files an affidavit setting out in great detail the facts, circumstances, and incidents attending the matter of settling the statement of the case in the District Court, and the averments of this affidavit are to the effect that the statement was settled with the entire consent of the respondent's counsel, and that the respondent's counsel did not at that time object to any statement, matter, or thing contained in the statement of the case. In opposition to the affidavit of the appellants' counsel, counsel for respondent has filed an affidavit in which he denies specifically and in detail nearly all the averments of fact set out in the appellants' affidavit, except that it is admitted in the last mentioned affidavit that counsel for the respondent was present when the statement was settled, and that he made no objection to the settlement, and further admitted that he said to the trial court at that time that he had no amendments to offer to the statement about to be settled. The certificate of the trial court is to the effect that the statement was settled with the consent of both counsel, and that it embraces all the evidence offered and proceedings had at the trial. The affidavits of counsel pro and con as to what was said, done, and understood when the statement was settled have no place in a petition for a rehearing, and the same will be disregarded wholly by this court. The affidavits might have pertinency, perhaps, if the same were presented upon an application to resettle the statement. But no such application was ever made. The statement of the case as settled is a court record, and it must be so regarded, and the certificate to the effect that the statement embraces all the evidence is *prima facie* evidence that all the evidence offered at the trial will be found in the statement; but this evidence is not conclusive. If, on examination of the statement, it appears affirmatively on its face that evi-

dence which was offered below has in fact been omitted from the statement of the case, this fact will control the court, and overcome the *prima facie* evidence contained in the certificate of the trial court. See *Erickson* v. *Kelly*, 9 N. D. 12, 81 N. W. 77; *Loan Co.* v. *McLeod*, 10 N. D. —, 86 N. W. 110; *Vassau* v. *Campbell*, (Minn.) 81 N. W. 829. As has been seen, in the original opinion this court found by an inspection of the statement of the case that certain papers relating to the tax proceedings in question had been offered in evidence at the trial, and that said papers had been omitted from the statement as settled. Upon this condition of the record the court was without authority to enter upon a trial *de novo* under § 5630, Rev. Codes 1899. Under said section a trial anew in this court of the entire case is conditioned upon two prerequisites, viz.: First, that such trial must be demanded in the statement of the case; and, second, that the statement must embrace all the evidence offered in the court below. Until these conditions are met, this court has no authority to try the case anew. In this case one condition was lacking, viz.: the evidence. The petition is therefore denied.

(86 N. W. Rep. 706.)

STATE *ex rel* P. J. MCCLORY *vs.* E. I. DONOVAN.

Opinion filed May 31, 1901.

Motion to Correct Irregular Judgment.

A judgment irregularly entered in violation of established procedure may be attacked by a motion addressed to the court entering it. But the remedy by motion is confined to irregular judgments, and cannot be resorted to for the purpose of enabling a court to revise and correct errors of law.

Liquor Nuisance—Sales by Druggist.

A place kept by a druggist who has a permit to sell intoxicating liquors becomes a common nuisance, under the provisions of section 7605, Rev. Codes, when such druggist sells intoxicating liquors therein unlawfully, and without the protection afforded by his permit.

Constitutional Safeguard Against Self Criminating Evidence Not Applicable.

The record of sales which druggists holding permits are required to keep by section 7596, Rev. Codes, is competent evidence to show the names of persons to whom sales were made, the kind and quantity of liquor sold, the date of sale, and purpose for which sold. Such records are public records. *Held*, that it was not error to permit the introduction of such records in evidence over defendant's objection that the contents thereof might tend to criminate him. The provision of section 13 of the state constitution that no person shall be compelled "in any criminal case to be a witness against himself" will shield a witness against the production of private books and papers, but that protection does not extend to public records, such as those required to be kept by section 7596, Rev. Codes.

Sale by Druggist to Habitual Drunkard.

A druggist holding a permit to sell intoxicating liquors is prohibited, by section 7597, from selling to persons who are in the habit of becoming intoxicated. It is not material whether he knows of such habit. He sells at the peril of the fact, whatever it may be.

Sale After Notice—Distinct Offense.

Section 7616, Rev. Codes, which prohibits sales by druggists to persons whose relatives have served the notice therein provided, describes a separate and distinct offense, and the same is consummated by a sale after notice, whether such person is in the habit of becoming intoxicated or not.

Party in Interest Must Raise Question of Constitutionality of Statute.

Courts will not inquire into and determine the constitutionality of statutory provisions at the instance of parties who are not interested or affected by such provisions.

Appeal from District Court, Cavalier County; *Fisk*, J.

Action by the state, on the relation of P. J. McClory, as assistant attorney general, against E. I. Donovan. Judgment dismissing the action, and both parties appeal.

Reversed.

Bosard & Bosard, for appellants.

An action to abate a nuisance will lie against a registered pharmacist holding a permit to sell intoxicating liquors. *State* v. *McGruer*, 84 N. W. Rep. 363; *State* v. *Webber*, 39 N. W. Rep. 286; *State* v. *Mullenhoff*, 37 N. W. Rep. 329; *State* v. *Davis*, 24 Pac. Rep. 73; *Holtenford* v. *State*, 89 Ind. 282; *State* v. *Blair*, 34 N. W. Rep. 432; *State* v. *Thompson*, 37 N. W. Rep. 104; *State* v. *Oeder*, 45 N. W. Rep. 543. The seller is bound to know at his peril whether the person to whom he sells liquor is in the prohibited class, good faith being no defense. *Commonwealth* v. *Perry*, 148 Mass. 160, 19 N. E. Rep. 212; *State* v. *Thompson*, 37 N. W. Rep. 104; *Hall* v. *Cown*, 79 N. W. Rep. 274; *McCoy* v. *Clark*, 81 N. W. Rep. 159; *Fielding* v. *LaGrange*, 73 N. W. Rep. 1039; *State* v. *Ward*, 36 N. W. Rep. 726; *Dudley* v. *Sustbine*, 49 Ia. 650; *Jamieson* v. *Burton*, 43 Ia. 282.

Templeton & Rex, for respondent.

Special provisions in a statute made strictly applicable to a certain class of persons is exclusive and limits general provisions of the statute which might include such class in the absence of such special provisions. *Stokes* v. *People*, 114 Ill. 320; *State* v. *Cornell*, 74 N. W. Rep. 432; *Felt* v. *Felt*, 19 Wis. 208; *Richardson County* v. *Miles*, 16 N. W. Rep. 150; *Crane* v. *Reider*, 22 Mich. 322; *State* v. *Piper*, 41 Mo. App. 160; *State* v. *McArmally*, 66 Mo. App. 392; *State* v. *Goff*, 70 Mo. App. 295; *State* v. *Polland*, 72 Mo. App. 230; *State* v. *Wittey*, 74 Mo. App. 550. If the remedy prescribed by § 7605, Rev. Codes, applies against druggists holding permits, then this section is void as in conflict with the fourteenth amendment

to the Federal Constitution. *Mugler* v. *Kansas*, 123 U. S. 623, 31 L. Ed. 205; *State* v. *Beswick*, 13 R. I. 211; *Board of Commissioners* v. *Merchant*, 103 N. Y. 143. If § 7605 is applicable to druggists holding permits it conflicts with § § 13 and 18 of the State Constitution, providing that no person shall be compelled to be a witness against himself, or be deprived of life, liberty or property without due process of law, and prohibiting unreasonable searches and seizures. *Councilman* v. *Hitchock*, 142 U. S. 547, 35 L. Ed. 1110; *Ex parte Cohen*, 38 Pac. Rep. 364; *People* v. *Forbes*, 143 N. Y. 219; *Boyd* v. *United States*, 116 U. S. 616, 29 L. Ed. 746. Under § 7616, Rev. Codes, knowledge of the habits of the purchaser can be set up as a defense by a druggist. Notice is necessary and can be given by the person designated, and the purchaser must in fact be in the habit of becoming intoxicated. *Tate* v. *Donovan*, 143 Mass. 590; *Kennedy* v. *Saunders*, 142 Mass. 9; *Engle* v. *State*, 97 Ind. 122; *Geraghty* v. *State*, 110 Ind. 103; *State* v. *Smith*, 122 Ind. 178. It was necessary for the plaintiff to set forth in his complaint the facts constituting the violation of law. *State* v. *Martin*, 18 S. W. Rep. 1005. Plaintiff having failed to prove the sale alleged, his case must fail. *State* v. *Neil*, 45 Pac. Rep. 623; *State* v. *Reynolds*, 47 Pac. Rep. 573; *State* v. *Watson*, 50 Pac. Rep. 959; *State* v. *Knoby*, 51 Pac. Rep. 53. The evidence does not establish that at the time of the sales the purchasers were in the habit of becoming intoxicated. *Zeizer* v. *State*, 47 Ind. 129; *Dolan* v. *State*, 122 Ind. 141, 17 A. & E. Enc. L. (2 Ed.) 343; *Knickerbocker* v. *Froley*, 105 U. S. 350, 26 L. Ed. 1053; *Mahone* v. *Mahone*, 19 Cal. 627.

YOUNG, J. This action was instituted in the District Court of Cavalier county by the state, upon relation of P. J. McClory, assistant attorney general, to abate a liquor nuisance kept and maintained by the defendant in a building situated upon lot 3, in block 22, in the city of Langdon, in said county, in violation of § 7605, Rev. Codes, which is a part of Chap. 63 of the Penal Code, prohibiting unlawful dealing in intoxicating liquors. Said section, so far as pertinent, reads as follows: "All places where intoxicating liquors are sold, bartered or given away, in violation of any of the provisions of this chapter, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, or where intoxicating liquors are kept for sale, barter or delivery in violation of this chapter, are hereby declared to be common nuisances; and if the existence of such nuisance is established either in a criminal or equitable action, upon the judgment of a court or judge having jurisdiction, finding such place to be a nuisance, the sheriff, his deputy or under sheriff, or any constable of the proper county or marshall of any city where the same is located, shall be directed to shut up and abate such place," etc. The complaint, in its language, is identical with that set out in the opinion in *State* v. *McGruer*, 9 N. D. 566, 84 N. W. 363, save as to the names of the parties and description of the

property, and reference is here made to such complaint in lieu of an extended statement. It is sufficient to state that the complaint avers all of the statutory grounds which render such places nuisances under § 7605, supra. It also alleges that the defendant owns and operates the place in question, and the further fact that he holds a druggist's permit, issued by the county court of said county; but alleges that his acts in and about the sales of intoxicating liquors have been and are in violation of his permit, and in violation of law. The answer admits the ownership and occupancy of the building, but denies all unlawful acts. This case was tried and determined at the same time *State* v. *McGruer*, supra, was tried and determined, and by the same judge. Here, as in the McGruer case, the findings of fact made and filed by the trial court judge sustain the allegations of the complaint, and here, as in that case, the court found as a conclusion of law that the action "should be dismissed, for the reason that a civil action cannot be maintained against druggists holding permits under § 7605 of the Rev. Codes of this state." Judgment was rendered and entered dismissing the action. Both parties have perfected appeals to this court. The state appeals from the judgment, and asks that the same be reversed, and that the District Court be directed to enter judgment in accordance with the prayer of the complaint, enjoining and abating said nuisance, upon the ground that the findings of the trial court, which are embraced in the judgment roll, show that the place complained of is a common nuisance, and that plaintiff is legally entitled to such relief. The defendant, on the other hand, challenges the findings of fact in his appeal, and, for the purpose of securing a review of the same, has caused a statement of the case to be settled containing all of the evidence offered, and a demand for a review of the entire case in this court. The questions involved in both appeals are largely similar. They will, therefore, be considered together.

At the outset the point is made by defendant's counsel that the judgment of which the state complains cannot be interferred with on this appeal, for the reason, as he contends, that the proper remedy to correct the same, under a former decision of this court, is by a motion in the trial court, and not by appeal to this court. This contention cannot be sustained. It is true, a remedy is offered by a motion addressed to the trial court in cases where judgment has been entered irregularly, and not in accordance with established procedure, and such remedy is better adapted to furnish speedy relief than the slow process of appeal. 1 Black, Judgm. § 326; *Gaar, Scott & Co.* v. *Spaulding*, 2 N. D. 414, 51 N. W. 867. The remedy by motion, however, is available only in case of irregular judgments, and cannot be resorted to as a means of enabling the trial court to review, revise, or correct errors of law into which it may have fallen. "That a judgment is erroneous as a matter of law is ground for appeal, writ of error, or certiorari, according to the case, but is no ground for setting aside the judgment on motion." 1 Black, Judgm.

§ 329, and cases cited. Counsel rely upon *Prondzinski* v. *Garbutt*, 9 N. D. 239, 83 N. W. 23. That was a case of an irregular entry of judgment, the irregularity consisting in an entire absence of findings, or of a waiver of the same. The remedy by motion was, therefore, proper. In the case at bar it is not claimed that the judgment is irregular. The sole contention of the state is that the conclusion of law of the trial court is erroneous. Such errors, as we have seen, are not reviewable upon a motion addressed to the trial court.

The question is next presented whether the present action is maintainable against a druggist holding a permit. This question was fully considered by this court in *State* v. *McGruer*, supra, and we there held that § 7605, Rev. Codes, above quoted, applies to places kept by druggists holding permits. The views we expressed in that case remain unchanged. So far as we are able to learn, no court of last resort has held otherwise under the same or similar statutes. The reasoning of all authorities available support our conclusions. In *State* v. *Davis*, 44 Kan. 60, 24 Pac. 73, it was held, under a similar statute, that a pharmacist who sells in violation of his permit may be enjoined for maintaining a nuisance. In the course of its opinion the court used this language, which is directly applicable to the contention made by defendant's counsel in the present case: "It is said that his place of business may not be declared a nuisance, and shut up and abated, because he has a right under the law to sell for medical purposes, and that he should be allowed to continue the sale for such purposes. A sufficient answer to that position is that he has no right to sell for medical purposes unless he sells for medical purposes according to law; and, if he does sell according to law, his business will not become a nuisance, and will not be in any danger of abatement." The proposition that a permit to make sales of intoxicating liquors in accordance with law affords no protection or immunity from liability, civil or criminal, for sales made without authority of law, should not require the citation of authority to sustain it. The following cases, however, will be found in point: *State* v. *Courtney*, (Iowa) 35 N. W. 685; *State* v. *Ward* (Iowa) 36 N. W. 765; *State* v. *Thompson*, (Iowa) 37 N. W. 104; *State* v. *Mullenhoff*, (Iowa) Id. 329; *State* v. *Noel*, (Iowa) 35 N. W. 922. See, also, *State* v. *Duggan*, (R. I.) 6 Atl. 787; *State* v. *Huff*, 76 Ia. 200, 40 N. W. 720; *State* v. *Oder*, 92 Ia. 767, 61 N. W. 190; *State* v. *Salts*, 77 Ia. 193, 39 N. W. 167, 41 N. W. 620; *Elwood* v. *Price*, 75 Ia. 228, 39 N. W. 281. It is only when a druggist holding a permit departs from the authority conferred upon him by the statute, and acts without authority of law, that his place of business becomes a nuisance.

We will now consider the evidence as to the existence of the alleged nuisance. The trial court found that at the times named in the complaint the defendant kept on his said premises large quantities of intoxicating liquors, consisting of whisky, brandy, wine, lager beer, alcohol, and gin; that during such time he made numer-

ous sales to a numebr of persons who were addicted to the use of intoxicating liquors, and in the habit of becoming intoxicated frequently, and well known as habitual drunkards in the city of Langdon. To one of such persons 11 sales were made, to another 11 sales, to another 12 sales, to another 24 sales, to another 42 sales, to another 60 sales. Such sales consisted chiefly of alcohol in quantities of one-half pint. The trial court further found that the defendant sold whisky, brandy, lager beer, alcohol, and gin in amounts of half pints and pints, almost daily, to a large number of persons, for various diseases, all of whom were persons in the habit of drinking intoxicating liquors as a beverage, and who were not suffering from the diseases for which the liquors were claimed to be sold, but were all men of ordinary good health; and, further, that sales were made by defendant from day to day without administering the oath required by the statute. It is entirely apparent that such findings bring defendant's place of business under the provisions of § 7605, Rev. Codes, and make it a common nuisance under said section. The evidence upon which the findings of the trial court were based consisted of books wherein defendant recorded his daily sales of intoxicating liquors, the affidavits of the purchasers of such liquors returned to the county court by the defendant, and the oral testimony of several witnesses, showing that a number of defendant's customers were common drunkards, and that many others to whom sales were made almost daily were persons addicted to the use of intoxicating liquors as a beverage, and who were not afflicted with the diseases described in their affidavits, but were persons in ordinary good health. All of the evidence, both documentary and oral, is in the record presented to this court. A review of the same fully satisfies us that the findings of the trial court are fully sustained, and that no other findings were possible under the evidence offered. Counsel for defendant do not claim otherwise, but it is their contention that the books wherein defendant kept the record of his sales were improperly admitted in evidence, and therefore should not have been considered by the trial court, and should not be considered by this court on this review. The books in question were procured by counsel for the state from the defendant pursuant to an order of court, and were introduced in evidence, over the objection of the defendant "that the facts disclosed by said books might tend to criminate him." The objection is based upon § 13 of the state constitution, which provides that no person shall "be compelled in any criminal case to be a witness against himself," and upon the fifth amendment to the federal constitution, containing the same provision. This constitutional guaranty has been construed to protect witnesses against the compulsory production of private books and papers. *Boyd* v. *U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; *Counselman* v. *Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110. It is clear, however, that the protection afforded by said sections was not available to defendant upon the facts which here exist, and that the books were properly admitted. They are

not private documents, but are public documents, which the defendant was required to keep, not for his private uses, but for the benefit of the public, and for public inspection. They were kept in pursuance of § 7596, Rev. Codes, which provides that: "* * * every such druggist shall keep a book wherein shall be recorded, daily, all sales of intoxicating liquors made by him or his employes, showing the name and residence of the purchaser, the kind and the quantity of the liquors sold, the purpose for which it was sold and the date of the sale. Such record and affidavit shall be open for the inspection of the public at all reasonable times during business hours, and any person so desiring may take memoranda or copies thereof." The succeeding section makes it a misdemeanor for the druggist to fail to keep such record, or to refuse such inspection. The books in question were official registers, and were competent evidence of the facts required to be recorded therein. 1 Greenl. Ev. 496; *Kyburg* v. *Perkins*, 6 Cal. 674. In *Coleman* v. *Com.*, 25 Grat. 881, 18 Am. Rep. 711, the court said that: "Whenever a written record of the transaction of a public officer in his office is a convenient and appropriate mode of discharging the duties of his office, it is not only his right, but his duty, to keep that memorial, whether expressly required so to do or not; and when kept it becomes a public document,—a public record belonging to the office, and not the officer,—is the property of the state, and not of the citizen, and is in no sense a private memorandum." 7 Am. & Eng. Enc. Law, 75; 2 Am. & Eng. Enc. Law, 467J; *State* v. *Huff*, 76 Ia. 200, 40 N. W. 720. As particularly in point see *State* v. *Smith*, 74 Ia. 583, 38 N. W. 492 and *State* v. *Cummins*, 76 Ia. 133, 40 N. W. 124. The trial court did not err in admitting these records. The evidence afforded by such records, taken in connection with the affidavits of the purchasers and the oral testimony, show conclusively that repeated, and almost daily, sales of intoxicating liquors were made by the defendant to persons who were in the habit of becoming intoxicated. Counsel for defendant contend, however, that such sales are not unlawful, and claim that sales "by druggists to persons in the habit of becoming intoxicated do not constitute a violation of the law, in the absence of the notice prescribed by § 7616, Rev. Codes." In this counsel is in error. Section 7597, among other things, expressly prohibits the sale of intoxicating liquors to a person who is in the habit of becoming intoxicated," and affixes as a penalty for a violation thereof a fine of not less than $200 or more than $1,000, and imprisonment in the county jail not less than 90 days or more than one year, and a forfeiture of his permit. Under this section it is immaterial whether the druggist knows that the person is in the habit of becoming intoxicated. He sells at his peril as to the fact, whatever it may be. *Dudley* v. *Sautbine*, 49 Ia. 650, 31 Am. Rep. 165; *Jamison* v. *Burton*, 43 Ia. 282. As was said in *State* v. *Thompson*, (Ia.) 37 N. W. 104, he "cannot excuse himself on the ground of his

ignorance of the fact that the persons to whom he sold were minors or inebriates. He was bound to know whether they were persons to whom he could sell lawfully, and the burden was upon him to show that the sales were lawful. *State* v. *Cloughly* (Ia.) 35 N. W. 652; *Shear* v. *Green*, 73 Ia. 688, 36 N. W. 642." His duty is to discriminate and sell only in the cases not prohibited. That the effect of § 7597, standing alone, is to absolutely prohibit sales to persons who are in the habit of becoming intoxicated, is not questioned by counsel for defendant. But it is their contention that it is qualified by a later section, namely, § 7616, which reads as follows: "Whenever the father, mother, brother, sister, wife, husband or guardian or any relative of any person shall notify any druggist that such person, naming him, is in the habit of becoming intoxicated, and shall forbid said druggist from selling, bartering or giving to such person any intoxicating liquors, it shall be unlawful for any such druggist, after such notice, to let such person have any intoxicating liquors upon any terms or conditions whatever. Any druggist who shall violate the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred nor more than five hundred dollars, and shall be imprisoned in the county jail not less than thirty days nor more than six months." It is urged that this section makes notice to the druggist necessary in every case to render sales to persons in the habit of becoming intoxicated unlawful sales, and that, in the absence of such notice, such sales are lawful. This construction cannot be sustained. Section 7616 is complete in itself, and defines an independent violation of law, entirely separate and distinct from that described in §7597. Section 7597 makes it a crime to sell to a person "who is in the habit of becoming intoxicated," and the crime under said section consists in selling to a person who in fact has such habit. The later section, namely, 7616, makes it a crime to sell to a person whose relatives have served the statutory notice. Under the latter section the crime is committed by selling after receiving the statutory notice, and does not depend upon whether the person to whom the sale is made is in fact in the habit of becoming intoxicated. The plain purpose of this section is to place in the hands of all persons the power to prevent sales of intoxicating liquors to those bearing the relationship to them described in the statute. Under § 7616 the crime is committed by selling after receiving the statutory notice, regardless of whether the person to whom the sale is made is in fact in the habit of becoming intoxicated. Under § 7597 the crime is only committed when a sale is made to a person who has such habit, and no notice is necessary to make such sale unlawful.

Counsel for defendant, both in the brief and oral argument, attack the constitutionality of certain provisions of § 7605 which relate to the seizure of intoxicating liquors under the search warrant authorized to be issued by said section, and which determine the legal

effect to be given to the liquors so seized. These questions are not properly before us, and need not be discussed. No search warrant was issued in this case, no liquors seized, and none offered in evidence; so that defendant is in no way affected by the provisions which he challenges. As was said by this court in *State* v. *McNulty*, 7 N. D. 169, 73 N. W. 87, "it is a well established and wholesome rule of law that no one can take advantage of the unconstitutionality of any provision who has no interest in and is not affected by it." *State* v. *Becker*, 3 S. D. 29, 51 N. W. 1018; *Stickrod* v. *Com.* (Ky.) 5 S. W. 580; *State* v. *Snow*, 3 R. I. 64; *Sinclair* v. *Jackson*, 8 Cow. 580. The evidence, as we have seen establishes the existence of the nuisance complained of, and the state is entitled to have the same abated. The District Court is accordingly directed to reverse its judgment, and enter a judgment in favor of the plaintiff for the relief demanded in the complaint. All concur.

(86 N. W. Rep. 709.)

AMELIA GEILS, *et al vs.* WILLIAM FLUEGEL.

Opinion filed May 2, 1901.

Appeal—Affirmance—Defective Record.

This action was tried in the District Court without a jury, and judgment was entered in favor of the intervener and the respondents. Contestants have appealed to this court from such judgment, and in their notice of appeal state that the appeal is taken from the judgment, and from the whole thereof. In the statement of the case appellants have demanded a trial anew in this court of the entire case. A motion was made in this court in behalf of the respondents to strike out the statement of the case and to affirm the judgment upon the ground that a mass of evidence, consisting of numerous papers numbered as exhibits, were offered and received in evidence in the court below, and that such evidence was not incorporated in the statement of the case, but was, on the contrary, wholly omitted from the statement. It appears upon the hearing of the motion, and the fact was conceded, that said evidence was offered and received below, and was not embodied in the statement.

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

Action by Amelia Geils and others against William Fluegel, Sr., and others. Hugh Wier intervened. From a judgment for defendants and intervener, plaintiffs appeal.

Affirmed.

Taylor Crum and *Ida M. Crum*, for appellants.

A conditional will may be denied probate. § 3646, Rev. Codes. A conditional disposition is one which depends upon some uncertain event by which it is to take effect or be defeated. § 3712, Rev. Codes. Permissive language is often construed as mandatory. *State* v. *Kent*, 4 N. D. 577, 590; Black on Interpretation, 156;

Cutler v. *Howard*, 9 Wis. 309; *Bowman* v. *City*, 43 Minn. 115, 49 N. W. Rep. 68; Shouler on Wills, 290. Extrinsic evidence of testator's intentions cannot be received for the construction of a will. § § 3673, 3674, 3685, 3707, Rev. Codes; In re Carrand, 35 Cal. 336; In re Stevens Estate, 23 Pac. Rep. 379; Estate of Utz, 43 Cal. 200; *Bush* v. *Lindsey*, 44 Cal. 121; Estate of Wardell, 57 Cal. 484; Estate of Solomons, 40 Pac. Rep. 1030; *Smith* v. *Omstead*, 26 Pac. Rep. 521, 22 Pac. Rep. 1143. The statute of North Dakota is literally copied from the language of the California statute after the California statute had received judicial interpretation. It is presumed, therefore, that the enactment was made with knowledge of such interpretation, and that it was the design of the legislature that the act should be understood and applied according to that interpretation. *Sanger* v. *Flow*, 48 Fed. Rep. 154; *Nicollet Natl. Bank* v. *City Bank*, 35 N. W. Rep. 597; *Eberding* v. *McGinn*, 35 Pac. Rep. 178; *Westcott* v. *Miller*, 42 Wis. 481; *Kilkelly* v. *State*, 43 Wis. 607; *Fisher* v. *Dunning*, 60 Ill. 114. The intent must appear in the will and from the will alone. Jarman on Wills, 708; Redfield on Wills, 539. McFadden, being a party in interest, was not a competent witness. His evidence should have been excluded. § § 5652, 5653, 6198, Rev. Codes; *Duryea* v. *Granger's Estate*, 33 N. W. Rep. 730; *McCartin* v. *Traphagen*, 11 At. Rep. 156; *Gilder* v. *Braham*, 3 S. W. Rep. 309.

Benton, Lovell & Holt, for respondents.

The statement of the case does not contain all the evidence offered upon the trial. Therefore this court cannot retry the entire case. *Edmonson* v. *White*, 8 N. D. 72; *Farmers' Etc. Co.* v. *Davis*, 8 N. D. 83. The omission of children from the will does not destroy the probate of the will but affects only the distribution of the estate. § 3675, Rev. Codes; In re Barker's Estate, 31 Pac. Rep. 976; *Northrup* v. *Marquam*, 18 Pac. Rep. 449. Sections 3685 and 3707, Rev. Codes, apply only to uncertainties appearing on the face of a will, and to the correction of imperfect descriptions. It is held that the testator's intention need not appear upon the face of the will. *Willson* v. *Fosket*, 6 Metc. 400; *Converse* v. *Wales*, 4 Allen, 512; *Buckley* v. *Guard*, 123 Mass. 8; *Coulam* v. *Doull*, 9 Pac. Rep. 568, sustained in *Coulam* v. *Doull*, 133 U. S. 216; In re Atwood's Estate, 45 Pac. Rep. 1036.

WALLIN, C. J. This cause originated in the county court for the county of Cass, and the principal question upon the merits has reference to the probate of a certain document filed in the county court, which purported to be the last will and testament of one Justina Fluegel, deceased. This record shows that on the 24th day of July, 1899, a decree was entered herein in said county court adjudging, in effect, that said document purporting to be a will should be admitted to probate as such will. By the same order Julius W. Fluegel and William Fluegel (sons of the deceased) were appointed execut-

ors, and letters testamentary were awarded to them as such. From this decree plaintiffs appealed to the District Court for Cass county, and demanded a trial anew in said court. After the case had reached the District Court, said intervenor, Hugh Wier, applied for and obtained leave to intervene as a party to the action, and thereupon filed his complaint in intervention, and in his said complaint prayed for certain equitable relief in the matter of certain mortgages held by the intervener upon the real estate described in and devised by the terms of said will. No answer or demurrer was ever filed or served to the said complaint in intervention, but during the progress of the trial of the action which was had in the District Court the intervener offered testimony in support of his complaint, and said testimony consisted in part of certain documents or exhibits, which were offered and received in evidence, and which were numbered from 5 to 14, inclusive. It is conceded that none of these exhibits were ever incorporated in the statement of the case, and that the same are not in the record transmitted to this court. The litigation in the District Court resulted in the entry of a judgment in that court, which, among things determined, affirmed the decree of the county court, from which an appeal was taken to the District Court as above stated. Said judgment also directed, in substance, that a satisfaction of a certain mortgage covering the real estate described in said will, which had previously been executed by the intervener, should be vacated and set aside; and said judgment of the District Court further directed that certain promissory notes executed by the legatees named in the will should be cancelled and surrendered, and that two certain mortgages upon said real estate, given to secure said notes, should also be surrendered and cancelled of record. The action was tried in the Distrcit Court without a jury, and the appellants, in their statement of the case herein, demand a trial *de novo* in this court of the entire case. When the case was called in this court a motion was interposed in behalf of the respondents to affirm the judgment of the District Court upon the ground that the record showed upon its face that said evidence of the intervener, consisting of a series of exhibits, and which had been offered and received in the District Court, had not been incorporated in the statement of the case, but had been omitted therefrom. The motion to affirm the judgment was opposed by counsel for the appellants, but the fact that said evidence of the intervener was never incorporated in the statement was conceded. Appellants' counsel, in opposing the motion, call attention to the fact that no answer to the complaint in intervention was ever served or filed, and upon this omission counsel argue that an issue of fact was never joined in the action. But the record conclusively shows that an issue of fact was joined as between the petitioners and the contestants, and this fact, we think, brings this action strictly within the terms of § 5630 of the Rev. Codes of 1899, which section must, therefore, govern the procedure in the case. Said section provides as follows: "But if the

appellant shall specify in the statement that he desires to review the entire case all the evidence and proceedings shall be embodied in the statement." The provisions of this section have been frequently applied to cases coming to this court, and the practice is now well settled that this court is without power to retry, and will refuse to retry, a case where a trial anew of the entire case is properly demanded in all cases where it appears that the evidence offered in the court below has been omitted from the statement in whole or in part. *Edmonson* v. *White*, 8 N. D. 73, 76 N. W. 986. We do not find from the record that any stipulation or agreement in open court was ever made by counsel to the effect that the judgment, or any part of the judgment entered below was entered by consent, and certainly there was no oral statement made by counsel in this court to the same effect. The feature of the judgment which determines the rights of the intervener bears vitally upon the estate involved and the interests of all parties to the litigation. By its terms it deals with notes and mortgages, and directs that they shall be canceled and surrendered; and it also in terms vacates a certain satisfaction of a mortgage, and assumes to restore the mortgage so satisfied to its original vigor as an incumbrance upon the estate of the deceased; and, as has been seen, the judgment embraced a feature wholly independent of and apart from any of the matters affecting the rights of the intervener. This fact was before the appellants' counsel when the appeal was taken, and is supposed to have been considered by him in taking his appeal. It was entirely feasible to appeal from that feature of the judgment, and that only which relates to the probate of the will. The statute permits an appeal from a judgment either in whole or in part. Section 5606, Rev. Codes 1899. In this case the notice of appeal declared in terms that the appeal was from the judgment, and the whole thereof. The statement of the case, as prepared by appellants' counsel, also states in terms that the appellants desired a trial anew in this court of the entire case. It is, therefore, entirely clear that an appeal was taken from the whole judgment, and that this was done for the purpose of retrying the whole case in this court. The status of the case in this court with reference to procedure here is controlled by the statute, and the steps taken by the appellants in taking the appeal; and this status, being once established, cannot be changed or affected by what counsel for the appellants may say with reference to the objects and purposes of the appeal. If all the evidence were before us, it would be the duty of this court to retry the whole case, including the matter of the intervener's rights, and to direct the entry of a judgment disposing of all questions involved in the case. Nor would such judgment necessarily conform to the views or requests of counsel, even if counsel were in full accord as to what the judgment should be. We are required under the law to enter judgment in accordance with law and testimony, and in conformity to justice. Under the law and the estab-

lished practice this court is precluded from entering upon a consideration of the merits of the case, unless the evidence offered at the trial is contained in the record. In this case it is conceded that such is not the fact. The motion to affirm the judgment is granted, and it will be so ordered. All the judges concurring.

(86 N. W. Rep. 712.)

PETER AUSK *vs.* THE GREAT NORTHERN RAILWAY COMPANY.

Opinion filed May 7, 1901.

Carriers—Live Stock Shipment—Pleading.

Plaintiff commenced an action against the defendant for negligently killing his horse during shipment, alleging that it was shipped from Grand Rapids, Minn., to Moorhead, Minn. The proof showed that the contract at Grand Rapids was in writing, and with another company; there being no evidence or allegation in the pleading of any joint relation between the defendant and such company. *Held*, that plaintiff could not recover, under such an allegation in the pleading, by virtue of a delivery to or contract with or duty of defendant entered into at another place.

Offer of Proof.

A certain offer of proof considered, and *held* not admissible under the complaint as framed.

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

Action by Peter Ausk against the Great Northern Railway Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

M. A. Hildreth, for appellant.

W. E. Dodge and *C. J. Murphy*, for respondent.

MORGAN, J. This action is brought to recover damages for the killing of a certain horse belonging to the plaintiff. The complaint (omitting allegation that defendant is a common carrier) states, in substance, that on or about the 25th day of March, 1900, the plaintiff, at Grand Rapids, Minn., delivered to the defendant, and it then and there received, as such carrier, one horse of the plaintiff's, of the value of $175, to be safely and securely conveyed by said defendant from said Grand Rapids, Minn., to the city of Moorhead, Minn., there to be safely delivered to the plaintiff, for a certain reward, which the plaintiff then and there paid to the said defendant as aforesaid; that the said defendant did not safely convey and deliver said horse as it had undertaken to do, but, on the contrary, conducted itself so carelessly and negligently in and about carrying and transporting the same that said horse was, in consequence thereof, killed, causing damage to the plaintiff in the sum of $175. The defendant interposed a general denial as an answer. The trial

court directed a verdict for the defendant at the close of plaintiff's case. Judgment of dismissal was entered, from which the plaintiff appeals, specifying many alleged errors. It will be necessary for us to consider but one of such specifications of error, viz.: "The court erred in directing a verdict in favor of the defendant and against the plaintiff for the dismissal of the action on the ground that the plaintiff had failed to make out a case."

On the trial, one John Ausk was a witness on behalf of the plaintiff, and testified that he shipped a car load of horses over the Great Northern road from Grand Rapids, Minn., to Moorhead on March 25, 1900; among such horses being the one that was killed. He testified further that such horses were thus shipped under a written contract, which was lost, and that this car load of horses was unloaded at Grand Forks, and reshipped in a Great Northern car, to be delivered at Moorhead. He testified concerning the negligent operation of the train, as he claimed, and the consequent injury to the horse. On his cross-examination, he identified the contract shown him as the one he had signed at Grand Rapids, under which his and his brother's horses had been shipped. This contract was received in evidence, under plaintiff's objection, as part of this cross-examination. The defendant's counsel thereupon moved the court to strike out all of this witness' oral testimony relating to the making of the contract of shipment, and the delivery of the horses under such oral contract, on the ground that the same was secondary and incompetent, which was granted. The written contract thus received in evidence was a contract for the shipment of a car of horses, in direct terms entered into "between the Eastern Railway Company of Minnesota, party of the first part, and John Ausk, party of the second part." Such contract is signed by "G. R. Reiss, Agent for Eastern Railway Co. of Minnesota, and by John Ausk, Shipper." At the top of the contract, in large letters, is printed, "Great Northern Railway Line," and right under these words, in smaller letters, "Eastern Railway Company of Minnesota." On the right hand margin of the contract, under the words "Issuing Agent," are stamped the words, "Great Northern Railway, Grand Rapids, Minn., March 25, 1900." On the same margin are written the words, "Car No. 8,394, G. N." On the back of such contract is a stipulation signed by John Ausk, releasing the Eastern Railway of Minnesota from all liability for injury to himself, in consideration of free passage of himself from Grand Rapids to Moorhead and return. As we construe this contract, it is not a contract with the defendant, but is one with the Eastern Railway Company of Minnesota. The fact that a car of the Great Northern was used, or that the stamp of the Great Northern Railway was made on the contract, does not seem to us of any particular significance as showing that the Great Northern was a party to the contract, or directly bound by it as a party to it. That it was a contract with the Eastern Railway Company seems too plain for argument;

and it is also apparent, from the reading of the contract, that the Eastern Railway Company is a distinct company from the Great Northern. There is nothing in the evidence, outside of the contract, nor in the complaint, tending to show any connection or relation between these two companies, nor anything to show where their lines connect, nor anything to show that the Great Northern is bound by any contract or violation of duty of the Eastern Railway Company. We think that it was perfectly proper to permit a preliminary cross-examination of the witness as to this contract. He had testified to a shipment. To ascertain whether such shipment was evidenced by written contract or not was necessary, in order to ascertain the rights of the parties, as such rights would be governed by the written contract, if one had been made. For the same reasons, such cross-examination was proper after he had been examined in chief; nor was there any error in receiving the contract in evidence; nor was it error to strike out all oral testimony as to the delivery and shipment at Grand Rapids as soon as the contract was received in evidence. This witness, who is plaintiff's brother, testified as to this contract: "Exhibit A is the contract of shipment executed by me at Grand Rapids, and delivered to me by the railroad company there." It follows, then, that this contract governed so far as any Grand Rapids shipment was concerned, and no evidence was offered as to any other contract at Grand Rapids. Such being the fact, there was no evidence in the case of any liability against the defendant, express or implied, under the Grand Rapids contract, as that was a contract with another company, and there is no allegation in the complaint in any way connecting the defendant with the Grand Rapids contract. Therefore no evidence would be relevant under this complaint, until amended, as to any other contract or duty of the defendant in respect to this shipment of horses.

After the contract, Exhibit A, had been received in evidence, plaintiff's counsel made the following offer of proof: "We offer to show by this witness [the plaintiff] that these horses were put into a car of the Great Northern line; that they were unloaded at Grand Forks for feeding purposes, reshipped in a car of the Great Northern Railway line, to be delivered at Moorhead, Minn.; that they went over the line of the Great Northern Railway; and further offers to show that through and by the negligence of the Great Northern Railway, its officers and servants, at Moorhead, this horse was thrown down and injured, and from such injuries it subsequently died." This offer was objected to as irrelevant under the pleadings, and the objection sustained. This was an endeavor to prove a new contract entirely irrelevant under the complaint as it then stood. Admitting that the horses were put into a Great Northern car at Grand Rapids under a contract with another company, still no responsibility would attach to the Great Northern by virtue of that fact alone. The unloading and reshipment at Grand Forks for feeding purposes would not be admissible as a fact to

bind the Great Northern by virtue of its acceptance of the stock there, when the complaint charges it with having received the stock at Grand Rapids. The rule is that the proof in such cases must conform to the allegations of the complaint. Such contracts must be proven, with comparative strictness, as pleaded. An allegation of one contract in the complaint is not met by proof of a contract at another place than that laid in the complaint. The defendant was entitled to be apprised of what it would have to meet by proof at the trial. The complaint having alleged that this stock was received by the defendant, as an initial carrier, at Grand Rapids, proof that it received it at some other place as a connecting carrier was not admissible without an amendment of the complaint. "In suing the last of several connecting carriers for a loss, it is necessary to allege that the carriers were joint contractors, or that the property was delivered and received by the defendant." 3 Am. & Eng. Enc. Law (2d Ed.) p. 853; *Railroad Co.* v. *Bryant,* 67 Ga. 212. Speaking of pleading in actions of this kind, a noted author has said: "The plaintiff may rely upon a more general statement when he elects to proceed *ex delicto* than when he sues upon a contract. But still, if he enters into a particular or detailed statement of his cause of action, and there be a misdescription as to any matter which goes to the essence of the action, he must fail; as, for instance, if the allegation should be of an undertaking to carry one thing or to one place, and the proof should be of an undertaking to carry another and a different thing or to a different place." Hutch. Carr. § 750. The complaint in this case having charged a delivery and acceptance of the stock by the defendant at Grand Rapids, a delivery and acceptance at Grand Forks or some other place cannot be relied on without an amendment of the complaint. The following cases strongly tend to sustain this proposition: *Banking Co.* v. *Tucker,* 79 Ga. 128, 4 S. E. 5; *Witzler* v. *Collins,* 70 Me. 290, 35 Am. Rep. 327; *Railroad Co.* v. *Cahill,* (Colo. App.) 45 Pac. 285. "Where the proof as to the termini of the transportation varies materially from the allegations of the declaration in that regard, such variance will be fatal to a recovery." 3 Enc. Pl. & Prac. (2d Ed.) p. 847. The following cases sustain this principle of pleading in this class of cases: *Mann* v. *Birchard,* 40 Vt. 326, 94 Am. Dec. 398; 2 Greenl. Ev. § 210, and cases there cited; *Railroad Co.* v. *Sullivan,* 25 Ga. 228. The plaintiff was therefore not entitled to have the evidence offered received, as it was not responsive to his complaint.

We decide this case upon the grounds that there was a total failure of proof, so far as the cause of action pleaded is concerned, and that no other contract or duty of the defendant could be proven under the allegations of the complaint as framed. The decision on these grounds being absolutely decisive of the appeal, it is not necessary to consider other assignments of error. Judgment affirmed. All concur.

(86 N. W. Rep. 719.)

CHARLES A. SMITH *vs.* CORA A. SMITH.

Opinion filed May 1, 1901.

Divorce—Admissions in Answer—Conclusiveness—Residence of Plaintiff.

In an action for a divorce, an admission in defendant's answer that plaintiff's residence in this state was bona fide when the action was commenced *held* not to conclude the court from examining the plaintiff as to his residence. Evidence examined, and *held* not to show bona fide residence within the state when the action was commenced.

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

Action by Charles A. Smith against Cora A. Smith. Judgment for defendant, and plaintiff appeals.

Affirmed.

M. A. Hildreth, for appellant.

The defendant, by her answer, admitted the marriage and the residence of the plaintiff as set forth in the complaint. The defendant, therefore, is not at liberty to raise an issue as to plaintiff's residence, which she has closed by the admission in the answer. Whart Ev. 1110; *Paige* v. *Willet*, 38 N. Y. 28; *Myrick* v. *Bill*, 17 N. W. Rep. 268; *Fleishman* v. *Stein*, 90 N. Y. 110; *Walrod* v. *Bennett*, 6 Barb. 144; *Ballow* v. *Parsons*, 11 Hun. 662. A judgment contrary to the admission of the pleadings must be set aside. *Getty* v. *Towne*, 46 Hun. 1; *Budge* v. *Passon*, 5 Sanf. 210; *Campo* v. *Lassen*, 67 Cal. 139; *Burnett* v. *Stearns*, 33 Cal. 469; *Silvy* v. *Neary*, 59 Cal. 97; *Manley* v. *Hallock*, 55 Cal. 94; 1 Rice on Ev. 228.

Turner & Lee, for respondent.

(No brief on file.)

MORGAN, J. This is an action for a divorce from the bonds of matrimony. The complaint states two grounds for such divorce, viz.: desertion and extreme cruelty. The complaint also states "that for more than ninety days last past, and prior to the commencement of this action, the plaintiff has been, and now is, a bona fide resident of the state of North Dakota." The defendant interposed an answer denying the desertion and the extreme cruelty set forth in the complaint, and admitting in terms the marriage of the parties and the bona fide residence of the plaintiff in the state of North Dakota. At the trial in the court below, the defendant appeared in court by her attorneys only. They did not participate in the proceedings by a cross-examination of the plaintiff or otherwise. The trial court dismissed the action upon the sole ground that the plaintiff was not a bona fide resident of the state of North Dakota. The plaintiff excepted to such dismissal, and appeals to this court, demanding a review of the entire case. There is no appearance on the part of the respondent in this court.

At the close of plaintiff's direct examination by his attorney, during which examination he had not been asked anything concerning his residence, nor had he testified concerning the same, the court asked him this question: "Where do you live?" Plaintiff's attorney objected to the question, alleging as grounds that it was not proper cross-examination, incompetent, irrelevant, and immaterial and upon the ground that the answer admitted the residence. The objection was overruled by the court, after which the examination continued at length. The question of law thus raised is, what is the effect of an admission on the record by the defendant of the residence of the plaintiff, so far as the parties or the court are concerned? If the action were any other civil action, affecting the rights of the parties only, it may be admitted that any admission in the answer of any fact in the complaint would be the equivalent of proof of such fact, and such would be true of any fact alleged in the complaint not controverted by the answer. Section 5292, Rev. Codes. An admission in the answer of the sufficiency of the plaintiff's residence in the state to enable him to maintain his action and secure a decree presents a very different question. It is generally, if not universally, held by the courts of this country that residence in the state for the prescribed time before commencing an action for a divorce is jurisdictional. This court has so held in two cases. *Smith* v. *Smith*, 7 N. D. 404, 75 N. W. 783; *Graham* v. *Graham*, 9 N. D. 88, 81 N. W. 44. In the Smith case, cited, the court says, in substance, that a divorce granted in this state to one not a good-faith resident of the state would be without binding force in other jurisdictions; and the principle thus announced is sustained by courts generally, if not universally. *Thelan* v. *Thelan*, (Minn.) 78 N. W. 108; Black, Judgm. § 930; Freem. Judgm. § 580; *Dunham* v. *Dunham*, 162 Ill. 589, 44 N. E. 841. In *Smith* v. *Smith*, supra, this court says, "The statute requiring residence, which means domicile, for a period of ninety days, as preliminary to starting an action for a divorce, is jurisdictional to the subject-matter." Residence must be established to have been within the letter and spirit of the statute before the action was commenced, or the court acquires no jurisdiction of the subject-matter of the action. The appearance of the defendant would not supply such want of jurisdiction. Her consent that the court proceed with the trial without inquiry as to plaintiff's residence would be binding upon her, perhaps, but upon no one else. Nor would her admission in her answer of plaintiff's residence confer upon the court any jurisdiction in this respect. That must be obtained by the plaintiff bringing himself strictly within the terms of the statute. It is against the policy of the law that divorces be decreed by consent of the parties immediately interested. It is likewise against the policy of the law that courts should grant divorces to any applicants save bona fide residents of this state. It is for this reason that courts are not restricted in their judicial inquiries as to facts in issue under the pleadings in divorce cases. This question

has often been before the courts, as the following extracts will show: "In every divorce suit, the state, for the enforcement of its policy concerning the marital relation, constitutes the third party, and no admission can be made by the other parties which will affect the public interest." *Prettyman* v. *Prettyman*, 125 Ind. 149, 25 N. E. 179. "An averment in the complaint for a divorce that the applicant has been six months a resident of this state, and a failure to deny the averment in the answer, does not do away with the necessity of proving residence." *Bennett* v. *Bennett*, 28 Cal. 600. See, also, *Schmidt* v. *Schmidt*, 29 N. J. Eq. 496, and 7 Enc. Pl. & Prac. p. 88, tit. "Divorce." We therefore reach the conclusion that the admission of residence in the answer was not the admission of such an issuable fact as dispensed with the necessity for proof on that subject.

We also have no difficulty in reaching the conclusion that it was the right and the duty of the trial court to inquire of the plaintiff concerning his residence. In divorce cases the plaintiff and defendant are not the only interested parties. The state is interested. The citizens of this and other states are interested that no divorce shall be granted that is not sustained by well-founded jurisdiction. This court has said in *Smith* v. *Smith*, supra: "In a divorce case, the sovereign state is always present as a party in the action,—not technically, but actually and potentially, a party. The state, represented by the court, is there to see to it that no mere transient inhabitant, whose domicile is elsewhere, shall call upon the courts of this state to adjudicate upon the marital relations of citizens of other states or nations. To do so would not only be without results, except as a purely local affair, but would be a gross violation of the comity of states, and one directly calculated to lead to much social and domestic discord, and unhappiness to the innocent parties directly concerned in the action." We adopt this language of the present chief justice as directly applicable to actions of this nature. In *Moore* v. *Moore*, 41 Mo. App. 176, it is said: "In such case there are, as has been said, three parties to the action,—the plaintiff, the defendant, and the public. It is to the interest of society at large to guard against sundering that relation which is its chief foundation. 2 Bish. Mar., Div. & Sep. § § 229-231, 234, 236, 238. So far as a defendant would be concerned, as a matter of right, which he may assert, he would be perhaps concluded by his pleading; but there is a maxim in these suits 'that a cause is never concluded against the judge.'" Precedents are ample and the principle clear that the court is not restricted by the pleadings in passing upon divorce cases, and that it has full power to inquire concerning matters not raised by the pleadings or matters admitted by the pleadings, that it may correctly determine as to its jurisdiction, as well as to determine whether the immediate parties to the suit are not acting collusively to obtain a divorce practically by consent.

We now come to the merits: Does the evidence show that

plaintiff was a bona fide resident of this state when he commenced his action? We observe that such residence must be established by clear and convincing proof. Residence for divorce purposes alone would be insufficient, although, if he came for other purposes, but intended to and did actually become a permanent resident with the intention of permanently remaining here, the fact that he incidentally intended to obtain a divorce would not defeat his action. No pretended residence, nor temporary visits, nor actual bodily presence, simply, nor a sojourn here for business purposes, as an incident to further his plans for a divorce, will suffice. He must have abandoned his former home, and must have actually established one here, with the purpose of permanently retaining it. "Residence," in contemplation of the divorce laws, is synonymous with "domicile," and must be adopted as permanent. *Smith* v. *Smith,* supra. From the abstract we gather the following facts concerning his residence here: He came to Fargo about June 18, 1898. Remained at Fargo two weeks. Went to Bismarck from Fargo, and remained there until the fore part of September. Then went to Grand Forks. Remained there and at surrounding towns until December. Soon after December 21st, at which date the summons was served, he went to Chicago, remaining a week, when he went to Buffalo, and remained there and at Niagara Falls until the fall of 1899, when he came back to Fargo, remaining a week. He then left for Buffalo again, and remained there until July, 1900, when he came to Fargo, remaining a week, and returned to Buffalo, where he remained until he returned to Fargo on September 30, 1900, and applied for his divorce on October 1st. He states that he came to North Dakota originally, having heard that it was a good place for his business,—that of penman or card writing. He states that he never voted while away, and came here intending to make it his permanent home, and had no other abode since coming here. He stated on his examination on October 1st that he intended locating in Bismarck, as he thought there was an opening for him there. He says he came back here on those two occasions to engage in his business. He had a place of business in Buffalo, but not the same place during all this time. We do not find that he had any stated place of abode in North Dakota since he came to Fargo. He says his home was in Fargo most of the time since 1898. When the summons was served, it is doubtful whether he was a legal voter in North Dakota. There is not one fact shown by the evidence indicating that he adopted any place in this state as his permanent abode. He says it was his intention to make this his home, but that cannot control, alone. We look for facts showing or tending to show such intention. Some corroboration as to residence we deem essential. Section 2757, Rev. Codes. It is true that, if he was a bona fide resident here on December 21st, his going back to engage in his business, only, would not alone cause him to lose his residence here. But we are not satisfied that he was a good-faith resident in December, 1898,

and his actions since strongly support the view that he was not. There is no explanation given of his coming back to Fargo on the two occasions mentioned, except that he came to follow the same business. It seems incredible that a person would come from Buffalo to follow the business of card writing in Fargo for one week. If he did, that business must be very remunerative. It is not improbable that he returned to Fargo to keep up the appearances of actual residence. We are not at all convinced that he ever acquired a residence here of that permanent nature required under the rule applicable in this class of cases. Judgment affirmed. All concur.

(86 N. W. Rep. 721.)

E. B. GRANDIN *vs.* GUNDER G. EMMONS.

Opinion filed May 4, 1901.

Mortgage—Assignment—Evidence.

A written assignment of real estate mortgage, the execution of which is acknowledged before a notary public of another state, is entitled to be read in evidence under the provisions of § 5696, Rev. Codes, without further proof, when the certificate of acknowledgment attached thereto is authenticated by the signature and official seal of such notary. It is not necessary to have attached thereto the certificate of an officer of a higher rank to the official character and signature of such notary.

Publication for Six Weeks—Notice of Sale.

A notice of mortgage foreclosure sale by advertisement, which is published six times, once in each week, for six successive weeks before the sale, is a sufficient compliance with § 5848, Rev. Codes, regulating the publication of notices. McDonald v. Nordyke Marmon Co., 9 N. D. 290, 83 N. W. 6, followed.

Power of Sale—Coupled with an Interest.

In this state a power of sale inserted in a real estate mortgage is a power coupled with an interest, and is not revoked or suspended by the death of the mortgagor, and when so exercised, and redemption is not made as provided by law, is effective to cut off the rights of redemption of the heirs of such deceased mortgagor.

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

Action by E. B. Grandin against Gunder G. Emmons and others. Judgment for defendants, and plaintiff appeals.

Reversed.

F. W. Ames, for appellant.

It was not necessary in the absence of fraud to read over the instrument to Mrs. Emmons where she signed by mark. *Kranz* v. *Srein*, 33 At. Rep. 1031. The mortgage was duly acknowledged, and this alone entitled it to be received in evidence. § 5696, Rev. Codes: Anglo-American Mtg. Co., 51 Pac. Rep. 915; *Wilkins* v. *Moore*, 20 Kan. 538; *Webb* v. *Holt*, 81 N. W. Rep. 637; *Cameron*

v. *Calkins,* 44 Mich. 531; Webb. on Record of Title, 65. Where a mortgage is signed by a husband and wife and shows a certificate of acknowledgment by both, fair on its face, a defense by the wife on the ground that it was executed under duress or undue influence, and that she never in fact acknowledged the mortgage, cannot be sustained except on clear, convincing and satisfactory evidence. The unsupported evidence of the wife alone will not suffice. *Smith* v. *Allis,* 9 N. W. Rep. 155; *Cameron* v. *Calkins,* 7 N. W. Rep. 157, 44 Mich. 531; 1 A. & E. Enc. L. (2d Ed.) 560; *Karscher* v. *Gans,* 83 N. W. Rep. 431.

M. A. Hildreth, for respondents.

Our statute does not cover an acknowledgment taken outside of the state. The certificate of the officer must be accompanied by higher evidence certifying to his official character and signature before such document can be offered in evidence. 1 A. & E. Enc. L. (2d Ed.) 535; *Titman* v. *Thornton,* 16 L. R. A. 41. A foreclosure by advertisement cannot be effectual as against minors or the heirs of the mortgagor because they are not parties to the record, and all these persons are entitled to redeem. *Johnson* v. *Johnson,* 3 S. E. Rep. 606; *Wilkins* v. *McGhee,* 13 S. E. Rep. 84; *Martin* v. *Noble,* 29 Ind. 216; *Kilgour* v. *Wood,* 64 Ill. 345; *Hodgen* v. *Guttry,* 58 Ill. 431; *Frische* v. *Cramer,* 16 Oh. 125; *Talman* v. *Ely,* 6 Wis. 244; *Hodgen* v. *Treat,* 7 Wis. 263; *Porter* v. *Kilgore,* 32 Ia. 279; *Valentyne* v. *Havener,* 20 Mo. 133; *Hafley* v. *Maier,* 13 Cal. 13.

YOUNG, J. Action to recover the possession of real estate and to quiet and confirm the title thereto. The real estate in controversy comprises 160 acres, situated in Traill county. The defendants are in possession under a claim of title. Plaintiff alleges that he is the owner of said land, and that defendants have no right, title, or interest therein. The case was tried to the court without a jury. No evidence was offered by the defendants. At the close of plaintiff's testimony, at the request of defendants' counsel and on his motion, findings of fact and conclusions of law were made adverse to plaintiff's claim of title. Judgment was thereafter entered declaring certain transfers, upon which plaintiff bases his claim of title, void an of no effect. Plaintiff appeals from the judgment, and requests a review of the entire case in this court.

It is a stipulated fact that on December 1, 1885, Gunder G. Emmons was the owner of the land in controversy, and it is from this common source that both parties to this action claim the title they rely upon. Plaintiff sets forth his claim of title as follows: He alleges that on December 1, 1885, Gunder G. Emmons and Ingeborg G. Emmons, his wife, executed and delivered a mortgage covering said land to one Hiram D. Upton, to secure their joint note for $700, payable to said Upton, of even date with said mortgage; that on June 1, 1894, said Upton assigned said note and mortgage to one R. C. Alexander, by an instrument in writing; that said mort-

gage contained a provision authorizing the mortgagee, his heirs and assigns, in case of default in payment of said debt or interest thereon, "to sell said premises at public auction, and convey the same agreeable to the statutes in such case made and provided"; that, pursuant to a default in payment of the debt so secured, the said Alexander foreclosed said mortgage by advertisement, causing the notice of sale to be published in a weekly newspaper "six times, once in each week, for six successive weeks," which notice so published fixed the time of sale on June 13, 1896, at 2 o'clock p. m.; that on said date said premises were sold to R. C. Alexander, and a sheriff's certificate of sale duly issued to him; that thereafter, to-wit, on June 18, 1897, no redemption having been made, a sheriff's deed was duly issued to the said Alexander, the purchaser at said sale; that thereafter to-wit, on June 21, 1897, the said Alexander conveyed said premises to the plaintiff by executing and delivering to him a warranty deed therefor. All of the instruments above referred to were duly recorded in the proper office.

It is apparent that, if the foreclosure proceedings and the several conveyances are valid, plaintiff's title is perfect, and he is entitled to the relief he demands.. The defendants do not claim title or right of possession by virtue of any conveyance. Their rights, if any they have, rest solely upon the fact that they are the heirs at law and next of kin of Ingeborg G. Emmons, who died prior to the foreclosure proceedings hereinbefore referred to. At the time of the execution of the mortgage, and up to the time of her death, she occupied the land in question with her husband as their homestead, and since her death the defendants have continued to so occupy it. One of the defendants, Peter Emmons, is still in his minority. The facts placed in issue by the answer are few, and require but brief mention.

The execution of the mortgage by Ingeborg G. Emmons is denied; also the assignment of the note and mortgage from Upton to Alexander. An examination of the evidence transmitted to this court leaves no doubt in our minds that the mortgage was executed by her, and that it was assigned to Alexander by Upton, as alleged in the complaint. The execution of the mortgage is satisfactorily shown by the testimony of one of the persons who witnessed its execution, and by the certificate of the notary public attached thereto, certifying to the acknowledgment of its execution by the mortgagors before such notary public. The transfer of the note and mortgage to Alexander is established by the introduction in evidence of the original written assignment, executed by Upton and duly acknowledged by him before a notary public, which acknowledgment is certified to by the notary public over his official signature and seal. Objection was made to the admission of this instrument on the ground that it is incompetent, and that no foundation was laid for its introduction. The particular ground of objection is that, the

instrument having been executed and acknowledged in New Hampshire before a notary public of that state, it is necessary to have attached thereto the certificate of some other officer of that state of higher official rank, certifying to the official character and signature of such notary public, before the same can be held to be an acknowledged instrument, within the meaning of the statutes of this state. The objection is not well taken. Sections 3573, 3575, 3576, Rev. Codes, authorize the proof or acknowledgment of instruments to be made before a notary public, within this or any other state or foreign country. The authentication of the certificate of acknowledgment taken by a notary public is prescribed by § 3586, Rev. Codes, which provides that the certificate shall be authenticated by the signature and official seal of the officer. Aside from these express statutory provisions, it is a well-settled rule of law that "courts will take judicial notice of the seal of a notary public, and it proves itself *prima facie* by its appearance upon the certificate." *Green* v. *Gross*, 12 Neb. 117, 10 N. W. 459, and cases cited on page 124, 12 Neb., and page 461, 10 N. W.; *Hoadley* v. *Stephens*, 4 Neb. 431; *Galley* v. *Galley*, 14 Neb. 174, 15 N. W. 318; *Southerin* v. *Mendum*, 5 N. H. 420. The assignment was accordingly acknowledged, within the meaning of § 5696, Rev. Codes, and, under the authority of said section, was entitled to be read in evidence without further proof. No further facts are in dispute. The questions which remain for consideration relate to the alleged invalidity of the foreclosure proceedings, and the legal effect of the foreclosure, if valid, upon the rights of the heirs of Ingeborg Emmons, deceased.

It was urged at the trial in the District Court that the entire foreclosure proceedings were void, and that the sheriff's deed issued to Alexander pursuant thereto, and the deed of the latter to plaintiff, conveyed no title, for the reason that "the publication of the notice of mortgage sale is insufficient to comply with the statutes in this, to-wit, that the publications occurred on May 7, 1896, May 14, 1896, May 21, 1896, May 28, 1896, June 4, 1896, and June 11, 1896, and the sale took place on June 13, 1896, being a period of only 37 days." The foregoing quotation from the language of the order of the trial judge correctly states the facts as to the publication of the notice and date of sale, and gives the sole ground relied upon by the trial court in rendering the judgment appealed from. The case was decided before our decision was announced in the case of *McDonald* v. *Nordyke Marmon Co.*, 9 N. D. 290, 83 N. W. 6, wherein for the first time a construction was placed upon § 5848, Rev. Codes, which governed the publication of the notice of mortgage sale now under consideration. In that case the statute now in force, namely, § 5848, was distinguished from the antecedent provisions found in § 5414, Comp. Laws, under which *Finlayson* v. *Peterson*, 5 N. D. 587, 67 N. W. 953, 33 L. R. A. 532, was decided, and was construed to only require a publication of the notice of sale six times, once in each

week for six successive weeks, prior to the date of sale, instead of a period of 42 days, as under the former enactment. In *McDonald* v. *Nordyke Marmon Co.,* supra, we said: "Under the present law, the notice is required to be published before the sale 'six times, once each week, for six successive weeks.' When this is done, there need be made no perplexing computations of days or weeks." No reasons are advanced by counsel for respondents, and none have occurred to us, for questioning the entire soundness of that construction. It follows, therefore, that the trial court was in error in holding the foreclosure proceedings invalid. The notice was published in strict conformity to the statute governing such publication.

It is also earnestly urged by respondents' counsel that, notwithstanding the regularity and validity of the foreclosure proceedings, they are ineffectual against minors and heirs of the mortgagors, because it is a foreclosure by advertisement, and they are not parties to the record, and that it does not, therefore, cut off their right to redeem. This contention is based upon the theory that the power of sale contained in the mortgage authorizing the mortgagee, his heirs, and assigns, to sell the land described in the mortgage, pursuant to the statute regulating the manner of exercising the right so conferred, was merely a naked power, one not coupled with an interest, and that it was therefore revoked by the death of Ingeborg Emmons, one of the mortgagors, and that, therefore, as to the heirs of said Ingeborg Emmons, the foreclosure is without effect. A large array of cases is presented by counsel as supporting this position. All but two of them relate to foreclosure by action wherein necessary parties were omitted. It is, of course, well settled that such persons are not cut off by such a foreclosure and upon elementary principles. None of these cases have reference to the effect of a statutory foreclosure under a power of sale, and are not in point. *Johnson* v. *Johnson,* (S. C.) 3 S. E. 606, and *Wilkins* v. *McGehee,* (Ga.) 13 S. E. 84, however, squarely hold that a power of sale in a real estate mortgage cannot be exercised after the death of a mortgagor, and that a sale made thereafter does not cut off the rights of the heirs at law of the mortgagor. The express ground of these decisions is that the power of sale in those states is not a power coupled with an interest, and is therefore revoked and rendered incapable of execution by the death of the mortgagor. In holding that the power of sale was not coupled with an interest, and so expired at the death of the mortgagor, it would appear that the courts in the cases just cited were largely controlled by the fact that in those states there was "no statute recognizing or declaring the effect or providing a method for the execution of the power. It could be executed only as any other power of attorney in the name of the principal." But, however that may be, the almost unanimous voice of authority is the other way. 2 Perry, Trusts, § 602, states that "it is a universal rule that a power coupled with an interest is irrevocable, and, as to a power of sale inserted in a mortgage, * * *

it is a power coupled with an interest, and it cannot be revoked by any act of the donor or grantor of the power. Not even the death or insanity of the grantor or donor will annul the power or suspend its exercise. The debt remains, the right or lien on the property remains, and the power is coupled with them." The doctrine just stated, that neither death nor disability will suspend or terminate the power, is supported by the following cases: *Conners* v. *Holland,* 113 Mass. 50; *Varnum* v. *Meserve,* 8 Allen, 158; *Hudgins* v. *Morrow,* 47 Ark. 515, 2 S. W. 104; *Beatie* v. *Butler,* 21 Mo. 313, 64 Am. Dec. 234; *Jones* v. *Tainter,* 15 Minn. 512, (Gil. 423.); *Encking* v. *Simmons,* 28 Wis. 272; *Meyer* v. *Kuechler,* 10 Mo. App. 371; *VanMeter* v. *Darrah,* (Mo. Sup.) 22 S. W. 30; *Berry* v. *Skinner,* 30 Md. 567. In support of the doctrine that the power of sale is a beneficial power coupled with an interest, see *Jencks* v. *Alexander,* 11 Paige, 624; *Wilson* v. *Troup,* 2 Cow. 195, 14 Am. Dec. 458; *Anderson* v. *Austin,* 34 Barb. 319, *King* v. *Duntz,* 11 Barb. 191; *George* v. *Arthur,* 2 Hun. 406; *Cole* v. *Moffit,* 20 Barb. 18. In this jurisdiction the doctrine of these cases has been recognized, and to some extent embodied, in the following sections of the statute: Section 4710 declares that the power of sale in a mortgage is a trust; and § 3419 declares that it is a part of the security, and vests in the person entitled to the security. Section 3403 distinguishes it from a simple power of attorney to convey real property in the name of the owner. Section 4350, which provides that the power of an agent shall be terminated by revocation, death, or incapacity, expressly excepts powers coupled with an interest in the subject of the agency. Section 5844 provides that "every mortgage of real property containing a power of sale may, upon default being made in the conditions of such mortgage, be foreclosed by advertisement," etc. That no limitation is in fact placed upon the exercise of the power is also made plain by § 5857, which directs that the surplus, if any, at the sale shall be paid to the mortgagor, his representatives or assigns, which plainly contemplates a sale after the death of the mortgagor. These several sections are identical in language with § § 4354, 2829, 2813, 4007, 5424, 5411, Comp. Laws, which were construed by the Supreme Court of South Dakota in a learned and exhaustive opinion written by Kellan, J., in *Reilly* v. *Phillips,* (S. D.) 57 N. W. 780, which was a case involving the precise questions under consideration and upon facts almost identical. In that case the widow and heirs of a deceased mortgagor made the same claim that is set up by these defendants. That court, after a careful investigation, reached the conclusion that "both under our statute or without it the power of sale is one so coupled with an interest that it survives the death of the grantor." We fully agree with this conclusion, and approve the following language as directly applicable and controlling in this case: "She [the deceased mortgagor] could leave no more to her heirs than she herself had at the time of her death. Their rights must be measured by hers.

They took her place, and might only do with respect to the property what she might do. The rights of the heirs having accrued subsequent to the mortgage, they are subordinate to it, not only to the lien of the mortgage, but to the power of sale which it conveyed as a part of the security. * * * By the statute of our state no notice of sale is required to be served upon anybody. General notice to all interested is given by publication. There are no parties to the proceeding, as in an action for foreclosure; and yet the proceeding, where authorized by a power of sale in the mortgage, was, without question, intended to take the place of a foreclosure by action, and to have the effect of an old foreclosure in equity. The statute having made no provision for service of notice of the sale either upon heirs or others interested in the mortgaged property, such service, if made, would be entirely voluntary on the part of the mortgagee, and could add nothing to the legal effect of the sale. This court cannot add to the statute another provision requiring that express notice shall be given to minor heirs or their guardian in order to make the foreclosure sale effective against them. If, as the law stands, a foreclosure would be good with such actual notice, it is good without it."

It follows from what we have already said that the foreclosure in question was regular and valid, and that the defendants, having failed to redeem within the time allowed by law, have no right, title, or interest in said premises, and that the plaintiff is entitled to judgment confirming his title to said real estate, and enjoining said defendants from asserting any claim or demand thereto, and giving possession thereof to the plaintiff. The District Court is accordingly directed to enter an order vacating its judgment heretofore entered, and to direct the entry of a judgment in plaintiff's favor for the relief to which he is entitled, as above stated.

Counsel for respondents in his oral argument, and also in his brief filed in this court, requested that, in the event of an adverse decision, the case be sent back to the District Court for a new trial. Section 5630, Rev. Codes, under which this case was tried and the appeal taken, among other things provides that this court may, "if it deem such a course necessary to the accomplishment of justice, order a new trial of the action." Just how broad a discretion is intended to be given by the language quoted is a matter of much doubt. But it is clear that the power so conferred should not be exercised arbitrarily or capriciously, but only upon substantial grounds. Such grounds do not exist in this case. It is true the respondents did not introduce any evidence in the District Court, for the reason, as appears, that the court held with the views of respondents' counsel, which were presented at the close of plaintiff's case, namely, that the notice of sale was insufficient, and the foreclosure proceedings void. The opportunity existed, however, for presenting testimony, if respondents so desired. There is not in this case even the suggestion of a possibility of establishing facts which would alter the conclusions we have already announced. Under such circumstances,

it certainly would not be in furtherance of justice to grant the request, and the same is denied. Judgment is reversed, and the District Court will enter judgment as heretofore directed. All concur.

(86 N. W. Rep.. 723.)

LEE A. ROBERTS, *et al vs.* CITY OF FARGO, *et al.*

Opinion filed April 25, 1901.

Municipal Corporations—Contracts—Street Lighting—Appropriations—Tax Levy—Necessity—Ultra Vires—Unlawful Disbursements—Taxpayer's Action—Injunction.

On August 6, 1895, in pursuance of a resolution adopted by the city council of the city of Fargo, certain officers of the city signed a written agreement, in which the city of Fargo was described as party of the second part, and the Fargo Gas & Electric Company, a private corporation, was described as party of the first part, and whereby the city agreed to pay said corporation, in consideration of certain electric light agreed to be furnished for lighting the city, the sum of $500 per month for the period of 10 years from and after August 19, 1895, at which date the contract, by its terms, took effect. Previous to signing said written agreement, no appropriation had ever been made or tax levied by the city council to meet the expenditures required to be made by the city in carrying out the agreement, or any part of such expenditures. *Held,* construing § § 2261, 2264, Rev. Codes 1895, that said agreement was ultra vires, and void. *Held* that, inasmuch as said agreement involved the dissipation of public funds in large amounts, without authority of law, and in violation of law, an action will lie in behalf of a taxpayer to enjoin such unlawful disbursements.

Previous Appropriation to Meet Municipal Expenditure.

Held, that the provisions of § 2264, supra, are mandatory and prohibitive, and that no contract requiring a disbursement of city funds can be made by the city council, and no expense can be incurred by any city officer or officers, unless a previous appropriation has been made covering the expense involved in the same.

Notice of Limitation of Corporate Powers.

Held, further, that all persons entering into contractual relations with public corporations or their officers are chargeable with notice of their powers and the limitations upon their powers.

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

Action by Lee A. Roberts and others against the city of Fargo and others to enjoin defendant from disbursing its funds in payment of street lighting under an alleged ultra vires contract. From a judgment dismissing the bill, plaintiffs appeal.

Reversed.

Ball, Watson & Maclay, for appellants.

Appellants are entitled to maintain this action. *Engstad* v. *Dinnie,* 8 N. D. 1; *Mock* v. *Santa Rosa,* 58 Pac. Rep. 826. No appro-

priation concerning the expenditure to be incurred under the contract was previously made by the city council. § § 2262, 2264, 2190, Rev. Codes, *Pryor* v. *Kansas City,* 54 S. W. Rep. 504; *Blair* v. *Lantry,* 31 N. W. Rep. 790; *Rubber Co.* v. *Village,* 59 N. W. Rep. 513; *McElhinney* v. *City,* 49 N. W. Rep. 705; *City* v. *Waterworks Co.,* 76 N. W. Rep. 906; *City* v. *Downing,* 81 N. W. Rep. 509; *Garrison* v. *Chicago,* 7 Biss. 480; *Smith Canal Co.* v. *City,* 36 Pac. Rep. 844; *Gas Co.* v. *Leadville,* 49 Pac. Rep. 268; *Indianapolis* v. *Wann,* 42 N. E. Rep. 901; *Putnam* v. *City,* 25 N. W. Rep. 330; *Tenant* v. *Crocker,* 48 N. W. Rep. 577; *City* v. *Norton,* 63 Fed. Rep. 357; *Kiichli* v. *Minneapolis,* 59 N. W. Rep. 1088; *City* v. *Land,* 35 At. Rep. 136; *Jutte* v. *Altoona,* 94 Fed. Rep. 61; *Bladen* v. *Philadelphia,* 60 Pa. St. 464; *Philadelphia* v. *Flannigan,* 47 Pa. St. 21; *Kingsland* v. *Mayor,* 5 Daly, 448; *Weigel* v. *County,* 32 S. W. Rep. 116; *City* v. *Dessaint,* 9 S. W. Rep. 593; *Rubber Co.* v. *City,* 56 S. W. Rep. 220; *City* v. *Laurant,* 23 So. Rep. 185; *Irrigation District* v. *McNeal,* 83 N. W. Rep. 847; *Engstad* v. *Dinnie,* 8 N. D. 1. The financial system mapped out by the statutes of North Dakota for the government of its cities, does not permit the making of contracts for longer than one year, for the reason that appropriations can be made only for the expenses of one year; and no contract can be made until the corresponding appropriation therefor has also been made. *State* v. *Bayonne,* 26 At. Rep. 81; *State* v. *Medberry,* 7 O. St. 522; *Findlay* v. *City of Pendleton,* 56 N. E. Rep. 649; *Kitchli* v. *Minneapolis,* 59 N. W. Rep. 1088; *City* v. *Waterworks Co.,* 32 S. E. Rep. 907. Authority to make contracts cannot be implied under the terms of § § 2261 to 2264, Rev. Codes. In the face of the language used, mere implied authority would not be sufficient. *Kiichli* v. *Minneapolis,* 59 N. W. Rep. 1088; *City* v. *Waterworks Co.,* 76 N. W. Rep. 908; *Gas Co.* v. *Leadville,* 49 Pac. Rep. 268. There can be no estoppel in the case of contracts such as the one in question. *Engstad* v. *Dinnie,* 8 N. D. 11; *Goose River Bank* v. *Township,* 1 N. D. 28; *State* v. *Getchell,* 3 N. D. 243; *Farmers' Bank* v. *School District,* 6 Dak. 255; *McDonald* v. *Mayor,* 68 N. Y. 23; *Rubber Co.* v. *Village,* 59 N. W. Rep. 513; *San Diego Water Co.* v. *City,* 59 Cal. 517; *McBrien* v. *City,* 22 N. W. Rep. 206; *Canal Co.* v. *City,* 36 Pac. Rep. 844; *Indianapolis* v. *Wann,* 42 N. E. Rep. 904; *City* v. *Land,* 35 At. Rep. 136; *District* v. *McNeal,* 83 N. W. Rep. 847.

Newman, Spalding & Stambaugh, for respondent.

The city has power to provide for lighting its streets. § 2148, Subd. 1, Rev. Codes. The authority conferred by this section is unlimited by any conditions, restrictions or limitations, and may be exercised by the council in its discretion as to its mode, manner or detail; and such discretion cannot be questioned by the taxpayer. *Connery* v. *Company,* 7 So. Rep. 8. If the contract was voidable as to certain portions of it, the city might either ratify it or avoid it; and it can only be voidable as to those portions which were executory.

East St. Louis v. *Gas Light Co.*, 98 Ill. 415; *Columbus Water Co.* v. *Columbus*, 28 Pac. Rep. 1097. The contract in question is neither void nor voidable, but valid in its entirety and for its full term. *Seitzinger* v. *Tamaqua*, 41 At. Rep. 454; *Bailey* v. *Philadelphia*, 39 At. Rep. 494; *City of Hartford* v. *Co.*, 32 At. Rep. 925; *New Orleans Gas Co.* v. *New Orleans*, 7 So. Rep. 559; *Illinois Trust Co.* v. *Arkansas City*, 40 U. S. App. 257; *City of Indianapolis* v. *County*, 66 Ind. 396; *City* v. *Gardner*, 97 Ind. 1; *City* v. *Gaslight Co.*, 31 N. E. Rep. 573; *City* v. *Water Co.*, 172 U. S. 1. No expense under the contract in question is or can be incurred until an indebtedness arises, then an annual appropriation is sufficient for the purposes of the contract, as no indebtedness arises under it until the company has furnished the city with the lights contracted for, for the full term of one month at a time. The indebtedness, in other words, accrues monthly and the expense is incurred monthly and no appropriation is necessary other than the regular appropriations for regular expenses of the city, the lighting of the streets being an ordinary current expense. *Carlisle* v. *City*, 29 N. E. Rep. 556; 141 Ill., 445; *Defiance Water Co.* v. *Defiance*, 90 Fed. Rep. 753; *Hill* v. *Indianapolis*, 92 Fed. Rep. 467; *Monroe Water Co.* v. *Heath*, 73 N. W. Rep. 234; *Black* v. *City*, 34 At. Rep. 354; *Wade* v. *Oakmont*, 30 At. Rep. 959; *Capital City Water Co.* v. *Montgomery*, 9 So. Rep. 343; *New Orleans Gas Co.* v. *New Orleans*, 7 So. Rep. 559; *McLean* v. *Frence*, 44 Pac. Rep. 358; *Utica* v. *Utica Co.*, 31 Hun. 430; *Merrill Ry. Co.* v. *Merrill*, 49 N. W. Rep. 965; *Weston* v. *Syracuse*, 17 N. Y. 110; *Valparaiso* v. *Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *East St. Louis* v. *Gaslight Co.*, 98 Ill. 415; *Smith* v. *Dedham*, 10 N. E. Rep. 782; *Crowder* v. *Sullivan*, 28 N. E. Rep. 94; *Salino* v. *Neosho*, 30 S. W. Rep. 190; *Grant* v. *Davenport*, 36 Ia. 365; *Lott* v. *Waycross*, 11 S. E. Rep. 558; *Burlington Water Co.* v. *Woodard*, 49 Ia. 58; *Walla Walla* v. *Walla Walla Co.*, 172 U. S. 1. The contract in question provides that in each year the city shall appropriate and levy a sufficient sum to pay the expenses under the contract, and this agreement is valid, binding and enforceable. *Monroe Water Co.* v. *Heath*, 72 N. W. Rep. 234.

WALLIN, C. J. The record in this action discloses the following facts: The plaintiffs, who are freeholders and taxpayers residing in the city of Fargo, bring this action to annul a certain contract in writing made on August 6, 1895, between said city of Fargo and the defendant the Fargo Gas & Electric Company, whereby the latter agreed to furnish electric light for lighting said city for a period of 10 years upon certain terms set out in said contract. The city of Fargo at all times in question was, and still is, a municipal corporation organized under Chap. 28 of the Political Code. See Rev. Codes 1895, § § 2108-2343. The mayor, treasurer, and auditor of said city are also made parties defendant. The Fargo Gas & Electric Company is a private corporation, formed for the purpose of manufacturing and selling gas and electricity, and having its princi-

pal office in said city of Fargo. The complaint sets out the contract in question as follows: "This contract, made and entered into pursuant to resolution of the city council of the city of Fargo adopted May 5, 1895, this 6th day of August, 1895, by and between the Fargo Gas & Electric Company, a corporation organized and doing business under the laws of the state of North Dakota, party of the first part, and the city of Fargo, party of the second part, witnesseth: The party of the first part, for and in consideration of the sum of five hundred dollars ($500) per month, to be paid monthly by the party of the second part, agrees to furnish to the party of the second part for the term of ten years from and after the 19th day of August, 1895, with fifty arc electric lights of 2,000 candle power each, to be kept burning each and every night during said term of ten years from dark until daylight: provided, that a pro rata reduction shall be made in any month for the number of hours any light or lights shall fail from accident or any other unavoidable cause to be kept burning as herein stated; such failures not to work a forfeiture of this contract. But if the party of the first part shall refuse upon reasonable notice to keep said lights burning as previously agreed for a longer term than is reasonably necessary to make any necessary repairs for that purpose and to put said lights in order, then said party of the second part may, at its option, cancel this contract. Said party of the first part shall suspend such of said lights as are not now in use under its present contract with said second party at such points upon the public streets of said city within a reasonable radius as shall be directed by said second party as soon as practicable, and, in case said lights are not so suspended on or before the 19th day of August, then the pro rata reduction hereinbefore provided for shall be made for all such lights as shall not then be ready for use until the same are in actual use. Said lights shall be suspended in the same manner as those now in use, and on Broadway and Front S. shall be placed not less than twenty-five, and on all other streets not less than thirty-five, feet above the surface of the street. Said party of the first part further agrees to furnish to said party of the second part such lights as it may order in excess of said fifty lights at the rate of $120.00 per year in addition to said $500.00 per month agreed to be paid for said fifty lights. Said party of the second part agrees during the term of this contract to take and use not less than said fifty lights, and in each and every year to appropriate and levy a sufficient sum to meet the requirements of this contract, and to pay the price herein agreed on for all lights used hereunder each month at the monthly meeting of the city council. It is further agreed that, in case of removal of any light or lights from one place to another after the same shall have been located and suspended, said city shall pay the actual and necessary expense for such removal to the party of the first part. It is further agreed that the party of the first part shall furnish to the party of the second part at the waterworks and city buildings of the party of the second part twenty-five 16 candle power

incandescent lights, twelve of which shall be all-night lights; all to be located as directed by the party of the second part; said lights to be furnished for the full period of said ten years,—in consideration of which the party of the first part may use such water from the system of waterworks of the second party as it may need for the operation of its plant during all said term, but without expense to the said party of the second part for pipes, connections, or anything except the water only. It is further agreed that the party of the second part shall have the right at all times to test any and all of said lights by a competent electrician, and if said lights, or any of them, shall be found to be less than 2,000 candle power, then the amount to be paid for such light or lights for the month in which said test is made shall be the proportion of the price above specified as the quantity of light furnished by such light or lights, shall be of 2,000 candle power. Such test, however, shall be made while the lights tested are burning, and shall continue for not less than one hour consecutively, and the average candle during such time shall be the basis of determination. In witness whereof said parties have caused these presents to be executed, with the seal of said corporation, on the day and year first above written." This contract was recorded in the proper record book by the city auditor, and ever since it was entered into the same has been acted upon as a valid obligation by the parties thereto. It appears that the city council of said city, at its regular session held in the month of September, 1895, duly adopted an ordinance wherein the sum of $6,500 was appropriated for the purpose of lighting the city under said contract for the fiscal year ending August 31, 1896; and said city council, at its regular session held in September in the year 1896, by ordinance appropriated the sum of $6,000 for the purpose of lighting the city under said contract for the fiscal year ending August 31, 1897. Similar appropriations were made by ordinance for lighting the city under said contract in the month of September of each of the following years, viz.: In 1897, $7,000; in 1898, $7,000; in 1899, $8,000; in 1900, $8,000. The last mentioned appropriation—that for 1900—was, however, made after this action commenced, and on July 20, 1900. At the trial it was stipulated that by an ordinance of the city council approved September 18, 1894, an appropriation of $6,000 was made out of the general fund "for lighting the city under contract with the Fargo Gas & Electric Company" during the fiscal year commencing September 1, 1894. It is alleged and conceded that the Fargo Gas & Electric Company, for a long period of time prior to the date of entering into the contract in question, viz. prior to August 6, 1895, had been engaged in furnishing electric light for lighting the streets of the city of Fargo, and that said electric light had been so furnished to the city under a contract with the city, which contract, by its own terms, expired on the 19th day of August, 1895. At the trial, evidence was offered tending to show that at the date when the contract in question was entered into there was, as ap-

peared by the books of the city, an unexpended balance in the city treasury of between two and three hundred dollars, which balance the evidence tended to show had been transferred by the city auditor from the lighting fund to the general fund of the city. The evidence did not show that said balance was available, or could be drawn upon, to pay for lighting the city, but the fact seems to be conceded that the appropriation made for lighting the city on September 18, 1894, had not all been expended for that purpose prior to August 6, 1895, but that, on the contrary, a balance out of said appropriation of between two and three hundred dollars had not been expended for lighting the city, but the same had been diverted and transferred to the general fund by the city auditor. With the exception of such small balance, however, the entire appropriation for lighting the city which was made in the preceding month of September had, prior to August 6, 1895, been paid out under a contract for lighting the city made with said Fargo Gas & Electric Company. Against objection, testimony was introduced at the trial tending to show that the Fargo Gas & Electric Company, in reliance upon said contract, and in executing the same on its part, expended about $2,000 in and about the erection of new poles and wires to be used in furnishing the light it had undertaken to furnish by the terms of the contract in question. There are no facts which are at all material to a decision of the case which are controverted.

Counsel for the plaintiffs assails the contract made on August 6, 1895, upon the sole ground that the same, as counsel contends, is ultra vires, and void, for the reason that the same was entered into in direct violation of certain restrictive provisions contained in the organic law of the city, which provisions are embraced in §§ 2261-2264 of the Rev. Codes of 1895. Said last mentioned section is as follows: "No contract shall be made by the city council and no expense shall be incurred by any officers or departments of the corporation, whether the object of the expenditures shall have been ordered by the city council or not, unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided." The following extract, which we have quoted from the brief of counsel for the plaintiffs' fully and fairly states the plaintiffs' principal contention in the case: "By the terms of the contract, respondent Gas & Electric Company agreed to furnish certain electric lights, for the compensation specified in the contract, during the term of ten years beginning August 19, 1895. No appropriation concerning the expenditure to be incurred under this contract was previously made by the city council. Not only was no such appropriation made to cover the expenditure of the full ten years, but none was made to cover the expense of the first year previous to the making of the contract." To fully understand the question presented, it will be necessary to refer to certain other sections of the city charter. Section 2140 provides that "the council shall hold its regular meetings on the

first Monday of each and every month." Section 2261 provides that the "fiscal year" of all cities organized under this law shall commence on the first day of September of each year. Section 2262 reads as follows: "The city council shall at its regular meeting in September of each year or within ten days thereafter pass an ordinance, to be termed the 'annual appropriation bill,' in which it may appropriate such sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation; and such ordinance shall specify the purposes for which such appropriations are made and the amount appropriated for each purpose. No further appropriations shall be made at any other time within such fiscal year unless the proposition to make each appropriation has been first sanctioned by a majority of the legal voters of such city either by a petition signed by them or at a general or special election duly called for that purpose." By § 2190 the annual city tax levy is required to be made in the month of September of each year, and this section specifically declares that such levy shall be "based upon the annual appropriation bill for the year," which appropriation, as already shown, is required to be made at the first regular meeting in September in each fiscal year, or within 10 days thereafter. § 2262, supra. The several sections of the city charter to which we have referred, in our opinion, leave no room for doubt as to the purpose of their enactment. By their very explicit terms the city council is required at the beginning of each fiscal year—First, to "appropriate such sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation, specifying the purposes for which such appropriations are made and the amount appropriated for each purpose"; and, secondly, the council is required to levy a tax based upon the said annual appropriation. All further appropriations out of city funds in the same year are strictly inhibited unless made upon the express sanction of the voters, obtained in the manner pointed out in § 2262, or unless, in exceptional cases, as provided in § 2263. In the case at bar there is no claim that the voters of the city have in any manner sanctioned or acted upon any appropriation involved in this case; nor is there a claim that the contract in question is an exceptional one, or that the same is authorized by any express provision of law. The statutes under discussion, and particularly § § 2262 and 2264, are severely restrictive in their nature, and they were obviously intended to operate as safeguards against the hasty and improvident expenditures of public funds by city officials,—a practice which, in some localities, has, as a matter of common knowledge, become an abuse and scandal. Similar statutes are found in many of the states. In *Pryor* v. *City of Kansas City*, (Mo.) 54 S. W. 499, the court, referring to a like statute, used the following language: "Similar provisions are contained in charters of many other cities in other states. Dill Mun. Corp. § 130, speaking of the reason underlying these provisions, says: 'Such limitations have been found by experience to

be necessary to prevent extravagance, are remedial in their nature, are based upon the wise policy of paying as you go, and ought, therefore, to be construed and applied to secure the end sought.' It is a matter of history, not only in our own state, but in most of the states, that before the adoption of these safeguards the credit of our cities was greatly impaired by outstanding liabilities, created by reckless disregard of ability to discharge obligations extravagantly or injudiciously incurred. These provisions of city charters are in harmony with the policy of the state. * * * They were all intended to put the state, the counties, and the cities upon a cash basis." In *Blair* v. *City of Lantry,* (Neb.) 31 N. W. 790, the court in construing statutes identical in meaning and very similar in language to those under consideration, annulled a contract for the purchase of a tract of land to be used for cemetery purposes, upon the ground that no previous appropriation had been made to cover any such expenditure. The language of the court in deciding the case, which is quoted below, is, in our judgment, entirely pertinent to the questions presented in the case at bar. The court said: "It will be seen that no contract can be made by the city council, or any committee or member thereof, or any expense incurred by any of the officers or departments of the corporation, whether such expense shall have been ordered by the city council or not, unless an appropriation shall have been previously made concerning such expense, except in certain cases where a further expenditure is sanctioned by a majority vote of the legal voters of the city, etc. The testimony clearly shows that the appropriation ordinance in the year 1884 did not include the amount required for the purchase of the lands in question, and the case is not within any of the exceptions named in the statute. Hence the contract was directly prohibited. The city council, no doubt, in entering into negotiations for the purchase of the land in controversy, as also the defendants in this case, acted in the utmost good faith, and there is not a particle of proof tending to show fraud or collusion, or an intention to disregard the law." The same court, in *Gutta-Percha & Rubber Co.* v. *Village of Ogalla,* (Neb.) 59 N. W. 513, uses the following language: "If a contract is invalid when made, because in violation of some mandatory requirement of statute, it will be deemed ultra vires, and can be ratified only upon the conditions essential to a valid agreement in the first instance." In this case the village, without having first made an appropriation to pay for the same, purchased certain apparatus for the use of its fire department. The property so purchased was delivered to and received by the village authorities, and the same was thereafter kept and used by them. The trial court and the Supreme Court held that the contract of purchase was void, for the reason that no previous appropriation had been made to cover the expense of the same. The statute upon which the court rested its decision in this case is, in our judgment, practically identical in its language, and wholly identical in effect, with § 2264 of the Rev.

Codes of 1895. The Nebraska statute (§ 89, Chap. 14, Comp. St.) reads as follows: "No contract shall be hereafter made by the city council or board of trustees, or any committee or member thereof, and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditure shall have been ordered by the city council or board of trustees or not, unless an appropriation shall have been previously made covering such expense, except as herein otherwise expressly provided." In the same opinion the following language is used: "It is plain that the statute under consideration is mandatory, and an express limitation upon the powers of cities and villages of the class to which it applies. Indeed, stronger language could not have been used, and its meaning is too apparent for construction. It is the recognized doctrine that whoever contracts with a municipality must, at his peril, take notice of the powers conferred by its charter, and whether the proposed indebtedness is in excess of the limitations imposed thereby." We think this case is squarely in point, and we regard the language of the opinion as apposite and instructive with reference to the case at bar. Wisconsin has a similar statute, although differing in its phraseology in some respects from that in this state. In *City of Superior* v. *Norton,* 12 C. C. A. 469, 63 Fed. 357, the circuit court of appeals has placed a construction upon the statute which harmonizes with the views of the Supreme Court of Nebraska in the cases above cited. In the course of its opinion the federal court said: "The people of the state, and their representatives in the legislature, sought thus to avoid reckless extravagance and the repudiation of just obligations. We find, therefore, throughout this act, the manifest design that there shall be prior provision for the payment of every obligation incurred, and restricted measures to insure such provision." Some of the facts in the Wisconsin case are dissimilar to those in the case under discussion, but the rule of construction laid down by the court, we think, is entirely in point, and the principle of the decision should govern in this case. In the case of *Kiichli* v. *City of Minneapolis,* (Minn.) 59 N. W. 1088, the plaintiff, a taxpayer, brought an action to enjoin the city from paying for certain apparatus and electric lighting service furnished the city by the Brush Electric Light Company under a contract made with officers of the city, which contract was asumed to be valid, and had, before the action was brought, been acted upon for some time by both parties as a binding contract. The court had occasion, in deciding the case, to place a construction upon the following provision of the city charter: "But neither said city council nor any officer or officers of said city shall otherwise, without special authority of law, have authority to issue any bonds, or create any debt, or any liabilities against said city in excess of the amount of revenue actually levied and applicable to the payment of such liabilities." Referring to this provision, the court said: "It clearly prohibits the anticipation of any future revenue except that for which the tax is actually levied

at the time the liability is incurred. It is unnecessary to notice step by step the limitations to be found in those sections. They constitute a system of checks and limitations on the creation of debt and the incurring of liability which wind up by depriving the city council of the power, without special authority of law, to create any debt or other liabilities against said city in excess of the amount of revenue actually levied and applicable to the payment of such liabilities." We regard this case also as being in point in support of the plaintiffs' contention. The language of the Minnesota statute differs slightly from that found in § 2264 of the Rev. Codes of North Dakota, but the two enactments are clearly the same in their general scope and purpose, and the intent of both is to place mandatory restrictions upon the action of cities and their officers, prohibiting them from contracting either debts, liabilities, or expenses until provision shall have first been made to meet and discharge such debts, liabilities, or expenses. The court ruled in this case that the city could be enjoined from making further payments under the contract involved. The following authorities are also in point: *City of Erie* v. *Land,* (Pa.) 35 Atl. 136; *Jutte* v. *City of Altoona,* 36 C. C. A. 84, 94 Fed. 61; *Bladen* v. *City of Philadelphia,* 60 Pa. 464; *City of Indianapolis* v. *Wann,* (Ind. Sup.) 42 N. E. 901; *Putnam* v. *City of Grand Rapids,* (Mich.) 25 N. W. 330; *Webster* v. *City of Kansas City,* 18 Mo. App. 217; *Tennant* v. *Crocker,* (Mich.) 48 N. W. 577; *City of Kearney* v. *Downing,* (Neb.) 81 N. W. 509; *Wiegel* v. *Pulaski Co.* (Ark.) 32 S. W. 116; *Mineralized Rubber Co.* v. *City of Cleburne,* (Tex. Civ. App.) 56 S. W. 220.

Respondents' counsel have called attention to *City of North Platte* v. *North Platte Waterworks Co.,* (Neb.) 76 N. W. 906, citing *McElhinney* v. *City of Superior,* (Neb.) 49 N. W. 705. An examination of those cases will clearly show that nothing whatever in the same militates against the construction placed upon the Nebraska statute in the other Nebraska cases above cited. Said last mentioned cases are not in point as sustaining respondents' contention. But we deem it unnecessary to further support the ruling announced in the cases cited. It will suffice to state that, except certain Illinois cases, hereafter to be cited, we have failed to discover a single adjudicated case based upon a statute the same or similar to that under consideration which announces a contrary rule; while, on the other hand, many cases supporting the rule have not been cited in this opinion. In this state the point involved, and upon which, in our judgment, the case must turn, viz. the proper construction to be placed upon the provisions of § 2264 of the Rev. Codes and cognate sections, has been passed upon and settled by this court in the recently decided case in *Engstad* v. *Dinnie,* 8 N. D. 1, 76 N. W. 292. That case is, in our opinion, in all of its essential features, analogous to the case at bar, and the same sections of the statute which we are discussing in this case received a careful consideration and construction at the hands of this court in deciding the case from Grand

Forks. In that case taxpayers of the city of Grand Forks were seeking to enjoin the officers of the city from carrying out contracts made with the city for the construction and equipment of an electric light plant, and to prevent the city from issuing warrants in payment for the same. In that case, as in this, the contract was regarded by all parties thereto as legal and binding; and the several contracts involved there, as here, were in part performed by the parties thereto prior to the institution of the action. The principal question there involved was whether, under the circumstances shown to exist by the record, the contracts to build and equip the plant created valid obligations of the city. In its opinion this court stated the contention as follows: "The contention is that the city, in attempting to exercise this power, has wholly failed to conform to plain charter requirements which are made prerequisites to its exercise, and without which the said contracts could not be lawfully entered into, or the plant be lawfully paid for, out of the general fund of the city or at all." In that case, as in this, there had not been, prior to making the contracts, any appropriation made or tax levied by the city council to meet the expense involved in carrying out the contracts. In deciding the case, the court placed a construction upon the language of §§ 2190, 2262, and 2264 of the Codes. Referring to these sections, the following language was employed: "In our opinion, the objections to these contracts as binding obligations are radical and insurmountable. They were entered into at a time and under circumstances which are fatal to their validity. The contracts were without authority of law, for the reason that no such improvement as that comprehended in the erection of a brick building and its equipment with the machinery mentioned was ever authorized or provided for either by an annual appropriation bill for said city for 1897 or by the tax levy of 1897 for the then current fiscal year." In the same case the court said: "The city was without power either to contract for, build, or operate the improvement in question. § 2264. In short all of its contracts and disbursements in connection with the plant were contrary to the statute, ultra vires, and therefore void; and hence all further proceedings and disbursements under the contracts should have been enjoined by the trial court." It therefore appears that in the Grand Forks case this court, in adjudging that the contracts there involved were ultra vires, and wholly void, placed its ruling upon the simple fact that the contracts were entered into prematurely, and before an appropriation or a tax levy had been made by the council to meet the expense incurred in carrying out said contracts. We expressly justified the decision by a reference to the sections of the city charter which we have already cited.

We have no hesitation in ruling that the record in the case at bar brings this case squarely within the construction of the statute established in the case last cited. The contract in question was entered into on the 6th day of August, 1895, which date occurs in

the last month of the fiscal year, which began on the 1st day of the preceding month of September. There is no claim made that at the regular session of the council which occurred in September, 1894, or at any time prior to or on August 6, 1895, the date of the contract, the council, by ordinance, resolution, or otherwise, made, or attempted to make, either an appropriation or a tax levy to meet the expense necessarily incurred in carrying out the particular contract in question, either for a period of ten years, or for one year, or for any period whatsoever. On the contrary, it is undisputed that the council at no time prior to entering into the contract in question took action with reference to an appropriation of city funds or with reference to levying a tax to meet the expense or liability incurred or to be incurred under the contract. As we have already said, in effect, we are compelled to hold that these omissions of duty by the city council are fatal to the validity of this contract. Nor does this ruling, in our judgment, involve any injustice either to the Fargo Gas & Electric Company or the city, inasmuch as it is elementary that any person or corporation entering into contractual relations with public corporations or their officers are chargeable with notice of all provisions of the charter of such corporations relating to the subject matter of their contracts, and are, therefore, presumed to have acted with full knowledge of such charter provisions.

It is contended that on August 6, 1895, the date of this contract, there was in the city treasury a balance of between two and three hundred dollars belonging to the lighting fund, which had been appropriated for lighting the city at the annual meeting of the council held in September, 1894, which appropriation was, however, in terms required to be paid out under a contract made with said gas and electric company. The existence of any such unexpended balance is controverted, but, from our standpoint it is wholly immaterial whether such balance was or was not in the treasury when the contract in suit was entered into. If in the treasury, it was a balance left over out of an appropriation of $6,000 made nearly one year prior to entering into the contract in question, and made at a time when the city was being furnished electric light under a contract with said Gas & Electric Company, which, by its terms, expired on August 19, 1895, upon which date the contract of August 6, 1895, took effect. Under these circumstances it is too clear for discussion that the appropriation of $6,000, made in September, 1894, was made to meet a liability for lighting the city which was then existing. Besides, under the terms of the statute, such appropriation only could be expended for an expense incurred during the fiscal year in which the appropriation was made, viz.: in the fiscal year ending September 1, 1895. It is, therefore, apparent that no admissible version of the facts of this case will warrant this court in holding that the alleged unexpended balance in the treasury was available to meet

a demand which, by its terms, did not mature in whole or in part until the next ensuing fiscal year, and which demand arose under a contract not made until nearly one year after the money was appropriated. Besides, as has been seen, the contract in question, by its own terms, looked forward to future appropriations and tax levies as being the source out of which the money required under the contract was to be provided by the city of Fargo. To this may be added the fact that at the meeting of the council occurring in September, 1895, a sum was appropriated sufficient in amount to meet all the obligations accruing under the contract in the then current fiscal year. Hence it conclusively appears that no appropriation was made, either at or prior to the date of the contract in question, or during that fiscal year, to meet the expense, or any part of the expense, arising under the contract of August 6, 1895. In point of fact, about two weeks elapsed after the contract took effect, August 19, 1895, before any attempt was made to appropriate funds with which to meet the expense to be incurred thereunder, or any part thereof.

Counsel for respondents, in their brief, submit the following propositions, which embody respondents' chief contention: "The section (2264) does not pretend to make all contracts of the city void unless an appropriation is made prior to or at the time of their execution. It is only where an expense is incurred under the contract for which no appropriation has been made." Counsel further say: "Our contention is that, if an appropriation is made by the city before expense is actually incurred, either under a contract or otherwise, the statute is satisfied." To this counsel adds the following by way of explanation: "It would seem axiomatic and elementary that no expense could arise or be incurred until there was something due,—some money due and payable from the city,—or at least until the obligation had matured, and such matured obligation to pay money is in itself a debt." This court has carefully read and considered the language of § 2264 in connection with the other sections of the city charter governing the revenues and expenditures of cities organized under Chap. 28 of the Political Code, and has reached the conclusion that the construction of § 2264, as contended for by counsel, is inadmissible, and would violate not only the plain language of the statute, but its equally plain purpose. In our opinion, the practical effect of such construction would be to pervert the obvious design of the lawmaker, and to introduce into the administration of cities in this state the very mischiefs which the statute and all similar statutes were intended to prevent The construction contended for manifestly excludes from the inhibitions of § 2264 all contracts made and all expense incurred, either by the city council or officers of the city under which the funds of the city are not to be disbursed until the next or some succeeding year, after the obligation is created. In other words, the sweeping prohibitive language used in said section has, as counsel contends, no application whatever to contracts made and debts incurred by the city in any case where pay day is postponed until some date

in a succeeding fiscal year. This court cannot yield its assent to a construction of the statute, which, in its effect would, in the judgment of this court, not only emasculate the language, and destroy the effect of the enactment, but would have the further effect to create a new law, under which the very abuses sought to be cut off by the legislature would be ushered in under the wing of judicial legislation. But counsel contend that no indebtedness was created by the contract of August 6th by its mere execution, and not until the city had been actually furnished light under the contract for the period of one month, and that all disbursements for the light so furnished could, under the terms of the contract, be provided for by the annual levies and appropriations before the same became due and payable, and that this arrangement as to disbursements fully satisfied the terms of the statute. In support of this contention counsel have cited a line of cases among which is the recent and leading case of *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341. We are of the opinion that the Walla Walla case is not an authority in point. There the plaintiff was granted an injunction restraining the city from proceeding to erect and pay for a system of water supply for the city to be owned and operated by the city. Prior to the commencement of the action, the city, under express charter provisions permitting it to do so, had entered into a contract with the plaintiff covering a period of 25 years, under which the plaintiff had erected a water system for the supply of the city, and had been supplying the city and its inhabitants with water for several years. The court held that under the circumstances surrounding that case, it would result in an impairment of the obligations of the contract made with the plaintiff if the city should proceed to build and operate a plant of its own, and accordingly the city was enjoined from doing so. The further point was made that in its said contract with plaintiff the city had entered into an indebtedness which exceeded the limit of debt permitted to be incurred by the city charter, and that the contract was, for that reason, ultra vires and void. But the contract with the plaintiff bound the city to pay plaintiff only by installments, and not until a specified service had been rendered the city under the contract. Construing this contract, the court held that the aggregate amount to be disbursed under it was not, within the meaning of the debt limit statute, a true measure of the debt; that under such statute no part of the whole indebtedness would be considered, except such part as had matured, and become a present debt of the city, actually due and payable. In making this ruling the court was considering only the one matter of the debt limit. No such inhibitive statutes as those existing in this state were to be construed in the Walla Walla case. Therefore we have no hesitation in declaring that the language used by the court in that case cannot be wrenched from its setting, and made to subserve the purposes of the respondents in the case at bar. In this case there is neither allegation, proof, nor contention that the contract of August 6th

exceeded the debt limit of the city of Fargo. The contract is assailed on no such ground.

But counsel for respondents have cited certain cases from Illinois where a statute like that in this state has been construed, and we shall concede that the same are in point as supporting their contention. See *Carlyle Light & Water Co.* v. *City of Carlyle,* 31 Ill. App. 325. This case was affirmed, but without discussion, by the Supreme Court of the state. See *City of Carlyle* v. *Carlyle Water Light & Power Co.,* 140 Ill. 445, 29 N. E. 556. We shall not attempt any analysis of the Illinois adjudications, nor shall we comment upon the same further than to say—and this with all respect for the courts which made the decisions—that, in our judgment, the effect of them is to defeat the purpose of the statute, and to break down the safeguards erected by the lawmaking branch of the government. To this we will add that, in our judgment, the authority of the decisions from Illinois is overborne by an immense preponderance of cases from other states, some of which have been cited in this opinion. In this state we regard the principal question in this case settled by the ruling made in *Engstad* v. *Dinnie,* 8 N. D. 1, 76 N. W. 292.

A further point—one not made by counsel—has occurred to this court in its study of the record. It is this: The contract of August 6, 1895, was not preceeded by or based upon any ordinance enacted by the council of the city of Fargo authorizing the council to enter into the contract, or authorizing any officer of the city to make or sign the same. The only authority for signing the contract ever given was a mere resolution passed by the council. There is neither a statute of the state nor an ordinance of the city commanding the city council of the City of Fargo to make annual levies or appropriations of money to meet the expenditures required to be met by the terms of the contract. Under such circumstances we are unable to see in what manner the city council could be compelled, by mandamus or otherwise, to make the appropriations agreed to be made by the terms of the contract. If the contract cannot be enforced in accordance with its provisions, it is mere worthless paper. It is true that under the charter the city is vested with a general authority to provide "for lighting the city," but the manner of exercising this power is nowhere pointed out by the charter. In such cases the charter itself provides that the power shall be exercised through the medium of an ordinance. It was not so exercised in this case. On this point, see *Engstad* v. *Dinnie,* supra. Inasmuch as counsel have not discussed this point in this court, we shall refrain from passing upon the same in this case. We place our conclusions wholly upon the other features of the case discussed in this opinion.

It will follow from what has been said in this opinion that the trial court erred in dismissing the action. The judgment of the trial court will be reversed, and that court will be directed to enter judgment for the relief demanded in the complaint, together with the costs and disbursements of both courts. All the judges concurring.

(86 N. W. Rep. 726.)

HENRY B. SCHAFFNER *vs.* JOHN YOUNG.

Opinion filed May 24, 1901.

Sheriffs—Extraterritorial Acts—Trespassers—Injunction—Complaint—Allegations—Statutes.

Action in equity to enjoin the defendant, who claimed to act officially as sheriff of Mercer county, from selling certain personal property belonging to the plaintiff, and which defendant had seized to satisfy an alleged personal tax charged against plaintiff on the tax lists of Mercer county. The defendant seized the plaintiff's property within the county of Williams, and did so under pretended authority contained in a warrant of distraint issued by the treasurer of Mercer county. *Held*, that the defendant, in seizing the plaintiff's property was a tresspasser, and that his usurpation of authority outside of his county was of such a nature as could be enjoined by a court of equity. But the complaint omitted to allege issuable facts to show that the trespass of the defendant was one which would cause irreparable damage to the plaintiff; nor did the complaint set out issuable facts sufficient to bring the case within any recognized head of equity. *Held*, that the facts alleged did not constitute a cause of action for equitable relief by injunction.

Unconstitutional Enactment.

Construing Chap. 25, Laws 1895, and Chap. 57, Laws 1899, *held*, that Chap. 57, Laws 1899, in so far as it attempted to change the boundaries of counties, is unconstitutional and void, because the same omitted any provision for submitting the law to the voters for approval. See § 168, Const.

Counties—Change of Boundaries.

For reasons set out in the opinion, the boundaries of the counties of Billings, Stark, and Mercer were not changed or affected by the passage and approval of either of the statutes embraced in said Chaps. 25 and 57.

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

Bill by Henry B. Schaffner against John Young, as sheriff of Mercer county, to restrain the latter from levying on complainant's property for taxes. From a judgment in favor of defendant, plaintiff appeals.

Affirmed.

F. H. Register, James B. Kerr and *J. B. McNamee*, for appellant.

Section 3, Chap. 25, Laws of 1895, purported to increase the area of Mercer county by including therein twenty-four townships belonging within the unorganized county of Williams. This act was held unconstitutional. *Richards* v. *Stark County*, 8 N. D. 392, 79 N. W. Rep. 863. Chap. 57 of the Laws of 1899, was passed to meet the difficulties presented by the isuues in the Richards case. Where the law under which a tax is imposed is in conflict with the constitution of the state, a court of equity will entertain jurisdiction by

injunction to prevent the enforcement and collection of the taxes. High on Injunctions, § 490; *Bristol* v. *Johnson,* 34 Mich. 123; *Gage* v. *Graham,* 57 Ill. 144; *Knowlton* v. *Supervisors,* 9 Wis. 410. If there is a total want of authority to levy the tax, relief by injunction may properly be allowed. *Town of Lebanon* v. *Ry. Co.,* 77 Ill. 539; *Kimball* v. *Company,* 89 Ill. 611; *Marsh* v. *Supervisors,* 42 Wis. 502; *Salscheider* v. *City,* 45 Wis. 519. Where, under a mistake, personal property of a railroad company is taxed in the wrong locality an injunction will be allowed. *Mohawk Co.* v. *Clute,* 4 Paige 384; *Chicago Etc. Ry. Co.* v. *Cole,* 74 Ill. 591. Relief is granted for the purpose of preventing the enforcement of a tax by a municipality other than that to which the property assessed rightfully belongs. High on Injuctions, § 540; *Union Pac. Ry. Co.* v. *Carr,* 1 Wy. 96; *Dorn* v. *Fox,* 61 N. Y. 264. Plaintiff is not estopped from complaining of the levy and assessments of taxes by the payment of taxes levied for state purposes. Plaintiff having delayed seeking relief until his property is advertised for sale, does not constitute such laches or acquiescence as to debar him from relief by injunction. High on Injunctions, § 550; *Holland* v. *Mayor,* 11 Md. 186; *Mayor* v. *Grand Lodge,* 44 Md. 436; *Stroesser* v. *City of Fort Wayne,* 100 Ind. 443; *Longworthy* v. *City,* 13 Ia. 86; *City* v. *Combs,* 16 O. 181; *Greencastle* v. *Black,* 5 Ind. 557; *Armstrong* v. *City,* 36 Kan. 432, 13 Pac. Rep. 843; *Storey* v. *Murphy,* 81 N. W. Rep. 23. Chap. 57 of the Laws of 1889, is unconstitutional. The legislature cannot validate void legislation. *Reading* v. *Savage,* 120 Pa. St. 198; *Stange* v. *Dubuque,* 62 Ia. 303; *Kimball* v. *Rosendale,* 42 Wis. 407; *Cain* v. *Goda,* 84 Ind. 209; *Strosser* v. *Ft. Wayne,* 100 Ind. 443. This act is void for the reason that it fails to provide for the submission to a vote of the qualified electors the proposed change in the county boundaries. § 168, Const.; *Wayne County* v. *Cobb,* 52 N. W. Rep. 1102. The vote of the electors taken under the unconstitutional act of 1895 was not sufficient compliance with the constitution. Cooley's Const. Lim. (5 Ed.) 224; *Clark* v. *Wallace Co.,* 39 Pac. Rep. 225; *Cahoon* v. *Iron Gate Co.,* 23 S. E. Rep. 767; *Meagher* v. *County of Storey,* 5 Nev. 251; *State* v. *Baker,* 31 S. W. Rep. 924; *Smith* v. *Sherry,* 50 Wis. 210; *Smith* v. *Sherry* 54 Wis. 114; *Lane* v. *Nelson,* 79 Pa. St. 407; *Richards* v. *Rote,* 75 Pa. St. 248, 256; *State* v. *Commissioners of Garfield Co.,* 38 Pac. Rep. 559; Sutherland on Statutory Construction, § 41.

E. C. Rice, Cochrane & Corliss, for respondent.

A court of equity will not hamper the administration of government by restraining the collection of a tax where the citizen has a remedy for the collection of the same by suit if he has paid the same. 1 High on Injunctions, § 505. The illegality of the tax alone, or the threat to sell if it is satisfied, cannot, of themselves, furnish any ground for equitable interposition. The party must find his remedy in the courts of law. Cooley on Taxation, 536; 2 Dillon's

Municipal Corporations (3 Ed.) 924; *Wason* v. *Magor,* 50 Pac. Rep. 741; *Lineham Etc. Co.* v. *Pendergas,* 70 Fed. Rep. 1; *Dows* v. *Chicago,* 11 Wall. 109; *Railway Co.* v. *Cheyenne,* 113 U. S. 526; *Shelton* v. *Platt,* 139 U. S. 594; *City* v. *Johnson,* 51 Pac. Rep. 1004; *Insurance Co.* v. *Bonner,* 49 Pac. Rep. 366; *Hall* v. *Fayetteville,* 20 S. E. Rep. 373; *St. Anthony & Dak. Elev. Co.* v. *Bottineau County,* 83 N. W. Rep. 212, 9 N. D. 346; *Erskine* v. *VanArsdale,* 15 Wall 77. Restraining the collection of this tax would, of course, affect every other case of property situated as plaintiff's was in the territory sought to be brought by the act of 1895 within the limits of the three counties named in that act. The court therefore should be extremely cautious in awarding on the complaint of an individual which may reach the cases of others not complaining and embarrass the operations of the government. Cooley on Taxation, 536. The financial condition of the county is not vital, as it is elementary that the officer collecting the tax is liable himself for the money, and his act being an official one, his bondsmen are likwise responsible. *St. Anthony & Dak. Elev. Co.* v. *Bottineau County,* 83 N. W. Rep. 212, 9 N. D. 346; *Erskine* v. *Van Arsdale,* 15 Wall. 75; *Western Union Tel. Co.* v. *Mayer,* 28 O. St. 521; *Shephan* v. *Daniels,* 27 O. St. 527; *Dunnell Mfg. Co.* v. *Newell,* 2 At. Rep. 766; *Shoup* v. *Willis,* 6 Pac. Rep. 124; *DeFremery* v. *Austin,* 53 Cal. 380; *Atwell* v. *Yeluff,* 26 Mich. 120; *Rumford Chemical Works* v. *Ray,* 34 At. Rep. 814; *Lindsay* v. *Allen,* 36 At. Rep. 840; *Wood* v. *Stirman,* 37 Tex. 584; *Powder River Cattle Co.* v. *Board of Comrs.,* 29 Pac. Rep. 361; *Board of Comrs.* v. *Searight,* 31 Pac. Rep. 268. Mercer county is a de-jure corporation within its original boundaries, and it is a de facto corporation within the new boundaries. The only way to oust the corporation from acting as a corporation over this new area is by an act of *quo warranto.* In this suit no such judgment can be secured. If plaintiff is successful it does not preclude Mercer county from establishing, in a direct suit brought to test its right to act as a corporation over the disputed territory, that the act of 1895 is constitutional. That *quo warranto* will lie where a municipal corporation is assuming to exercise corporate functions over an enlarged territory, is elementary. *People* v. *Oakland,* 28 Pac. Rep. 807; *State* v. *Fleming,* 44 S. W. Rep. 760; *State* v. *Westport,* 22 S. W. Rep. 888; *State* v. *McMillan,* 18 S. W. Rep. 784; *East Dallas* v. *State,* 11 S. W. Rep. 1030; *People* v. *Peoria,* 46 N. E. Rep. 1075; *State* v. *Cram,* 16 Wis. 343; *People* v. *Maynard,* 15 Mich. 463; 2 Spelling on Extraordinary Remedies, § 1802. Private suitors cannot raise the question whether Mercer county is lawfully exercising powers over the disputed territory, and in a collateral suit involving private interests. The questions must be raised in a direct proceeding, public in character, brought to settle once for all, so as to bind the whole world, the question of the legality of such corporate claim. *Coler* v. *Dwight School Twp.,* 3 N. D. 249; *State* v. *Ry. Co.,* 25

Pac. Rep. 296; *Stuart* v. *School Dist.*, 30 Mich. 69; *Mendenhall* v. *Burton*, 22 Pac. Rep. 558; *City of St. Louis* v. *Shields*, 62 Mo. 247; *Wason* v. *Magor*, 50 Pac. Rep. 741. *Richards* v. *Stark Co.*, 8 N. D. 392, in which the court held against the constitutionality of the act of 1895, was a direct proceeding by *quo warranto* attacking the right of Stark county to act as a corporation over the disputed territory.

WALLIN, C. J. This is an action in equity brought to enjoin the defendant, who is sheriff of Mercer county, from selling certain personal property belonging to the plaintiff, which property the defendant, under a warrant of authority issued by the treasurer of said county, had seized and was threatening to sell in satisfaction of certain alleged personal property taxes charged against the plaintiff on the tax lists of Mercer county. At the commencement of the action the District Court issued a preliminary injunctional order, whereby defendant was restrained from selling said property until the further order of the court. Later, and by an order dated September 8, 1900, the District Court dissolved and set aside the said preliminary order. Plaintiff has appealed to this court from said last mentioned order.

The facts in the record, which in our judgment, control the result in this court, are uncontradicted, and they may be briefly stated: The plaintiff's personal property in the years 1897 and 1898 was valued for taxation by one of the qualified and acting assessors of the county of Mercer, and in each of said years the county officials of Mercer county levied taxes for county revenue against the plaintiff, based on such assessments, and such taxes were later extended upon the tax lists of that county. The warrant of authority under which the defendant seized and distrained the plaintiff's property as above stated was issued by the treasurer of Mercer county, and delivered to the defendant, as sheriff of that county, under the provisions of § 1243 of the Rev. Codes of 1899, relating to the collection of delinquent personal property taxes. This section authorizes the sheriff, when a delinquent list is delivered to him, if the taxes are not paid on demand, to "distrain sufficient goods and chattels belonging to the person charged with such taxes, if found within the county, to pay the same with the said penalty," etc. In support of his contention the plaintiff claims that the taxes charged against him on the tax list of Mercer county are absolutely void, for want of authority to levy and extend the same, and this contention rests upon the following state of facts. It is conceded that at all times in question, and long prior thereto, the plaintiff resided on section 10 of township No. 142 N., of range 92 W., and that the property of plaintiff assessed by the assessor of Mercer county in 1897 and 1898 as above stated, was and ever since has been in the possession and custody of the plaintiff at his said place of residence. It is conceded that the plaintiff's place of residence was originally located within the county of Williams, which county is claimed by both par-

ties to have been an unorganized county adjoining the county of Mercer. The defendant, however, claims that said town and range upon which plaintiff resides, together with some 23 other congressional townships, were detached from Williams county in the year 1895 and incorporated within the county of Mercer by an act of the legislative assembly which is published as Chap. 25 of the Laws of 1895. But plaintiff meets this contention by the statement that said act of 1895 is unconstitutional and void, and has been so adjudged by this court in *Richard* v. *Stark Co.*, reported in 8 N. D. 392, 79 N. W. 863; and from this fact the plaintiff argues that it necessarily follows that the act of 1895 did not operate to detach the disputed territory from the county of Williams, and hence that the plaintiff still resides in Williams county, and has not resided in Mercer at any time. The defendant admits that the act of 1895 was held to be void by this court in the case above cited, but defendant claims that the holding of this court was erroneous, and that this court should in the present action reverse its ruling, and declare said act to be a valid and constitutional enactment. But there are objections to any such action on the part of this court which are insurmountable. Without in the least intimating that this court, as now constituted, would favor a reversal of the decision made in *Richard* v. *Stark Co.*, it seems entirely clear that in the present action which is a private controversy arising out of the seizure of plaintiff's property by the defendant, this court, under established rules of procedure, would be without power to make a ruling which would reverse a decision made in a proper action (viz. a *quo warranto* action), in which this court held in effect that the territory here in dispute was never detached from the county of Williams, and that the law assuming to do so was unconstitutional and void. It is, moreover, elementary that the rights of suitors are to be determined by the law existing when the cause of action arose, and such rights cannot, except as to mere rules of procedure and evidence, be measured by a different legal status, created while the action is pending, either by a judicial decision or by a statute. See *Conrad* v. *Smith*, 6 N. D. 337, 70 N. W. 815. The acts complained of in the case at bar, were committed on the 24th day of January, 1900, and this court, in deciding upon the issues involved, must therefore be governed by the law as it existed at that time.

But the defendant further contends that the void act of 1895 has been validated by subsequent legislation, and cites Chap. 57 of the Laws of 1899 to sustain his contention. This last named act took effect on March 9, 1899, and, if it operated to relate back and reenact the law of 1895, then defendant would be within the protection of the later law when he seized the plaintiff's property. But it is obvious that the act of 1899 did not operate to validate the void act of 1895. The act of 1899, including its title, is as follows:

"An act to settle disputes as to county boundaries and to confirm the acts of officials in counties that have exercised jurisdiction over territory not clearly within county boundaries.

"Be it enacted by the legislative assembly of the state of North Dakota:

"Section 1. That all territory within the state of North Dakota over which any county has exercised jurisdiction in civil and criminal matters and which has for all intents and purposes been treated as a portion of such county for not less than two years last past, shall be and the same is hereby declared a part of such county, and all of the official acts and doings of all state, county, township, school, district or other officials within such county in the exercise of such jurisdiction are hereby ratified in so far as to give such acts the same validity as they would have had if such territory had been a part of such county when such acts were performed."

Without commenting upon the fact that this statute embraces two distinct and independent subjects, both of which are expressed in its title, it will suffice to say that the legislature has omitted from the act any provision for submitting the same to the voters of the county concerned for ratification. This omission renders the act unconstitutional and void in so far as it attempts to change the boundaries of Mercer county, which county is conceded to be an organized county. See § 168, Const. To hold the act of 1899 to be a valid enactment would involve, among other anomalies, the absurd conclusion that the statute, which was invalid under one provision of the organic law, could be rehabilitated by a later statute, which is itself unconstitutional under another feature of the organic law.

But defendant's counsel contend further that the act of 1899 embraces a curative feature, and it does attempt to ratify the action of all officers over any territory within the state over which any county for a period of two years "last past" have exercised jurisdiction in both civil and criminal matters, and which territory "has for all intents and purposes been treated as a portion of such county." The defendant insists that the effect of this curative feature of the act of 1899 is to validate the action of the officers of Mercer county in all they did during the years 1897 and 1898, and hence that the taxes in question were, under the operation of this act, in all respects valid. But we deem it unnecessary in the present action to pass upon the interesting questions presented by this contention of counsel. The act of 1899, by its terms, is retrospective only. It does not look forward or attempt to cure or validate any action which might be taken by any officer or officers after the date of its passage. The curative feature of the act, therefore, cannot be made available as a shield for any action taken by this defendant, inasmuch as the acts complained of were not committed by the defendant until a date long subsequent to the approval of the curative act.

Another point made is that the officers of Mercer county, in levying and extending the county and other local taxes of 1897 and 1898,

were acting in entire good faith, and that said taxes were levied and expended long prior to the date at which said statute was held to be invalid by this court. Upon this foundation it is argued that all that was done by the officers of Mercer county in and about the laying of the taxes involved was done by those who were at the time officers de jure of Mercer county, and was done pursuant to a statute which was presumptively valid until the same was annulled by the judgment of this court. To this contention it may be observed that if the action of the officers of Mercer county in 1897 and 1898 in the matter of laying the taxes in these years can be sustained upon the theory that the same was taken pursuant to the terms of the act of 1895, and while the act was presumptively in force, still this theory would be unavailing to the defendant when interposed as a defense in the case at bar. At the time the defendant seized the plaintiff's property he was not, if he ever had been, an officer with jurisdiction as such over the territory in which the plaintiff resided, and in which the property was seized. Long prior to the date of such seizure, and in May, 1899, the act of 1895, under which the officials of Mercer county seek to justify their action, had been adjudged null and void by this court, sitting as a court of last resort. When that decision was handed down, and a rehearing of the case denied, the last vestige or color of authority conferred by the act of 1895 vanished and ceased to exist. No other or further rights could be based upon the statute, nor could the statute be made available to justify any action taken after the same had been annulled by a judicial determination which was final. It must follow that, after the case of *Richard* v. *Stark Co.* was decided, the officers of Mercer county were shorn of any color of authority, either as officers de jure or otherwise, over the territory lying within the boundaries of Williams county and here in dispute. To this should be added another consideration: Under the mandate of the statute the sheriff was required, by the very terms of his warrant to seize the property of the delinquent taxpayers named in the warrant, "if found within the county." Section 1243, Rev. Codes 1899. The sheriff, therefore, was in duty bound to confine his attempts to execute his warrant to the seizure of goods and chattels found within the territorial limits of his own conuty, viz.: the county of Mercer. It follows that, in seizing the plaintiff's property in the county of Williams, the defendant was not acting under the authority of the warrant under which he is seeking to justify the seizure. The warrant can furnish neither authority nor color of authority for a seizure made in Williams county. The sheriff, therefore, was a naked trespasser; and it cannot well be doubted that he seized the plaintiff's property, deliberately, and with full knowledge that his acts were illegal. It is entirely certain that he is chargeable with knowledge that his acts were done outside of his own county, and hence that the same were unlawful. The case of *Richard* v. *Stark Co.* was decided after the curative act of 1899 took effect by its terms, and said act is con-

clusively presumed to have been considered by this court in making said decision. In making the seizure, therefore, the defendant was simply a trespasser. Had the seizure been followed by an actual sale of the property, we know of no law whereby the defendant could have been compelled to turn over the proceeds of the sale to any officer in Mercer county. If said curative act could or did operate to validate the levy of the taxes, the same did not operate to validate an unlawful seizure of property located in another county. The act of validation looked backward, and not to acts done in the future.

The considerations already advanced lead to a matter which we regard as controlling. As has been seen, this action is brought in equity, and the relief sought is to enjoin the collection of an alleged tax. The plaintiff claims that such relief may be had in exceptional cases, and that the facts of the present case entitle it to be classed as an exceptional case. Upon the general question whether the injunctional remedy is available to restrain the collection of an illegal or void tax there is abundant authority, but as to the particular circumstances under which this relief will be granted there is a lamentable divergence of judicial opinion, and no end of direct conflict in the cases. It will be conceded, however, that this remedy is, as a general rule, withheld where it is sought to restrain the collection of a personal property tax. In such cases the remedies at law are ordinarily deemed to be adequate, and hence the general rule is that equity will not intervene in such cases. Upon this point, see Cooley, Tax'n, p. 772, and cases in note 2; *Clark* v. *Ganz*, 21 Minn. 387; *Society* v. *Austin*, 46 Cal. 417. The general rule is stated in 2 Dill Mun. Corp. (4th Ed.) § 924, as follows: "Equity will not, according to the rule generally adopted, restrain even an illegal and void tax assessment, where it is sought to be enforced against personal property only." See cases cited in note 1. Nevertheless courts of equity will intervene, even in personal property cases, upon a few grounds if in connection with such grounds the bill or complaint embodies other facts sufficient to bring the case within some acknowledged head of equity. Among the grounds are the following: (1) Where it appears that the property taxed is exempt from taxation; (2) where the tax is not warranted by any law; (3) where the tax is imposed by officers acting outside of their territorial jurisdiction; (4) where the statute under which the tax is levied is unconstitutional. And there are some other grounds deemed to be sufficient by some courts. We are of the opinion that the case at bar presents ample ground for equitable interference, so far as the mere matter of the tax is concerned. But it is our opinion that the complaint in this action fails wholly to bring the case within the cognizance of a court of equity. There are no facts averred showing that the remedies afforded at law are not adequate. Nothing in the way of facts is alleged tending to show that the seizure and sale of the plaintiff's property would re-

sult in irreparable injury to the plaintiff, nor are issuable facts set out showing that the intervention of a court of equity will or can result in preventing a multiplicity of suits. The only attempt made by the plaintiff to meet this imperative requirement of the law af pleading is found in the following language of the complaint: "That unless the defendant is restrained and enjoined from selling said property, the plaintiff will suffer irreparable injury; * * * That the plaintiff has no other plain, speedy, and adequate remedy; that the said county of Mercer is bankrupt and insolvent, and a judgment against said Mercer county can only be enforced, if at all, after a long number of years; and that its warrants are much depreciated from their face value in the market." We deem these averments wholly insufficient under the authorities. No issuable facts are stated tending to show an irreparable injury to the plaintiff, and no other averments of fact attempt to bring the case within the domain of equity. We regard the averment as to Mercer county both insufficient and unimportant. We think this court cannot assume, upon the facts averred, that said county is insolvent or bankrupt. Under the law, the presumption is very strong that organized counties in this state have resources necessary to meet their financial obligations. But, if it conclusively appeared that Mercer county is bankrupt, that fact does not show or tend to show that the defendant, who committed the trespass without even color of authority from Mercer county, is either insolvent or bankrupt. No fact is alleged bearing at all upon the vital matter of defendant's solvency or insolvency. The legal presumption is that he is solvent. This presumption must prevail in the absence of any contrary showing. It follows, therefore, upon the facts alleged, that the plaintiff has, presumptively, an adequate remedy at law for the trespass complained of. In tax cases the general rule is firmly settled that special facts must be inserted in the bill or complaint calling for equitable relief, and when none such are averred the suitor will be relegated to his legal remedies. See 1 Spell. Extr. Relief, § 658; 2 Desty, Tax'n, p. 667; Cooley, Tax'n, p. 772, and cases in note 2; *Wason* v. *Major,* (Colo. App.) 50 Pac. 741; *Transfer Co.* v. *Pendergas,* 16 C. C. A. 585, 70 Fed. 1; *Shelton* v. *Platt,* 139 U. S. 594, 11 Sup. Ct. 646, 35 L. Ed. 273; *Erskine* v. *Van Arsdale,* 15 Wall. 77, 21 L. Ed. 63. In this state the rule was recognized in an early case where real estate taxes only were involved. See *Farrington* v. *Investment Co.,* 1 N. D. 102, 45 N. W. 191. In that case a majority of the court held that, in addition to showing the illegality of a tax, it must appear that the plaintiff has brought himself within some recognized head of equity. If the rule was applicable in that case, it should for a much stronged reason be applied in the case at bar, where only a personal tax is involved. In this case there was a remedy at law. *Elevator Co.* v. *Bottineau Co.,* 9 N. D. 346, 83 N. W. 212.

We deem it proper to add a few words by way of explanation: In formulating this opinion, certain features of the case found in the

record have been passed upon, which, from the court's point of view, could have been left untouched without affecting the result in this court. Our reason for doing this is that we are very desirous of doing all that we legitimately can do to aid in defining and clarifying the political status of the extensive region of country which is involved in the subject matter of this litigation. In this view, we have emphasized the fact that the boundaries of the counties of Billings, Stark and Mercer were in no wise changed or affected by the act embraced in Chap. 25 of the Laws of 1895, and the additional fact is pointed out that the attempt to relocate the boundaries of said counties by the act embraced in Chap. 57 of the Laws of 1899 was also abortive. The lines of said counties remain intact, and exactly as they were before either of said statutes were enacted. We do not need the assurances of counsel to convince us that the present status in all the territory affected is, to say the least, serious. Indeed, it may be said that in some of its aspects the condition is a little short of chaotic. We would gladly do our part in restoring normal conditions, but the courts are powerless to establish county lines, or add to or take from the territorial area of counties. This can only be done by another branch of the state government. If the true interests of the people living in the regions affected demand that the areas of Billings, Stark and Mercer counties should be enlarged, that can be accomplished only by means of laws constitutionally enacted and ratified by the voters. Nor can this important work be accomplished by the mere makeshift of curative legislation. We can only hope that the decision of this case may aid in defining the situation, to the end that relief, if any relief is needed, may be sought for where it is possible to obtain it, viz: from the legislature. The order appealed from will be affirmed. All the judges concurring.

(86 N. W. Rep. 733.)

JAMES B. POWER *vs.* JOHN KITCHING.

Opinion filed May 17, 1901.

Statutes—Title—Too General.

Construing Chap. 158, Laws 1899: The title of said statute is as follows: "An act relating to titles to real property." This title is faulty, because too general, but the subject of the act is expressed in the title. It leads, and does not mislead. *Held*, that the law is not unconstitutional, under § 61 of the State Constitution.

Color of Title—Adverse Possession.

Under said Chap. 158, any person who claims title to real estate in this state may perfect his title thereto by taking and retaining adverse, open, exclusive, and undisputed possession of such real estate for a period of 10 years, and by paying all taxes assessed against the land for said period. The claim of title will suffice, under the statute, if the occupant claims title and ownership in good faith under an in-

strument which constitutes color of title, within the meaning of the law.

Tax Deed—When Sufficient Color of Title.

Held, that a tax deed in the form prescribed by § 1639, Comp. Laws 1887, issued by the county treasurer, and purporting to be based upon a tax sale of the land, and describing the same, is sufficient, under the statute, to constitute color of title.

Color of Title—Where Tax the Basis for Deed is Void.

Held, further, such deed will constitute color of title, under the statute, even if the tax upon which it was issued was void by reason of irregularities in the tax proceedings, and irregularities appearing on the face of the deed sufficient to render the deed void on its face will not operate to defeat the instrument as a color of title.

Tax Deed—Limitations.

The statute of limitations embraced in § 1640, Comp. Laws, does not control where the occupant of land claims title by adverse possession under Chap. 158, supra.

Journal Entries—Impeachment.

Held, that an enrolled bill properly authenticated by the officials of the senate and house of representatives, approved by the governor, and filed with the secretary of state, is conclusive upon the courts, and that the same cannot be impeached, by entries in the journals. Narregang v. Brown Co., (S. D.) 85 N. W. 602.

Appeal from District Court, Griggs County; *Glaspell*, J.

Action by James B. Power against John Kitching. From a judgment in favor of defendant, plaintiff appeals.

Affirmed.

J. E. Robinson, for appellant.

The act relating to titles to real property is void. § 61 Const.; *State* v. *Nomland*, 3 N. D. 427; *Richard* v. *Stark Co.*, 8 N. D. 392; *Divet* v. *Richland Co.*, 8 N. D. 65. The tax deed is void because not signed officially. The signing of the name without the official designation is the same as if the signature had been omitted, so far as any official validity is concerned. 2 Blackwell on Tax Titles, § § 865, 871. The deed shows the sale made on November 1, 1887, and not on October 3, 1887,—the day fixed by law. § 1621, Comp. Laws; *Salmer* v. *Lathrop*, 10 S. D. 224. The deed is not given under the seal of the county treasurer, and it does not recite facts showing that the sale was made to the county because there were no other bidders, who offered to pay the amount of the taxes. *Babbitt* v. *Johnson*, 15 Kan. 252; *Morton* v. *Friend*, 13 Kan. 339; *Magill* v. *Martin*, 14 Kan. 1610; *Martin* v. *Wilson*, 28 Kan. 513; *Salmer* v. *Lathrop*, 10 S. D. 226. Since obtaining the tax deed defendant has paid all the taxes charged against the land. But to recover the taxes paid he should have alleged and proved the assessment of the property for taxation and the levy of a valid tax; *Green-*

land v. *Swenson*, 4 N. D. 532; *O'Neil* v. *Tyler*, 3 N. D. 53. As the sale was not based on a valid assessment defendant had no lien on the land, and no right to pay even valid taxes so as to recover the same from the owner of the land. *McHenry* v. *Brett*, 9 N. D. 68, 81 N. W. Rep. 65.

Cole & Martinson and *Benjamin Tufte*, for respondent.

The title of the statute is sufficient to meet all constitutional requirements. *Nebraska Loan & Building Assn.* v. *Perkins*, 85 N. W. Rep. 67; *Martin* v. *Tyler*, 60 N. W. Rep. 392; *Gillett* v. *McCarthy*, 25 N. W. Rep. 637; *Plummer* v. *Kennedy*, 40 N. W. Rep. 433; *Fort Street Depot Co.* v. *Morton*, 47 N. W. Rep. 227; *Western Union Tel. Co.* v. *Lowry*, 49 N. W. Rep. 707; *Christie* v. *Inv. Co.*, 48 N. W. Rep. 94; *People* v. *Gobles*, 35 N. W. Rep. 91; *Bissell* v. *Heath*, 57 N. W. Rep. 585; *Finnegan* v. *Building Assn.*, 53 N. W. Rep. 1150; *State* v. *Paige*, 11 N. W. Rep. 495; *Ripley* v. *Evans*, 49 N. W. Rep. 904; *Canal Street Co.* v. *Paas*, 54 N. W. Rep. 907; *Lynott* v. *Dickerman*, 67 N. W. Rep. 1143; *Kleckner* v. *Clerk*, 63 N. W. Rep. 469; *State* v. *Bemis*, 64 N. W. Rep. 348; *State* v. *Moore*, 67 N. W. Rep. 56; *Affholder* v. *State*, 70 N. W. Rep. 550; *State* v. *Forkner*, 62 N. W. Rep. 772; *State* v. *Morgan*, 48 N. W. Rep. 314. The tax deed, though void in fact for want of a valid assessment, was *prima facie* good. The tax deed is color of title. *Adams* v. *Osgood*, 84 N. W. Rep. 257; *Lantry* v. *Parker*, 55 N. W. Rep. 552; *Murphy* v. *Doyle*, 33 N. W. Rep. 220; *Sater* v. *Meadows*, 27 N. W. Rep. 481; *Hunt* v. *Gray*, 41 N. W. Rep. 14; *Rickter* v. *Butler*, 48 N. W. Rep. 407; *Gattling* v. *Lane*, 22 N. W. Rep. 227; *Haywood* v. *Thomas*, 22 N. W. Rep. 460. It is immaterial under the statute of limitations, whether the tax deed be valid or void upon its face. It will in any event give color of title. If it were necessary to produce a regular deed and prove compliance with all the preliminary requisites, the statute of limitations would be unnecessary and useless. *Leffingwell* v. *Warren*, 2 Black. 559; *Edgerton* v. *Bird*, 6 Wis. 527; *Hill* v. *Kricke*, 6 Wis. 442; *Sprecker* v. *Wakely*, 11 Wis. 432; *Lindsay* v. *Fay*, 25 Wis. 460; *Oconto Co.* v. *Jerrard*, 50 N. W. Rep. 591; *McMillan* v. *Wehle*, 55 Wis. 685, 13 N. W. Rep. 694; *Whittlesey* v. *Hoppenyan*, 39 N. W. Rep. 355; *Deputron* v. *Young*, 134 U. S. 241, 10 Sup. Ct. Rep. 539; *Gatling* v. *Lane*, 22 N. W. Rep. 227; *Smith* v. *Shattuck*, 12 Ore. 362, 7 Pac. Rep. 335; *Harrison* v. *Spencer*, 51 N. W. Rep. 642; *Ricker* v. *Butler*, 48 N. W. Rep. 407; *Dickinson* v. *Breedin*, 30 Ill. 279; *Wright* v. *Mattison*, 18 How. 56; *Hall* v. *Law*, 102 U. S. 466; *Brooks* v. *Bruyn*, 35 Ill. 392; *Maxson* v. *Huston*, 22 Kan. 643; *Ensign* v. *Barse*, 107 N. Y. 329, 14 N. E. Rep. 400; *Thomas* v. *Stickle*, 32 Ia. 71; *Peck* v. *Comstock*, 6 Fed. Rep. 22; Desty on Taxation, Vol. II, 1884 Ed. § 149, p. 961; *Caruthers* v. *Weaver*, 7 Kan. 110; *Sapp.* v. *Morrill*, 8 Kan. 677; *Cain* v. *Hunt*, 41 Ind. 466; *Seigneuret* v. *Fahey*, 27 Minn. 60; *Buckley* v. *Taggart*, 62 Ind. 236; *Foster* v. *Lentz*, 86 Ill. 415; *Busch* v. *Huston*, 75 Ill. 343; *Stubblefield* v. *Borders*, 92 Ill. 279; *Piatt* v. *Goodell*, 97 Ill.

88; *Wistanley* v. *Meachem,* 58 Ill. 97; *Dalton* v. *Lucas,* 63 Ill. 337; *Webster* v. *Webster,* 55 Ill. 325; *Hardin* v. *Crate,* 60 Ill. 215; *Degraw* v. *Taylor,* 37 Mo. 310; *Moss* v. *Shear,* 25 Cal. 38; *Blackwood* v. *Van Vliet,* 30 Mich. 118; *Pepper* v. *O'Dowd,* 39 Wis. 538; *Dunphy* v. *Auditor General,* 82 N. W. Rep. 55.

WALLIN, C. J. The plaintiff in this action sues to recover the possession and the value of the use of a quarter section of land situated in the county of Griggs. It is conceded that plaintiff is the fee-simple owner of the land, unless the defendant has acquired title thereto by virtue of his claim of title pleaded in the answer to the complaint. The defendant alleges, in effect, that he is the owner and holder of a tax deed which describes the land, a copy of which is annexed to and made a part of the answer. Said deed is dated on November 2, 1889, and the same was recorded on said date. The deed named the defendant as grantee therein, and embraces a description of the land in question. It purports to have been issued pursuant to a tax sale made in Griggs county on November 1, 1887, for the taxes charged against the land in 1886. The deed is in the form prescribed by § 1639, Comp. Laws, and recites on its face that it is made "between the territory of Dakota, by Knud Thompson, the treasurer of said county, of the first part, and the said John Kitching, of the second part." Defendant alleges title and ownership under said deed, and that he has been in the quiet possession of said land under said deed ever since the 2d day of November, 1889, and that the said possession of the land by the defendant has been continuous from said date, and the same has been open, notorious, and peaceable. The answer further states that the defendant has regularly and fully paid all taxes assessed against said lands since said tax deed was issued to him. Plaintiff served a reply denying the allegations of the answer, and alleging that said tax deed is void on its face, and void because the land was not described in the assessment roll or tax list of 1886, and that no assessor's oath was annexed to the roll in said year. The defendant concedes that the assessment of 1886 is void, and the trial court so found. Upon these issues the case was tried to the court, and judgment was entered quieting the title in the defendant. Plaintiff appeals from the judgment, and demands a trial anew in this court. The evidence offered below is in the record, and we find no conflict in the same upon any point which we deem material to a proper decision of the case.

The tax deed was issued and recorded, as already stated, and the evidence shows conclusively that the defendant claimed title and ownership of the land under the deed. Defendant fenced a part of the land, and farmed another portion. He also placed buildings upon the land, and at the time of the trial resided upon the land. His occupation for farming purposes is shown to have been continuous for a period of over ten years after he received the deed,

and the evidence is undisputed that the plaintiff never attempted to interfere with the defendant's possession, and that plaintiff never claimed the title of the land, to defendant's knowledge, until this action was commenced on August 13, 1900. Defendant claims title under said deed, and by virtue of his continuous adverse possession of the land for a period of over ten years, together with payment of all taxes charged against the land during said period, and bases his claim of title upon Chap. 158 of the Laws of 1899. See Rev. Codes 1899, § 3491a. This statute was approved March 8, 1899, and took effect July 1, 1899. Under the terms of said statute the defendant's title to the land did not mature or become perfect until November 2, 1899. There was therefore a period of over seven months after the approval of the law by the governor, and a period of over four months after the law took effect, within which an action might have been brought against the defendant to determine his adverse claim of title. Said chapter, therefore, when applied to conditions established in this case, did not operate to unreasonably abridge the period within which an action might be brought to determine defendant's claim of title. A purchaser at a tax sale has no vested right in the statute of limitations in force at the date of sale. The statute may be changed and shortened by subsequent legislation, provided, always, that a reasonable time is allowed within which actions may be brought. See a full discussion of this point in *Osborne* v. *Lindstrom*, 9 N. D. 1, 81 N. W. 72, 46 L. R. A. 715; *Keith* v. *Keith*, 26 Kan. 26.

But appellant's counsel claims that the statute embraced in Chap. 158, Laws 1899, is unconstitutional, and hence void, under § 61 of the State Constitution, which is as follows: "No bill shall embrace more than one subject, which shall be expressed in its title," etc. In support of this point counsel cites a number of cases decided by this court in which this section has been construed. We think none of the cases are in point, because in all of them the facts are wholly unlike those in the case under consideration. For the purposes of a decision, each case must stand upon the language employed by the legislature, and must be governed by its own peculiar facts and conditions. But the authorities are uniform to the point that similar constitutional restrictions upon legislative action should have a liberal construction in the courts. A narrow interpretation of the language would require the title of all bills to embrace a statement of the details and particular features to be found in the body of the act. Any such rigid rule would, in our opinion, lead to abuses more intolerable than those which were sought to be corrected by the constitution. The object was to correct a certain abuse. In earlier times legislatures had not infrequently enacted laws under false and misleading titles, and thereby concealed from the people, as well as from members of the legislative body, the true character of laws so enacted. To prevent such an abuse, the constitution declares, in effect: (1) No law shall embrace more than one subject; (2)

such subject must be expressed in the title of the bill. Tested by this language, we are convinced that the statute in question is not obnoxious to the constitution. The title is certainly not a model. It is extremely general in its reference to the subject of the law, as the same is set forth in the body of the enactment. Nevertheless the title does refer to the subject of the enactment, and refers to nothing else and nothing different. The law itself deals with the matter of acquiring title to real estate in a particular manner, which is detailed in the body of the law. The title declares that the bill which embraces the law is "an act relating to title to real property." We think the subject of the law is "expressed in the title." True, it does not indicate the particular features of the law, but it certainly points out the subject of the law, and does so with accuracy. Hence this point will be ruled against the appellant.

Turning now to the statute under which defendant claims title, we discover from its language that the legislative purpose in its enactment was to validate or make perfect defective titles to land. It declares: "All titles to real property vested in any person or persons * * * shall be and the same are declared good and valid in law, any law to the contrary notwithstanding." This validation of title, however, can be accomplished only by fully meeting the requirements laid down in the statute. The benefits of the statute can be realized by only those "who have been or hereafter may be in the actual open, adverse and undisputed possession of the land under such title for a period of ten years and shall have paid all taxes and assessments legally levied thereon." As has been seen, the defendant in the case at bar has shown by undisputed testimony that he has fully complied with the requirements of this statute with reference to the duration and character of his adverse possession of the land, and also with respect to the payment of the taxes assessed thereon.

There remains therefore for consideration only one further question, viz: whether the tax deed under which the defendant claims that title has vested in him is a sufficient title to sustain the defendant's contention. This question, under the authorities, is one of no little difficulty. Judicial opinion upon it is abundant, but there is much conflict in the decisions of the courts, and no little confusion has resulted therefrom. In this court the questions for determination are entirely new, and we are therefore neither governed nor hampered by precedents of our own making. We remark, first, that the defendant, to sustain his tax deed, neither relied upon nor pleaded in bar of the action the special statute of limitations which was in force when the land was sold for taxes, and is found in § 1640, Comp. Laws. Such a defense, had it been pleaded, would have been unavailing under the facts in this record. It is conceded that the pretended tax for which the land was sold was never assessed. This defect in the tax proceedings is, under the repeated decisions of this court, one which goes to the groundwork of the tax,

and operates to defeat the jurisdiction of the taxing officers. A tax deed based on a sale for such pretended taxes, though regular on its face, would be voidable, and would be vacated in any action brought to avoid the same: nor would such a deed be protected by the statute of limitations. See *Roberts* v. *Bank*, 8 N. D. 504, 79 N. W. 1049; *Steigle* v. *Gates*, 9 N. D. 538, 84 N. W. 481. It would follow necessarily from these precedents that, if the defendant's claim of title rested entirely upon the validity of the tax deed set out in his answer, his claim would be worthless and held for naught. But defendant does not rest his claim of title solely upon the validity of his tax deed. His title depends upon a special statute which forms no part of the revenue laws of the state, and which nowhere refers in terms either to taxes or tax titles. The benefits of the statutes are intended for all who are vested with imperfect titles to real estate, and are not limited to persons holding tax titles. The statute (Chap. 158, Laws 1899) establishes a mode and manner of acquiring title to land which is new to this state. Under this statute, title is not acquired until each of three prescribed conditions are fully met: First, the claimant must be vested with some sort of title; second, he must occupy the land, under claim of title thereto, openly, adversely, and exclusively, for a period of ten years; finally, the claimant must pay all taxes assessed against the land for such period. The only difficulty presented in this case is to determine whether the defendant is vested with a sufficient title or color of title to the land to come within the benefits of the statute. At common law, as well as under the Code, of this state, a valid title to land is created by 20 years of adverse occupancy under claim of title. The claim of title, to be effectual, may rest upon a writing or upon a decree of a court, or may rest in parol, merely, and not upon any writing. See Rev. Codes 1899, § § 3491, 5191-5195, inclusive. But the payment of taxes is not essential in acquiring title at common law, or under the general statutes governing the matter of 20 years' adverse possession. But the legislature in the act of 1899 has seen proper, on the one hand, to shorten the period of adverse occupancy to 10 years, and, on the other, to add a new condition, viz: that of the payment of all taxes. The act of 1899 does not attempt to define the nature of the title upon which the claimant under the statute may rest as a basis upon which to build up a title by adverse possession and the payment of taxes. It becomes necessary therefore, to have recourse to general principles of law in solving this question. In this respect we have derived no aid from the brief of counsel for the appellant. Counsel has relied upon the claim that the act of 1899 is unconstitutional on the ground above indicated, and upon the further ground that the tax deed annexed to the answer is wholly void, and this for reasons dehors the deed, as well as upon the ground that the instrument, as counsel claims, is void upon its face. The tax deed was signed with the name of the county treasurer, but to this was not appended his official designation. The

deed was not under seal, except as follows: "(Seal.)" There were defects, also, appearing on the face of the deed, to which counsel calls attention, and which he claims operate to make the deed void on its face. Without deciding the question, we shall assume, for the purposes of this case, that the deed is void on its face. Conceding this fact, it is nevertheless true that the instrument is in the form of a deed of conveyance prescribed by the statute, and was made and delivered by an officer having general authority to sell land for delinquent taxes, and to execute and deliver tax deeds describing the land so sold. Such a deed was delivered to the defendant. It described the land, and purported, in terms, to convey a title in fee simple to the defendant. It is under such a deed that the defendant, a layman, claims title, and there is no suggestion in the record that the defendant has not at all times in good faith relied upon this deed as the basis of his claim of ownership. Is this deed sufficient to sustain the defendant's claim of title? Standing alone, the deed is worthless. But we are of the opinion, and shall so rule, that it is a sufficient color of title to serve as a basis upon which defendant, under the statute, can predicate a good title to the land. There are decisions, and those made by courts of high rank, holding that deeds of conveyance void on their face do not constitute color of title, and this is the holding in a number of states. See 25 Am. & Eng. Enc. Law. (1st Ed.) p. 704. But upon this point there is great conflict in the cases. We cite below some of the many cases which hold that instruments which describe the land and purport to convey the same will give a color of title upon which a claim of title by adverse possession may rest, even when for other reasons the instruments may be void. There seems to be great unanimity in the holdings that a tax deed regular on its face, even when voidable on account of fundamental defects in the antecedent tax proceedings, will constitute color of title, within the meaning of the law governing the acquisition of title by adverse possession. See Id., and authorities in note 2. But the cases are numerous which hold that an instrument void on its face for certain reasons may nevertheless be good as color of title on which to found a claim of title by adverse possession. See *Deputron* v. *Young*, 134 U. S. 241, 10 Sup. Ct. 539, 33 L. Ed. 923; *Gatling* v. *Lane*, (Neb.) 22 N. W. 227; *Hamilton* v. *Boggess*, 63 Mo. 233; *Wilson* v. *Atkinson*, 77 Cal. 485, 20 Pac. 66, 11 Am. St. Rep. 299; *Edgerton's Adm'r* v. *Bird*, 6 Wis. 527, 70 Am. Dec. 473, citing *Wright* v. *Mattison*, 18 How. 50, 15 L. Ed. 280; *Smith* v. *Shattuck*, (Or.) 7 Pac. 335; *Ricker* v. *Butler*, 45 Minn. 545, 48 N. W. 407; *Railway Co.* v. *Allfree*, 64 Ia. 500, 20 N. W. 779; *Stevens* v. *Johnson*, 55 N. H. 405. As to defective and void titles, see Sedg. & W. Tr. Tit. Land, § 780, and authorities cited in note 7; *Lantry* v. *Parker*, (Neb.) 55 N. W. 962; *Sater* v. *Meadows*, (Iowa) 27 N. W. 481; *Murphy* v. *Doyle*, (Minn.) 33 N. W. 221; *Hardin* v. *Crate*, 60 Ill. 215; *Piatt Co.* v. *Goodell*, 97 Ill. 88; *Harrison* v. *Spencer*, (Mich.) 51 N. W. 642; *Pillow* v.

Roberts, 13 How. 472, 14 L. Ed. 228; *Brooks* v. *Bruyn,* 35 Ill. 392; Black, Tax Titles, § 502. In the section last cited the author defines color of title as follows: "Any instrument having a grantor and grantee, and containing a description of the lands intended to be conveyed, and apt words for their conveyance, gives color of title to the lands described." The Suprme Court of the United States (*Wright* v. *Mattison,* 18 How. 56, 15 L. Ed. 283), adds the following: "The courts have concurred, it is believed, without an exception, in defining color of title to be that which in appearance is title, but which in reality is no title." Id. Many additional authorities might be cited, but, as already stated, there is a wide divergence of judicial opinion, and much conflict in the cases, upon the question of what constitutes color of title, and particularly whether a deed so irregular as to be void on its face will constitute color of title for the purpose of proving title by adverse possession. The deed in suit is one made *prima facie* evidence of title by statute. It has a grantor and a grantee. It contains a description of the land, and apt words showing an intent to convey. It came from an officer clothed with authority to sell land for taxes, and to give deeds therefor. We, therefore hold, under what we deem to be the better authority, that the deed in question is a sufficient color of title upon which defendant can build a claim of ownership by adverse possession. The judgment of the trial court will be affirmed. All the judges concurring.

ON PETITION FOR REHEARING.

The defendant asks for a rehearing in this court upon several grounds relating to points discussed in the original opinion in this case. As to such points, it is enough to say that the views of the court have undergone no change since the decision was handed down, and that the same, therefore, will be adhered to, without further attempts at elucidation. But the petition embraces one point not referred to in any way upon the argument in this court. The fact that the point is first mentioned in a petition for a rehearing would, alone, justify a denial of the petition. See *Sweigle* v. *Gates,* 9 N. D. 538, 84 N. W. 481. But in this case a denial of the petition may safely rest upon the merits. The petitioner claims that the statute referred to in the original opinion, and relied upon by the defendant (Chap. 158, Laws 1899), was never enacted or passed by both branches of the legislative assembly. It is conceded that a bill (No. 121) embracing the statute originated in the senate, and, after passing that body, that it was regularly transmitted to the house of representatives; and it is further conceded that the house journal shows that the bill was amended in the house, and after being amended was regularly passed by the house, and that upon the day of its passage in the house it was certified or messaged to the senate by the chief clerk of the house, and that such crtificate of the clerk stated, in effect, that the bill was returned to the senate "unchanged," thereby declaring that the bill had not been amended in

the house of representatives. It is further conceded that, after the measure was returned to the senate, it was regularly signed there, but the journal of the senate is silent as to any passage of the measure by the senate after its return from the house. It is noticeable that the petition nowhere states that said Chap. 158, as published in the Session Laws of 1899, is not a copy of an enrolled senate bill which is on file in the office of the secretary of state. The existence of an enrolled bill on file with the proper state official seems to be studiously ignored by the petitioner. Until the contrary is made to appear, courts are bound to presume that the published statute is in fact a true copy of the bill in the office of the secretary of state. In this case, however, the writer has been at pains to verify this legal presumption, and by a search has ascertained the fact that the published statute is a verbatim copy of the law on file, and that the original enactment is not only signed by the governor, but is further authenticated by the president and secretary of the senate, and by the speaker and chief clerk of the house of representatives. The petitioner reminds the court that the court is in duty bound to judicially notice the journals of both branches of the legislature; but the petition does not advise the court respecting any rule of law which is to govern courts in a case such as this, where the legislative journals are at loggerheads with each other, and where it will become necessary, in deciding a question of fact, to accept one part of the record evidence, and disregard another. That such a conflict of evidence exists in this case is manifest. The house journal shows affirmatively that the bill was amended in that body, and that it passed after such amendment. But the senate journal shows affirmatively that a sworn officer of the house—its chief clerk—certified that the bill was returned to the senate "unchanged," which means and must mean that the measure was not amended in the house. There is also strong negative evidence that the bill was not amended in the house. Had it been so amended, it would have been necessary to again pass it in the senate before it could take effect as a law, or be officially signed and sent to the governor for approval. But the senate journal is silent as to any such action after the bill was returned to the senate. The senate journal only shows that the bill was signed officially in the senate after being transmitted from the house. This silence of the senate journal, while negative in character, is nevertheless strong evidence that the bill never was amended in the house. We refer to these conflicts in the evidence, however, only to show that there is evidence to be found in the journals of the two houses bearing upon both sides of the question of fact to be determined, viz: whether the published law was in fact ever enacted by both branches of the legislature. The evidence of the journals being conflicting, it will be necessary to consider the evidential effect of the enrolled bill properly authenticated and on file with the secretary of state. Which shall prevail? Which possesses the greater probative force,—the conflicting evidence of the journals,

upon one side, or, on the other side, the positive evidence, consisting of the authenticated bill found in the hands of the official custodian of the laws? Many courts have attempted to answer this question, and judicial tribunals of the highest respectability have widely differed in their answers. But we are inclined to the opinion that the better reason, as well as the greater weight of authority, will be found to preponderate in favor of the evidence to be found in the bill itself, when properly authenticated. The Supreme Court of South Dakota, in a very recent case, has reached this conclusion; and in its opinion the court has exhaustively considered, and very ably discussed, the leading cases bearing upon the question. See *Narregang* v. *Brown Co.,* (S. D.) 85 N. W. 602; also page 605, Id. We are satisfied with the reasoning contained in the opinion in the case cited, and we shall therefore content ourselves with a citation of that case and the authorities found in it. The petition is denied. All the judges concurring.

(86 N. W. Rep. 737.)

TOWNSHIP OF NOBLE *vs.* OLE T. AASEN.

Opinion filed May 28, 1901.

Contempt—Change of Judge Not Allowed.

Contempt proceedings under Chap. 34 of the Code of Civil Procedure: In proceedings instituted under said chapter, the accused is not, upon filing affidavits showing the prejudice of the presiding judge, entitled to have another judge called in to determine the case; construing § § 5454a, 8120, Rev. Codes 1899. The proceeding is neither a civil nor a criminal action.

Appeal in Contempt Cases—Statement of the Case—Specification of Particulars.

Construing § § 5630, 5954, Rev. Codes 1899: *Held,* that appeals in contempt cases are not governed by § 5630, and the same are governed by § 5954 and by the provisions of Art. 8 of Chap. 10 of the Code of Civil Procedure. *Held,* further, that, in order to review the sufficiency of the evidence, the statement of the case must embrace specifications of particulars showing wherein the evidence is insufficient.

Interrogatories—Silence Not a Waiver.

Section 5942, Rev. Codes 1899, construed. *Held,* that the accused, whether brought into court by order to show cause, or under a warrant of attachment, unless he admits the offense charged, is entitled, under the statute, to have interrogatories filed "specifying the facts and circumstances of the offense charged against him." *Held,* further, that defendant's mere silence and failure to object to the proceedings upon the ground that none have been filed will not waive this statutory right. Whether an express waiver of interrogatories would defeat a conviction had without filing interrogatories is not decided.

Conviction Reversed for Want of Interrogatories.

In the absence of an express waiver of interrogatories an order of conviction will be vacated where none are filed.

Civil Contempt—Evidence—Damages.

Construing § § 5943 and 5944, Rev. Codes 1899: *Held,* that in cases of contempts of a civil nature, where the accused is found guilty of the offense charged, and the offense consists of acts or conduct calculated to defeat, impair, impede, or prejudice the rights or remedies of a party to an action or proceeding, but no actual loss or injury is proved, the court can impose a fine nevertheless, but the same cannot exceed $250 in addition to the costs and expenses of the proceeding. In such case the fine must be paid into the public treasury, and no part of the same can be paid to the moving party. *Held,* further, in cases of civil contempt, where an actual loss has been produced by the commission of the offense, and where the injured party has incurred costs and expense, that the court may order the offender to pay over to the injured party a sufficient sum to indemnify him. But the amount so ordered to be paid over must be ascertained from the evidence, and cannot be fixed arbitrarily at the discretion of the trial court. Accordingly, *held,* that the order in this case is illegal and void, for the reason that the same required the accused to pay over to the plaintiff the sum of $150, which sum was an amount fixed by the trial court arbitrarily, and the same was not based upon testimony showing either an actual loss or the amount of damage suffered, in dollars and cents; nor was there any evidence offered tending to show the amount of the plaintiff's costs or expenses.

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

Action by the Township of Noble against Ole T. Aasen, in which defendant was adjudged guilty of a civil contempt, and he appeals. Reversed.

M. A. Hildreth, for appellant.

Proceedings for the punishment of parties for contempt of court, are criminal in their nature. No presumptions or intendments are indulged in. Statutes regulating the procedure and the power of the court to punish must be strictly construed. *Boyd* v. *State,* 26 N. W. Rep. 925; *Burdick* v. *Marshall,* 8 S. D. 308; Ex parte Hollis, 59 Cal. 405; Ex parte Gould, 21 L. R. A. 751; In re Shortridge, 21 L. R. A. 755; *State* v. *Sweetland,* 54 N. W. Rep. 415; *Hawes* v. *State,* 64 N. W. Rep. 699. No interrogatories were filed in this proceeding as required by § 5942, Rev. Codes. This renders the proceedings absolutely of no effect. *Latimer* v. *Bermore,* 46 N. W. Rep. 4; *Pitt* v. *Davison,* 37 Barb. 98; *Jewett* v. *Deringer,* 27 N. J. Eq. 271, 4 Enc. Pl. & Pr. 796. In contempt proceedings the evidence must prove guilt beyond a reasonable doubt. *Hydock* v. *State,* 80 N. W. Rep. 903; *Passmore* v. *Williamson,* 26 Pa. St. 19; *Haight* v. *Lucia,* 36 Wis. 360; *Boyd* v. *United States,* 116 U. S. 616.

Morrill & Engerud, for respondent.

Defendant admits all the facts which plaintiff alleges as a contempt, and an allegation of new matter by way of excuse or avoidance is made. Under such circumstances interrogatories are not re-

quired. § 5942, Rev. Codes; *Pitt* v. *Davidson*, 37 N. Y. 235; *State* v. *Brophy*, 38 Wis. 413; *Smith* v. *Walker*, 66 N. W. Rep. 679; *State* v. *Mathews*, 37 N. H. 450; *State* v. *Ackerman*, 25 N. J. L. 209; *Yates* v. *Lunsing*, 6 Am. Dec. 280, In re Hummell, 9 Watts 416. If interrogatories were proper in this case the appellant is not in a position to urge their omission as error. This is a proceeding for civil contempt—a motion after judgment in the original action. § § 5934, 5937, Rev. Codes. Filing interrogatories is not a jurisdictional step. It is merely an act in the course of the trial after jurisdiction had been acquired. If the trial court for any reason erred in this respect, it was the duty of the party injured to direct attention to the error by proper objection pointing out specifically the alleged error. Failure to do so estops the injured party to complain on appeal. He is deemed to have waived all objections by his silence. *Kolka* v. *Jones*, 6 N. D. 461; *Marshall* v. *Andrews*, 8 N. D. 364; *Braithwaite* v. *Power*, 1 N. D. 455; *Little* v. *Little*, 2 N. D. 175; *Plummer* v. *Supervisors*, 46 Wis. 163; *Hooper* v. *Ry. Co.*, 37 Minn. 52; *Schustu* v. *Carson*, 14 N. W. Rep. 734; *State* v. *Leekman*, 49 N. W. Rep. 3; *Bailey* v. *Ry. Co.*, 3 S. D. 531. Failure to file interrogatories like any other error on the trial is waived unless objected to and cannot be urged for the first time on appeal. In re Nichols, 54 N. Y. 62; In re Chesseman, 8 At. Rep. 513; *Park* v. *Park*, 80 N. Y. 156; *Zimmerman* v. *State*, 64 N. W. Rep. 375; *People* v. *Court*, 147 N. Y. 290, 41 N. E. Rep. 700; *Bramon* v. *Central Bank*, 18 Ga. 361; *King* v. *Barnes*, 113 N. Y. 476, 21 N. E. Rep 182. The sufficiency of the evidence cannot be reviewed by this court on this appeal because the statement of the case does not specify any questions of fact for review nor does it demand a new trial of the entire case. *Security Imp. Co.* v. *Cass County*, 9 N. D. 553, 84 N. W. Rep. 477. If the proceeding is governed by the general statutes permitting review of questions of fact on appeal, appellant has not included in his statement of the case a specification of particulars wherein the evidence is insufficient to justify the decision. § 5467, Rev. Codes; *Banner* v. *French*, 8 N. D. 319. It is plain that the legislature intended that the moving party in contempt proceedings should be compensated for his outlay and trouble, and the amount of such compensation is left to the discretion of the court. § § 5944, 5949, 5950, Rev. Codes. This provision of our laws was taken from New York. Rev. Statutes of New York, § 2248. Under that law in the absence of proof of the amount of the loss or injury the fine is limited to $250.00 and costs. *Whitman* v. *Haines*, 4 N. Y. Supp. 48; *Holly Mfg. Co.* v. *Venner*, 26 N. Y. Supp. 581; *People* v. *Brown*, 46 Hun. 320; *Suidike* v. *Courson*, 23 N. Y. Supp. 314; *Moffat* v. *Herman*, 22 N. E. Rep. 287. Such has been the practice adopted by the courts which were not governed by statutes on the subject. In re North Bloomfield Co., 27 Fed. Rep. 795. The imprisonment clause in the order was proper. The imprisonment mentioned is not any part of the punishment and hence it was not neces-

sary to specify its duration. Whether he will be imprisoned or not depends upon whether he pays the fine. The duration of imprisonment depends entirely upon how long the defendant remains refractory. It could not exceed, however, one day for each $2.00 of fine. §§ 5945, 8295, Rev. Codes: *Commonwealth* v. *Perkins,* 16 At. Rep. 525; In re Whitmore, 35 Pac. Rep. 524; Ex parte Bugman, 26 Pac. Rep. 914. The order in the case at bar fully complies with the requirements of the New York rule. It states the guilt of the defendant. It states in detail the acts which the court found he had done in violation of the judgment. It does not state in express terms that these acts were calculated to or did impede or prejudice plaintiff's right or remedies, but that conclusion is necessarily implied from the facts. It was not necessary to recite the judgment or its terms because that appears of record and the court takes judicial notice of it. Ex parte Ah. Men., 19 Pac. Rep. 380; *Silver* v. *Traverse,* 47 N. W. Rep. 868; *Fisher* v. *Hayes,* 6 Fed. Rep. 63; *Easton* v. *State,* 36 Ala. 551; *Fisher* v. *Raab,* 81 N. Y. 235. The fine under the practice in New York goes to the relator. *King* v. *Flynn,* 37 Hun. 329; *Socialistic Pub. Co.* v. *Kuhn,* 58 N. E. Rep. 649.

WALLIN, C. J. In this proceeding the trial court found that the defendant was guilty of a contempt of court, in this: that the defendant had disregarded and otherwise violated a certain judgment entered in said court in the above entitled action. The proceeding was initiated by an order of the District Court, based upon two affidavits, directing the defendant to show cause on November 7, 1900, before said court, why the defendant "should not be adjudged guilty of contempt, and punished therefor accordingly." The order, with the affidavits, was served upon the defendant; and on the return day named in the order the defendant filed three affidavits with the clerk of the District Court, which the defendant relied upon as a basis for an application to said court to call in another judge to preside in the case. The matter came on to be heard before the District Court on November 8, 1900, counsel for both sides appearing. The record shows that counsel for the plaintiff stated that he appeared in support of an application for an attachment for contempt. The defendant's counsel stated that his appearance in the case was special, and that he claimed that the court could not then proceed to hear the application for an attachment, for the reason that the affidavits filed the previous day set out a state of facts which required the calling in of an outside judge to determine the issues presented. Counsel claimed that he was entitled to have another judge called, under either § 5454a or § 8120 of the Rev. Codes of 1899. This contention of defendant's counsel was overruled, whereupon the court postponed the further hearing of the matter until November 12, 1900. We are clear that the defendant was not entitled to have an outside judge called in to hear this proceeding. The sections of the Code relied upon by defendant, and above cited, have reference either to a civil or criminal action proper, and this

proceeding is neither the one nor the other. If the proceeding is to be regarded as a means of punishing a criminal contempt of court, it must be classed as a summary proceeding of a quasi criminal nature, and hence not a criminal action. *State* v. *Crum*, 7 N. D. 299, 74 N. W. 992. If, on the other hand, the proceeding is to be regarded as a remedy resorted to in the interest of a suitor in a civil action, it must, under the statute, be regarded as a motion made in an action. See Rev. Codes 1899, § 5937. If an attachment is issued in a contempt case, the matter at once becomes an original special proceeding, wherein the state is plaintiff and the accused is defendant. Id. The application to call in an outside judge was therefore properly denied.

The matter came on to be heard upon the merits on November 12th, at which time the parties were represented by counsel. The defendant filed certain affidavits in opposition to the affidavits filed in support of the motion, and the moving party then introduced certain oral testimony in rebuttal, whereupon the trial court entered its final order in the matter, from which the defendant has appealed to this court. Said order, so far as the same is material, is as follows: "The court finds that the said defendant, Ole T. Aasen, in violation of the terms of the judgment, planted trees and constructed an embankment of manure, straw, and earth below the culvert across the swale or water course mentioned in said judgment, thereby obstructing said water course. It is therefore ordered that said Ole T. Aasen, defendant, be, and he is hereby, adjudged guilty of contempt of this court, and that he pay to the plaintff a fine of one hundred and fifty dollars (which includes the cost); and in default of such payment said defendant will be committed to the jail of Cass county, and there be confined until discharged according to law. It is further ordered that said defendant forthwith remove the obstruction placed in said water course on his land, and restore the same, as near as possible, to its natural condition. Let judgment be entered accordingly." To this order an exception was saved. A statement of the case was settled, which embodies all the affidavits and evidence upon which said final order was made; and the statement also embraces exceptions to the findings of fact upon which the conviction is predicated, and also specifies a list of alleged errors of law. The statement contains no demand for a trial anew in this court either of the entire case or of any fact in the case.

Upon this record it is contended here that this court is without authority either to try the entire case anew, or any issue of fact in the case; and the further contention is made that, on account of an alleged insufficiency of the specifications in the statement, this court cannot, under the statute, proceed to inquire whether the findings of facts are justified by the evidence. These contentions of counsel present important questions of procedure, which have never before been passed upon by this court in a contempt case; and, with a view of settling the practice in such cases, it becomes necessary to put

a construction upon § 5954 of the Rev. Codes of 1895, which is as follows: "Appeals may be taken to the Supreme Court from any final order adjudging the accused guilty of contempt and upon such appeal the Supreme Court may review all the proceedings had and affidavits and other proof introduced by or against the accused. For the purpose of reviewing questions as to the sufficiency of the evidence a statement of the case may be prepared and settled within the time and in the manner provided in Article 8 of Chap. 10 of this Code. Such appeal shall be taken, except as in this section otherwise provided in the manner prescribed in Chap. 14 of this Code."

We remark first that in the absence of legislation it is very difficult to determine upon authority precisely what matters may be considered by a court of review in passing upon a conviction for contempt of court committed in an inferior tribunal. See 4 Enc. Pl. & Prac. p. 809. In the light of this conflict of authority, we may safely say that the section of the Rev. Codes above quoted was primarily intended to settle the question in this state, and that the same is disposed of by the declaration that "upon such appeal the Supreme Court may review all the proceedings had and affidavits and other proofs introduced by or against the accused." But in what form are the evidence and the procedure had and taken in the court below to be presented to this court? The statute furnishes an answer. It declares: "For the purposes of reviewing questions as to the sufficiency of the evidence a statement of the case may be prepared and settled within the time and in the manner provided in Article 8 of Chap. 10 of this Code." The article referred to defines a statement of the case, and prescribes the time and manner of its preparation, and includes a careful enumeration of the elements entering into the same. A statement may contain the whole evidence, or a part thereof. It may embrace specification of errors of law, or of particulars in which the evidence is insufficient to justify findings of fact. In brief, the article referred to in § 5954 is pointed out as the particular law which governs the preparation of a statement in all contempt cases arising under Chap. 33, Code of Civ. Proc., in which the appellant desires the Supreme Court to review questions "as to the sufficiency of the evidence." In such cases, therefore, where a review of the evidence is sought, the statement must specify "the particulars in which the evidence is alleged to be insufficient to justify the decision." Section 5630 does not apply in contempt cases. This is obvious, first, from the fact that a contempt matter, whether civil or criminal, is not an action, in the proper sense of that term; neither is it a proceeding in which an issue of fact is necessarily joined, although such issues may be joined in a contempt case. Nor is there any language in the statute regulating the procedure in contempt cases which directs this court to retry any issue of fact anew. This court has frequently held, in construing § 5630, supra, that it derives its authority to sit as a trial court solely from that section, and that it will refuse to try any case anew which does

not fall within the provisions of that section. The decision in the case at bar does not, however, turn upon any question as to the sufficiency of the evidence, and therefore we shall refrain from any discussion as to the sufficiency of the specifications embodied in the statement, and relating to the evidence.

Reverting to the record, the fact is developed that no interrogatories were ever filed in this case as prescribed by § 5942 of the Rev. Codes of 1895, and counsel for appellant strenuously contends that this omission is fatal to the conviction of the accused. Respondent's counsel combats this proposition by the argument that the omission to file interrogatories is a mere irregularity of procedure, and that the same is entirely cured by the omission of the accused to demand that interrogatories be filed, and by his further neglect to take an exception in the court below based upon such omission. The record shows no demand for interrogatories, and no exception based upon the failure of the trial court to cause the same to be filed. Counsel for the respondent claims that the accused practically admitted the "offense charged," and hence, under § 5942, no interrogatories were required. But, in our opinion, the record effectually refutes this claim. The first affidavit filed by the accused (that relating to calling in another judge) contained the statement that the accused had read the affidavits which embraced the grounds of the charge, and then proceeded to say that the accused "denies the same, and each and every part thereof"; and again, in the defendant's counter affidavit filed upon the merits at the commencement of the trial, the accused avers (referring to the affidavits of the plaintiff) "that he knows the contents of each and both of them, and that he denies the same, and each and every allegation and statement therein made and contained, except as herein specifically admitted." It is true that this denial was qualified, and further true that the accused proceeded to set out his version of the facts and matters set out in plaintiff's affidavits, and in so doing admitted or modified and explained some particular features of the charge against him. But he nowhere "admitted" the commission of the offense charged, but, on the contrary combatted the idea of his guilt with much vigor in the court below, and continues to do so in this court. There is no claim made that the defendant ever "admitted the offense charged," in terms. The question, therefore, is this: Did the defendant, by failing to demand interrogatories or to take exceptions to the proceedings against him, upon the ground that none were filed, waive this irregularity in procedure? Section 5942 is as follows: "When the accused is produced by virtue of a warrant, or appears upon the return of a warrant, or of an order to show cause the court or judge must, unless the accused admits the offense charged, cause interrogatories to be filed, specifying the facts and circumstances of the offense charged against him. The accused must make a written answer thereto under oath within such reasonable time as the court or judge allows therefor and either party may produce affidavits or

other proof contradicting or corroborating any answer. Upon the original affidavits, the answer, and subsequent proofs the court or judge must determine whether the accused has committed the offense charged." The authorities bearing upon the matter of filing interrogatories in contempt cases, while very numerous, are by no means uniform in their holdings. At the common law they were indispensable in all contempt cases, except where the commission of the offense was admitted; and when the answer of the accused squarely met and denied the subject matter of the interrogatories such answers were conclusive, and no further evidence could be received. In courts of equity, however, the answers were never conclusive. See 4 Enc. Pl. & Prac. 7956. In this state the statute has followed the chancery rule with respect to allowing the parties to offer proofs after the accused has answered the interrogatories required to be filed, and also has adopted the rule of the common law courts to the effect that interrogatories must be filed in all cases except where the offense is admitted. The section of the Code of this state last cited, while it is very similar to a section of the statute of New York is not identical with the New York enactment. In this state interrogatories are required to be filed as well where the accused is cited into court on an order to show cause as in cases where an attachment issues, and the defendant is arrested or appears pursuant to a warrant of attachment. In the state of New York interrogatories are not required by the statute where the accused appears in response to an order to show cause. See § 5942, supra, also 2 Stover's N. Y. Ann. Code, § § 2273, 2280. See, also, *People* v. *Pendleton,* 64 N. Y. 622. As has been said, respondent's counsel contends that the filing of interrogatories is a mere irregularity, and that the same has been waived by the defendant. Counsel cite the following cases in support of this contention: In re Nichols, 54 N. Y. 62; In re Cheeseman, (N. J. Sup.) 6 Atl. 513; *Park* v. *Park,* 80 N. Y. 156; *People* v. *Court of Sessions of Albany Co.,* 147 N. Y. 290, 41 N. E. 700; *King* v. *Barnes,* 113 N. Y. 477, 21 N. E. 182. In 54 N. Y. 62, an order to show cause for an attachment was served on the accused. On the return day the matter was heard without objection, and a reference was ordered to take testimony and report the same to the court. This was done, and after a further hearing in court the accused was found guilty of contempt, no attachment ever issued, and the court held that, the matter having been fully litigated on the merits, it was too late to raise the point that no attachment had issued. The matter of filing interrogatories was not referred to in the majority opinion. Two judges dissented, and held that the accused was entitled to have an attachment issue, and before conviction was entitled to have interrogatories filed. We think the reasoning of the dissenting judges was sound, but in no aspect is this case an authority sustaining the respondent's contention. Nor, in our view, is the New Jersey case (In re Cheeseman) very much in point. In that case the court was not governed by a statute. True,

it was a contempt case, but the procedure was controlled by rules of court; and these, it would seem, were little regarded, and were frequently disregarded, either in whole or in part. The court say (page 517, 6 Atl.): "But the practice has not been uniform. Sometimes a rule to show cause has been allowed without an affidavit, on a mere suggestion. Sometimes an attachment has issued without a rule to show cause." Again: "The penalty has been imposed on the offender's admissions made under the original rule, without either writ or interrogatories." It is therefore apparent that the practice in courts of chancery in the state of New Jersey is of little value to the courts of this state in construing the language of a carefully framed statute, which was evidently intended to cure irregularities and correct abuses of practice which have grown up in other jurisdictions. In *Park* v. *Park* the matter of interrogatories is not referred to in the opinion, and this is also true of the case of *People* v. *Court of Sessions of Albany Co.*, and *King* v. *Barnes*, supra. On the other hand, there is authority holding that the filing of interrogtories in cases arising under statutes which are practically identical with that above quoted from the Code of this state is essential, and that their omission is fatal to a conviction under the statute. In Michigan there is a similar statute. See 2 How. Ann. St. § 7275. Construing this statute the Supreme Court of Michigan held that the omission to file interrogatories was an irregularity calling for a reversal. See *Latimer* v. *Barmore*, 81 Mich. 592, 46 N. W. 1; also *Pitt* v. *Davison*, 37 Barb. 97. The case of *Jewett* v. *Dringer*, 27 N. J. Eq. 271, is somewhat in point, as illustrative of the importance of interrogatories in this class of cases even in that state.

But in this new state where as yet no uniform practice has grown up in the trial courts, and where this court is unhampered by precedents of its own making, we deem it to be an imperative duty to place such construction upon the legislation in this state governing the procedure in contempt cases as will meet and carry out the manifest purpose of the lawmaker. Section 5942 deals with and disposes of many features of the procedure in this class of cases about which the courts of this country have not been in accord. Its language is unambiguous, and covers all cases arising under Chap. 34 of the Code of Civil Procedure. Nor does this section discriminate between cases where the accused is cited into court by an order to show cause, and those where a warrant of attachment is issued. In either case, "unless the accused admits the offense charged," the court or judge must "cause interrogatories to be filed specifying the facts and circumstances of the offense charged." This requirement of the statute is mandatory in form, and it devolves upon the judge presiding a definite duty. When interrogatories are filed, and not before then, the defendant is required to "make written answers thereto under oath," and for this purpose he is allowed a reasonable time, to be fixed by the court. When issues are framed by filing answers to meet interrogatories, the statute declares that "either party may produce affidavits or other proof contradicting or corrob-

orating any answer." In deciding the case the court is required to consider, in addition to the original affidavits, the answers and other proofs submitted upon the issues made by such answers. The facts relied upon as constituting the offense of contempt of court may be few or many, and they may be submitted in one or in many affidavits; but the plainest principles of justice demand that the defendant should, before interposing his defense, be confronted with an accusation setting forth concisely the facts and circumstances constituting the offense charged. This rule is sustained by a great preponderance of authority, and this court has expressly recognized it in the case of *State* v. *Root,* 5 N. D. 487, 67 N. W. 590. This right is guaranteed by the statute from which we have quoted. It requires the court or judge not only to cause interrogatories to be filed but the same, when filed, must specify "the facts and circumstances of the offense charged." This is substantially the same requirement as that made in the statute governing informations and indictments in criminal actions. See § 8040, Rev. Codes 1899. This requirement is but just, and the necessity for it, in our judgment, is quite as important in trials for contempt of court as in other cases where criminal penalties are imposed. The offense is criminal with respect to its punishment, while the procedure is summary and does not embrace many of the safeguards—including that of a jury trial—which are secured to defendants in criminal actions proper. As to the nature of this offense, see the following cases: *City of New Orleans* v. *Steamship Co.,* 20 Wall. 387, 22 L. Ed. 354, and cases cited in *State* v. *Markuson,* 5 N. D. 147, 64 N. W. 934. Our conclusion upon this feature of the case is that the mere silence of the accused should not operate to waive the right secured to him by statute to have the facts and circumstances of the offense charged set out by interrogatories placed on file. In our judgment, the omission is fatal to the conviction, and we shall so rule. In the present case it is not necessary to decide whether, in a litigated case, a conviction could be sustained where the accused expressly waived the filing of interrogatories. But it must be understood that what we have said in this case must be limited to cases properly triable under Chap. 34 of the Code of Civil Procedure. Some cases may be governed by special provisions of the statute. See § 7605, Rev. Codes 1899.

But there is another feature of the case appearing in the record which in itself will require a reversal of the conviction. It appears distinctly upon the face of the order of conviction that this proceeding was regarded as a civil contempt in the court below, and was not instituted primarily to vindicate the authority of the law or the dignity of the court. The theory of the prosecution is that the acts of the accused, as set out in the affidavits of the plaintiff, are such as are calculated to, and did, defeat, impair, impede, or prejudice the rights of the plaintiff, as the same are set forth in the judgment previously entered in the civil action out of which this proceeding has

grown. The essence of the offense consists in the alleged disregard and violation of the mandate of the original judgment. The case, therefore, must be governed by § § 5943 and 5944 of the Rev. Codes of 1899. Section 5944 reads: "If an actual loss or injury has been produced to any party by the misconduct alleged, the court or judge shall order a sufficient sum to be paid by the offender to such party to indemnify him and to satisfy his costs and expenses instead of imposing a fine upon the accused; and in such case the payment and acceptance of such sum shall be an absolute bar to any action by the aggrieved party to recover damages for such injury or loss. When no such actual injury or loss has been produced the fine shall not exceed two hundred and fifty dollars over and above the costs and expenses of the proceeding. A corporation may be fined as prescribed in this section." The two sections cited, when read together, divide civil contempts into two classes, viz. those where it is proper to impose a fine as a punishment for contempt of the authority of the court; and, second, those where no fine can be imposed, but in lieu thereof the court is required to "order a sufficient sum to be paid by the offender to such party to indemnify him and to satisfy his costs and expenses." In the present case the sum of $150 (which includes the costs) was required to be paid over by the defendant to the plaintiff. It is true that the defendant was, in terms, required to "pay to the plaintiff a fine." But this language, in our judgment, does not change the essential nature of the adjudication. The money was not to be paid into the public treasury and hence it was not a fine, in legal contemplation. Hence, under the statute of this state, the term "fine" is a misnomer in the connection in which it is found in the order of conviction. It is conceded the record discloses the fact that no testimony was offered at the trial touching the amount of the pecuniary damages resulting to the plaintiff from the acts of the accused which are set out as a basis of this proceeding, nor was testimony offered showing the amounts of plaintiff's costs or expenses. The court was therefore not advised by the evidence what sum of money would be adequate to indemnify the plaintiff for its injuries or for its costs or expenses. Upon such a state of evidence, if the defendant was guilty of any contempt of court, it was the duty of the trial court to have imposed a fine, under the authority found in the last sentence but one of § 5944. Under the evidence, no power was vested in the court to enter an order directing the accused to pay any particular sum over to plaintiff. The sum directed to be paid over necessarily represented an amount which the trial court fixed arbitrarily as an amount which would, in the opinion of the court, indemnify the plaintiff for his injuries. In our opinion, the law of this state does not, in contempt proceedings, permit sums of money in amounts arbitrarily fixed by the court to be paid over by one suitor to another under the compulsion of an order of court. The amount to be paid over must in some way be ascertained judicially, and this means that the same must be ascertained by a consid-

eration of testimony bearing upon the matter. It is true that an exact measure in money in cases of unliquidated damages is difficult to find, but this difficulty is met in all cases where suit is brought for unliquidated damages. Counsel for respondent cites § § 5944, 5949 and 5950 in support of his contention that it was the legislative purpose, in contempt proceedings, to compensate the moving party for his "outlay and trouble, and the amount of such compensation is left to the discretion of the court." Sections 5949 and 5950 have reference only to civil actions brought upon undertakings given in contempt proceedings, and hence are not in point. Such actions are based upon obligations to pay a specified sum. Nor do these sections provide that the moving party shall receive any sum for indemnity in excess of the amount of his proved loss, with costs and expenses added. Counsel cite § 2284 of Stover's N. Y. Ann. Code, supra, and argues that the provisions of the Code of this state above cited are substantially the same. To this proposition we cannot assent. The Code of this state omits some important language found in § 2284. The sections from the Rev. Code were so framed as to accentuate the distinction between cases where an actual loss is shown and those where none is shown. We have read the cases cited by respondent's counsel on this feature of the case, and we think they fail entirely to sustain his contention. Besides, the language we have quoted from our Code is plain, and needs no aid from rules of construction to make its meaning clear. But see *Coal Co.* v. *Hecksher,* 42 Hun. 535; *Manufacturing Co.* v. *Venner,* (Sup.) 26 N. Y. Supp. 581; *Meyer* v. *Dreyspring,* (City Ct. N. Y.) 23 N. Y. Supp. 315, and cases cited; *King* v. *Flynn,* 37 Hun. 329. All of the cases cited support the rule that, where there is an actual loss occasioned by the acts of the contemnor, the amount thereof must be ascertained by proof, and that the court cannot fix such amount without proof. But, as has been stated, the Code of this state is quite clear and unambiguous in this regard, and the same differs in important particulars from the Code of New York. It follows from what has been said that the order of conviction which is appealed from must be reversed. It will be so ordered. All the judges concurring.

(86 N. W. Rep. 742.)

FIRST NATIONAL BANK OF ST. THOMAS *vs.* WILLIAM FLATH, *et al.*

Opinion filed May 29, 1901.

Mortgage—Payment.

The evidence in the case reviewed and considered, and *held* that the mortgage in suit was not paid as a matter of fact or by operation of law.

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

Action by the First National Bank of St. Thomas against William Flath and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Templeton & Rex, for appellants.

Bosard & Bosard, for respondent.

MORGAN, J. This is an action for the foreclosure of a real estate mortgage. It was given by William Flath and Jemima Flath to one William Bradley on the 6th day of July, 1893, to secure the payment of a promissory note given on that day for the sum of $1,250, due January 1, 1894. This mortgage was duly assigned to T. A. Miller on December 24, 1897, and by said Miller assigned to the plaintiff on April 12, 1899. Payments are alleged to have been made on the note as follows: All interest due on said note up to January 15, 1900, and the sum of $41.53 paid on the principal on January 15, 1900. These are the only payments credited on the note so far as the allegations of the complaint are concerned. The defendants interposed an answer alleging (1) that such note and mortgage are fully paid; (2) that it was not the intention of T. A. Miller to assign to the plaintiff any interest in said mortgage and that the plaintiff never took or received such assignment with the intention of acquiring any interest in such mortgage, but took the same for the purpose of cheating and defrauding the defendants. The trial court found in favor of the plaintiff. The defendants appeal, demanding a trial *de novo.* The defendants Anton Flath and John Birkholz are made parties as subsequent purchasers and incumbrancers of said real estate. The answer denies that their interests in such real estate are subsequent to that of the plaintiff. Other material facts appear from the evidence, substantially as follows: That there was a prior mortgage on the land embraced in the mortgage in suit in favor of the Middlesex Banking Company for $2,000, which was, in the fall of 1897, like the mortgage in suit, past due. There was then due thereon about $2,259. The mortgage in suit was owned by T. A. Miller at this date. About this time—that is, in the fall of 1897—William Flath and the firm of A. L. & T. A. Miller talked over among themselves the making of a loan on this land, through the Millers as agents, for a sum sufficient to take up the incumbrances on this land, —that is, these two mortgages,—and the Millers were then authorized, to negotiate such a loan, which they did with the Fargo Loan Agency. The Millers learned soon after this time, through Mr. Flath himself, that he had made arrangements for making the loan through Mr. Leistikow, and that he would not take the loan for which the Millers had negotiated with the Fargo Loan Agency. Upon hearing that Flath would not take the loan thus arranged for by the Millers, T. A. Miller immediately commenced a foreclosure of the mortgage in suit, and notice of such foreclosure was published in a newspaper. For some reason, probably because the loan he had arranged for through Mr. Leistikow was not large enough to take up the two mortgages on the land, Mr. Flath abandoned the Leistikow loan, and went back to the Millers, and the arrangement originally made between them as to making a loan through the Fargo agency for $3,500 was put into operation and actually consummated, and the

foreclosure proceedings were abandoned. The date of this loan was January 31, 1898. The $3,500, for which a note and mortgage were executed by Flath and wife to the Fargo agency, came into the hands of the Millers some time in February, 1898, the precise date not clearly appearing in the evidence. Upon receipt of this sum the Millers paid to the Middlesex Banking Company $2,259, the full amount of its mortgage. At this time there was due on the mortgage held by T. A. Miller the sum of $1,327.95, so that there was not enough left of the $3,500 loan to pay the Miller mortgage within $86.95. Some time about March 1, 1898, the Millers rendered a statement to Flath respecting the loan of $3,500, and the disposition of that money. This statement is known as "Exhibit 5," and is as follows:

EXHIBIT 5.

William Flath Loan Account A. L. & T. A. Miller.

Cash to Hager, mortgage notice	$ 3.65	
Amt. due Bradley Mtg. on 1-31-98, date new loan	1,327.95	
Cash paid old loan	2,259.00	
Cash paid to J. A. Dunn	49.75	
To cash from new loan		$3,500.00
Balance due A. L. & T. A. Miller		140.35
	$3,640.35	$3,640.35

This statement pertained exclusively to the loan of $3,500. The sum therein stated as due the Millers ($140.35) was made up of the sum of $3.65 paid by them on the foreclosure that had been commenced and withdrawn, $49.75 which they had paid on the Leistikow mortgage at Flath's request, and the $86.95 heretofore mentioned. This statement was taken to, and shown to, Mr. Flath by A. L. Miller early in March. There is a dispute between Miller and Flath as to what was said when this statement was presented. Miller says that he then told Flath that this was to show the state of the account, and was not presented as a settlement, but to show what the deficiency was, and to show "how the matter would stand if settlement was made." Flath denies that Miller so stated, and claims that he requested Miller to apply what money they had in their hands as a part payment upon the mortgage in suit. As to whether Flath directed that this money be applied on the Miller note there is a conflict. Flath said he did, and Miller denies that he did. If such direction was given by Flath, it was before the accounts were turned over in June. Up to June 24th, when the mortgage in suit was made an inferior lien to the $3,500 mortgage, the Millers could not be expected to apply only a part of what was due on the T. A. Miller mortgage, and Miller was not compelled to release his mortgage until it was wholly paid. If the Millers had allowed a part payment to be made on this mortgage, to the extent of the balance left of the $3,500, the Fargo Loan Agency would not have had a first mortgage, which it was entitled to. If Miller had satisfied his mortgage before it was fully paid, he would have had no security for $140.35 due him, and it is not reasonable to suppose that the Mil-

lers would have consented to any arrangement that would not give the Fargo Loan Agency a first mortgage, and at the same time not give Miller his money in full or security for it. It is claimed by appellants that Exhibit 5 shows upon its face that the full amount due was actually applied on the note and mortgage in suit. We do not so understand it, when considered by itself, independently or in connection with the evidence. It purports to show on its face the amount due on the mortgage, and what disposition had been made of the money on the $3,500 loan, so far as disposed of. If it was intended as a statement of a settlement, the sum stated to be due would naturally have been expressed as paid to T. A. Miller, and not as a sum due on that mortgage. We think that Exhibit 5 shows upon its face that it was drawn up and shown to Flath as a statement of the condition of the account only. The language of it is corroborative of Miller's evidence concerning it. From the time when Exhibit 5 was presented, Flath and the Millers had no negotiations nor conversations concerning the note, the mortgage, or the deficiency until about June 6th following. On this day Flath turned over to the Millers some book accounts to "pay some accounts that I had been owing some wholesale houses down below, together with this old debt of theirs. I mean the one hundred forty dollars and thirty-five cents." Flath thus states the purpose for which these book accounts were put into the hands of the Millers. The Millers gave him a receipt for such book accounts on June 6th, reading as follows, and known as "Exhibit F.": "Received of Wm. Flath his book accounts to be held as collateral to the following claims, and, when fully paid, the balance of the book accounts are to be returned to the said Flath, viz." Here follows a list of the accounts thus secured to be paid, amounting to $1,231.50. These embrace an account in favor of the Millers of $285, which sum includes the deficiency item of $140.35, hitherto described. Matters now ran on until June 24th without anything being done between these parties concerning either the mortgage, the note, or the accounts. On June 24th, T. A. Miller executed and acknowledged an instrument to the Fargo Loan Agency, wherein he waived the lien of his mortgage so far as the $3,500 mortgage was concerned, and therein stipulated that the $3,500 mortgage of said Fargo Loan Agency should be a first lien on the lands mortgaged, and that his mortgage should be subsequent thereto. In this instrument there is the following recital: "Whereas, the said T. A. Miller, for good and valid reasons, does not now desire to release the mortgage made by said Flath and wife to Bradley, and by him duly assigned to said Miller, as to said Flath and wife, but does desire to release the same as to said Fargo Loan Agency," etc. In testifying concerning this instrument, A. L. Miller says: "It was six months after the loan was started, and still it was incomplete, because Mr. Flath could not get the money to straighten up the balance. That was the reason the waiver was made to hold the money on the Bradley mortgage, and still to

complete the loan. We did not recite that we held the security for any indebtedness. We were dealing with the Fargo Loan Agency, at his request, and it was not their business what we were keeping it for." By requesting this instrument to be executed Mr. Flath recognized the mortgage as still unpaid, although he testifies that it was paid some months before this date.

The accounts turned over by Flath on June 6th amounted to about $2,300. On June 24th, the date of making the so-called "waiver," there had been collected on these accounts by the Millers a very few dollars only,—not over $15, as appears from the statement rendered. Up to the time of trial $313.39 had been collected on these accounts, and this sum had been paid out by the Millers according to directions given by Flath. This sum was paid out by the Millers upon accounts in their hands as collections against Flath, and was paid out under his directions. None of this sum was applied on the Miller mortgage, nor did Flath direct that any of this sum be applied on the Miller mortgage in particular.

The next transaction between these parties respecting this mortgage was on September 15, 1898. At this time the following writing was signed by Mr. Flath, on the same sheet of paper that Exhibit F was written on: "It is hereby understood and agreed by and between Wm. Flath and A. L. & T. A. Miller that a certain note for $1,250, dated July 6th, 1893, and due January 1st, 1894, with 12 per cent. interest after maturity, payable to the order of William Bradley as payee, and signed, executed, and delivered by William Flath and Jemima Flath, his wife, as makers (with payments on the said note as follows: Sept. 26, 1894, $253.55; Nov. 28, 1895, $50; Dec. 20, 1895, $100; Feby. 26, 1896, $75), which said note was secured by real estate mortgage recorded in the office of the register of deeds of Pembina county, North Dakota, July 11th, 1893, at 8 o'clock a. m., in Book 54, page 208, and which said note and mortgage were by the said William Bradley, for a valuable consideration, duly assigned to T. A. Miller, one of the members of the firm of A. L. & T. A. Miller, and that said note and mortgage shall be held as collateral security in addition to the other security held as collateral to secure the payment of the eight claims listed above on this sheet. St. Thomas, N. D., Sept. 15th, 1898. William Flath." At the date of making the contract of September 15th the Millers had not collected but a trifling part of the book accounts, and not enough to make up the amount that was required to fully pay the Miller mortgage, as computed in March previous. Mr. Miller testifies as to the signing of the stipulation (Exhibit F) as follows: "I told him, if the matter was going to run along in the condition it was any longer, that we must have other security, and have the arrangement in black and white. I don't know as I used these words, but I gave him to understand that it was our intention; that we would not carry it any longer in the condition that it was in. I showed him the Bradley mortgage and the indorsements on the note, and told him what we

wanted, and I drew up that stipulation, and he signed it." Between the date of making this contract (Exhibit F) and June, Miller had paid out, at Flath's request, considerable money upon accounts owed by Flath and statements rendered Flath of such payments. In these statements of the condition of the accounts between the Millers and Flath, which statements were rendered up to November, 1898, the item of $140.35 was included as due from Flath to the Millers. When these statements were rendered collections were being made, and new payments were made by the Millers at Flath's request. The result was that the state of the accounts between them was constantly changing, rendering such statements necessary to give Flath a correct understanding as to how matters stood. We do not therefore, think that because the Millers stated the $140.35 item in these accounts as so much due them can be taken to show that the mortgage was fully paid or that this item was due as an account simply. Flath was in embarrassed circumstances financially, and was being pressed for payment of money due from him. It was natural that he should consent to this arrangement of September 15th as expressed in Exhibit F, in order to satisfy the Millers, who had been previously advancing money for him without written authority. It would not be natural nor usual that Miller, with full knowledge of Flath's embarrassed financial condition, should pay out money on behalf of Flath, and release his security, and accept Flath's personal obligation for his reimbursement. Looking at all these transactions with a view of determining what two business men would naturally do under such circumstances, we are forced to conclude that it was not the intention of these parties to apply the money received from the Fargo Loan Agency on the note in suit, and that they intended a contrary disposition of such money. The agreement of September 15th was a positive acknowledgment on the part of Flath that the note and mortgage were still unpaid. His statement now that this note was paid long before this is directly contradicted by this writing and by his conduct generally. This is in corroboration of Miller's testimony, and the facts considered altogether impress us with the belief that this note and mortgage are still unpaid, except as to payments indorsed on the note. As bearing upon the question as to whether Mr. Flath thought that the mortgage in suit was paid or not, it is an undisputed fact in the case that he never mentioned or demanded a release of the mortgage, nor a surrender of the note. If he considered this debt paid, it would seem that during some of these numerous transactions he would have stated that this note was paid. On the contrary, he did what was inconsistent with such an idea We are satisfied that he directed or consented to a different disposition to be made of the money that was in the hands of the Millers. That he could do so could not be reasonably questioned, and is not questioned. That it was in his interest to do so appears from the evidence, and strengthens the conclusion that he intended that this money should not be applied on the mortgage. On consideration of

all the evidence, we fail to find that Flath has succeeded in showing that T. A. Miller ever received the money due on his mortgage, and it is not shown that the mortgage was paid as a matter of fact or by operation of law. The burden was on him to show that the note was paid. He has not sustained it in any way, but has failed to do so.

Our conclusion that the note and mortgage in suit were not paid renders it unnecessary for us to determine whether Exhibit F extended or revived the note and mortgage, if the evidence had shown that they were paid. The defendants Anton Flath and John Birkholz, having acquired their interests in the land involved while the mortgage was unsatisfied and appeared of record, had notice of its existence, and their rights are subject thereto. The judgment is affirmed. All concur.

(86 N. W. Rep. 864.)

FIRST NATIONAL BANK OF ST. THOMAS *vs.* WILLIAM FLATH.

Opinion filed May 23, 1901.

Action on Note—Burden of Proof—Bona Fide Purchaser.

Where, in an action on a negotiable note by an indorsee, the burden to prove a good faith purchase has shifted to the plaintiff, by the introduction of evidence showing fraud between the original parties thereto, such burden is sustained prima facie, by showing a purchase for full value and before maturity.

Knowledge of Suspicious Circumstances Will Not Defeat Recovery by Indorsee of Note.

Good faith in the purchase of a negotiable note does not require the purchaser to make inquiries as to the purpose for which it was given or as to the existence of possible defenses. Bad faith is imputed only from knowledge or notice of the fraud or defenses. Mere knowledge of suspicious circumstances will not defeat a recovery.

Indorsee in Due Course.

It is *held* that the plaintiff is an indorsee in due course, and as such holds the note in suit freed from defenses existing between the original parties.

Note and Mortgage Securing it—Not One Contract.

Section 3900, Rev. Codes, which provides that "several contracts relating to the same matters between the same parties, and made as parts of substantially one transaction, are to be taken together," construed and *held* to establish a rule of interpretation merely, and that it does not unite several contracts into one contract. Under said section, a real estate mortgage and the note secured thereby do not constitute a single contract, but remain as separate contracts, except for purposes of interpretation.

Mortgage Protected in Hands of Bona Fide Purchaser.

In this state a mortgage securing a negotiable note shares the same immunity from defenses between original parties as the note secured.

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

Action by the First National Bank of St. Thomas against William Flath and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Templeton & Rex, for appellants.

Bosard & Bosard, for respondent.

YOUNG, J. Plaintiff seeks in this action to foreclose a mortgage upon certain real estate situated in Pembina county. The mortgage was executed and delivered by William Flath, one of the defendants herein, to William McBride, and was assigned by the latter to the plaintiff. The interest of the other defendants, Anton Flath and John Birkholz, in said real estate was acquired subsequent to the execution and recording of the assignment of the mortgage to plaintiff, and is not claimed to be in any way superior thereto. The judgment of the trial court was in all things favorable to plaintiff. Defendants appeal from the judgment, and demand a review of the entire case in this court.

The mortgage in suit was executed on June 2, 1898, to secure a promissory note for $1,200, of even date therewith, payable to the said William McBride, which note by its terms bore 12 per cent. interest from the date of its execution, and became due on November 1, 1898. On July 11, 1898, McBride sold and indorsed said note to plaintiff, and on the same day executed and delivered to plaintiff a written assignment of the mortgage securing the same, which is the mortgage involved in the action. Both the mortgage and the assignment were properly recorded at the date of their execution. There is no pretense that the note has been paid to the bank, but it is claimed by the defendants, and the evidence fully sustains them, that as to McBride they have a defense to it. It appears that McBride was surety for Flath on a number of notes which the latter owed to Noyes Bros. & Cutler, amounting in all to $1,176.80. The note and mortgage in question were given to McBride by Flath to indemnify him against liability arising out of such suretyship, and for no other purpose whatever. A separate written instrument was executed and delivered by McBride to Flath contemporaneously with the execution of the note and mortgage, which stated such purpose, and contained the further agreement that the mortgage was to be satisfied when the Noyes Bros. & Cutler notes were paid. It is undisputed that these notes have been paid, and that the payments were all made by Flath, except as to the sum of $50, as to which there is a conflict in the testimony. It is entirely clear, on this state of facts, that McBride could not recover were he the plaintiff in this action, except perhaps the disputed $50 payment. This is very properly conceded by counsel for plaintiff. But it is claimed that the plaintiff is an indorsee in due course, and that it holds the note in question entirely freed from the defense interposed. This presents the first question for consideration, namely, is the plaintiff an indorsee in due course? If so, the defense is not available.

Section 4884, Rev. Codes, was in force when the note was executed. It reads as follows: "An indorsee in due course is one who in good faith in the ordinary course of business and for value before its apparent maturity or presumptive dishonor and without knowledge of its actual dishonor acquires a negotiable instrument duly endorsed to him, or endorsed generally, or payable to the bearer, or one other than the payee, who acquires such an instrument of such an indorsee thereof." Section 4885, Rev. Codes, being the section succeeding that just quoted, provides that such an indorsee acquires absolute title. The note in question is negotiable in form. It was properly indorsed, and was transferred to plaintiff before it was due. Under the general rule the burden would rest upon the defendants to show that plaintiff is not a good-faith purchaser, but it is contended that, under the facts of this case, the burden is shifted to plaintiff to establish its good faith. There is no doubt that, when fraud in the inception of a note is shown, the holder who claims to be a good-faith purchaser has the burden of showing it; that is, the burden shifts. This court has so held in a number of cases. See *Vickery* v. *Burton*, 6 N. D. 245, 69 N. W. 193; *Knowlton* v. *Schultz*, 6 N. D. 417, 71 N. W. 550; *Mooney* v. *Williams*, 9 N. D. 329, 83 N. W. 237. We find it unnecessary to decide whether the facts shown in this case are sufficient to cast the burden upon plaintiff to show its good faith. We will assume, for the purpose of the decision, that the rule is the same here as in cases where there is fraud in the inception or fraud in delivery of the note. The result is the same. The burden has been sustained. As has been stated, the note was purchased before maturity, and it was properly indorsed, and the evidence shows that plaintiff paid full value for it. This proof raises a presumption that it purchased in good faith and without notice of the alleged fraud. *Bank* v. *Sargent*, 85 Me. 349, 27 Atl. 192, 35 Am. St. Rep. 376. "The burden is *prima facie* sustained by the indorsee by showing that the note was indorsed to him for value before maturity. Nothing else appearing, a presumption arises that he purchased the note in good faith, without notice of the fraud." *Kellogg* v. *Curtis*, 69 Me. 212, 31 Am. Rep. 273. See, also, *Bank* v. *Foote*, 12 Utah, 157, 42 Pac. 205. The reason for the presumption is that it is not likely one would give full value for a note which he believed to be fradulent, taking the hazard upon himself, and because it would be difficult to prove good faith in any other way. Unless there are circumstances which seem to bring home notice of the fraud or illegality imputed, the requirement of further proof than the giving of full value seems unreasonably harsh and exacting. 1 Daniel, Neg. Inst. § 819. But plaintiff's good faith in the case at bar does not rest alone upon the proof of payment of full value. The president of the bank, who conducted the negotiations and made the purchase, testifies that the bank "had no notice or knowledge of what the note was given for, or that Mr. Flath claimed any defense to it of any kind," until long after the purchase was made. And this evi-

dence is undisputed. A great variety of facts are relied upon by appellants to show bad faith on the part of the bank. None of them go the extent of showing knowledge, and it is extremely doubtful whether there were any facts within the knowledge of the officers of the bank which would create even a suspicion of the purpose for which the note was given. But, even so, that is not enough. As was said in *Moorehead* v. *Gilmore,* 77 Pa. 118: "The latest decisions in England and in this country have strongly set in favor of the principle that nothing but clear evidence of knowledge or notice of fraud or *mala fides* can impeach the *prima facie* title of a holder of a negotiable paper taken before maturity. It is of the utmost importance to the commerce of the country that it should be strictly adhered to, however hard its operations in particular instances." The Supreme Court of Maine in *Farrell* v. *Lovett,* 68 Me. 326, 28 Am. Rep. 59, in announcing its adherence to the rule that knowledge of circumstances which might tend to arouse suspicions would not defeat a recovery, said: "The purchaser of a note before maturity has a right to assume that it is given on good consideration. The defendant by his signature gives notice to all the world of that fact, and promises when due that he will pay it to the person who may at the time happen to be the legal holder of the same. The purchaser is not bound to inquire. The maker has absolved him from that duty. Where he has paid full consideration for the note before due, fraud only will prevent his recovery, or gross negligence equivalent to fraud." See cases cited in opinion. Good faith did not require the plaintiff to make inquiry as to possible defenses, of which it had no notice either from the face of the paper or facts communicated at the time. *Howry* v. *Eppinger,* 34 Mich. 39; *Murray* v. *Beckwith,* 81 Ill. 43; 1 Daniel, Neg. Inst. § 775.

It is true McBride did not act in good faith towards Flath in selling the note, but it is not his good faith which is in question. In every case of this kind it is the bona fides of the indorser, that is in question. Daniel, Neg. Inst. § 770; *Helmer* v. *Krolick,* 36 Mich. 371. The direct evidence shows that McBride made no disclosure to Thompson of the secret purpose of the note, and all of the circumstances also go to show that he did not do so. It appears that Flath owed him about the amount of the note in suit, outside of the liability on his suretyship, and that it was unsecured. His purpose was to dispose of the note so that Flath would not be able to make a defense, which he could do so long as he held it. McBride is shown to have had many years of experience in handling commercial paper and as a bank cashier. Under these circumstances, we can indulge no inferences that he would disclose to the purchaser the existence of the secret agreement, and thus lay the foundation to defeat the very purpose he had in view. Every selfish motive prompted him to sell to a good-faith purchaser, for in no other way could he accomplish the result he had in view, which was to get what Flath owed him by this indirect method. But, as already said, it affirmatively ap-

pears that no such disclosure was made, and that plaintiff purchased in good faith. That plaintiff purchased the note before maturity is not disputed, and that it purchased for value and in the ordinary course of business is established by the evidence. McBride testifies that he received $1,200 for the note, and the president of the bank testifies that he gave $1,200 for it. On cross-examination of the latter, it was developed that payment was made by taking up a couple of demand notes which McBride owed the bank, and giving him credit for the balance, presumably on his bank account. It is contended by counsel for appellants that this is a mere credit on the books of the bank, and that it does not appear that the demand notes were surrendered, from which it is insisted that no value is shown to have been parted with by plaintiff. No effort was made by counsel for either party in their examination of the witnesses to develop anything further on the question of payment. The only evidence is that above stated, and it is exceedingly unsatisfactory. It is true the witnesses do not say in words that McBride's notes were given up by the bank, and that the credit was drawn out, but there is no other reasonable inference possible from the statement that $1,200 was paid and received. So, also, it appears that plaintiff purchased the note in suit in the ordinary course of business. This phrase is intended to describe a transfer according to the usages and customs of commercial transactions. Daniel, Neg. Inst. § 780. It was held in *Kellogg* v. *Curtis,* 69 Me. 212, that a purchase of a note before maturity for value constituted such a transaction. In *Kimbro* v. *Lytle,* 10 Yerg. 423, 31 Am. Dec. 585, "due course of trade" is said to be "where the holder has given for the note his money, goods, or credit at the time of receiving it, or has on account of it incurred some loss or incurred some liability." And the surrender of an antecedent debt as a consideration for the purchase of a negotiable note, under the decided weight of authority, is sufficient. *Bank* v. *McClelland,* 9 Colo. 610, 13 Pac. 723, and cases cited. This court had occasion to consider the meaning of the phrase "ordinary course of business" in *Christianson* v. *Association,* 5 N. D. 438, 67 N. W. 300, and held that it means "according to the usages and customs of commercial transactions"; and further held that the purchase of a negotiable note before maturity, for a valuable consideration, and duly indorsed by the payee, and delivered to the purchaser, is a purchase in the ordinary course of business. The purchase here in question clearly comes within the above language. It is urged by appellants' counsel that the transaction under consideration was not in the ordinary course of business, for the reason that the transaction was not a discount, within the meaning of the national banking act under which plaintiff is organized; and, further, that it was a taking of real estate security in violation of said act. It is true the bank was acting ultra vires in taking the mortgage, but it is well settled that "no one but the United States, in the person of the comptroller, can object; the transaction is perfectly good and enforceable between the parties." 1

Morse, Banks, § 75; *Bank* v. *Matthews,* 98 U. S. 621, 25 L. Ed. 188; *Fortier* v. *Bank,* 112 U. S. 439, 5 Sup. Ct. 234, 28 L. Ed. 764. The error in the contention lies in the assumption that a purchase, to be in the ordinary course of business, must be made in accordance with the particular rules, customs, or laws which govern the conduct of the purchaser. Such is not the law. The purchase is only required to be in accordance with "the usages and customs of commercial transactions," and when it is so made the fact that it was made in violation of some rule or law peculiar to the purchaser is of no importance.

One further question remains for consideration. It is urged that the mortgage, in any event, does not partake of the negotiable character of the note secured, and is therefore subject to equities existing between the original parties. This view has support in a number of cases, among which are the following: *Shippen* v. *Whittier,* 117 Ill. 282, 7 N. E. 642; *Hodson* v. *Glass Co.,* 156 Ill. 397, 40 N. E. 971. The decided weight of judicial opinion, however, is that a mortgage shares the same immunity from defenses as the note it secures. The Supreme Court of the United States so held in *Carpenter* v. *Longan,* 16 Wall. 271, 21 L. Ed. 313. Mr. Justice Swayne, speaking for the court in that case, said: "The question is whether an assignee, under the circumstances of the case, takes the mortgage as he takes the note, free from the objections to which it was liable in the hands of the mortgagee. We hold the affirmative. The contract, as regards the note, was that the maker should pay it at maturity to any bona fide indorsee, without reference to any defenses to which it might have been liable in the hands of the payee. The mortgage was conditioned to secure the fulfillment of that contract. To let in such a defense against such a holder would be a clear departure from the agreement of the mortgagor and mortgagee, to which the assignee subsequently in good faith, became a party. If the mortgagor desired to reserve such an advantage, he should have given a non-negotiable instrument. 'If one of two innocent persons must suffer by deceit, it is more consonant to reason that he who puts trust and confidence in the deceiver should be a loser rather than a stranger.' *Hern* v. *Nichols,* 1 Salk. 289. * * * All the authorities agree that the debt is the principal thing, and the mortgage an accessory. Equity puts the principal and accessory upon a footing of equality, and gives to the assignee of the evidence of the debt the same rights in regard to both. There is no analogy between this case and one where a chose in action, standing alone, is sought to be enforced. The fallacy which lies in overlooking this distinction has misled many able minds, and is the source of all the confusion that exists. The mortgage can have no separate existence. When the note is paid, the mortgage expires. It cannot survive for a moment the debt which the note represents. This dependent and incidental relation is the controlling consideration, and takes the case out of the rule applied to choses in action, where no such relation of dependence." See, also, § § 162-174, Coleb. Coll. Sec., and cases cited. Our adherence to the

last-named rule was announced in the case of *Christianson* v. *Association,* supra, but without discussion. The claim is now advanced that so far, at least, as this state is concerned, the question is settled against the view there announced by § 3900, Rev. Codes, which reads as follows: "Several contracts relating to the same matters, between the same parties and made as parts of substantially one transaction, are to be taken together." Counsel's contention is that, under this section, "the note and mortgage in law are but a single instrument"; and from this assumption the conclusion readily follows that the mortgage is subject to defenses. The point is made only as to the mortgage; but, if the premise is correct, it must also follow that all notes, although negotiable in form, which are secured by mortgages, whether real estate or chattel, are non-negotiable. The section relied upon, however, does not carry the meaning ascribed to it, which is that it unites the two or several contracts relating to a transaction into a single contract. The section is found in Article 7, Chap. 43, Civ. Code, and is one of twenty-seven sections, all relating to the interpretation of contracts. The language of the section is ambiguous, and the meaning somewhat obscure, but, when read with the sections preceding and following it, it is entirely clear that it is merely a rule of interpretation. The requirement that the several contracts are to be "taken together" does not mean that they are to be joined, and thereby become a single contract, but plainly means that they are to be "taken together" for the purpose of interpreting, either the transaction to which they relate, or the several contracts themselves. It does not purport to destroy the separate identity of the several contracts, and does not do so in effect.

Having reached the conclusion that the plaintiff is an indorsee in due course, and that the mortgage shares in the same immunity from equities existing between original parties as the note it secures, it follows that the judgment of the District Court must be in all things affirmed; and it is so ordered. All concur.

(86 N. W. Rep. 867.)

MATHIAS FABER *vs.* CHARLES WAGNER.

Opinion filed June 25, 1901.

Fraudulent Conveyance—Assignment of Threshing Lien.

The defendant was indebted to W. on account for threshing grain. W. perfected a statutory lien upon the grain threshed by him by filing a verified account with the register of deeds. Subsequently the account and lien were transferred to plaintiff by an assignment in writing executed by W., and delivered to plaintiff. The assignment of the account and lien were made without consideration, and with intent to defraud the creditors of W., and the plaintiff shared in such fraudulent intent. *Held,* that said transfer of the account and lien, while good as between the parties thereto, was fraudulent and void as to the execution creditors of W.

Execution Levy—Discharge of Lien.

After said transfer was made, and delivered to the plaintiff, certain creditors of W. obtained judgments against him, and executions thereon were delivered to the sheriff for service, whereupon the sheriff duly levied upon the debt due from the defendant to W. on account of such threshing. After the levies were made, but before receiving notice of the transfer of the account and lien to the plaintiff, the defendant paid over to the sheriff the entire amount of the debt due from defendant to W. on account of said threshing, taking a receipt therefor from the sheriff. The amount paid the sheriff was duly applied upon said execution. *Held*, that said transfer of the account, being fraudulent and void as to creditors, did not operate to defeat the levy made upon the debt due W. for threshing. *Held*, further, that the payment to the sheriff, together with the sheriff's receipt therefor, operate as full payment of the debt, and are a sufficient discharge of the same under the provisions of § 5514, Rev. Codes 1895 (Comp. Laws, § 5124.) *Held*, further, the debt having been lawfully and fully paid prior to the commencement of this action, plaintiff cannot recover.

Appeal from District Court, Ramsey County; *Morgan*, J.

Action by Mathias Faber against Charles Wagner. Judgment for defendant, and plaintiff appeals.

Affirmed.

J. B. Eaton, and *R. A. Eaton*, for appellant.

John W. Maher, for respondent.

WALLIN, C. J. The record in this action discloses the following facts: The action was brought to foreclose a threshing lien, and judgment was entered below dismissing the action, with costs, which judgment was preceded by findings of fact and conclusions of law filed by the trial court. No statement of the case was settled, but plaintiff has appealed to this court from the judgment, and such appeal brings up for consideration the judgment roll, embracing the pleadings, findings, and judgment; also an order denying plaintiff's application for judgment. Appellant's counsel assign error in this court upon the conclusion of law that the defendant is entitled to a judgment of dismissal, with costs. Counsel contend that the facts embraced in the findings do not warrant such conclusion. The findings of fact, briefly stated, are as follows: That the defendant, in the month of September, 1892, became indebted to one George F. Weiss in the sum of $165.35 for threshing grain, and that said Weiss, on September 29, 1892, filed a lien for said threshing in the office of the register of deeds of said county of Ramsey. That on or about October 4, 1892, the said Weiss made a written assignment of said account and thresher's lien to the plaintiff in this action, that prior to the commencement of this action and prior to receiving any notice of said assignment, the debt due from defendant to Weiss for said threshing was levied on in the hands of said defendant under executions issued on judgments obtained against Weiss by creditors of Weiss, which judgments were entered after the filing of said lien, and on October 7 and 8, 1892. The several judg-

ments aggregated a sum greater in amount than the debt due from defendant and secured by said thresher's lien. That said defendant immediately after the levy of the executions upon said debt paid over to the sheriff, who made the levy, a sum equal to the entire amount of his debt due to Weiss for said threshing and received a receipt from the sheriff showing the fact of such payment on said executions. That the amount so paid the sheriff has been applied on said executions. "That the said alleged assignment was without consideration, and made for the purpose of defrauding the creditors of said George F. Weiss, and that said plaintiff accepted said assignment knowing that said Weiss had such fraudulent intent. That the said defendant had no notice or knowledge, nor was he informed, of said assignment before he paid the money over to the sheriff aforesaid." The question presented upon the findings is whether the facts as found justified the conclusion of the trial court that defendant was entitled to a judgment dismissing the action. This question, in our opinion, should receive an affirmative answer.

The defendant pleads payment of the debt secured by the threshing lien which the plaintiff is seeking to foreclose. In effect, the payment of the debt is the sole defense pleaded by the defendant's answer. The transfer of the account being fraudulent as to the creditors of Weiss, the same in no wise prejudiced the rights of such creditors. When the sheriff levied upon the debt due from the defendant to Weiss for threshing, said debt was, as to such creditors, still a debt due and owing to Weiss, and as such the same was property belonging to Weiss, and therefore subject to levy under execution. See § 5507, Rev. Codes 1895 (Comp. Laws, § 5118). After such levy, an action could have been maintained by the sheriff against the defendant to recover the debt so levied upon. Section 5510, Rev. Codes 1895 (Comp. Laws, § 5120). But the defendant was not compelled to submit to the vexation of a lawsuit. It was his privilege, under the law, as applied to the facts found by the trial court, to pay over the amount of his debt to the sheriff, and thereby obtain a discharge of his obligation incurred for threshing the grain. He elected to do so, and accordingly paid over to the sheriff the entire amount due to Weiss on account of said threshing, and at the same time received a sheriff's receipt for such payment. The money so paid was applied upon the executions against Weiss under which the levies had been made upon the debt. Such payment extinguished the debt, under the provisions of § 5514, Rev. Codes 1895 (Comp. Laws, § 5124), which section reads as follows: "After the rendition of the judgment any person indebted to the defendant in execution may pay to the sheriff the amount of such indebtedness, or so much thereof as is necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge therefor." It follows—the defendant's debt having been paid in full to the execution debtor—that the lien, which was a mere incident to the debt, was extinguished, and ceased to have

any life or efficacy. When the debt was paid, the lien securing the debt disappeared as a necessary consequence of the discharge of the debt.

Counsel for appellant claim that, inasmuch as the creditors of Weiss are not parties to this action, and have no rights which can be affected by the result of the action, the transfer of the account and lien must be upheld as a good and valid assignment of the account and lien to this plaintiff. To this proposition we assent with the qualification that the assignment was valid only as between the parties to the assignment. But, as the plaintiff is not a good-faith purchaser of the account and lien, the transfer was void as to the creditors of Weiss, and, this being true, the debt, as against creditors, was never transferred to the plaintiff. Not having been transferred, the debt was subject to seizure on execution by the creditors of Weiss.

We have examined with care the other assignments of error found in the appellant's brief, and find that the same are untenable, and must, therefore, be overruled. None of them bear upon the merits of the controversy, nor are any of them of such a nature as to prejudice any substantial right of the appellant. Our conclusion is that the judgment of the trial court should be affirmed, and this court will so direct; all the judges concurring.

MORGAN, J., being disqualified, took no part in the decision; FISK, J., of the First Judicial District, sitting by request.

(86 N. W. Rep. 963.)

AMERICAN MORTGAGE COMPANY *vs.* MOUSE RIVER LIVE STOCK COMPANY, *et al.*

Opinion filed June 15, 1901.

Mortgage Foreclosure—Record of Conveyance—Secondary Evidence—Objection.

Action to foreclose a mortgage upon real estate in McHenry county. Defendant C. A. Prouty alone appeared, and in his answer to the complaint alleges ownership of the land in himself, and further alleges that he purchased the same for value, and in good faith, and without notice, actual or constructive, of the existence of plaintiff's mortgage. To prove title, at the trial defendant offered certain pages of a deed-record book kept in the office of the register of deeds of McHenry county, showing a chain of title. To this evidence objection was properly made to the effect that no foundation had been laid for such evidence. The evidence was excluded in the trial court, and the same is excluded and not considered in this court. *Held*, that neither a record nor a copy of a record of any conveyance of land is admissible in evidence against objection until proof by affidavit or otherwise is made that the original is not in the possession or under the control of the party producing such record or copy. See § 5696, Rev. Codes 1899.

Objection Need Not be Repeated—When.

The purpose of an objection to testimony is to call the court's attention to the fact that the same is inadmissible under the rules of evidence, and it is accordingly *held* that, where the objection is sustained, and the evidence is excluded, no advantage can be taken of such ruling on appeal upon the ground that the objection was not sufficiently specific. *Held*, further, that where evidence is properly objected to, the objection need not be repeated when other evidence of the same class is offered.

Defendant Without Title.

Held that, the defendant C. A. Prouty having failed to show title in himself by competent testimony, it becomes unnecessary to determine whether he purchased the land in good faith and without notice of the plaintiff's mortgage.

Appeal from District Court, McHenry County; *Morgan*, J.

Action by the American Mortgage Company of Scotland, Limited, against the Mouse River Live Stock Company and others. Judgment for plaintiff, and defendant C. A. Prouty appeals.

Affirmed.

Cochrane & Corliss, for appellant.

The law presumes as against an unrecorded mortgage that appellant was a bona fide purchaser for value, without notice. *Roll* v. *Rea*, 50 N. J. L. 264; *Vest* v. *Michie*, 31 Am. Rep. 722; *Wood* v. *Chapin*, 13 N. Y. 509; *Ryder* v. *Rush*, 102 Ill. 338; *Lacustrine* v. *Co.*, 82 N. Y. 476; *Holmes* v. *Stout*, 10 N. J. Eq. 419; *Coleman* v. *Barklew*, 27 N. J. L. 357; *Marshall* v. *Dunham*, 66 Me. 539; *Anthony* v. *Wheeler*, 130 Ill. 128; *Gratz* v. *Improvement Co.*, 82 Fed. Rep. 381; *Hoyt* v. *Jones*, 31 Wis. 389; *Doody* v. *Hollwedell*, 48 N. Y. Supp. 93; *Beman* v. *Douglas*, 37 N. Y. Supp. 859; *Saunders* v. *Isbell*, 24 S. W. Rep. 307; *Red River Land & Imp. Co.*, v. *Smith*, 7 N. D. 236. At the time of the purchase appellant held the promissory note of E. M. Prouty for $5,000, and paid the purchase price, $2,000, by crediting the amount on such indebtedness and endorsing the same upon such note. Appellant extinguished $2,000 of a valid claim against his grantor, and was in the same position as though Prouty had paid him $2,000 on the note and appellant had handed the money back as the consideration on the purchase price of the land. Under these circumstances appellant was a bona fide purchaser for a valuable consideration. *Mayer* v. *Heidelbach*, 123 N. Y. 332; *Wert* v. *Naylor*, 93 Ind. 431; *Murray* v. *Bank*, 49 Pac. Rep. 326; *Clark* v. *Barnes*, 72 Ia. 563; *Adams* v. *Vanderbeck*, 47 N. E. Rep. 24; *Butterfield* v. *Pitcher*, 36 N. J. Eq. 482; *Bunn* v. *Schnellbacher*, 45 N. E. Rep. 227; *Adams* v. *Vanderbeck*, 45 N. E. Rep. 645; *State Bank* v. *Fraine*, 20 S. W. Rep. 620; *Heath* v. *Company*, 39 Wis. 146; 2 Warvell on Vendors, 612; 20 A. & E. Enc. L. 591; Bump on Fraudulent Conveyances, 198. The certificate of acknowledgement to the mortgage in question was

fatally defective. A statement that the person is known to the notary public to be the person who is described in the mortgage as president is not equivalent to a certificate that the person signing is known to be the president. *Tully* v. *Davis*, 30 Ill. 103; *Newman* v. *Samuels*, 70 Ill. 528; *Fell* v. *Young*, 63 Ill. 106; *Murphy* v. *Williamson*, 85 Ill. 149; *Coburn* v. *Harrington*, 114 Ill. 104; *Fryar* v. *Rockerfeller*, 63 N. Y. 268; *Dewey* v. *Campan*, 4 Mich. 565; *Harrington* v. *Fish*, 10 Mich. 415; *Pickney* v. *Burrage*, 31 N. J. L. 21; *Wood* v. *Cochrane*, 39 Vt. 544; *Callaway* v. *Fash*, 50 N. W. Rep. 420; *Hines* v. *Himkin*, 47 N. W. Rep. 818; *Cannon* v. *Deming*, 3 S. D. 421; 53 N. W. Rep. 863; *Davidson* v. *Wellingford*, 32 S. W. Rep. 1030; *Davidson* v. *Company*, 19 So. Rep. 390; *Salman* v. *Huff*, 15 S. W. Rep. 1047; *Holt* v. *Company*, 78 N. W. Rep. 947. It is essential that a real estate mortgage should be recorded to entitle the mortgagee to foreclose by advertisement under the power of sale therein contained. *Holt* v. *Trust Co.*, 78 N. W. Rep. 947; § 5846, Rev. Codes. An instrument with a defective certificate of acknowledgment is not entitled to record and the recording of the same does not constitute constructive notice. Webb on Record Title, § 55; I A. & E. Enc. L. (2 Ed.) 489, 491; *James* v. *Moore*, 14 Am. Dec. 521; *Staples* v. *Shackleford*, 51 S. W. Rep. 1032; *Donovan* v. *Elev. Co.*, 8 N. D. 585; *Abney* v. *Company*, 32 S. E. Rep. 256; *Emmerick* v. *Alvarado*, 27 Pac. Rep. 356; *Cannon* v. *Deming*, 3 S. D. 421; § 648, Civil Code; §3269, Comp. Laws; § § 3564, 3568, 3588, 3589, 3590, Rev. Codes. While the legislature may cure defective acknowledgments, it cannot, under the guise of passing a curative law, divest vested rights. Webb on Record Title, § 97; *McGehee* v. *McKenzie*, 43 Ark. 156; *Thompson* v. *Morgan*, 6 Minn. 292; *Fogg* v. *Holcomb*, 64 Ga. 621; *Green* v. *Drinker*, 7 S. W. Rep. 440; *Newman* v. *Samuels*, 17 Ia. 521; *Brinton* v. *Seevers*, 12 Ia. 389. A validating statute will not operate upon an acknowledgment which has been adjudged defective prior to the passage of the act, even though the case be still pending on appeal. 1 A. & E. Enc. L. (2 Ed.) 566; *Wright* v. *Graham*, 42 Ark. 141; *Ralston* v. *Moore*, 83 Ky. 571; *Barnett* v. *Barnett*, 16 Am. Dec. 516. The rule that one cannot claim to be a bona fide purchaser who claims under a quit-claim deed does not apply where the purchaser claiming to be a bona fide purchaser takes under a warranty deed, and the quit-claim deed is in the chain of title back of his warranty deed. *Winker* v. *Willer*, 54 Ga. 476; *Hubert* v. *Bossart*, 70 Ga. 78; *Snowden* v. *Tyler*, 21 Neb. 199; *Sherwood* v. *Moelle*, 36 Fed. Rep. 478; *United States* v. *Co.*, 148 U. S. 31; *Michael* v. *Border*, 129 Ind. 529; *Finch* v. *Trent*, 22 S. W. Rep. 132. A purchaser even under a quit-claim deed is entitled to protection if he is in fact a bona fide purchaser. Devlin on Deeds, § § 672, 673; *Schott* v. *Dosh*, 68 N. W. Rep. 346; *Wilhelm* v. *Wilkin*, 44 N. E. Rep. 82; *Stanley* v. *Hamilton*, 33 S. W. Rep. 601; *Baylor* v. *Scottish Co.*, 66 Fed. Rep. 631; *Elliott* v. *Buffington*, 51 S. W. Rep. 408; *Smith* v. *McClaim*, 45 N. E. Rep.

41; *Moelle* v. *Sherwood,* 13 Sup. Ct. Rep. 426; *U. S.* v. *Company,* 13 Sup. Ct. Rep. 458.

John W. Maher and *M. H. Brennan,* for respondent.

Plaintiff's claim in the former litigation furnishes sufficient information to put a prudent man upon his inquiry as to the existence of outstanding incumbrances regardless of the record in the register's office. Appellant cannot take advantage of the judgment and close his eyes to the information given by the record in the case. *Ferguson* v. *Tarbox,* 44 Pac. Rep. 905; § 5118 Rev. Codes; *Doran* v. *Dazy,* 5 N. D. 167, 64 N. W. Rep. 1023. The consideration for the deed to C. A. Prouty was a pre-existing indebtedness and will not support his claim of being a bona fide purchaser. 16 A. & E. Enc. L. 837; *Pride* v. *Whitfield,* 51 S. W. Rep. 1100; *Richerson* v. *Moody,* 42 S. W. Rep. 317; *Marshall* v. *Marshall,* 42 S. W. Rep. 353; *Hirsch* v. *Jones,* 42 S. W. Rep. 604; *Huff* v. *Maroney,* 56 S. W. Rep. 754; *Freeman* v. *Linsley,* 40 S. W. Rep. 835; *Lillibridge* v. *Allen,* 69 N. W. Rep. 931; *Williams* v. *Williams,* 76 N. W. Rep. 1039; *Howells* v. *Hettrick,* 150 N. Y. 308, 54 N. E. Rep. 677; *Frey* v. *Clifford,* 44 Cal. 335; *Stanley* v. *Schwalby,* 162 U. S. 276. A judgment in ejectment is not a bar to a subsequent action as to the same property. *Evans* v. *Kunze,* 31 S. W. Rep. 123; *Ryan* v. *Fulghin,* 22 S. E. Rep. 940; *Sampson* v. *Mitchell,* 28 S. W. Rep. 768; *Harper* v. *Campbell,* 14 So. Rep. 650; *Newell* v. *Neal,* 27 S. E. Rep. 560; *Dawson* v. *Parkham,* 18 S. W. Rep. 48; *Buford* v. *Adair,* 64 Am. St. Rep. 854.

WALLIN, C. J. This action is brought to foreclose a mortgage upon certain real estate situated in McHenry county, which mortgage was executed on the 15th day of September, 1886, by the defendant Mouse River Live-Stock Company, a corporation, and was delivered to the plaintiff, in whose favor it was made. This mortgage was filed for record and was recorded in the office of the register of deeds of said county on the 10th day of October, 1886, in Book 20 of Mortgages. The complaint states that the defendants Richardson and C. A. Prouty claim an interest in said real estate as purchasers since the recording of said mortgage, and after having notice of the mortgage, and that the other defendants claim an interest in the real estate as tenants of Richardson and Prouty. All of the defendants except C. A. Prouty defaulted, and made no appearance in the action. After a trial in the District Court without a jury, judgment was entered in favor of the plaintiff, from which judgment C. A. Prouty has appealed to this court, and demands a trial anew in this court.

The defendant C. A. Prouty, in his answer to the complaint, alleges that he is the owner in fee simple of the real estate described in plaintiff's mortgage; that he purchased the same in good faith, for a valuable consideration, and without notice of the mortgage,

actual or constructive, for a consideration of $2,000, which amount defendant states was paid to one E. M. Prouty by giving him credit for $2,000, and indorsing that amount on a certain promissory note for $5,000 held by the defendant, and signed by E. M. Prouty. The answer further alleges that E. M. Prouty was seized of a fee-simple title to the land on the 24th day of February, 1894, and was then in possession of the land, and that on said day and for said consideration E. M. Prouty executed and delivered to him a deed of warranty of said land, with full covenants, and that said deed was duly recorded in the office of the register of deeds of McHenry county, and that he (the said C. A. Prouty) now owns the land, and claims title under said deed of E. M. Prouty. To sustain the allegation of his answer, C. A. Prouty offered certain evidence at the trial to establish a chain of title to the land extending from the mortgagor, the Mouse River Live-Stock Company, to himself. The register of deeds of McHenry county was called as a witness by the defendant, and produced a certain deed-record book, which he identified as an official record in his office, whereupon the defendant offered in evidence what purported to be the record of a warranty deed recorded on page 566 of said record book, and which deed, according to the record, was dated on the 24th day of February, 1894, and purported to be the deed above described, conveying the title of the land from E. M. Prouty to C. A. Prouty. To the introduction of this evidence the plaintiff, by its counsel, objected as follows: "Objected to as incompetent, irrelevant, immaterial, and no foundation laid; does not appear that E. M. Prouty had any record title, or any title whatever." Counsel for defendant then offered in evidence page 366 of said record book, on which page a quit-claim deed of the premises appeared to be recorded from the Mouse River Live-Stock Company to E. M. Prouty and L. B. Richardson, and dated June 15, 1888, and recorded on the day of its date. Plaintiff's counsel objected to the introduction of this evidence as follows: "Objected to as incompetent, irrelevant, and no foundation laid, and not appearing that the original is lost; and furthermore, the acknowledgment not being in accordance with the requirements of the statute, there being in fact no acknowledgment to the paper in question, and the same not being entitled to record." Counsel for the defendant next offered in evidence the record of a quit-claim deed as recorded in said record book, and appearing to be a deed from L. B. Richardson to E. M. Prouty, dated the 10th day of May, 1893, and describing the land in controversy, which deed was recorded on the 14th day of April, 1894, on page 570 of said record book. To this evidence the plaintiff, by its counsel, interposed the following objection: "Objected to as incompetent, irrelevant, and immaterial; not appearing that L. B. Richardson had any record title, or any title." The evidence offered shows that the certificate of acknowledgment appended to the plaintiff's mortgage is as follows: "Territory of Dakota, County of Ramsey—ss: On this 15th day of September, in the year one thousand eight hundred

and eighty-six, before me, Harry L. Prescott, a notary public in and for said county and territory, personally appeared John McKelvey, known to me to be the person who is described in the within mortgage, as president and manager of the within-named corporation, and who signed said mortgage as president and manager of said corporation, and he acknowledged that said corporation executed the same, and who executed the within and foregoing instrument, and acknowledged to me that he executed the same. Harry L. Prescott, Notary Public, Dakota Territory. [Notary Seal.]"

The statutes in force governing the acknowledgment and certification of instruments at the time in question are found in § § 3269, 3272, and 3288 of the Comp. Laws of 1887. It is tacitly conceded by counsel that the acknowledgments of the mortgage and of the deed to Richardson and E. M. Prouty, as certified to by the respective notaries, are insufficient, under the statute, by reason of such defective acknowledgments, and that neither of said instruments was entitled to be recorded, and that, when actually recorded in the office of the register of deeds, such records could not operate as constructive notice to the public of the existence of either said mortgage or said deed. Construing the same provisions of the statute, the Supreme Court of South Dakota has reached the conclusion that an instrument not acknowledged as prescribed by the statute is not entitled to record, and that, when recorded in fact, the same does not operate as notice to the public. See *Cannon* v. *Deming*, 3 S. D. 421, 53 N. W. 863. The phraseology of the two certificates of acknowledgment is slightly different, but the defect is substantially the same in both. The two instruments purported to be executed by a corporation, but it does not appear from the certificates appended to either instrument that the individuals who acknowledged the same were in fact officers of the corporation, or were known to be such by the notaries who took their acknowledgments. Without further discussion, we shall hold that the record of the deed and mortgage executed by the live-stock company did not operate as constructive notice to the public. See *Donovan* v. *Elevator Co.*, 8 N. D. 585, 80 N. W. Rep. 772, and *Emeric* v. *Alvarado*, 27 Pac. 356. But counsel for C. A. Prouty contend that the defective acknowledgment was cured as to the deed to Richardson and E. M. Prouty by an act of the legislative assembly embraced in Chap. 1 of the Laws of 1895. By the terms of this statute, acknowledgments of deeds and other instruments taken and certified previous to January 1 1895, and which had been recorded in the proper counties prior to said date, are "declared to be legal and valid in all courts of law and equity in this state or elsewhere, anything in the laws of the territory of Dakota or state of North Dakota in regard to acknowledgments to the contrary notwithstanding: *provided* that nothing herein contained shall in any manner affect the right or title of any bona fide purchaser without notice of such instrument, or record thereof, for a valuable consideration, of any such property or real estate, prior to January 1st, 1895," etc. As

has been seen, the defendant C. A. Prouty alleges in his answer that he purchased the land in question and recorded his deed prior to the date at which said act of 1895 took effect, and hence was in a position to claim that his title comes within the benefits of the statute; and that under the statute the deed to E. M. Prouty and L. B. Richardson, and the other deed from Richardson to E. M. Prouty, and that from the latter to C. A. Prouty, were, at the time of the trial, legally of record, and that the validating effect of the curative enactment related back to the several dates upon which the deeds defectively certified were filed for record with the register of deeds. We are disposd to sustain this contention of counsel as sound, and upon this view of the effect of the curative statute we will now proceed to consider whether the record of the several deeds was competent evidence of the execution, delivery, and contents thereof. Counsel for the plaintiff contends that the record was not competent as evidence of the execution and delivery of the deeds, as against his objections to such records as above set out. If this objection must be sustained, it will necessarily follow that the defendant C. A. Prouty wholly failed to show at the trial that he has now, or ever had, any right, title, or interest in the premises covered by the plaintiff's mortgage. In support of this contention respondent's counsel cite a provision of the Code of Civil Procedure which reads as follows: "Every instrument conveying or affecting real property acknowledged or proved and certified as provided in the Civil Code may, together with the certificate of acknowledgment or proof, be read in evidence in an action or proceeding without further proof; the record of such instrument or a duly authenticated copy of the record may also be read in evidence with the like effect of the original on proof by affidavit or otherwise that the original is not in the possession or under the control of the party producing such record or copy." Rev. Codes, § 5696. It will be noticed that the first feature of this section embraces a rule of evidence quite familiar to the profession. It declares, in effect, that the original instrument, when so certified or proved, may be read in evidence "without further proof." If the original is produced in court, so certified, no evidence aliunde is needed to vouch for its genuineness. It proves itself without preliminary or additional evidence to give it competency. But, when only a record or copy of the record is offered in evidence, a different rule is laid down by the statute; and, as we read the statute, neither a record of the original nor a copy of the record is admissible in evidence against objection without certain preliminary proof being submitted to give competency to such secondary evidence. But, when the proof prescribed in the statute has been furnished, the copy of the record or the record becomes competent evidence of the execution, delivery, and contents of the original, and for these purposes the record or copy of the record—the requisite proof being made—"may be read in evidence with like effect as the original. The statute is much more liberal than the common-law rule of evidence governing the

matter of proving the existence and contents of an original instrument not produced in court. At the common law due deligence must be first shown in searching for the original, and in explaining by testimony why it is not offered in evidence. But under the more liberal rule laid down in § 5696 it is only necessary to submit to the court proof "by affidavit or otherwise that the original is not in the possession or under the control of the party producing such record or copy." But this proof is clearly required before the secondary evidence becomes competent, and there is nothing in the statute lending countenance to the idea that a record or a copy is competent as against objection until the prescribed proof is first submitted.

Reverting to the several objections made to the introduction of the record proof as above set out, we discover that the same was sufficiently full and specific to call the attention of the trial court to the grounds of the plaintiff's objection to the several records when the same were offered in evidence. When the record of the deed to Richardson and E. M. Prouty was offered, it was objected to as "incompetent, irrelevant, and no foundation laid, and not appearing that the original is lost." This language invites attention particularly to the fact that the proof offered was, when it was offered, incompetent, and that the proper foundation had not been laid for its introduction. The only foundation which could be laid, under the statute, was proof that the original deed was not in the possession or under the control of C. A. Prouty. When the record of the deed from Richardson to E. M. Prouty was offered, the general objection of incompetency and irrelevancy was interposed, and as a further ground it was urged that it did not appear that L. B. Richardson had any "record title, or any title." This, in our judgment, was, under the attending circumstances, equivalent to a reiteration of the objection made to the record of the deed which had just previously been offered in evidence. It pointedly called the attention of defendant's counsel to the fact that he had not, at that time, shown that Richardson had title of any kind, and hence could convey none; and at this time counsel and court had been fully advised of the fact that the plaintiff objected to the competency of the evidence offered to show title in E. M. Prouty and Richardson, and were advised fully of the grounds of plaintiff's objections. The record of the deed from E. M. Prouty to C. A. Prouty, when offered in evidence, was objected to generally, and on specific grounds. There was a general objection that said deed was incompetent, and to this was added the specific objection that no "foundation" had been laid, and that it did not appear that E. M. Prouty "had any record title, or any title whatever." Defendant was chargeable with notice that, when he offered a record of an original instrument in evidence, preliminary proof is needed as a foundation for such secondary evidence; and in this case the attention of defendant's counsel was called to the fact that the proper foundation had not been laid. The record pages of the several conveyances were offered at one time, and directly following each other; hence

reiterated objections were unnecessary. All the evidence being of the same quality and class, one objection to all of it would have been sufficient. See *Whitney* v. *Traynor*, 74 Wis. 289, 42 N. W. Rep. 267; *Sharon* v. *Sharon*, 79 Cal. 633, 22 Pac. 26, 131. But it is further true that, if the objections to the evidence were amenable to judicial criticism,—and they are not,—they have nevertheless served their purpose. The objections were all sustained by the court below, as is conclusively shown by the finding that C. A. Prouty did not own the land; and this court has also sustained the objections. When an objection to evidence is sustained, the point cannot be raised on appeal that it was not sufficiently specific. See *Hulburt* v. *Hall*, 39 Neb. 889, 58 N. W. Rep. 538.

Upon the record we deem it unnecessary to offer anything further in support of the obvious conclusion that the evidence offered at the trial signally failed to show that C. A. Prouty has, or ever had, any title to or interest in the land involved in this action. The trial court reached this conclusion upon the evidence, and we have been compelled to reach the same conclusion. But to avoid the very serious consequences to the defense which must necessarily result from the failure of the defendant to prove that he has any interest in the lands involved, counsel for appellant contend in this court that the plaintiff, in submitting its own testimony, has brought upon the record sufficient oral evidence to establish the necessary chain of title showing that C. A. Prouty is vested with title to the lands. Counsel claim that the chain of title is established by the deposition of L. B. Richardson, which was put in evidence by the plaintiff. It therefore becomes necssary to consider said deposition, and to do so intelligently the deposition must be examined in the light of the issues made by the pleadings. We have seen that C. A. Prouty alone answered the complaint, and that as affirmative matter he pleaded that he was a good-faith purchaser of the land from E. M. Prouty, without notice of the mortgage, and that E. M. Prouty had conveyed the land to him by a deed of warranty. These allegations were in issue. Hence it became proper and necessary for the plaintiff to be prepared at the trial, as far as he could be prepared, to dispute by evidence any testimony which the defendant might offer to establish the defense as set out in the answer, viz. that C. A. Prouty owned the land, and was a bona fide purchaser thereof, without notice of plaintiff's mortgage. We have carefully perused the deposition, and are quite clear that it was offered for the sole purpose of showing that C. A. Prouty was not a purchaser of the land in good faith, and without notice of plaintiff's mortgage. Plaintiff offered considerable testimony from other witnesses for the same purpose, and all of such testimony was entirely pertinent to the issue of a good-faith purchase, without notice, as tendered by the answer. It is, moreover, transparently clear that plaintiff did not intentionally volunteer any evidence tending to sustain the burden resting upon the defendant, which burden defendant had expressly assumed and pleaded by his answer. In disproving the alleged purchase in good

faith, it was very important to plaintiff to show that E. M. Prouty bought the land with full knowledge of the existence of plaintiff's mortgage, because, if E. M. Prouty bought without notice of the mortgage, then his grantee could stand securely on title acquired in good faith by E. M. Prouty. Upon this point, see *Investment Co.* v. *Smith*, 7 N. D. 236, opinion 240, 74 N. W. 194. The deposition of Richardson showed conclusively that E. M. Prouty and Richardson, when they purchased the land on September 15, 1888, had actual notice of the existence of the plaintiff's mortgage, and this was the obvious purpose of the evidence. But in testifying as to such notice it became necessary for the witness to detail the circumstances surrounding the purchase of the land. In doing so Richardson spoke of the deed of conveyance, and at this point said: "My remembrance is that the deed for the land purchased was signed by the Mouse River Live-Stock Company, a corporation, by McKelvey, and also by J. G. Hamilton. The deed ran to E. M. Prouty and myself." The witness further said: "The only purchase of land made by me in company with E. M. Prouty in McHenry county, North Dakota, from the Mouse River Live-Stock Company or John McKelvey was the land I stated that I and E. M. Prouty purchased on or about June 5, 1888." The witness further testified that there was a mortgage on the land, and that he "understood that the mortgage ran to the plaintiff in this action;" also that the amount of the mortgage was taken into consideration in the purchase of these lands. Enough of the deposition has been set out to show that the evidence contained in the same tended to establish two facts, viz: First, that Richardson and E. M. Prouty, about June 5, 1888, purchased the land in question from the Mouse River Live-Stock Company, and received a deed for the same; second, that Richardson and E. M. Prouty purchased the land with actual notice of the plaintiff's mortgage. In the nature of things, it is obvious that it would have been impracticable for the plaintiff to have shown by evidence that Richardson and E. M. Prouty bought the land with actual notice of the plaintiff's mortgage without referring to the collateral, but vital, fact of their purchase of the land. The deposition should have been withheld until defendant made proof of title. Strictly speaking, the evidence contained in it was only rebutting as against the testimony of C. A. Prouty that he bought the land without notice. But the order of proof is ordinarily a matter within the discretion of the trial court, and in this case no point is made as to the order of proof. It is true, and entirely elementary, that testimony which is inadmissible, but which is introduced without objection, will be considered in support of any fact which the evidence is competent to prove. But in this case the evidence in the deposition was not vulnerable to objection. It was strictly admissible testimony upon the issue of a good-faith purchase without notice of the mortgage. Hence this is not a case where the evidence would have been ruled out if objection thereto had been made upon the ground that it was not competent to show title. It certainly was not, and equally

certain that it was not offered to show title. But, if it were conceded—and it is not conceded—that the oral evidence offered by plaintiff for another purpose, and one purely collateral, is competent to show, and does show, that on June 5, 1888, E. M. Prouty and L. B. Richardson became vested with title to the land, what effect would that fact have upon the defense set out in the answer? The fact that certain parties in the chain of defendant's alleged title at one time owned the land is unavailing as proof of title unless it is followed by other testimony showing that the defendant now asserting title is in fact vested with the title. No claim is made by appellant's counsel that the plaintiff offered any evidence tending to show that E. M. Prouty and L. B. Richardson, or either of them, ever conveyed the title to C. A. Prouty, and we have already shown that the defendant has omitted to offer any competent evidence that C. A. Prouty is now vested with title. It is claimed that L. B. Richardson quit-claimed his interest in the land to E. M. Prouty by a deed dated May 10, 1893, and that E. M. Prouty conveyed to C. A. Prouty by a deed of warranty dated February 24, 1894. If these claims had been established as facts by competent evidence, it would then have been necessary to consider and determine an additional question of fact, viz. the question of the good faith of C. A. Prouty in making the purchase, which question was decided adversely to him in the court below. But the question of good faith in the alleged purchase drops out and becomes immaterial in the absence of proof of the primary fact of purchase.

Other questions of much interest are embraced in the record, and they have been exhaustively discussed in the briefs of counsel filed in this court, but none of the same will require the attention of the court in deciding the case in view of the conclusion already stated to which the court has been led. C. A. Prouty having failed to show any title or interest in the land described in the plaintiff's mortgage, he is without standing in court to contest the foreclosure of the mortgage. The judgment of the District Court will be affirmed. All the judges concurring.

MORGAN, J., having presided at the trial in District Court, did not sit in the case, nor participate in the decision; FISK, J., of the First Judicial District, sitting by request.

(86 N. W. Rep. 965.)

MICHAEL PRONDZINSKI *vs.* JAMES GARBUTT.

Opinion filed June 19, 1901.

Involuntary Trustee of Real Estate.

On a trial de novo in this court it is found that the defendant promised to extend the time of redemption for plaintiff to redeem from a mortgage foreclosure; that in violation of such promise, upon which plaintiff relied, defendant took a sheriff's deed on such foreclosure. *Held*, on the facts established and referred to in the opinion, that

defendant was an involuntary trustee of the real estate in question for plaintiff, under § 4263, Rev. Codes.

Dismissal Without Prejudice—Judgment.

A court of equity has the power to dismiss an action without prejudice, and, when a judgment contains a recital that it was so dismissed, the effect of such recital is to prevent such judgment from operating as a bar in another suit brought on the same subject matter. Whether a judgment in fact constitutes a bar is to be determined in the action in which it is pleaded, and not in the action in which it was rendered.

Liability of Trustee—Damages.

The general rule is that a trustee who wrongfully disposes of trust property is liable to the beneficiary for the value of the same, with interest. This rule is not changed by § 4273, Rev. Codes, which gives the beneficiary the right to require a restoration of the property, with its fruits, or to recover the proceeds, with interest. Where an election is made to have the property replaced, the trustee cannot defeat the beneficiary's legal right thereto by refusing to replace or by placing it out of his power to do so, and thus compel the beneficiary to accept the proceeds. For a breach of the duty to restore, the beneficiary may recover the value of the property, with interest.

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

Action by Michael Prondzinski against James Garbutt. Judgment for plaintiff, and defendant appeals.

Affirmed.

DePuy & DePuy and *Templeton & Rex*, for appellant.

The judgment in the first case is a bar to the present action. If plaintiff was entitled to recover in equity damages for alleged fraud of defendant in taking a sheriff's deed, he could and should have recovered such damages in that suit. *Chapman* v. *Mad River Co.*, 6 O. St. 119; *Holland* v. *Anderson*, 38 Mo. 55; *Hamilton* v. *Hamilton*, 59 Mo. 232; *Pinnock* v. *Clough*, 16 Vt. 500, 42. Am. Dec. 521; *Aday* v. *Echols*, 52 Am. Dec. 225; *Robinson* v. *Braiden*, 28 S. E. Rep. 798; *Milkman* v. *Ordway*, 106 Mass. 232; *Kelly* v. *Galbraith*, 58 N. E. Rep. 431; Pomeroy Eq. Jur. § 1410. There is only the union of remedial rights flowing from one cause of action. Pom. Rem. 97; *Sternberger* v. *McGovern*, 56 N. Y. 12; *Cole* v. *Getzinger*, 71 N. W. Rep. 75; *Hanna* v. *Reeves*, 60 Pac. Rep. 62; *Gray* v. *Dougherty*, 25 Cal. 266. Whether proof was offered in the first case to show the damage plaintiff claims to have sustained is immaterial; the judgment is conclusive nevertheless. *Thompson* v. *Myrick*, 24 Minn. 4; *Scottish Amer. Mortg. Co.* v. *Reeve*, 7 N. D. 552; *Foogman* v. *Patterson*, 9 N. D. 254; *Jungnitsch* v. *Iron Co.*, 80 N. W. Rep. 245; *Werlien* v. *New Orleans*, 177 U. S. 390, 44 L. Ed. 817; *Roby* v. *Dock Co.*, 165 Ill. 277. There is a distinction between an estoppel by verdict and an estoppel by judgment. The estoppel by judgment is conclusive as to every matter that might have been presented and adjudicated in the first suit. *Nilson* v. *Oil Co.*, 80 N. W. Rep. 859; *New Orleans* v. *Bank*, 167 U. S. 371;

Cromwell v. *Sac County*, 94 U. S. 351, 24 L. Ed. 195; *Boyd* v. *Wallace*, 84 N. W. Rep. 760. The dismissal of the former action without prejudice was of no effect. *Prondzinski* v. *Garbutt*, 83 N. W. Rep. 23, 9 N. D. 239; *Davenport* v. *Kleinschmidt*, 20 Pac. Rep. 823; *Chicago, Etc. Ry. Co.* v. *Black*, 29 Pac. Rep. 96; *Forgerson* v. *Smith*, 104 Ind. 246; *Nickless* v. *Pearson*, 126 Ind. 477, 489; *Lorillard* v. *Clyde*, 122 N. Y. 41; *Indiana Nat'l. Bank* v. *Bank*, 36 N. E. Rep. 382; *Franke* v. *Franke*, 43 N. E. Rep. 468. The trial court, under the facts as they existed, had no authority to insert the words "without prejudice" in the order of dismissal. *Chicago Etc. Ry. Co.* v. *Mill Co.*, 109 U. S. 702, 27 L. Ed. 1081; *Casey* v. *Jordan*, 9 Pac. Rep. 92; *Lee* v. *Stahl*, 22 Pac. Rep. 437. Plaintiff elected in the first suit to pursue the specific property and thereby foreclosed his right forever to avail himself of any other remedy. *Rosenbaum* v. *Hayes*, 8 N. D. 461, 79 N. W. Rep. 987; *Washburn* v. *Ry. Co.*, 114 Mass. 175; *Bailey* v. *Hervey*, 135 Mass. 172; *Ormsby* v. *Dearborn*, 116 Mass. 386; *Brunswick Co.* v. *Dart*, 20 S. E. Rep. 631; *Carroll* v. *Fethers*, 78 N. W. Rep. 604. Prior to the expiration of the period of redemption, plaintiff offered to pay the defendant an amount sufficient to redeem from the foreclosure sale. This offer wiped out the lien and destroyed entirely the force of the sale. § 1716, Civil Code; *Tiffany* v. *St. John*, 65 N. Y. 314; *Loughborough* v. *McNevin*, 14 Pac. Rep. 369. After the sale defendant by virtue of his certificate held only a lien. *Meeker County Bank* v. *Young*, 51 Minn. 254, 53 N. W. Rep. 630; Jones on Mtgs., § 1661. The effect of the sale having been nullified by the offer on plaintiff's part to pay the defendant, the sheriff's deed was absolutely void and plaintiff could have recovered the property notwithstanding the transfer. *Dodge* v. *Brewer*, 31 Mich. 227; *Frost* v. *Bank*, 70 N. Y. 553; *Clute* v. *Emmerich*, 99 N. Y. 342; *Benton* v. *Hatch*, 122 N. Y. 322. If Joseph Garbutt was a necessary party to the first action the court was required to bring him in. § § 5297, 5230, 5238, Rev. Codes; *Osterhoudt* v. *Supervisors*, 98 N. Y. 239. *Chapman* v. *Forbes*, 123 N. Y. 532; *Derham* v. *Lee*, 87 N. Y. 509. The value of the land cannot be recovered on the theory that defendant was plaintiff's trustee. *Booth* v. *Thompson*, 49 Mich. 72, 13 N. W. Rep. 363; *Jeffery* v. *Robbins*, 167 Ill. 375; *Newell* v. *Meyendorff*, 23 Pac. Rep. 333; *Moorman* v. *Wood*, 117 Ind. 144. The District Court erred in allowing plaintiff interest on the difference between the value of the land and the amount of the foreclosure sale. § § 4974, 4975, 4273, Rev. Codes; *Johnson* v. *Ry. Co.*, 1 N. D. 354, 365; *Lell* v. *N. P. Ry. Co.*, 1 N. D. 336, 353.

J. H. Fraine and *Cochrane & Corliss*, for respondent.

The object of the present action is to compel the defendant to account to plaintiff for the value of the real estate described in the complaint. The foundation of plaintiff's claim is a sale by defendant to a third person of this property when, in fact, the defendant held the same as trustee for the plaintiff, subject to the payment by

plaintiff to defendant of the sum of $731.35. The judgment in the first action was not a bar because the cause of action in the first suit was not the same upon which plaintiff seeks to recover in this, and the complaint in the first suit did not state a cause of action. The naked allegation of fraud therein, without the averment of any facts to sustain the allegation, was a nullity. *Gould* v. *Ry. Co.*, 91 U. S. 526; *Gilmer* v. *Morris*, 30 Fed. Rep. 481; *Rodman* v. *Ry. Co.*, 26 N. W. Rep. 651; *Morrill* v. *Morgan*, 4 Pac. Rep. 580; *State* v. *Mellus*, 59 Cal. 444; *Terry* v. *Hammond*, 47 Cal. 32; *O'Hara* v. *Parker*, 39 Pac. Rep. 1004; 1 Black on Judgmts., § 707. Where the second action is not based on the same claim as the first, plaintiff is not concluded by an adverse judgment as to any questions except such questions as were actually litigated and decided against him in the first suit. *Cromwell* v. *County*, 94 U. S. 351, *Wentworth* v. *County*, 74 N. W. Rep. 552; *Jones* v. *Hillis*, 100 Fed. Rep. 355. The original judgment entered in the action has been set aside and disappears from the case. The second judgment entered by the court in the first action recites that the judgment was entered upon the sole ground that the defendant had put it out of his power to give a deed of the property, and declares that the judgment is without prejudice to the right of plaintiff to litigate in a proper action the other questions in the case, such questions having not been litigated and decided in this case. Therefore the judgment is no bar. *Wanzer* v. *Self*, 30 O. St. 378. Whenever a decree or judgment in equity is declared to be without prejudice the judgment is not a bar to another action on the same claim. *Hazen* v. *Bank*, 41 At. Rep. 1047; *O'Keefe* v. *Company*, 39 At. Rep. 428; *Wolfe* v. *Potts*, 42 S. W. Rep. 188; *Long* v. *Long*, 44 S. W. Rep. 341; 1 Van Fleet Form. Adj. § 45; 2 Black Judgmts., § 721; *Ulrich* v. *Drischell*, 88 Ind. 354, 363; *Epstein* v. *Ferst*, 17 So. Rep. 414. A judgment, when it is used as a bar, cannot be explained or contradicted by the opinion of the court pronouncing the same. *Citizens' Bank* v. *Brigham*, 60 Pac. Rep. 754; Buckingham's Appeal, 22 At. Rep. 509; *Harmon* v. *Auditor*, 13 N. E. Rep. 161; *Chaffee* v. *Morgan*, 30 La. Ann. 1307; *Penouilah* v. *Abraham*, 9 So. Rep. 36, 15 Enc. Pl. & Pr. 309; 1 Herman on Estop. 470; *Martin* v. *Evans*, 36 At. Rep. 258; *State* v. *Krug*, 94 Ind. 366; *Ry. Co.* v. *New Orleans*, 14 Fed. Rep. 373; *In re Broderick*, 56 N. Y. Supp. 99; *Morske* v. *Williard*, 48 N. E. Rep. 290; *Kalumet Ry. Co.* v. *Van Pelt*, 50 N. E. Rep. 678. Appellate courts have not, in general, the power to review their own decisions after the time for rehearing has expired. 2 Enc. Pl. & Pr. 373. Expressions of opinion as to matters beyond the scope of the case do not, in any sense, constitute the law of the case. 2 Enc. Pl. & Pr. 381; *Barney* v. *Ry. Co.* 117 U. S. 228; *Findlay* v. *Trigg*, 83 Va. 539; *Forgenson* v. *Smith*, 104 Ind. 246; *Dilworth* v. *Curtis*, 139 Ill. 508. It is the general practice in this country, when a bill in equity is dismissed without a consideration of the merits, for the court to express in its decree that the dismissal is without prejudice. The omission of the qualification in a proper case will

be corrected on appeal. *Durant* v. *Essex County*, 7 Wall. 107; 2 Beach Eq. Prac., § 643; *Barney* v. *Baltimore*, 6 Wall. 280; *Bodkin* v. *Arnold*, 30 S. E. Rep. 154; *Mitchell* v. *Dowell*, 105 U. S. 430; Evans v. Schafer, 86 Ind. 135; *Long* v. *Long*, 44 S. W. Rep. 341; *Thorne* v. *Phares*, 14 S. E. Rep. 399; *Ulrich* v. *Drischell*, 88 Ind. 354; *Gunn* v. *Peakes*, 36 Minn. 177; *Ry. Co.* v. *Township*, 28 N. E. Rep. 439; *Wanzer* v. *Self*, 30 O. St. 378; *Epstein* v. *Ferst*, 17 So. Rep. 414; 2 Black Judgmts., § 721. Even if the saving clause were not in the judgment, and if the complaint in the first action showed that plaintiff therein relied upon the redemption agreement as the foundation of his claim, still, the former judgment would not be a bar. *Cromwell* v. *Sac County*, 96 U. S. 681; Freeman on Judgmts., § 265; *Sager* v. *Blaine*, 44 N. Y. 445; 2 Van Fleet Form Adj. 444; 2 Black on Judgmts., § 715. Plaintiff's cause of action in the present case is the wrong of the defendant in deeding away trust property to which plaintiff had in equity a claim. This is entirely distinct from the cause of action he had against defendant previous to such transfer to compel him to convey the land to him on being paid the sum already specified. *Rogers* v. *Barnes*, 47 N. E. Rep. 602; *Bonker* v. *Charlesworth*, 33 Mich. 81; *Wright* v. *Anderson*, 20 N. E. Rep. 277; *Elgin Watch Co.* v. *Myer*, 29 Fed. Rep. 225; *Gwinn* v. *Smur*, 49 Mo. App. 361; 2 Van Fleet Form Adj., 886; 2 Dan. Ch. Prac. 995, Note 2; *Snyder* v. *McComb*, 39 Fed. Rep. 292; *Ballantyne* v. *Appleton*, 20 At. Rep. 234; *Bank* v. *Harding*, 53 N. W. Rep. 99; *Gall* v. *Gall*, 45 N. Y. Supp. 248; *Marsh* v. *Masterton*, 101 N. Y. 401. *Ferguson* v. *Ins. Co.*, 22 Hun. 320; *Mussey* v. *Bates*, 27 At. Rep. 167; *Porter* v. *Wagner*, 36 O. St. 461; *Prayette* v. *Ferrier*, 55 Pac. Rep. 629; *Dixon* v. *Merritt*, 21 Minn. 196; *Smith* v. *Auld*, 1 Pac. Rep. 626; *Lyons* v. *Robbins*, 45 Conn. 513, 524; *Smith* v. *Rountree*, 56 N. E. Rep. 1130; *Rease* v. *Dobson* 13 S. E. Rep. 530. Even if a case has been tried and submitted and decided on the merits a court of equity may allow the plaintiff to relitigate all or any the questions involved. *Burton* v. *Burton*, 58 Vt. 414; *Upjohn* v. *Ewing*, 2 O. St. 13; *Hepburn* v. *Dunlop*, 1 Wheat. 179; *Krutzinger* v. *Brown*, 72 Ind. 466.

YOUNG, J. This is an action in equity, wherein the plaintiff seeks to recover from the defendant, as an involuntary trustee, the value of certain real estate, the title of which, he alleges, the latter fraudulently obtained from him, and thereafter conveyed to another. The trial was to the court without a jury, and resulted in a judgment in plaintiff's favor in the sum of $2,096.06. Defendant has appealed from the judgment. In addition to certain questions of law, to which reference will be hereafter made, appellant presents for review certain questions of fact, and, for the purpose of securing such review, has caused a statement of case to be settled, embracing all the evidence offered in the trial court, with a proper specification of the facts which he desires to have reviewed. As preliminary to a consideration of the questions presented, we state certain

facts which are not in controversy. It appears that the real estate in question was purchased by plaintiff on October 20, 1893, from one Grabanski. Grabanski had mortgaged it to W. R. Sheppard to secure his three promissory notes, for $600 each, maturing January 1, 1893, 1894, and 1895, respectively. He had also placed a second mortgage upon it to John Paschke to secure an indebtedness due the latter of $800. The debts secured by these mortgages were wholly unpaid when plaintiff purchased, and in the deed he received from Grabanski he assumed their payment as part of the consideration for this purchase. In August or September, 1893, Sheppard, who resided in California, sent the three $600 notes to defendant, Garbut, for collection. Shortly after receiving them, foreclosure proceedings by advertisement were commenced as to the first note, which was past due, and the land was sold thereunder on December 30, 1893, to W. R. Sheppard, mortgagee, for the amount due on said note, with costs of foreclosure, amounting in all to $731.35, and a sheriff's certificate was duly issued to him. In March, 1894, defendant, Garbut, purchased the notes from Sheppard, and also the sheriff's certificate, and received a written assignment of the latter. In 1894 plaintiff paid the debt secured by the Paschke mortgage, and also paid to defendant, Garbut, the full amount due on the second note; that is, the one falling due January 1, 1894. Early in January, 1895, he also paid defendant $340, and subsequent thereto enough more was paid to entirely cancel the third note, due January 1, 1895. On January 5, 1895, defendant took a sheriff's deed on the foreclosure on the first note. On January 16, 1895, defendant and his wife executed and delivered a deed of said real estate to his brother Joseph Garbutt. All of the conveyances herein referred to were recorded at or about the date of their execution. Plaintiff's claim is that defendant obtained the title through his sheriff's deed under such circumstances as to render him a trustee thereof for plaintiff, in equity, and liable to plaintiff for the value of said real estate, less the amount due on the sheriff's certificate at the date defendant deeded the same to his brother. The complaint, so far as important, alleges, in substance, that in the month of December, 1894, and within the year allowed by law for a redemption from the foreclosure, the plaintiff offered to pay to the defendant the sum required to make redemption; that the defendant, with intent to defraud and deceive the plaintiff, and for the purpose of inducing the plaintiff to defer making redemption, well knowing that plaintiff relied upon his representations, promised plaintiff that he would give him further time in which to redeem, which promise was made for the purpose of deceiving plaintiff and without any intention of keeping it, and for the purpose of inducing the plaintiff to alter his position and put it out of his power to redeem said land, to the end that defendant might get a sheriff's deed thereto; that plaintiff, in reliance upon such promises, allowed the period of redemption to

expire, and not otherwise; that the plaintiff was ready, willing, and able to pay the amount necessary to redeem said land. The defendant in his answer denies that he promised to extend the period for redemption, and pleads a former adjudication in bar of this action. It was settled on a former appeal that the facts pleaded in the complaint are sufficient to entitle the plaintiff to relief in equity. See *Prondzinski* v. *Garbutt,* 8 N. D. 191, 77 N. W. 1012. Our inquiry on the present appeal is directed to the existence of these facts; also the question whether the plaintiff is barred from obtaining relief by reason of a former adjudication, and, if he is not, as to the nature and extent of relief available to him.

Counsel for appellant presents the following questions of fact for review: "(1) Did defendant agree to extend the time within which plaintiff might redeem from the foreclosure sale beyond the year limited by law? (2) Did plaintiff offer to pay defendant the amount necessary to redeem from the foreclosure sale? (3) Did defendant cheat, wrong, or defraud plaintiff in any way? (4) Did plaintiff rely upon any promise made by defendant regarding the redemption from the mortgage sale? (5) What was the value of the land in December, 1894, and January, 1895?" The trial court found the value of the real estate was $2,250 at the time in question, and resolved each of the other questions against the appellant. After an independent examination of the evidence contained in the record, we have reached the same conclusion. On the question as to the alleged extension of time of redemption, and offer to pay, the testimony of plaintiff and defendant is squarely in conflict; but the facts and circumstances surrounding the transaction, which are not in dispute, leave no doubt in our minds that the promise was made as alleged, and found by the trial court, and that plaintiff offered to redeem, just as he claims. The testimony does not, in our judgment, admit of any other interpretation. On the question of the value of the land the evidence covers a wide range, but the amount found by the trial judge is clearly favorable to defendant. A number of witnesses place the value at from $2,500 to $3,000. In defendant's deed to his brother the consideration recited is $3,000. It also appears that on a former trial a jury found the value at $3,000. The evidence certainly does not warrant a reduction of the value found by the trial court.

We come now to a consideration of the judgment pleaded in bar. In his answer defendant alleges, for a further and second defense, "that on the 30th day of January, 1899, in an action then pending in the District Court of Walsh County, wherein this plaintiff was plaintiff and this defendant was defendant, for the same cause of action as that set forth in the complaint herein, final judgment was duly rendered and entered, after a trial of said action on the merits, adjudging that plaintiff take nothing thereby, that said action be dismissed, and that defendant recover his costs and disbursements therein, which judgment is now in full force and effect." The complaint, answer, findings of fact, conclusions of law, order for judg-

ment, and judgment in the action so pleaded in bar were introduced in evidence, and are contained in the record before us. That action was commenced shortly after plaintiff discovered defendant had obtained the sheriff's deed. The purpose of the action was to compel the defendant to deed the land back to him, and the basis of his demand for such relief is contained in an allegation in the complaint that the defendant, acting as attorney for William Sheppard, agreed with the plaintiff to accept him for the amount due to Sheppard. No allegations as to the agreement to extend the time of redemption, which is the basis of the present action, is contained in the complaint. The judgment so pleaded follows the findings of fact and conclusions of law upon which it is based, and, so far as important for reference, is as follows: "The issues in the action having come on for trial, and the defendant having established upon the trial that before the commencement of this action he had conveyed the land in question to one Joseph Garbutt, and no other issues having been litigated in this case, and the sole defense of the defendant being the fact of the said conveyance, and the court having rendered its decision herein, and ordered that judgment be entered herein in accordance with the said decision, now on motion, * * * it is adjudged that this action be dismissed on the sole ground that the defendant had, previous to the commencement thereof, transferred the real estate in question to another person, and therefore could not be compelled to give to the plaintiff a quit-claim deed therefor. And it is further adjudged that the dismissal of this action shall be without prejudice to the rights of the plaintiff to litigate in a proper action all the other questions involved in this case, which questions were not litigated upon the trial of this action." The above judgment of dismissal was rendered and entered on motion of plaintiff's counsel. An appeal was taken by defendant, and the same was affirmed by this court. 9 N. D. 239, 83 N. W. Rep. 23. Does this judgment operate as bar to the present action? We are of opinion that it does not. In reaching this conclusion we are not influenced by the claim of plaintiff's counsel that the present cause of action and the one involved in the former action, wherein the judgment relied upon was rendered, are not the same, or the contention that the complaint did not state a cause of action. These questions we need not discuss or determine. Our conclusion rests entirely upon the language of the judgment itself, which sets forth without uncertainty just what was determined in said action, which was that defendant had conveyed the land to his brother before the commencement of the action, and consequently could not be compelled to deed it to plaintiff. The judgment, however, is not silent as to other questions involved, but affirmatively shows not only that they were not litigated, but that as to all other questions the case was dismissed without prejudice. That a court of equity has the power to dismiss an action without prejudice is well settled, and it is equally well settled that the effect of such a dismissal is to prevent the decree entered from constituting a bar to another

suit brought on the same subject-matter. See 2 Black, Judgm. § 721. It is the general practice, when a bill in equity is dismissed without a consideration of the merits, for the court to express in its decree that the dismissal is without prejudice. *Durant* v. *Essex Co.*, 7 Wall. 107-113, 19 L. Ed. 154; *Ballentine* v. *Ballentine*, (Pa.) 15 At. 859; *Lang* v. *Waring*, 25 Ala. 625, 60 Am. Dec. 533. And the purport of such an order is that the dismissal shall not operate as a bar to a new suit which the party may institute. Story, Eq. Pl. § 793; *Nevitt* v. *Bacon*, 32 Miss. 212, 66 Am. Dec. 609. "Such a judgment is by its terms no bar." *Gunn* v. *Peakes*, (Minn.) 30 N. W. 466, 1 Am. St. Rep. 661. And this even though it was so rendered erroneously. *Wanzer* v. *Self*, 30 Ohio St. 378. See, also, *Magill* v. *Trust Co.*, 81 Ky. 129; *English* v. *English*, 27 N. J. Eq. 579; 1 Van Fleet, Form. Adj. § 45, and cases cited. As to the correctness of the above rule no doubt can exist. Counsel for appellant do not contend otherwise. Their contention is that the insertion of the clause in the judgment that the dismissal of the action should be "without prejudice," etc., was of no effect, and they rely entirely upon the language used by the court in affirming the judgment. See *Prondzinski* v. *Garbutt*, 9 N. D. 243, 244, 83 N. W. 23. A careful examination of the opinion in that case will show that our criticism of the language used in the judgment was directed entirely to those portions wherein the trial court attempted to reach out and predetermine absolutely and in advance the effect which the judgment should have in other actions or other courts. Our purpose was merely to point out that the determination of the question as to whether a judgment in any case constitutes a bar is one to be determined by the court in the action in which the judgment is pleaded, and not by the court in the case in which it is rendered. It certainly was not our intention to hold that a court of equity may not dismiss a case without prejudice, or that the dismissal without prejudice in the case then under consideration was erroneous. A careful examination of all of the language employed in the opinion will not show otherwise, and if it carries any other interpretation it is expressly disapproved. The trial court properly concluded that the judgment relied upon by defendant does not constitute a bar to the relief sought in the present action.

Counsel for appellant also takes the position that in any event the plaintiff is not entitled to judgment for the value of the land, but that his recovery, under the facts of this case, is limited to the proceeds derived from the sale to his brother. This contention cannot be sustained. Independent of the statute, no doubt can exist that plaintiff can recover the value of the real estate wrongfully and fraudulently acquired and sold by defendant. As was said in *Long* v. *Fox*, 100 Ill. 43, "no rule of law is better settled than that where a trustee wrongfully converts to his own use the trust property, or any part of it, the *cestui que* trust, is entitled in equity to a personal decree for the value of the property so converted." Hill, Trustees, 522; Perry, Trusts, § 847. And this without regard to

the amount for which they were sold. *Hardin* v. *Eames,* 5 Ill. App. 153; *Loomis* v. *Satterthwaite,* (Tex. Civ. App.) 25 S. W. 68; *Boothe* v. *Feist,* (Tex. Sup.) 15 S. W. 799; *Silliman* v. *Gano,* (Tex. Sup.) 39 S. W. 559; *Rogers* v. *Barns,* (Mass.) 47 N. E. 602; *Mixon* v. *Miles,* (Tex. Civ. App.) 46 S. W. 105; *Ringgold* v. *Ringgold,* (Md.) 18 Am. Dec. 250; *Chamberlain* v. *O'Brien,* 46 Minn. 80, 48 N. W. 447, and cases cited on page 83, 46 Minn., and page 448, 48 N. W. See, also, *Cushman* v. *Bonfield,* 139 Ill. 219, 28 N. E. 937; *Harton* v. *McClaren,* (Ind. Sup.) 31 N. E. 48. It would seem to be the well-settled doctrine that courts of equity will lend their assistance to a beneficiary, as against his trustee, who has fraudulently disposed of the trust property, and give to the former his property, if it can be obtained, or the proceeds received by the trustee, or its value, with interest, as he may elect. Appellant's contention is wholly based upon § 4273, Rev. Codes, which reads as follows: "A trustee who uses or disposes of trust property contrary to § 4265, may, at the option of the beneficiary, be required to account for all profits so made or to pay the value of its use, and if he has disposed thereof, to replace it with its fruits, or to account for its proceeds with interest." Does the statute just quoted establish different rights from those which existed prior to its enactment, and cut off the right to recover the value of property fraudulently disposed of by a trustee? We do not so construe it. In referring to this section, and also § 4265, on the former appeal (*Prondzinski* v. *Garbutt,* 8 N. D. 191, 77 N. W. 1012), we said: "Not only does the statute declare that a trust relation results, but to some extent, at least, fixes the liability of the trustee; and should it appear that the plaintiff is entitled to relief, and if the land and its fruits are not restored to him, if such is his election, he may recover its value, with interest, or the proceeds of the sale, with interest, as he may elect, in either case deducting the amount due on the sheriff's certificate." It is true, as counsel contend, that a construction of said section of the statute was not necessary to a decision of the question presented on that appeal, which was whether the order of the trial court in granting a new trial was proper; the action, through a mistake as to its nature, having been tried as one at law, and to a jury. In pointing out that the case was one exclusively of equity cognizance, we used the language above quoted. But we are of opinion that, on the facts of this case, in stating that "plaintiff may recover the value of the land, with interest, or the proceeds of the sale, with interest, as he may elect," we correctly stated the law applicable. Counsel's contention is that: "Nowhere is it provided in § 4273 that the beneficiary may recover the value of the property. If the property has been disposed of by the trustee, and the beneficiary does not seek to have the property restored to him, with its fruits, he can only recover the proceeds, with interest, not the value, with interest." It is true, the statute does not expressly declare that the beneficiary may recover the value of the property, with interest, but it plainly establishes an absolute legal right in the beneficiary to have the property, with its

fruits, restored, if he so elects; and it requires no argument or citation of authority to show that if that right is denied, and the property is not replaced by the trustee according to such election, he is entitled to his damages for the breach of the obligation, just as much as though the duty was one created by the contract of the parties, instead of by the statute. The statute gives the beneficiary a right to have his property, with its fruits, replaced, or he may elect to ratify the sale and recover the proceeds, with interest. He may have either right at his option, but cannot have both. Should he elect to recover the proceeds, he cannot recover the property. If he elects to require the property to be replaced, he cannot recover the proceeds. The option, however, is entirely with the beneficiary. The trustee, by placing the property where he cannot replace it, or by refusing to replace it, cannot compel the beneficiary to accept the proceeds of the sale. The language of the statute under consideration will not warrant such a construction. Furthermore, to so hold would convict the legislature of establishing a rule definitely calculated to facilitate the perpetuation of frauds, instead of preventing them, and one which would lead to a general miscarriage of justice; for, as a rule, men who commit frauds usually place it out of their power to repair their wrongs. Under such construction beneficiaries would have to accept the proceeds of fraudulent sales, however insignificant as compared with the value of the property wrongfully conveyed by their trustees. The statute establishes no such rule. In the case at bar the plaintiff never elected to ratify the sale made by the defendant to his brother, and to take the proceeds of such sale. On the contrary, he elected to have his land restored, and, as we have seen, brought an action to enforce that right; but, because the defendant had put it out of his power to reconvey, he was defeated. Does the fact that he failed to get his land compel him to accept the proceeds of the sale? Certainly not. His legal right to have his land restored has not been destroyed or lost; neither has his election to have it restored been annulled by any election to take the proceeds of the sale. And in this action he is simply attempting to recover his damages arising from defendant's breach of duty in failing to restore it to him. That duty arose at the time he took out the sheriff's deed, viz: January 5, 1895; and the trial court, in estimating plaintiff's damages, properly added interest to the value of the land as of that date, after deducting the amount due on the sheriff's certificate. A wrongful diversion of trust property by a trustee is analogous to a conversion of personal property, and is attended by a similar liability to respond for its value, with interest. As to the defendant's liability for interest, see 1 Perry, Trusts, § 468. See, also, cases cited supra. It follows that the judgment of the District Court must be affirmed, and it is so ordered. All concur.

(86 N. W. Rep. 969.)

MORRIS ROSENBAUM, *et al vs.* JERRY HAYES.

Opinion filed June 14, 1901.

Factor's Lien—Possession.

The factor's lien provided for in § 4836, Rev. Codes, is dependent upon the possession of the property upon which the lien is claimed. The possession required to sustain such lien is sufficient if it appears that the property is so appropriated to the factor that it is assuredly under his control. Just what will constitute a sufficient assumption of possession by the factor must depend largely upon the kind and nature of the property, the situation of the parties, and other circumstances peculiar to each case.

Plaintiff in Control of Property.

On a trial de novo in this court it is found that the evidence establishes the possession and the control of the sheep in controversy in plaintiffs under a factor's lien at the time they were seized by defendant under a writ of attachment directed against the property of the owner thereof.

Sunday Transfer—Valid When Executed.

It is *held* that the fact that the factor acquired possession of the property on Sunday will not defeat his possession or lien based thereon. A Sunday transfer of property, even when prohibited by law, is effective so far as executed. The law merely refuses to lend its aid to enforce executory features of the contract, or to help the parties to regain their former position. It requires them to remain in the position in which they have placed themselves. A creditor of the owner has no other right than the owner. Whether the transfer of possession in this case constituted "servile labor" or "trade," within the meaning of § § 6841, 6842, Rev. Codes, and is prohibited, is not determined.

Factor's Lien—How Waived.

A factor's lien is waived by a special agreement inconsistent with the continuance of the lien, such as an extension of time of payment beyond the period when the lien would naturally terminate; or by an intentional waiver, such as the acceptance of other security with intent to rely upon it exclusively, or an agreement to look to the personal responsibility of the debtor. It is *held*, on the facts of this case, that the time of payment was not extended; neither did plaintiffs waive their lien by taking other security, nor did they at any time waive the lien by relying upon the personal responsibility of the debtor.

Assignment of Factor's Lien Not Involved.

Plaintiffs took possession of the sheep in controversy under the present claim and delivery proceedings on August 11, 1893. Two days later the defendant rebonded, and regained possession. On November 20, 1893, defendant sold the sheep, and transferred title. It is claimed that an assignment of the factor's lien was made by the factor on January 1st thereafter. *Held*, that the rights of the parties had become fixed prior to the alleged assignment, and that the lien was merged in the present cause of action. Accordingly, the question of the assignability of a factor's lien is not involved.

Complaint Sustained by Evidence.

Evidence examined, and found to establish the balance due the plaintiffs as factors at the amount demanded in the complaint.

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

Action by Morris Rosenbaum and others against Jerry Hayes, sheriff. Judgment for plaintiffs, and defendant appeals.

Affirmed.

James B. Kerr, Alexander Hughes and *George W. Newton*, for appellants.

This case has been twice before the court. *Rosenbaum* v. *Hayes*, 5 N. D. 476; *Rosenbaum* v. *Hayes*, 8 N. D. 461. Possession of the sheep, by the plaintiffs, upon the range during the summer would not be sufficient to create a lien in favor of the plaintiffs as factors for the reason that a factor has a lien only upon such property of his principal as comes into his hands in the ordinary course of business as a factor. 2 Kents Com. 637; 2 Parsons Cont. (8 Ed.) 99; *Dixon* v. *Stansfield*, 10 C. B. 399; *Stevenson* v. *Blakelock*, 1 M. & S. 535; § § 4836, 4134, 4353, Rev. Codes; § § 4442, 3791, 4010 Comp. Laws; Whart. Agcy. § 735; 3 A. & E. Enc. L. 318, Note 2. A factor must be a specialist pursuing the particular business as a trade. One who undertakes to sell a piece of goods out of his line of business is not, therefore, a factor. *Bank* v. *Jones*, 4 N. Y. 497; Benjamin on Sales, 38; *Thatcher* v. *Moors*, 134 Mass. 156. Possession is essential to create, and essential to preserve a lien at common law. The right begins and ends with possession. Jones on Liens, § 21; *Bank* v. *Janin*, 46 La. Ann. 1001; *Hinchman* v. *Lincoln*, 124 U. S. 38. Conceding that all the testimony offered by the plaintiffs as to the transaction on the prairie is true, yet it is clear that there was no such change of possession as would pass the title between the parties on sale. *Hinchman* v. *Lincoln*, 124 U. S. 38; *Shindler* v. *Houston*, 1 N. Y. 261; *Edwards* v. *Meadows*, 71 Ala. 42; *Hollenbeck* v. *Cochran*, 20 Hun. 416. Any delivery upon the prairie on August 6th conferred no rights for the reason that the transaction was in violation of the Sunday law. § § 6241, 6242, 6245, Comp. Laws; *Smith* v. *Wilcox*, 24 N. Y. 353; *Link* v. *Clemens*, 7 Blackf. 479; *Reynolds* v. *Stevenson*, 4 Ind. 619; *Cincinnati* v. *Rice*, 15 O. St. 225; Note 14 L. R. A. 192; *Smith* v. *Foster*, 41 N. H. 215; *Moseley* v. *Hatch*, 108 Mass. 519; *Finley* v. *Quirk*, 9 Minn. 194; *Durant* v. *Rhenier*, 26 Minn. 302, 4 N. W. Rep. 610; *Brackett* v. *Edgerton*, 14 Minn. 174; *Gibbs, Etc. Co.* v. *Brucker*, 111 U. S. 597, 601; *Vinz* v. *Beatty*, 61 Wis. 645. The transfer was fradulent and void as against creditors because not accompanied by and followed by an actual and continued change of possession. § 4657 Comp. Laws; *Conrad* v. *Smith*, 2 N. D. 412; *McFarland* v. *Wheeler*, 26 Wend. 467. The amendment of § 4657, Comp. Laws by Chap. 78 of the Laws of 1893, which changes the rule of presumption from a conclusive to a rebuttable presumption, only relates to sales and not

to liens. The policy of the law which requires a visible possession to support a lien is found in the re-enactment of § 4345, Comp. Laws as § 4698, Rev. Codes. *Newell* v. *Wagness,* 1 N. D. 62; *Conrad* v. *Smith,* 2 N. D. 408; *Morrison* v. *Oium,* 3 N. D. 76; *Bank* v. *Janin,* 46 La. Ann. 1001; *McFarland* v. *Wheeler,* 26 Wend. 467; *Flanagan* v. *Wood,* 33 Vt. 327. The claim of the plaintiffs against the Beasleys has been assigned, and any lien is extinguished. The lien or right to a lien cannot be assigned. Jones on Liens, § 982; *Tewksbury* v. *Bronson,* 48 Wis. 581, 4 N. W. Rep. 749; *Gage* v. *Allison,* 2 Am. Dec. 682; *Ames* v. *Palmer,* 66 Am. Dec. 271; *Holly* v. *Huggeford,* 19 Am. Dec. 303. The recovery must be limited to the special interest of the plaintiffs in the property. *Tewksbury* v. *Bronson,* 48 Wis. 581, 4 N. W. Rep. 749; Suth rland on Damages, § 1160; *Deal* v. *Osborne,* 42 Minn. 102; *Wheeler* v. *Train,* 4. Pick. 168. By § 229 of the Montana statute, the mortgages executed at Chicago were fraudulent. They were a part of the same transaction with the execution of the paper at Dickinson. The law in force at the time and place when and where a contract is entered into, and where it is to be performed, enters into and becomes a part of it. *Walker* v. *Whithead,* 16 Wall. 314; 21 L. Ed. 57; *Ogden* v. *Saunders,* 12 Wheat. 213; 6 L. Ed. 606; *Cook* v. *Moffat,* 5 How. 312, 12 L. Ed. 167; Bishop. Cont. 554. 567. The statute law of another state will be enforced, if not against public policy, when such law has entered into a contract. *Bucher* v. *Gregory,* 9 Mo. App. 102; *Cobb* v. *Griffith,* 12 Mo. App. 130. The repeal of § 4657, Comp. Laws of North Dakota, by Chap. 78, Laws of 1893, did not repeal the statutes of Montana. The Montana statutes were the law of the contract and could not be changed so as to affect the note in question, or Gans' rights thereunder, even by the legislature of Montana. *Conrad* v. *Smith,* 6 N. D. 337; *Bosher* v. *Berry,* 6 Mont. 448; *Harmon* v. *Bank,* 18 Mont. 525; *Merchants Nat. Bank* v. *Greenhood,* 16 Mont. 395, 453. The Montana statute forming a part of the contract, this court should enforce it. *Flash* v. *Conn.,* 107 U. S. 371, 381; 29 L. Ed. 966; *Jessup* v. *Carnegie,* 80 N. Y. 441.

Ball, Watson & Maclay, A. B. Melville and *J. G. Campbell,* for respondents.

It is an undisputed fact in the case that it was the custom in 1893, in the shipment of sheep to eastern markets, to feed them in transit on the range. This fact is sufficient answer to appellant's contention that the sheep did not go into plaintiffs' possession in the usual course of business. A factor may prepare as well as keep property for sale on the market. *Bank* v. *Schween,* 127 Ill. 573; *State* v. *Thompson,* 120 Mo. 12; *Shaw* v. *Ferguson,* 78 Ind. 547, 554. The delivery of possession was sufficient. *Sumner* v. *Hamlet,* 29 Mass. 26; *Cady* v. *Zimmerman,* 20 Mont. 225; *Dodge* v. *Jones,* 7 Mont. 121; *Rice* v. *Austin,* 17 Mass. 197; *Williams* v. *Lerch,* 56 Cal. 334 *Montgomery* v. *Hunt,* 5 Cal. 369; *Goodwin* v. *Goodwin,* 90 Me. 23; *Brown* v. *Wade,* 42 Ia. 647; *Garretson* v. *Hackenberg,* 144 Pa. St.

107; *Bell* v. *McClosky*, 155 Pa. St. 319; *Webster* v. *Anderson*, 42 Mich. 554; *Tunell* v. *Larson*, 39 Minn. 269; *Stanley* v. *Robbins*, 36 Vt. 422; *Stevenson* v. *Clark*, 40 Vt. 624; *Godchaux* v. *Mulford*, 26 Cal. 316, 324 et seq.; *Parks* v. *Barney*, 55 Cal. 239; *Humphreys* v. *Harkey*, 59 Cal. 626; *Morgan* v. *Miller*, 62 Cal. 492; *Meads* v. *Lasar*, 92 Cal. 221; *Porter* v. *Bucher*, 98 Cal. 454; *O'Brien* v. *Ballou*, 116 Cal. 318; *Adams* v. *Weber*, 117 Cal. 42; *Williams* v. *Borgwardt*, 119 Cal. 83; *Asbill* v. *Standley*, 31 Pac. Rep. 738; *Clute* v. *Steele*, 6 Nev. 335; *State* v. *Flynn*, 56 Mo. App. 236; *McGuire* v. *West*, 43 S. W. Rep. 458; *Grenthal* v. *Lincoln*, 68 Conn. 384; *Warner* v. *Carlton*, 22 Ill. 424; *Grady* v. *Baker*, 3 Dak. 298. The transactions at Dickinson on August 6th amounted to a sufficient change of possession of the sheep to satisfy the requirements even of the Montana statutes. *Cady* v. *Zimmerman*, 20 Mont. 225; *Dodge* v. *Jones*, 7 Mont. 121. The Montana statute was not such a part of the substantive law as to prevent the legislature from altering it so as to affect contracts made prior to such amendment so long as the parties to such contracts had obtained no specific right or title to the property affected by the amendment, or any lien upon it by attachment, or otherwise. *Conrad* v. *Smith*, 6 N. D. 337. The bill of lading, freight receipts and way bills were admissible upon the question of the intent of the parties, as well as upon the question of delivery of possession. It was not necessary to show the authority of the railroad agent to issue them either as against the company or a third person. *Hanson* v. *Ry. Co.*, 41 N. W. Rep. 529; *Brooks* v. *Ry. Co.*, 21 A. & E. R. R. Cas. 64. They were admissible even though not authorized. *Prince* v. *Ry. Co.*, 101 Mass. 542; *Bryan* v. *Nix*, 4 M. & W. 775. The transfer of plaintiffs' claims to Rosenbaum Bros. & Co., was proved in cross-examination, over objection, and was outside the line of examination in chief. *Kaeppler* v. *Bank*, 8 N. D. 406. This transfer did not include the claims in litigation. But even if established that plaintiffs are not now the owners of the cause of action, the case should continue in the name of the original party. § 5234, Rev. Codes; *Johnson* v. *King*, 58 N. W. Rep. 1105; *Moss* v. *Shear*, 30 Cal. 469; *Camerillo* v. *Fenton*, 49 Cal. 203; *Alexander* v. *Overton*, 72 N. W. Rep. 212. The factor's lien law descends to and can be enforced by the personal representative of the factor, or by his assignee in insolvency. This is enough to show that the right is not a purely personal right. 10 A. & E. Enc. L. (2 Ed.) 687, Notes 2 and 3. No such important distinction exists between the factor's lien and other common law liens dependent upon possession as should differentiate them with respect to the right of assignability. *Nash* v. *Mosher*, 19 Wend. 431; Jones on Pledges, § 331; *Sibley* v. *Willard*, 17 N. W. Rep. 337; *Tuttle* v. *Howe*, 14 Minn. 145; *Duncan* v. *Hawn*, 37 Pac. Rep. 626; *DeWitt* v. *Prescott*, 16 N. W. Rep. 656. While the form of the present action is replevin, as the property has been sold and disposed of and cannot be returned to the plaintiff, an alternative judgment would be unnecessary and unavailing. *Boley* v. *Griswold*, 20 Wall. 486; *Brown* v. *Johnson*,

45 Cal. 76. The action is changed, so far as practical results are concerned, into an action for conversion. *Brewster* v. *Carmichael,* 39 Wis. 456; Cobbey on Replevin, § 852. The rights of all the parties were fixed at the time the defendant gave the redelivery bond and took back the sheep. *Union Nat. Bank* v. *Moline, Milburn & Stoddard Co.,* 7 N. D. 219, 222. After suit is begun, when the rights of the parties have become fixed, an assignment will not destroy the right of action. *Tuttle* v. *Howe,* 14 Minn. 149. Assuming that the transfer to the corporation were proved, it would be a transfer in name only and not in substance. Under such circumstances the court will consider substance and not form. *New York Bank Note Co.* v. *Bank Note Co.,* 50 N. Y. Supp. 1093, 1099. The taking of collateral security was not, as a matter of law, a waiver of the lien, there being no evidence tending to show an intent to waive it. 28 A. & E. Enc. L. 526, 529. The intention to waive a lien must be express or the implication must be very clear and plain. The presumption is always against it. *Lambert* v. *Nicklass,* 31 S. E. Rep. 951; *Howe* v. *Kindred,* 44 N. W. Rep. 311; *Mines* v. *Seymour,* 153 U. S. 509, 517; *Brisco* v. *Mining Co.,* 82 Fed. Rep. 952; *Kilpatrick* v. *Ry. Co.,* 57 N. W. Rep. 664; *Ford* v. *Wilson,* 11 S. E. Rep. 559; *Chicago Etc. Ry. Co.* v. *Rolling Mill,* 109 U. S. 702. Taking a mortgage upon the same property does not necessarily waive the lien. Jones on Liens, § § 1011, 1013; *Joslyn* v. *Smith,* 2 N. D. 53; *Chapman* v. *Brewer,* 62 N. W. Rep. 320; *Bank* v. *Taylor,* 4 S. W. Rep. 876, 880; *Payne* v. *Wilson,* 74 N. Y. 348; *Gilchrist* v. *Gottschalk,* 39 Ia. 311; The D. B. Steelman, 48 Fed. Rep. 589; *Taylor* v. *Fryar,* 44 S. W. Rep. 183; *Clark* v. *Moore,* 64 Ill. 273; *Roberts* v. *Wilcoxson,* 36 Ark. 355; *Franklin* v. *Moyer,* 36 Ark. 96; *Rollins* v. *Proctor,* 9 N. W. Rep. 235; *Ladner* v. *Balsley,* 72 N. W. Rep. 787; *Block* v. *Lathen,* 63 Tex. 414; *Angus* v. *McLachlan,* L. R. 23 Ch. D. 330, 334, 335; The Ellen Holgate, 30 Fed. Rep. 125; the D. B. Steelman, 48 Fed. Rep. 580; the Gate City, 5 Biss. (U. S.) 200; *Page* v. *Edwards,* 23 At. Rep. 917; *Remick* v. *Ludvigton,* 16 W. Va. 378. *Powell* v. *Smith,* 20 So. Rep. 872. The retaining of title to the property itself does not necessarily waive the lien. *Peninsular Co.* v. *Norris,* 59 N. Y. 151; *Manf. Co.* v. *Smith,* 40 Fed. Rep. 339; *Manf. Co.* v. *Hunter,* 15 Neb. 32. The rule against the admission of parole testimony to vary the terms of a written instrument is applied only in controversies between the parties to a contract, or their privies or representatives. Best Ev. § 225; *Iron Co.* v. *Green,* 88 Fed Rep. 207; *Sigafus* v. *Porter,* 84 Fed. Rep. 430; *Hussman* v. *Wilke,* 40 Cal. 250; *Dempsey* v. *Kipp,* 61 N. Y. 462; *McMaster* v. *Ins.* Co., 55 N. Y. 222; *Gaar, Scott & Co.* v. *Green,* 6 N. D. 48. The fact that plaintiffs accepted the mortgages does not raise a presumption that they extended the time of payment to the date named in the mortgage, or that they thereby agreed to extend the time. *Borden* v. *Bank,* 144 U. S. 97; *United States* v. *Hodge,* 6 How. 281; *Cary* v. *White,* 52 N. Y. 138; *Brengle* v. *Bushey,* 17 Am. Rep. 586; *Fisher* v. *Bank,* 45 Pac. Rep. 440; *Ripley* v. *Greenleaf,* 2 Vt. 129;

Benton v. *Bank*, 64 N. W. Rep. 227; *Shaw* v. *Church*, 39 Pa. St. 226; *Elwood* v. *Diefendorf*, 5 Barb. 398; *Bank* v. *Ives*, 17 Wend. 501.

YOUNG, J. This action was commenced in the District Court of Stark county on August 1, 1893, to recover the possession or value of 5,600 sheep owned by Beasley & Co., which sheep the defendant seized and took into his possession four days prior thereto, as sheriff of said county, under a warrant of attachment issued out of said court at the suit of Joseph Gans against the property of said Beasley & Co. Such proceedings were had by plaintiffs that the sheep in question were taken possession of by the county coroner of said county at the date of the service of the summons and complaint herein. Within the time allowed by law, viz. on August 13, 1893, the defendant executed a redelivery bond, and was restored to possession. On November 20, 1893, and before trial, the sheep were sold under an order of said court procured by defendant, since which date plaintiffs' only available relief has been confined to a recovery of the value of the sheep. At the times here in question the plaintiffs were live stock commission merchants, with headquarters in the city of Chicago, and as such were engaged in receiving consignments of stock for sale, and making advances thereon to local buyers, according to the custom of such business. Beasley & Co., a co-partnership composed of W. W. Beasley and his two sons, Nat C. Beasley and George M. Beasley, were engaged in the business of buying sheep in the west, and shipping them to plaintiffs to be sold on commission. The money for their purchases was furnished by plaintiffs. Plaintiffs claim that on the date the sheep in question were seized by the defendant, Beasley & Co. were indebted to them in the sum of $16,163.07 for advances. Joseph Gans, at whose instance the defendant seized the sheep, is a creditor of Beasley & Co., and resides in Montana. The amount of his claim at the date of the attachment was about $10,000. Plaintiffs allege that the relation of factor and principal existed between them and Beasley & Co., and that on the date of the seizure plaintiffs were in possession of the sheep in question as such factor, and were, therefore, entitled to retain such possession by virtue of a factor's lien thereon to secure the balance due for advances theretofore made to Beasley & Co. The defendant denies the existence of the lien, and claims that the sheep, when attached, were in the possession of the owners, Beasley & Co., and not in the possession of plaintiffs. Four trials have been had in the District Court, and this is the third appeal to this court. By consent the last trial in the District Court, from which the present appeal is prosecuted, was to the court without a jury, under the provisions of § 5630, Rev. Codes. Plaintiffs were successful. Judgment was ordered and entered in their favor for a return of the sheep, or for the amout found to be due on the claim secured by their alleged lien, with interest and costs, amounting in the aggregate to the sum of $25,523.58. Defendant has appealed from such judgment, and in a

settled statement of case, containing all of the evidence offered in the trial court, has demanded a review of the entire case in this court.

The first and most important question of fact to be considered relates to the possession of the property in controversy at the date of the attachment. The factor's lien, which furnishes the sole basis of plaintiffs' demand, exists only when coupled with the possession of the property on which the lien is claimed. Section 4836, Rev. Codes. Accordingly, if plaintiffs did not in fact have such possession of the property in question, on the date of the seizure, as would sustain such lien, they must fail in this action. It appears that the sheep were purchased in Montana, and were shipped to Dickinson, in Stark county, in April 1893, and were put upon the range at that point pursuant to an arrangement made by plaintiffs with the railroad company, which arrangement permitted plaintiffs to stop them in transit for feeding and grazing purposes, on a through rate tariff. The complaint, in substance, alleges that on April 11, 1893, the plaintiffs had, and ever since have had, a factor's lien on said sheep; that Beasley & Co. were engaged at said date in shipping stock to plaintiffs, as commission merchants at Chicago, Ill.; that upon said date plaintiffs had advanced to Beasley & Co. $16,163.07 on account of the shipment of said sheep and other live stock; that they were indebted to plaintiffs in that amount; that said sheep were taken off the cars in transit at Dickinson, N. D., and were in plaintiffs' possession as commission merchants and factors for purposes of sale; that, in addition to said factor's lien, it was expressly agreed by Beasley & Co. that the plaintiffs should have a factor's lien on said sheep for the general balance of $16,163.07; and that the possession of said sheep was transferred to the plaintiffs, and by them held at the time they were attached, on August 7, 1893. The answer admits the seizure, sets up the fact that the same was made under a warrant of attachment duly issued against the property of Beasley & Co., and alleges that the sheep were found in the possession of Beasley & Co., and were levied on as their property, and that such sheep were their property. It is a conceded fact that the sheep were owned by Beasley & Co. The question in dispute relates solely to the possession. Were they in the possession of plaintiffs or of Beasley & Co. when seized? The answer to this question will turn upon the effect to be given to certain acts relative to the possession of said sheep, which occurred in the three days immediately preceding the seizure by defendant. It is claimed by plaintiffs that during said time the possession of the sheep was delivered to them by Beasley & Co., and that they assumed the exclusive possession and control thereof, and had such possession and control when they were attached. To gain an intelligent understanding of the situation of the parties and the evidence on this point, it becomes necessary to narrate some preliminary facts. On April 11, 1893, Beasley & Co. owned 8,200 sheep, all of which, except 10 car loads, had been wintered at or near Rosebud, Mont. The sheep at Rosebud, which did not include the 10 car loads, were in three bands; one kept by a herder named Charles

W. Smith, another by a herder named Isaac Hodges, and the third by a herder named Harvey Willcutt. The 10 car loads referred to were purchased by Beasley & Co. on April 3, 1893, at Big Timber, Mont., for $9,500, which sum was advanced to them on said date by plaintiffs for such purchase. These 10 cars were loaded for shipment to Dickinson, in Stark county, but were stopped in transit at Rosebud, unloaded, and fed, and on April 9th or 10th were reloaded, and 10 cars loads added from the sheep wintered at Rosebud, making a train load of 20 cars, and all were shipped to Dickinson. Nat C. Beasley had the care and custody of the sheep on this train, assisted by Charles W. Smith and a herder named David Tetters. These sheep were unloaded at Dickinson, and left in the custody of Smith and Tetters. On the following day Nat C. Beasley returned to Rosebud with the same cars, and loaded the remaining sheep, 20 cars in all; also the camp equipage, which had been in use at Rosebud, and returned to Dickinson. The sheep on this train were in the care of W. W. Beasley and Nat C. Beasley, assisted by the two remaining herders, Isaac Hodgins and Harvey Willcutt. A summer range was located on the Cannon Ball river, and the sheep were divided into three bands, and placed in charge of the herders who had accompanied them from Montana. Isaac Hodges kept one band, Harvey Willcutt another, and David Tetters the third. Charles W. Smith was placed in general charge of the three camps. When the last train load was on the cars at Rosebud, the agent of the railroad company at that point, at the request of the Beasleys, issued a bill of lading for the entire 40 cars, and delivered the same to them. So far as important it is as follows: "Rosebud, Montana, April 11th, 1893. Received from Geo. M. Beasley & Co., in apparent good condition. * * * 40 cars sheep. * * * Consignee, Rosenbaum Bros. & Co. * * * Destination, Dickinson, N. Dak. S. L. C. Contract. * * * Northern Pacific Railroad, by H. Morrow, Agent." The word "contract" indorsed on the bill of lading means that the shipment is made under a live-stock contract. This contract is in evidence, and shows that the care and control of the sheep, with right to unload and feed during transportation, was in the consignors, Beasley & Co. The bill of lading showing the consignment to plaintiffs was at once forwarded to them at Chicago. At the date of the shipment from Montana to Dickinson, Beasley & Co. drew a draft on the plaintiffs for sufficient money to pay the freight charges, and also $200 to cover expenses of men and hotel bills, which draft was paid. On the arrival of the sheep at Dickinson, W. W. Beasley introduced the head herder, Charles W. Smith, to J. L. Dickinson, a merchant in that place, and informed him that Smith was in charge of a band of sheep in transit to Chicago to the stock firm of Rosenbaum & Co., and requested him to let Smith have supplies, and to send his bills to Rosenbaum Bros. & Co., who, he said, would pay the same. About June 1, 1893, the Beasleys caused the sheep to be brought into Dickinson, where they were sheared at their expense. The wool was shipped to Boston in their name and sold.

They received the proceeds, amounting to about $6,600. In July, Geo. M. Beasley had the sheep again driven to Dickinson, where he selected out about 2,200 head, which he shipped to Rockefeller, Ill., accompanied by the herder Harvey Willcutt. There is some evidence tending to show that this band, after being fed for a time at Rockefeller, were shipped to Chicago; but this is not entirely clear. The sheep remaining on the range were divided into two bands. One was about six or seven miles south of Dickinson, in the custody of Tetters; the other, probably 25 miles south, in the custody of Hodges. Charles W. Smith had charge of the two camps as before.

This was the situation on August 4, 1893, when the alleged turning over occurred upon which plaintiffs base their present claim of possession. There can be no doubt that both plaintiffs and Beasley & Co. firmly believe that the bill of lading to which reference has been made gave to plaintiffs the exclusive possession and control of said sheep from and after the time they were loaded on the cars in Montana. In this they were mistaken. On the first appeal (*Rosenbaum* v. *Hayes,* 5 N. D. 476, 67 N. W. Rep. 951) this court held that the bill of lading was not conclusive on the question of the intent of the owners to deliver possession to plaintiffs, in view of the other facts in the case showing that the delivery was of a qualified possession only. On the second appeal (*Rosenbaum* v. *Hayes,* 8 N. D. 462, 79 N. W. Rep. 987) this court further held that the shearing in June, and shipment of sheep to Rockefeller in July, by the Beasleys, which plaintiffs either knew or were bound to know, was entirely inconsistent with their claim of possession made by plaintiffs, and operated in law to forfeit any lien which they may have theretofore had. After a careful examination of the evidence, which differs in no important particular from that now before us, we then reached the conclusion that a verdict for plaintiffs could not be sustained, based upon any possession upon their part prior to August 4, 1893, and we still hold the same view. But we also held that the evidence as to the possession acquired by plaintiffs on and after August 4, 1893, was of sufficient weight to entitle plaintiffs to go to the jury on that question. This conclusion we adhered to upon a petition for rehearing. See *Rosenbaum* v. *Hayes,* 8 N. D. 471, 79 N. W. 987. The trial court at the last trial expressly found "that on the 7th day of August, 1893, the plaintiffs were in the actual possession of said sheep, and were driving them to Dickinson for the purpose of shipping them to Chicago, to be sold by plaintiffs as commission merchants, when they were attached and seized by the defendant." If this were the finding of a jury, it goes without saying that it would have to be sustained; for, as we have already seen, upon a former review of substantially the same facts we held that they were sufficient to take the disputed question of possession to the jury. But the present appeal calls for more than our judgment as to the sufficiency of the evidence to sustain the finding, and demands an independent determination of that question at our hands under the pro-

visions of § 5630, Rev. Codes. Our deliberations on the evidence on the point now under consideration have led us to the same conclusion announced by the trial court in the finding above quoted, namely, that the sheep in question were in plaintiff's possession when seized by defendant. It appears that one J. P. Smith, who was the general western agent of plaintiffs, in charge of their business in North Dakota and Montana, was in Montana on the 3d of August, 1893. At that time Joseph Rosenbaum, a member of the plaintiff's firm, was also in Montana. When returning to Chicago, he fell in on the train with Joseph Gans, who was on his way to see the Beasleys about the amount they owed him. During their conversation it was disclosed that both were creditors of the Beasleys, but as to the exact amount due to each their language was somewhat guarded and equivocal. Gans stated to Rosenbaum that he understood the Beasleys had about 30 loads of sheep which they were about to load and ship, and he was going down to Rosebud to see whether they were shipping. Rosenbaum informed him that, if there were any sheep to be loaded at Rosebud, they would be for him; that he did not know of any one else loading there. Later they met plaintiff's general agent, Smith, at the train at Forsythe, at which time Rosenbaum informed Gans where the sheep were, and that they were in plaintiff's possession, both by virtue of the bill of lading and by actual custody. Rosenbaum told Gans that, if he was "up to any law suit or devilment," he "would stay by him." He says: "I instructed my man Smith, in the presence of Gans, to stay by him. Gans says, 'I have no intention of doing anything, because I know Beasley will pay me.'" Rosenbaum continued his journey to Chicago, leaving the entire matter in the hands of Smith. It is shown that Smith at once went to Dickinson, and interviewed George Beasley, and had the latter execute and deliver to him the following instrument, which is known in the record as "Exhibit 82:" "Northern Pacific Railroad Company. Station 189—. Dickinson, N. D., August 4th, 1893. I this day turn over to Rosenbaum Bros. & Co. all of my sheep, which is about (6,000) six thousand head, now ranging on the Cannon Ball. Sheep are all branded with a red bar on the back, thus: I. George M. Beasley & Co." We fully agree with the finding of the trial court "that the purpose of Beasley & Co. and of the plaintiffs, in the making and acceptance of said writing, was in part to furnish and to place in existence at that time visible evidence of plaintiff's claim on the sheep as factors for Beasley & Co., and to fortify and sustain plaintiff's possession and right to the possession of said sheep. And we may add that, as between the parties to said instrument, it had the legal effect of terminating any right of possession which may have theretofore existed in Beasley & Co., and vesting the same exclusively in these plaintiffs. The fact is also established that J. P. Smith, after obtaining Exhibit 82, above set out, went to the railroad office at Dickinson, and ordered 30 cars to ship the sheep to Chicago; stating that the cars would be needed as soon as they could

get the sheep in. It is also shown that on the morning of August 6th—which was Sunday—J. P. Smith went to the sheep camps for the purpose of taking possession of the sheep for plaintiffs. On this trip he was accompanied by W. W. Beasley and one Frank Knigge, of Rockefeller, Ill., who was a friend of George Beasley, then visiting in North Dakota. At the first camp, nearest to Dickinson, they found the chief herder, Charles W. Smith, and the herder David Tetters. Beasley and J. P. Smith went through this band with the head herder, and "looked them over," after which, taking the head herder with them, they proceeded to the second band, some 10 or 12 miles further on. In company with the head herder, they went through this band also; Beasley informing plaintiffs agent that this "was the balance of the bunch of sheep." Upon their return to the first band, Beasley and the two Smiths again went through the sheep, and Beasley stated to J. P. Smith that he turned over all his interest in said sheep to him as plaintiff's agent, and requested him to take charge of them. The latter informed the chief herder that he had ordered cars to ship the sheep. He testified: "I told him to take good care of the sheep, and do as he had been doing before, and bring them to the railroad, and I was going to ship them." It is satisfactorily shown that the chief herder assented to the directions and instructions thus given to him by plaintiff's agent in the presence of W. W. Beasley, and undertook and agreed to carry them into execution. Beasley, J. P. Smith, and Knigge returned late in the evening to Dickinson. On the following morning, viz: August 7th, the papers in the attachment suit were served on Beasley in Dickinson, and the sheep were taken possession of by the defendant during the forenoon. The testimony of the chief herder shows that the first band had been moved some distance towards Dickinson since the evening of the preceding day, and it appears to our satisfaction that this was done in pursuance of the directions of plaintiff's agent before referred to. It does not appear that the herders Tetters and Hodges participated in or heard the conversations which occurred on Sunday, or received any instructions either from Beasley or J. P. Smith. Neither does it appear that the sheep in the second band had been moved when the defendant levied upon them. The only person in the immediate custody of the sheep who directly participated in the alleged "turning over" was Charles W. Smith.

In our judgment, the following facts are satisfactorily established: First, that plaintiff's manager obtained Exhibit 82 for the purpose of making plaintiff's right of possession absolute; second, that he then ordered cars for making immediate shipment of the sheep; third, that he then went to the sheep camps for the special purpose of taking actual possession and control of the sheep for plaintiffs; fourth, that he arranged with Smith, the chief herder, who was in general charge of the two camps, to bring the sheep to Dickinson; fifth, that said Smith proceeded to carry out such arrangement, and

had moved the first band some distance, pursuant to such directions, when they were seized by defendant. Do these facts show such possession and control of the sheep as will sustain a factor's lien thereon? We are of opinion that they do. Our views as to the character of the possession required to sustain the lien were partially expressed by the late Chief Justice Bartholomew in *Rosenbaum* v. *Hayes*, 8 N. D. 472, 473, 79 N. W. 992, in the following language: "We have said that the factor's possession must be exclusive, but that does not mean that it must be actual and personal. Delivery by the owner to any person for the factor enables the factor's lien to attach at once, whether the delivery be to a common carrier, shipowner, warehouseman, or agent. 1 Jones, Liens, § 460. And the delivery may be constructive as well as actual. 'It is only necessary that the goods should be so appropriated to the factor that they are assuredly under his control.' * * * A factor's lien depends upon the fact of possession, and not the appearance. Rev. Codes, § 4836. Our statute is like that of New York, and there it is held that possession means such control of or dominion over merchandise as enables a factor rightfully to take it into actual custody without the aid of any new authority or document furnished by the owner. *Pegram* v. *Carson*, 10 Bosw. 505. The rule as between vendee and creditor has been stated by this court as follows: 'What the law requires, and all the law requires, is that the conduct of the parties should clearly show a relinquishment of ownership and possession, and all right of control on the part of the vendor, and an assumption of ownership, possession, and control on the part of the vendee. *Morrison* v. *Oium*, 3 N. D. 76, 54 N. W. Rep. 288. How stood the parties under the evidence? That the Beasleys had surrendered all legal right to possession and control must be conceded. We think it must also be conceded that, the Beasleys having surrendered the right of possession and control to plaintiffs, they had the legal right to take the property into actual custody, without the aid of any new authority or document from the Beasleys. * * * We have endeavored to show that the matter of visible change does not apply in this case, or in this state. As between a vendee and an attaching creditor, an entire want of change of possession would not be conclusive as against the vendee. Rev. Codes, § 5053. A factor is in a worse position than a vendee, in that his lien depends upon possession; but, so far as visible appearances are concerned, he should be in no worse position, and the bona fides as between the Beasleys and plaintiffs cannot be questioned on this record." In the case at bar the fact of possession depends, not upon a delivery to a third person for the factor, but upon an actual delivery of possession by the owner directly to the factor.

It certainly cannot be claimed that the change of possession necessary to sustain a factor's lien must be of a more open and decisive character than is required in a sale of personal property, and it would seem that a transfer of possession which would be good as

against attaching creditors of a vendor would be sufficient to sustain a factor's lien. No rule has been, or, in the nature of things, can be, formulated, which will universally determine what particular facts will constitute a change of possession such as the law requires. Necessarily, each case must turn upon its own facts. As was said by *Collins,* J., in *Tunnell* v. *Larson,* 39 Minn. 269, 39 N. W. 628: Precisely what constitutes a delivery and change of possession must depend largely upon the kind and nature of the chattels, the situation of the parties, and other cicumstances peculiar to each case. No arbitrary test or rule can be laid down." In *Dodge* v. *Jones,* 7 Mont. 121, 14 Pac. 707, it was said that: "No particular act or formal ceremony is necessarv to make a delivery in law. Any act done, coupled with the intent to change the ownership, which has the effect to transfer the dominion over the thing sold to the buyer is a delivery." This was a case of a sale of range horses. They were brought in and branded with the vendee's brand, and then turned back on the range. This was held a sufficient delivery. The court said: "What more could have been done to constitute a delivery? The law does not require a proclamation of delivery to be made, nor that these horses should be temporarily separated from the others, or put in a corral or inclosure. All that was necessary to be done was done. There was a permanent identification of these horses, and the relations of the parties to these horses were changed." In *Potter* v. *Bucher,* 98 Cal. 454, 33 Pac. 335, that court said that, "in the determination of the question as to the kind of possession necessary to be given in order to make a sale of personal property valid as against creditors, regard must be had not only to the caracter of the property, but also to the nature of the transaction, the position of the parties, and the intended use of the property. The law only requires that which could naturally be done in an honest and business-like transaction, where there was no thought of fraud or concealment." The above was a case of sale of cattle and horses by a husband to his wife, where the property continued on the farm after the sale. The facts peculiar to that case were held sufficient to establish a change of possession. *Cady* v. *Zimmerman,* 20 Mont. 225, 50 Pac. 553, involved a sale of sheep where the vendee merely branded them with his brand, and arranged with the vendor to keep them for him. The delivery was held sufficient as against an attaching creditor of the vendor, and the language of the Montana and California courts above quoted was expressly approved. In *Long* v. *Knapp,* 54 Pa. 514, it was held that the law only requires such a delivery and change of possession as the nature of the property will allow; further, that, while "creditors are justly entitled to protection against secret alienations and frauds, there is a limit, and many cases show it, where legal presumptions must not overturn honest sales and fair dealing." In *Montgomery* v. *Hunt,* 5 Cal. 366, a vendor of cattle gave the vendee an order for them on his agent at his ranch. "The agent pointed out the cattle as they were grazing in

view, and told the purchaser that he delivered him possession, and then accepted an offer of employment from him, and remained in charge of them until seized by the sheriff as the property of the vendor. It was held that "this was a delivery as immediate and complete as the nature of the case would admit and followed by an actual and continued change of possession." The following cases are cited as showing the variety of facts, many of them similar to the case at bar, which have been held to constitute a sufficient change of possession: *Williams* v. *Lerch,* 56 Cal. 330; *Morgan* v. *Miller,* 62 Cal. 492; *O'Brien* v. *Ballou,* 116 Cal. 318, 48 Pac. 130; *Williams* v. *Borgwardt,* 119 Cal. 80, 51 Pac. 15. And the employment of the vendor to keep and care for property after a sale is not absolutely incompatible with a change of possession. As was said in *Godchaux* v. *Mulford,* 26 Cal. 316, 85 Am. Dec. 178: "A hired clerk or salesman is no more in the possession of the goods of his employer than a hired laborer is in possession of the farm on which he works. The employment of the vendor in a subordinate capacity is colorable only, and not conclusive upon the question as to whether there has been an immediate delivery and actual change of possession. He cannot be allowed to remain in the apparent sole and exclusive possession of the goods after the sale, for that would be inconsistent with such an open and notorious delivery and actual delivery as the statute exacts in order to exclude from the transaction the idea of fraud. But if it be apparent to all the world that he has ceased to be the principal in the charge and management of the concern, and becomes only a subordinate or clerk, the reason of the rule announced in the statute is satisfied. The immediate delivery and actual and continual change of possession are the ultimate facts by which, according as they are present or absent, the statute determines the legal character of the sale." For cases holding that a vendor may under some circumstances hold possession for his vendee after sale and delivery, see *Adams* v. *Weaver,* 117 Cal. 42, 48 Pac. 972; *Humphreys* v. *Harkey,* 59 Cal. 626; *Parks* v. *Barney,* 55 Cal. 239; *Clute* v. *Steele,* 6 Nev. 335; *O'Brien* v. *Ballou,* supra. Under the strictest rule of the foregoing cases, we think the possession of the plaintiffs was amply sufficient. It was as open as circumstances would permit, and there was no concealment. Nor do we attach much importance to the fact that the herders, Tetters and Hodges, were not informed of the transfer. It was not necessary. Charles W. Smith was in general charge of the camp, and had been for four months, and it would have been an idle ceremony to specially inform them of the transfer, when the fact was openly made known to the chief herder. Neither do we deem it important that plaintiff's manager did not make definite contracts for the services of the herders when he took possession. Our inquiry is not as to the particular contractual relations existing between the herders and Beasleys after the change of possession on Sunday, but it is merely as to the fact of the possession and control thereafter and at the date

of the seizure. Beasley & Co. transferred all right of possession to plaintiffs when they executed and delivered Exhibit 82. After that date they could assert no lawful right of possession. Neither could their agents or servants. Neither did they attempt to do so. On the contrary, W. W. Beasley went to the camps, and in the presence of the chief herder disclaimed any further possession or right of possession, and the same was in fact assumed by the plaintiff's agent. Plaintiff's complete dominion and control of the sheep is sufficiently shown by proof that it was their orders which were being executed through the chief herder at all times after the turning over on Sunday.

But it is claimed that no effect can be given to the delivery on the prairie because it occurred on Sunday. It is contended that it comes within the terms "servile labor" and "trade," prohibited by § § 6841, 6842, Rev. Codes. This claim is without merit. As we have seen, the plaintiff's right of possession was complete when they received Exhibit 82. Their agent, when he visited the sheep camps on Sunday, needed no new authority to entitle him to possession. He was merely asserting a right which he had acquired on a secular day. But if it were assumed that the transaction stands on the same footing as a Sunday sale and delivery of the sheep, and that it was an unlawful act,—a point which we are not called upon to decide,—yet it would avail defendant in no way. The inquiry which the law makes is merely as to the situation of the property at the time of the seizure, not as to the means by which it came into the status in which it was found. In cases of Sunday sales, where held unlawful, the law refuses to interfere to aid either the vendor or the vendee. It leaves them, so far as the transaction is executed, just where their unlawful acts have placed them. For this reason it will not aid a vendor to retake the possession of property with which he has parted on a Sunday sale. *Smith* v. *Bean,* 15 N. H. 577; *Kinney* v. *McDermott,* (Ia.) 8 N. W. 656; *Myers* v. *Meinrath,* 101 Mass. 366, 3 Am. Rep. 368; *Cranson* v. *Goss,* 107 Mass. 439, 9 Am. Rep. 45; *King* v. *Green,* 6 Allen, 139. The law says to both parties: "This transaction was a violation of the statute. Both of you are equally guilty, and each of you must remain in the position in which you have placed yourselves." *Block* v. *McMurry,* 56 Miss. 217, 31 Am. Rep. 357. Neither can an attaching creditor of the vendor assert a right of possession which is denied to the vendor. *Horton* v. *Buffington,* 105 Mass. 399; *Smith* v. *Bean,* supra; *Chestnut* v. *Harbaugh,* 78 Pa. 473. The rule of law is absolute nonaction. "It will give neither party to the contract any assistance, nor listen to any complaint. It will leave the parties where it finds them." And it applies to the attaching creditor of the vendor. *Foster* v. *Wooten,* (Miss.) 7 South. 701. See, also, *Greene* v. *Godfrey,* 44 Me. 25, and *Jameson* v. *Carpenter,* (N. H.) 36 Atl. 554. On the subject of Sunday sales, see *Ward* v. *Ward,* (Minn.) 77 N. W. Rep. 965.

It is claimed by defendant that in any event the plaintiffs thereafter

lost their lien. The first claim is that it was waived by taking mortgage security for the indebtedness secured by the lien. It appears that after executing Exhibit 82 George M. Beasley went to Chicago and endeavored to meet Joseph Rosenbaum, but was not able to find him. He then went to the office of one A. B. Melville, an attorney at law in that city, and there executed, unler date of August 7, 1893, four mortgages in favor of plaintiffs. One was a real estate mortgage on lands located in Stutsman county, this state. Two were duplicate chattel mortgages on property situated at Rosebud, Mont. The fourth was a chattel mortgage on the sheep in suit. All of said mortgages were mailed for record. The chattel mortgage on the sheep was recalled by wire before it was filed. The value of the property covered by the Stutsman county mortgage and the Montana chattel mortgage is shown to be about $2,500. The real-estate mortgage contained this clause: "And the said (George M. Beasley & Co.) hereby covenant and agree to and with Rosenbaum Bros. & Co. that they will pay all of the indebtedness above described within one year from this date, and will pay any future indebtedness which may be incurred from the firm of George M. Beasley & Co. to the firm of Rosenbaum Bros. & Co. within one year from this date, and in default of such payment [then follows a power of sale.]" Plaintiffs strenuously claim that the execution of these mortgages was a voluntary act on the part of Beasley, done without their knowledge, solicitation, or approval, and that they expressly repudiated any acceptance or reliance thereon as soon as they became aware of their execution. They further disclaim any authority in A. B. Melville to act for them, and endeavor to show that Melville was acting entirely for the Beasleys. Such is the testimony of Joseph Rosenbaum, and the testimonv of A. B. Melville and George M. Beasley is to the same effect. Notwithstanding the harmony which exists in the testimony of these three witnesses on the question of plaintiff's ignorance of and nonparticipation in the giving of the mortgages, we are not convinced that the transaction was wholly unauthorized by plaintiffs. We shall therefore treat the transaction as one in which the plaintiffs participated. The question then is presented whether the giving and acceptance of these mortgages, on the facts of this case, operate to forfeit plaintiff's lien. Counsel for defendant claim that it had such effect, and in support of their contention rely entirely upon the rule laid down in 1 Jones, Liens, § 1002, which is that: "There can be no lien at common law or by usage where the parties make a special agreement inconsistent with a lien, either for a particular mode of payment, or for a payment at a future particular time, although without such agreement the right to a lien would be implied or recognized. If such agreement is antecedent to the possession, no lien is created. If it is made afterwards, the lien is waived." The authorities cited by the author in support of the rule as above formulated are cases where the lienor had stipulated for payment at a time beyond that at which the lien would naturally terminate. (*Pinney* v. *Wells*, 10 Conn. 103; *Chandler* v. *Belden*, 18

Johns. 157, 9 Am. Dec. 193; *Lee* v. *Gould,* 47 Pa. 398), or had agreed to look to his debtor personally (*Pullis* v. *Sanborn,* 52 Pa. 368; *Bailey* v. *Adams,* 14 Wend. 202), or where the facts showed an intention not to rely upon the lien (*Darlington* v. *Chamberlain,* 20 Ill. App. 443.) No claim is made, or can be made, upon the evidence in the record, that the plaintiffs at any time relied upon the personal responsibility of the Beasleys for payment of their advances. If, therefore, their lien was waived, the waiver must have resulted from an intent to waive it, actual or implied, or by reason of an extension of time of payment of the debt secured, inconsistent with the continuance of the lien. The burden of showing a waiver is upon the party asserting it. *Cordova* v. *Hood,* 17 Wall. 1, 21 L. Ed. 587; *Gold Mines* v. *Seymour,* 153 U. S. 509, 14 Sup. Ct. 842, 38 L. Ed. 802; Story, Eq. Jur. § § 1224, 1225; *Brisco* v. *Mining Co.,* (*C. C.*) 82 Fed. 952. And the law is not anxious to imply a waiver. * * * The taking of a mortgage upon the same property upon which the creditor claims a statutory lien may not displace the lien. The mortgage is regarded as cumulative security, and the creditor may enforce either the lien or the mortgage. So, also, the taking of the collateral obligation of another person for the payment of a lien does not ordinarily debar the lienholder from claiming the security of his lien, unless the circumstances are such that an intention to waive the lien can be reasonably inferred." *Payne* v. *Wilson,* 74 N. Y. 348. The rule which appeals to us as voicing the doctrine of the authorities is laid down in Jones, Liens, § 1011, in this language: "The mere taking of security for the amount of a debt for which a lien is claimed does not ordinarily destroy the lien. To have that effect, there must be something in the facts of the case or the nature of the security generally which is inconsistent with the existence of the lien, and destructive of it." In *Slide* v. *Seymour,* supra, Mr. Justice Brewer said: "An intent to abandon it is not to be presumed, and while, of course, like any other right, it may be abandoned or waived, the evidence to so abandon or waive should be clear and satisfactory. 2 Story, Eq. Jur. § 226, and cases cited in notes. In *Cordova* v. *Hood,* 17 Wall. 1, 21 L. Ed. 587, it was held that, while the taking of security may raise a presumption of a waiver of a lien, it is a presumption which is open to rebuttal. In 2 Story, Eq. Jur. § 1224, the author says that "if, under all the circumstances, the waiver remains in doubt, then the lien attaches.'" See, also, 28 Am. & Eng. Enc. Law, 526; *Kilpatrick* v. *Railway Co.,* (Neb.) 57 N. W. 664; *Ford* v. *Wilson,* (Ga.) 11 S. E. 559; *Chicago & A. R. Co.* v. *Union Rolling-Mill Co.,* 109 U. S. 702, 3 Sup. Ct. 594, 27 L. Ed. 1081; *Howe* v. *Kindred,* (Minn.) 44 N. W. 311. The prevailing rule undoubtedly is that: "One will not be held to have waived a lien unless the intent be expressed or very plain and clear. The presumption is always against it." See *Lambert* v. *Nicklass,* (W. Va.) 31 S. E. 951. This court has expressly held that the taking of a mortgage upon property upon which a statutory lien is claimed does not of it-

self operate to forfeit the lien. *Joslyn* v. *Smith*, 2 N. D. 53, 49 N. W. 382. In that case a chattel mortgage had been given to secure a debt also secured by a seed lien. The court, in the course of its opinion, in discussing the question whether the taking of a mortgage waived the lien, said: "It has sometimes been so held, but only when the security taken, or length of time given for payment, was entirely inconsistent with the idea of relying upon or enforcing a lien, and manifested an intent to waive it. The question of waiver is a question of intent, and, where the law raises a presumption of waiver from the act of the party in taking security, such presumption may be overcome by evidence aliunde." See cases cited in 2 N. D. 56, 49 N. W. Rep. 383. Do the facts of this case show an intent to waive the factor's lien? Most clearly they do not. Aside from the doubt which exists as to plaintiff's connection with the taking of the mortgages, the fact is shown that they were speedily rejected by them. Besides, at the very time the mortgages were given, plaintiffs were actually engaged in strengthening their factor's lien, and strenuously relying upon it, through their agent, J. P. Smith, at Dickinson. There are no facts showing an actual intent to waive it. The evidence, on the other hand, shows the contrary. Neither are we at liberty to infer a waiver on the facts. The mortgage security given was insignificant in value, as compared with the value of the sheep covered by their factor's lien, and forbids such inference. Neither was the time of payment of the debt secured by the factor's lien in fact extended by plaintiffs. The parties themselves disclaim any such intention or agreement. The only evidence relied upon is the mortgages, wherein it appears that Beasleys agreed to pay the debt within a year thereafter, with the condition that, if such payment was not so made as there promised, the mortgage might be foreclosed. These mortgages, as we have seen, were merely additional security, and the promise to pay was a collateral promise, and not a novation of the original debt. The form of the old debt was not changed. The rule applicable is concisely stated in *Fisher* v. *Bank*, (Colo. Sup.) 45 Pac. Rep. 440 by *Campbell*, J., in the following language: "We think it the safer rule, and the one resting upon principle, and so hold, that the mere taking of collateral security, whether it be a note or mortgage, or both, and payable or enforceable after the maturity of the original debt, is not of itself *prima facie* evidence of an extension of the time of payment of the original debt." The question as to the effect of a promise in a mortgage securing the payment of a debt which was then due, at a period six months thereafter, was before the United States Supreme Court, in *U. S.* v. *Hodge*, 6 How. 279, 12 L. Ed. 437, and it was held that the provisions of the mortgage did not extend the time of payment of the original debt or prevent its enforcement. Resort to the mortgage security, however, could not be had except according to its terms. To the same effect is *Cary* v. *White*, 52 N. Y. 138; *Gordon* v. *Bank*, 144 U. S. 97, 12 Sup. Ct. 657, 36 L. Ed. 360.

Brengle v. *Bushey,* 40 Md. 141, 17 Am. Rep. 586, is a case directly in point. The court said: "It is well settled that the acceptance of a security of a higher nature in lieu of or in satisfaction of one of an inferior nature operates as an extinguishment of the latter; but, where such security is accepted merely as additional or collateral security of a pre-existing debt, it is equally clear that the doctrine of extinguishment or merger does not apply. * * * Where a mortgage is taken as collateral security for a pre-existing debt, the current of authorities holds that in the absence of an express provision in the mortgage to that effect, or proof aliunde to show that such was the intention of the parties, the mortgage will not suspend the remedy on the old indebtedness." See, also, *Benton* v. *Bank,* (Neb.) 64 N. W. 227; *Elwood* v. *Deifendorf,* 5 Barb. 398; *Bank* v. *Ives,* 17 Wend. 501; *Shaw* v. *First Associated Reformed Presbyterian Church,* 39 Pa. 226.

It is also urged by defendant's counsel that "the claim of the plaintiffs against the Beasleys has been assigned, and any lien is extinguished." The point is made by defendant's counsel that a factor's lien or right to a lien cannot be assigned, and authorities are cited in support of that position. See Jones, Liens, § 982 et seq. The question of the assignability of the lien we need not discuss or determine. It is not involved on the facts as they exist in this case, as will appear by a brief reference thereto. The claim that the lien was assigned is based entirely upon the testimony of Joseph Rosenbaum. In his deposition taken November 4, 1899, upon cross-examination by defendant's counsel, he testified that the business of the plaintiff co-partnership was transferred on January 1, 1894, to a corporation of the same name, and that "all the claims and accounts of the partnership were turned over to the company," and on redirect examination that the partnership guaranteed all accounts and bills receivable to the corporation; further, that "the partnership of Rosenbaum Bros. & Co. was not dissolved then nor since, as we are still doing part of our business under the partnership." On November 10, 1899, his testimony was taken by plaintiffs in a second deposition, with special reference to this assignment; and he expressly states that "when the corporation was formed the matter in litigation in this case was left just as it was," and that "the partnership of Rosenbaum Bros. & Co. has never made any transfer or assignment of any of the matters, accounts, or claims in litigation in this action." Counsel for defendant ask us to believe that when this witness testified on November 4th, not having in mind the question of the assignment of matters in litigation, and his attention not being called to it, he testified truthfully, but that his testimony six days later, specially directed to that question, is wholly false. We do not so interpret the testimony. His specific declaration of November 10th that matters in suit were not assigned is not fairly in conflict with his general statement of November 4th that "all claims and accounts" were turned over; for the latter would not necessarily, and ordinarily would not, include

mere causes of action and pending suits which would not appear upon the books of the co-partnership. If any credence is to be given to this witness, the fact is established that there was no assignment. The belief that it was not assigned is somewhat strengthened by the fact that it does not appear that the corporation to which it is alleged it was assigned has made any claim or demand thereon, although more than seven years have passed since the date of the alleged assignment, which certainly is unaccountable, considering the amount of the claim. But if we are mistaken in this, and the account against Beasleys was assigned, the result is the same; for, clearly, there was no assignment of the lien, as will appear by a brief reference to the facts. The sheep were taken from the defendant by the coroner on August 11, 1893. On August 13, 1893, defendant rebonded and retook possession. On November 20, 1893, he sold the sheep under an order of court which he had procured for that purpose. The alleged assignment of the claim did not occur until January 1, 1894, if at all. What was there to assign at that date? A factor's lien, or right to a lien? Clearly not. There existed at that time the account against Beasley & Co. and the present cause of action against the defendant Hayes, and nothing more. The act of the defendant in executing the undertaking and retaking the sheep fixed the rights of the parties, so far as any further legal right of possession of the sheep was concerned. Thereafter the plaintiffs had no legal claim to the possession of the sheep. The plaintiffs only claimed a lien, and the defendant, by his rebonding, had become possessed of the legal right to sell the sheep and transfer the title. See *Union Nat. Bank* v. *Moline, Milburn & Stoddard Co.*, 7 N. D. 201, 219, 73 N. W. Rep. 527. This power was exercised by him, as we have seen, on November 20th; and he therefore no longer had it in his power to restore possession to plaintiffs, had he desired to do so. This was the condition when it is asserted that the "claim against the Beasleys was assigned." At this time the lien was entirely merged in the present cause of action, and had no independent existence. Furthermore, an assignment of plaintiff's account against Beasleys (and that is all that is claimed) is a far different thing from an assignment of plaintiff's cause of action against defendant, Hayes. But, even if the cause of action was assigned to the corporation by the plaintiffs, it is properly continued in the name of the original party; no application for substitution having been made. See § 5234, Rev. Codes.

The trial court found the balance due plaintiffs on August 7, 1893, was $16,163.07. This finding is challenged by appellant. It is insisted that the sum then due did not exceed the sum of $12,496.69. Both amounts are based upon the testimony of Joseph Rosenbaum. The discrepancy in the amounts is between the general balance of account to which he testified, and the sum obtained by an addition of what purports to be the items of which the account is composed. In his deposition given February 5, 1894, and in another given on March 31, 1894, he gave in detail various items of receipts

from and advancements to the Beasleys, which items were taken from the firm books then before him. On November 16, 1894, in a third deposition, he testified that the amount due the plaintiffs from Beasley & Co. on August 7, 1893, was $15,603.07, with interest, being interest on a $10,000 note dated November 28, 1892, which represented part of the indebtedness, making the sum then due $16,156.38,—the amount named in the complaint and found by the trial court It appears that at no time was the witness able to state the items of the account from memory, and did not undertake to do so. On his last examination he produced all books containing the accounts of the dealings of the firm with Beasley & Co., and testified to the balance as above stated and found by the trial court. Under the circumstances, we are compelled to agree with the finding of the trial court. The witness was not asked to state each and every item of the account; neither was he asked whether the items he enumerated composed all that appeared on the books; neither was his attention called to any apparent discrepancy between the total of the items given and the general balance claimed, all of which could easily have been demonstrated by the books upon which his testimony was based, if in fact the balance as stated was erroneous. Later, as we have seen, the books were again produced, but no attempt was made by counsel for defendant to impeach the balance as stated by the witness by the books, which were open to them for that purpose. Upon this state of facts, we are compelled, in fairness, to accept the balance as testified to by the witness as the amount actually due when the sheep were seized, and so find. It follows from what we have said that the judgment of the District Court must be in all things affirmed.

In conclusion, the members of this court wish to acknowledge their indebtedness to counsel for both parties for invaluable assistance derived from their able and carefully prepared briefs, both upon questions of law and fact. They have materially lightened our labor in considering the questions involved in an exceedingly voluminous and intricate record. Judgment affirmed. All concur.

(86 N. W. Rep. 973.)

STATE *ex rel* ROBT. J. LAIRD *vs.* JOHN GANG, *et al.*

Opinion filed June 15, 1901.

Petition for Organization of Civil Township—Sufficiency—Reviewed.

The board of county commisioners having found that a certain petition for the organization of a civil township containing the requisite number of legal voters, and having acted thereon by taking the necessary steps to organize such township, *held*, that the question as to the sufficiency of such petition is not open to judicial investigation in mandamus proceedings to compel the calling of an election for school officers in such township. Following State v. Langlie, 67 N. W. 958, 5 N. D. 594.

School Township When Embraces Civil Township.

Upon organization into a civil township of a portion of the territory comprising a school township corporation, *held*, construing § § 658, 659, Rev. Codes, that such civil township continues for school purposes as a part of such school township corporation until segregated therefrom by the commissioners and county superintendent of schools, upon petition of the voters.

Appeal from District Court, Towner County; *Morgan*, J.

Application by Robert J. Laird for a peremptory writ of mandamus to compel John Gang, as county superintendent of schools to call an election in Greenfield township for the purpose of electing school officers. From a final judgment awarding the writ defendant appeals.

Reversed.

Brennan & Kennedy, for appellants.

Sections 35 and 36, Chap. 62, Laws of 1890, being § § 658 and 659, Rev. Codes, were construed by the state superintendent so that school districts organized prior to the passage of Art. 3, which consisted of more than one congressional township, are not affected by § § 35 and 36, and that to become separate organizations, compliance must be made with the provisions of the law for subdivisions of districts. Section 35 does not intend that every civil township in the state shall be a distinct school corporation, but only such as had no previous school organization. This construction by the state superintendent is a practical construction of the law. *Scanlon* v. *Childs*, 33 Wis. 663; *State* v. *Alabama*, 142 U. S. 615. The word 'code' as substituted in the revision of 1895 for the word 'act' as used in the original act, does not render the Revised Codes a new enactment. The change of the word was made to harmonize the language with the general body of the law. A change in the phraseology of a statute made by means of a general revision of the entire body of the law cannot be regarded as indicative of a design and purpose on the part of the legislature as when the change is made by direct amendment. *Hugo* v. *Miller*, 52 N. W. Rep. 381; Sutherland on Statutory Construction, § 256; *State* v. *Morehouse*, 5 N. D. 411; *Gull River Lumber Co.* v. *Brock*, 73 N. W. Rep. 430. Repeals by implication are not favored. *Walcott Township* v. *Skauge*, 6 N. D. 382; *Braun* v. *State*, 49 S. W. Rep. 620; *Comer* v. *State*, 29 S. E. Rep. 501. A civil township does not consist of mere area. Until an election is held at the time fixed by law the organization of the school township is not complete. *School District* v. *Wallace*, 75 Mo. App. 317; *Dickey* v. *Hurlbut*, 5 Colo. 343; Melvin's Case, 68 Pa. 333; Beach on Corporations, § 384; McCreary on Elections, § 141.

Newton & Smith and *H. G. Middaugh*, for respondents.

Appellants, in preparing their abstract, have not complied with Rule 13. The abstract does not abridge the testimony, but gives it in full by question and answer, and with all the deadwood or ver-

biage perpetrated in its production in the District Court. *Farmers and Merchants Bank* v. *Davis*, 8 N. D. 83. There was a judgment entered in this action that was appealable. A demurrer was overruled, and this order was appealable. § 5626, Rev. Codes. The appeal in this case is from the judgment, and from all orders against the defendant prior to judgment. The appeal is duplicitous and bad. *Amer. Etc. Co.* v. *Gurnee*, 38 Wis. 533, *Anderson* v. *Hultman*, 80 N. W. Rep. 165; *Hackett* v. *Gunderson*, 47 N. W. Rep. 546.

Prior to the school law of 1883, school corporations were organized as school districts. The law of that year, Chap. 44, page 66, Laws of 1883, took away the right to organize a school corporation except as a school township, § 65, page 91. A law must be understood as beginning to speak at the moment it takes effect and not before. If passed to take effect upon a future day, it must be construed as passed on that day, and ordered to take immediate effect. *Rice* v. *Ruddiman*, 10 Mich. 125; *Charles* v. *Lamberson*, 1 Clark (Iowa) 442; *Price* v. *Hopkins*, 13 Mich. 318; Sutherland on Statutory Construction, § 107; *Guillotel* v. *Mayor*, 87 N. Y. 441. This contention does not conflict with the ruling in *Merchants National Bank* v. *Braithwaite*, 7 N. D. 358; *Osborne* v. *Lindstrom*, 9 N. D. 1. There has never been sufficient action under the construction contended for by appellants to effect a practical construction of the law. *Ewing* v. *Ainger*, 56 N. W. Rep. 767; *Thomas* v. *Collins*, 58 Mich. 64; *Swartwout* v. *Railway Co.*, 24 Mich. 389; *People* v. *Mahaney*, 13 Mich. 482; *People* v. *Wands*, 23 Mich. 385. A statute having amendatory effect by implication to repeal inconsistent acts is not in conflict with the constitution because not re-enacting and passing at length the acts so altered and amended by implication. *Ripley* v. *Evans*, 87 Mich. 217, 232; Sutherland on Statutory Construction, § 137, 138; *State* v. *Moore*, 67 N. W. Rep. 876; 9 General Digest, page 4186; *Mack* v. *Jastro*, 58 Pac. Rep. 372, 126 Cal. 130; *Murdock* v. *City*, 20 Wall. 590; *Pierpont* v. *Crouch*, 10 Cal. 1015; *State* v. *Bird*, 15 Cal. 295; *State* v. *Conkling*, 19 Cal. 501; *Charnock* v. *Rose*, 70 Cal. 189, 1 Pac. Rep. 625; *Fisk* v. *Henarie*, 142 U. S. 459, 12 Sup. Ct. Rep. 207; *King* v. *Cornell*, 106 U. S. 395, 1 Sup. Ct. Rep. 512; *District* v. *Hutton*, 143 U. S. 18, 12 Sup. Ct. Rep. 369. Section 658 of the Rev. Codes is the law on the subject and speaks from January 1st, 1896. An amendatory act takes effect from the time of its passage and has no retroactive effect in the absence of an express intention to the contrary. In re Miller, 110 N. Y. 216; *Reid* v. *Albany*, 128 N. Y. 364; *Ely* v. *Holton*, 13 N. Y. 595; *Moore* v. *Mausert*, 49 N. Y. 332; *Gibbs* v. *Queen Ins. Co.*, 63 N. Y. 114, 20 Am. Rep. 513; *Goillitel* v. *Holton*, 87 N. Y. 445. The reenactment creates anew the rule of action, and even if there was not the slightest difference in the phraseology of the two, the latter alone would be referred to as the law, and the former stands to all intents as if expressly repealed. *People* v. *Tisdale*, 57 Cal. 104; *State* v. *Hill*, 20 N. W. Rep. 196, 32 Minn. 275. A statute amending a former act operates as to matters thereafter occurring precisely as

if the amendatory section had been added to the prior act at the time of the latter's adoption, and the two must be considered together and as one statute. *Holbrook* v. *Nichols,* 36 Ill. 131; *McEwen* v. *Den,* 24 How. 242, 16 L. Ed. 672; *Parsons* v. *Wayne Co. Circuit Judge,* 37 Mich. 207. Qualifying words and phrases should be confined to their next antecedent. *Cushing* v. *Warwick,* 9 Gray 382; *Queen* v. *Lowell,* 140 Mass. 106; *Dearborn* v. *Brookline,* 97 Mass. 469; *State* v. *Conklin,* 34 Wis. 31. A later statute covering the same subject matter and embracing new provisions operates to repeal the prior act, although the two acts are not in express terms repugnant. *People* v. *Jehne,* 105 N. Y. 182, 195; *Norris* v. *Crooker,* 13 How. 429; *Bartlett* v. *King,* 12 Mass. 537; *U. S.* v. *Tynen,* 11 Wall. 88; *Heckman* v. *Pinckney,* 81 N. Y. 211; *People* v. *Co.,* 98 N. Y. 67; *King* v. *Cornell,* 106 U. S. 60; *Smith* v. *Board,* 35 N. W. Rep. 383; *Giddings* v. *Cox,* 31 Vt. 604; *Bartlett* v. *King,* 12 Mass. 537; *Mason* v. *Waite,* 1 Pick. 452; *Goddard* v. *Boston,* 20 Pick. 407. What the legislature's intent was can be derived only from the words used. The spirit of the act must be gathered from the words of the act, not from conjectures aliunde. *Gardner* v. *Collins,* 2 Peters 93; *Benton* v. *Wickwire,* 54 N. Y. 226; *McCluskey* v. *Cromwell,* 11 N. Y. 593; *Thornley* v. *United States,* 113 U. S. 310; *Brewer* v. *Blougher,* 14 Peters 178, § 2682, Rev. Codes. The organization of the town of Greenfield was not open to collateral attack. The county commissioners was the board established by law to pass upon the questions raised, and they having so done, the question was not open to inquiry in this proceeding. *State* v. *Langlie,* 5 N. D. 594; *State* v. *Supervisors,* 23 Minn. 521; *Ormsbee* v. *Piper,* 82 N. W. Rep. 36; *Dickey* v. *Taft,* 55 N. E. Rep. 318, 175 Mass. 4.

FISK, J. This is an appeal from a judgment of the District Court of Towner county, directing the issuance of a peremptory writ of mandamus to compel the defendant, as county superintendent of schools, to call an election in Greenfield township for the purpose of electing school officers, pursuant to § 671, Rev. Codes. The facts, briefly stated, are that Towner county was organized on or about the 6th day of November, 1883, and during the same year, or the following year, was divided into school townships. Congressional township 160, range 68, together with three other congressional townships, was organized into one school township, under the name of "New City School Township." In April, 1895, township 160 range 68, was attempted to be organized into a civil township, and the relator bases his claim to a writ upon the proposition that, by the organization of said township into a civil township, said territory *ipso facto* became a distinct school township corporation, and hence that it became the duty of the county superintendent of schools to call an election, etc. New City school township was permitted to intervene, and the contention of the defendant and intervener is—First, that the territory designated as Greenfield civil township was not legally organized into a civil township; and, second, conceding

that it was so organized, that it did not *ipso facto* become a distinct school corporation; that certain steps which were not taken were required by law to be taken in order to complete such organization; and hence, that it was in error to issue such peremptory writ of mandamus.

We are required by this appeal to review the entire case, but, before considering the merits, we will first dispose of a preliminary question of practice which is raised by counsel for respondent. A motion was made to dismiss the appeal for duplicity. The notice of appeal states, in substance, that appellants appeal from the judgment, and from all orders made by the District Court prior to said judgment. The record discloses that numerous orders were made prior to the entry of final judgment, including an order denying a motion to quash the alternative writ, and also an order over-ruling the demurrer to the complaint or affidavit upon which the altenative writ was issued; and respondents argue that by attempting to appeal from the judgment, and also from such orders, the appeal is bad for duplicity. This point would be well taken if said orders were appealable, and the time for appeal from the same had not expired. In the case of *Prondzinski* v. *Garbutt*, 9 N. D. 239, 83 N. W. Rep. 26, this court had occasion to refer to this subject, and numerous authorities are there collated holding such double appeals bad. The order over-ruling the demurrer was, of course, appealable, but the same was made and served upon defendant's counsel in July, 1899, and the time for appeal therefrom had therefore long since elapsed when this appeal was taken, and, the other orders not being appealable, we must overrule said motion.

The record presents a great mass of objections, exceptions, and so-called "assignments of error"; but in disposing of the case on the merits we do not deem it necessary to notice each of them, but shall confine the opinion to the two propositions above referred to, which to our minds are the vital questions involved.

First, we will consider the question as to the incorporation of Greenfield civil township; for if such township was never legally organized as a civil township, and appellants are permitted to raise such question in this proceeding, then the judgment below was erroneous. Respondents contend that it was organized in 1895, under the provisions of Chap. 10 of the Political Code, entitled "Township Organization," as found in Comp. Laws, § 704 et seq. Section 704 reads: "That whenever a majority of the legal voters of any congressional township in this territory containing twenty-five legal voters petition the board of county commissioners to be organized as a town under this article, said board shall forthwith proceed to fix and determine the boundaries of such new town and to name the same," etc. Section 706 provides for the naming of such townships; and § 707 provides as follows: "The county commissioners shall thereupon make out notices designating a suitable place for holding the first town meeting in each town, which shall be holden within twenty days after such town is organized," etc. From the

foregoing language it is apparent that the township becomes organized before the election of its officers. It precedes such election. Counsel for appellants cite numerous authorities holding that the election of officers is a part of the organization of the town, but it will be found upon investigation that each of these cases arose in states having radically different statutes than this state, and are therefore not in point. Pursuant to the provisions of our code above quoted, a petition asking for the organization of this township as Greenfield civil township was presented to the board of county commissioners, and the same was indorsed "Approved and allowed January 9, 1895," by the chairman of the board of county commissioners; and in the commissioner's record, which was introduced in evidence, we find the following entry: "January 9, 1895. Petition of Robert J. Laird and others, asking that township 160, range 68, be set apart and organized as a civil township, is hereby granted, and the county attorney is requested to prepare the necessary papers and instructions to carry this order into force and effect, the said civil township to be known as 'Greenfield.' Carried." And in such record, under date of April 1, 1895, is the following: "Upon motion, the following resolution was adopted: 'Whereas, a majority of the legal voters of township 160, range 68, a congressional township containing twenty-five legal voters, having petitioned the county commissioners to organize as a town under Art. 1, Chap. 10, of the Comp. Laws of 1887, resolved, that said congressional township 160, range 68, be, and the same is hereby, set apart and declared to be a town under the provisions of said law, and shall be designated by the name of the town of "Greenfield." The county auditor is hereby authorized and directed to make out three notices for holding the first meeting, and the residence of R. J. Laird, in said township, is hereby designated as the place for holding said first town meeting, and the time is hereby designated as Thursday, April 25, 1895, at 2 o'clock p. m.; and the auditor is further directed to deliver said notices to the sheriff of said county, who shall cause the same to be posted in said township not less than ten days before the 25th day of April, 1895.'" Said record is signed, "E. E. Priest, chairman of the board of county commissioners," and the same is attested by "D. K. Brightbill, county auditor." It appears by the testimony of Robert J. Laird, the relator, that said township of Greenfield had a board of officers and was transacting business as a civil township for some time prior to the commencement of these proceedings. Appellants attempted to prove that said township was never legally organized as a civil township for two reasons: First, that those petitioning the board of county commissioners were not all electors therein. This evidence was promptly objected to at all stages of the trial, upon the ground that the organization of said township was not open to collateral attack in this proceeding; and, further, that the county commissioners was the board established by law to pass upon such questions, and, they having done so, that the question was not open to inquiry in this proceeding. We think these objections were

well founded, and that all of this class of testimony was irrelevant and immaterial. In the case of *State* v. *Langlie*, 5 N. D. 594, 67 N. W. 958, this court held "that after a county seat election has been ordered and held, and a sufficient vote is cast in favor of some one place to work a relocation of the county seat, the question whether the petition presented to the board of county commissioners praying that such election be held was signed by a sufficient number of voters is not open to judicial investigation, when the board has found that it was so signed." To the same effect, see *State* v. *Supervisors*, 23 Minn. 521; *Ormsbee* v. *Piper*, (Mich.) 82 N. W. Rep. 36; *Currie* v. *Paulson*, (Minn.) 45 N. W. Rep. 854; *Ellis* v. *Karl*, 7 Neb. 381; *Bennett* v. *Hetherington*, 41 Ia., 142; *Baker* v. *Supervisors*, 40 Ia. 226. Having reached the conclusion that the action of the board of county commissioners in receiving and acting upon the petition for the organization of this township is conclusive in this proceeding as to the qualifications and requisite number of petitioners, it follows that appellant's contention that said civil township was not legally organized must be overruled.

Counsel for appellants next urge that, conceding the due organization of such civil township, Greenfield school township was never completely organized, and hence that it was error to require the superintendent of schools to call an election therein for school officers. Their contention is that before such school township can be deemed completely organized the boundaries of the old school township must be rearranged by the commissioners and county superintendent of schools, pursuant to a petition to be filed with them, signed by a majority of the voters of each school corporation whose boundaries will be affected thereby, in accordance with § 660, Rev. Codes. On the other hand, respondent's counsel argue that by the organization of township 160, range 68, into a civil township, such township was, by force of § 658, Rev. Codes 1895, *ipso facto* segregated from said New City school township, and that by operation of law the same became a distinct school corporation, without any action on the part of the commissioners and superintendent of schools. A solution of this question necessitates a construction of several sections of school law, as found in Chap. 62, Laws 1890, and the same sections as revised in the Code of 1895. Section 35, Chap. 62, Laws 1890, reads: "Each civil township in every county in the state, not organized for school purposes under the district system at the taking effect of this act, shall be and is hereby constituted a distinct school corporation, and whenever hereafter in any county a civil township shall be organized, it shall from and after such organization as a civil township, be and constitute a distinct school corporation, except as otherwise specially provided in this act." Greenfield township, at the taking effect of said act, was not a civil township, but it became such in 1895, and, not being organized for school purposes under the district system, it at that time came squarely within the

provisions of said § 35. This section deals—First, with civil townships already organized; and, second, with civil townships thereafter to become organized. The excepting clause at the end of the section, as we construe the same, has reference to other provisions of the school law specially providing when civil townships, either already organized or to become organized, shall not constitute a distinct school corporation. Section 42, which is the same as § 664, Rev. Codes, provides that if a civil township having less than 15 persons of school age residing therein, by reason of the irregular course of natural boundary, contains less than 12 sections, it shall constitute a part of an adjacent school district. Section 39 provides that if a part of any school corporation, having not to exceed ten children of school age residing therein, is, by reason of natural obstacles, separated from the other part of such corporation, so as to prevent children from attending school in such other part, the part so separated may be annexed to an adjoining corporation. Again, by § 40, it is provided that a town or village may be annexed to the adjacent school corporation which includes such other portion, and the part thus annexed shall constitute a part of such adjacent corporation. These in our opinion are the special provisions referred to in the excepting clause contained in § 35, being § 658, Rev. Codes. We are aware that this construction is not contended for by counsel upon either side, but it seems to us to be the only reasonable construction that can be placed upon the language used. If we are correct in this, then it follows that Greenfield civil township, upon its organization in 1895, were it not for § 36, became a distinct school corporation, by force § 35 of said law.

But § 36 provides as follows: "Each school township in every county in the state which after the taking effect of this act consists of territory not organized into a civil township, shall be and remain a distinct school corporation: provided, whenever such school township or any part thereof shall be organized into or annexed to a civil township, such civil township shall thenceforth constitute a distinct school corporation; provided, further, that nothing in this act shall be construed to alter the boundary lines of any school township organized prior to the passage of this act except upon petition as hereinafter provided." New City school township was organized prior to the passage of said act, and at the taking effect of said act consisted of territory not organized into a civil township, and hence said section applies thereto, and upon the organization of Greenfield civil township, in 1895, the same would have become a distinct school corporation, were it not for the proviso in the latter part of said section. This proviso is explicit to the effect that nothing in the act shall be construed to alter the boundary lines of any school township organized prior to the passage of said law, except upon petition, etc. It was the evident intent of the legislature by this law to establish a uniform school district system, each civil township already organized or thereafter to be organized to constitute a distinct school corporation, with certain ex-

ceptions heretofore referred to; but it is also evident, when we construe § § 35 and 36 together, as we must, that as to school townships organized prior to 1890 it was the legislative intent that no boundary lines should be altered except upon petition. Any other construction would render meaningless the proviso at the end of § 36.

Respondents contend, however, that Greenfield civil township became a distinct school corporation by force of the legislative declarations in § § 658, 659, Rev. Codes. We will now examine these sections to ascertain whether any change was made requiring a different construction than their predecessors. Section 658 is the same as § 35, except that it speaks from a later date. This section, like § 35, is however, general, and broad enough in its terms, standing alone, to constitute Greenfield civil township a distinct school corporation. But § 659 also applies, and must be construed with § 658. This section also speaks from a later date than its predecessor (§ 36, Chap. 62, Laws 1890), but we do not think the change brought about through the revision materially changes the legal effect of the law. It plainly provides that each school township which, at the taking effect of the Code, consisted of territory not organized into a civil township, shall be and remain a distinct school corporation. New City school township, at the taking effect of the Code, consisted of some territory not organized into a civil township, and hence we think comes squarely within the above language, and therefore must remain intact as a distinct school corporation until Greenfield civil township is segregated therefrom by a petition, as provided in the next section. The latter portion of § 659 provides that nothing in that section shall be construed to alter the boundary lines of any school township organized prior to the passage of the Code. While this provision is vague and almost unintelligible, and while § § 658 and 659 are in almost hopeless conflict, still we believe the legislative intent, as gathered therefrom, was to require a petition by the voters in order to alter the boundary lines of existing school townhsip corporations whose territory is not wholly within a civil township. Greenfield civil township never having been segregated from New City school township for school purposes by petition of the voters, as required by law, it follows that the application for a writ requiring the county superintendent of schools to call an election in Greenfield civil township should have been denied. The judgment of the District Court is reversed, and that court is directed to enter judgment in favor of the defendant and intervener, with costs of both courts. All concur.

MORGAN, J., being disqualified, FISK, J., of the First Judicial District, sat by request.

(87 N. W. Rep. 5.)

JAMES MCMANUS *vs.* SUZANNE COMMOW, *et al.*

Opinion filed June 24, 1901.

Quieting Title—Lost Deed—Proof of Execution.

In an action to quiet title to real property, plaintiff claims title under a deed from A., who claims under an alleged lost deed from C. *Held*, that the proof of the execution and delivery of such lost deed, and the contents thereof, must be established by clear and satisfactory evidence.

Finding of Deed Sustained.

Held, further, that the evidence is sufficient to sustain the finding of the trial court that such deed was in fact executed and delivered.

Execution—How Proved.

The common law of evidence, requiring proof of the execution of written instruments to be made by the testimony of subscribing witnesses, is no longer in force in this state; citing Chap. 59, Laws 1897.

Foundation for Secondary Evidence.

Before secondary evidence of the contents of a lost instrument is permitted, such diligence should be required to be shown in attempting to produce the original as will leave no reasonable supposition that the original is in existence, or can be produced. Evidence examined, and *held*, that sufficient foundation was laid to admit secondary evidence.

No Delivery Proven.

C., in 1892, executed a deed of certain land to his infant daughter, 4 years of age, retaining the same in his possession until August, 1899, when he placed the same on record. There was no consideration for this conveyance, and no agreement that the same was to be considered as delivered. *Held*, construing § 3520, Rev. Codes, that there was neither an actual nor constructive delivery of the deed, and hence no title passed thereunder.

Appeal from District Court, Rolette County; *Morgan*, J.

Action by James McManus against Suzanne Common and others. Judgment for plaintiff. Defendant Suzanne Common appeals. Affirmed.

H. G. Middaugh, Cochrane & Corliss, for appellants.

Under our recording law, to entitle a person holding under a second deed to priorities against the prior deed, the holder of such second deed must get his deed on record before the first deed is recorded, § 3594, Rev Codes. No matter how innocent the second purchaser may be, and notwithstanding he pays full value for the property, he cannot assail the unrecorded deed as void if the unrecorded deed is in fact put on record before his deed. *Pennsylvania Etc. Co.* v. *Neil*, 54 Pa. St. 9; *Fallas* v. *Pierce*, 30 Wis. 443; *Fort* v. *Burch*, 5 Denio. 187; *Simmonds* v. *Trump*, 144 Ill. 454.

John Burke, for respondent.

The deed from Commow to his daughter was not delivered, and

no title ever passed, § 3515, Rev. Codes; Warvell on Vendors, 499; *Erickson* v. *Kelly*, 81 N. W. Rep. 77, 9 N. D. 12. The recording of a deed without knowledge of the mortgagee is not equivalent to delivery. Webb on Record Title, 144; *Day* v. *Griffith*, 15 Ia. 104; *National Bank* v. *Morse*, 73 Ia. 174. McManus was in possession after the execution of the deed to him and is protected by such possession. *Nearing* v. *Coop*, 70 N. W. Rep. 1044; *Goodrich* v. *Vallandingham*, 46 Cal. 601; *Bradley* v. *West*, 60 Mo. 59; *Brown* v. *Walking*, 64 N. Y. 80.

FISK, District Judge. This is an action to quiet title to certain real property described in the complaint. The plaintiff alleges, in substance, that he is the owner in fee and in possession of the real property in question; that in December, 1892, John Commow sold and conveyed, by deed, said land to one W. W. Allen, and subsequently informed plaintiff of such sale, and that thereafter the plaintiff, relying on the representations so made by Commow, purchased the land from Allen, receiving from him a warranty deed, together with the possession of said land, which possession he has ever since held; that in August, 1899, said Commow filed for record in the office of the register of deeds of said county a deed to said land, which he executed to his daughter, Suzanne, on May 4, 1892, said daughter at that time being but 4 years of age; that said deed was without consideration, was never delivered, and that plaintiff never had any knowledge of the execution thereof until the same was filed in August, 1899; that plaintiff purchased said land from Allen in good faith, and for a valuable consideration. Defendant Suzanne Commow, by her guardian *ad litem*, answered, admitting that in May, 1892, John Commow executed to her a deed of said real estate, and that such deed was, in 1899, filed for record. There is a denial of the other allegations of the complaint. Upon these issues the action was tried in the lower court, and judgment was rendered for plaintiff. The trial court made certain findings of fact, the material portions of which are substantially as follows: (1) That on May 5, 1892, John Commow was the owner in fee of the real property in question. (2) Suzanne is a minor of the age of 12 years, and John Commow is her guardian *ad litem* for the purpose of this action. (3) That Suzanne Commow is the daughter of John Commow, and has lived with and been supported and educated since the age of 2 years by one Bruno Charboneau. (4) That on May 5, 1892, John Commow signed an instrument purporting to convey to Suzanne, then 4 years old, by warranty deed, the said lands. That Suzanne had no knowledge of such conveyance, and the same was without money consideration, and was never delivered, and that there was no agreement between the said grantor and grantee that the same was considered and understood to be delivered, and no agreement between the said parties that the same should be delivered to a third party or stranger for the benefit of the grantee. (5) That in December, 1892, the said John Commow executed and delivered to one W. W.

Allen a warranty deed to said lands for the consideration of $25, subject to a certain mortgage and taxes. (7) That in January, 1893, plaintiff, relying upon the statements of John Commow that he had sold said land to Allen, purchased the same from Allen by warranty deed, paying him therefor $650, plaintiff at said time having no knowledge of the deed to Suzanne. (8) That the said Allen retained the deed from Commow to him in his possession, and agreed to pay certain taxes on said property, and to cause said deed to be thereafter recorded. (9) That in the spring of 1893 plaintiff went into possession of said real estate, and has ever since been in possession thereof, making valuable improvements. (10) That plaintiff has paid the incumbrances on said land, and the defendant had actual notice of such payments, and of plaintiff's possession of said real estate. From these findings the trial court found as conclusions of law that the deed from John to Suzanne Commow is void and should be cancelled of record; that defendant John Commow is estopped from claiming title in, and has no title to, said real property; and that plaintiff is the owner in fee of said land, and entitled to a judgment quieting such title in him, with costs.

By this appeal we are required to review the entire case. There are but few material facts in dispute. As to the findings of the trial court numbered 1 to 4, inclusive (with the exception of the statement in finding No. 4 that the deed from John to Suzanne was never delivered), there can be no dispute. Finding No. 5, as to the conveyance from Commow to Allen, is challenged; also finding No. 7, as to statements made by Commow to plaintiff relative to the Allen deed; likewise finding No. 8, as to the loss of such deed. Findings 9 and 10, as to plaintiff's possession, etc., of said land, and the payment by him of the incumbrances thereon with Commow's knowledge, must, from the evidence, be accepted as true. It is, therefore, apparent that the principal question of fact in dispute is as to whether or not John Commow ever executed and delivered to W. W. Allen a deed to this land, as claimed by plaintiff. If he did not, then plaintiff acquired no title by his deed from Allen, and hence he could not recover in this action. The burden is upon the plaintiff to establish the fact of the execution and delivery of such deed, and this he should do by clear and satisfactory proof. Has he done so? The trial court found that he has, and this finding, as all findings of the court below, is entitled to much weight. That court had an opportunity to see the witnesses, and hence is better enabled to judge of the weight of the evidence than we are from the printed abstract. What is the testimony? James McManus, the plaintiff, testified: "Commow and I had always been neighbors and friends. He had confided in me, some time in December, that he was going to lose his pre-emption [the land in dispute] if he could not make some arrangement to meet the debt that had been due since 1890. I met him in St. John a few days either before or after Christmas, and asked him if I could make a deal with him for this land,—buy the title to it. I would try to redeem it. And he answered me that he

was very willing; he didn't know I wanted the land; that I could have had it, but he had just sold it a while prior to Allen. W. W. Allen testified: "Q. Was there a conveyance of the land to you by Commow? A. Yes, sir; there was an instrument in writing." And after testifying to facts showing the loss of the deed, and his search for the same, and his inability to find it, he testified to the contents thereof, and then continues: "Commow gave as a reason at that time why he wanted to sell the land that he was going to lose it anyway, and he wanted to sell it, and get what he could out of it. He said he was going to lose it by reason of the foreclosure of the mortgage that was against the place. That is the mortgage I was to assume. The consideration was paid Commow there. He was owing me $10 or $12 in a note, and he paid the note, and received the balance in money; the total consideration being $25 to him. I had been trying to collect this note of him. It was about due, I think, then." On cross-examination he testified: "The date of the deed that Commow gave me was some time the latter part of November or first of December. The date of the deed I gave McManus was shortly after that. Commow, at the time of the execution of this deed, was in St. John, and the papers were drawn up in the bank in St. John. I drew them up myself." On redirect: "This deed from Commow to me was acknowledged. Premeau, I think, took the ackowledgment. It was witnessed, but I don't know who the witnesses were." Frank Premeau testified that in 1892 or 1893, he, as notary public, took the acknowledgment of some instrument, but does not remember the nature of the instrument. Thomas Craig testified that he was present one time when there was a deed between Commow and Allen in relation to some land. He said: "I went in the bank one day, and Commow was there, and he was getting some money, and they were talking about dealing for land,—buying a farm; and I noticed that he didn't get very much money, and I said to Allen, afterwards: 'It must be a pretty cheap farm. He didn't get but little money.' He said, 'Yes, but he had to pay off what was against it, and there was lots against it,' or something like that." John Burke testified: "Some time in the summer of 1899, Commow met me on the street in Rolla, and says: 'John, when Allen lived up here, he got me drunk one time, and got a deed to a piece of land; but before I gave the deed to Allen I had given another deed, which was on record.'" Peter Theabear testified: "Was working around the bank in St. John for Mears in the fall of 1892. Heard something about land deal between Allen and Commow. Saw Commow sign papers about some land business." In behalf of the defense John Commow is the only person who testified on this point. He flatly contradicts the plaintiff and his witnesses. In the face of this testimony we have no hesitation in adopting the finding made by the trial court. In fact, we do not see how any different conclusion could have been reached, unless, as contended for by appellant's counsel, the plaintiff's evidence, standing alone, is insufficient upon which to base such finding. They contend that there is

no competent evidence in the case upon which a finding that Commow ever sold, made, executed, acknowledged, or delivered any deed of this land to Allen can be predicated. The fact of the execution and delivery of the deed must, we think, as counsel contend, be proved by clear and satisfactory evidence. Any less rigid rule would be dangerous to the security of titles, and evil practices, which it was the purpose of the statute of frauds to prevent, would be encouraged. The learned counsel for appellant filed a very elaborate brief in this court, in which a great many authorities are cited and reviewed relative to the degree of proof required to establish the existence of a lost deed. We are satisfied that these authorities state the rule correctly, which is, in substance, as we have stated above, that clear and satisfactory proof is required. The proof must clearly show that in fact such deed was executed and delivered, and that the same is lost; also the contents thereof. After a careful examination of the record, we are of the opinion that the plaintiff sufficiently proved these facts, and that the finding of the trial court that such deed was executed and delivered is correct.

Appellant's counsel make the point that there was no proof that there were not subscribing witnesses, or that the subscribing witnesses, if any, are dead, and hence that the doctrine established in *Brynjolfson* v. *Elevator Co.*, 6 N. D. 452, 77 N. W. Rep. 555, applies. This point is not sound, for the reason that since said case was decided the rule has been changed by statute. Chap. 59, Laws 1897, being § 3888a, Rev. Codes 1899. In the case cited and relied upon by counsel this court said: "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."

Counsel for appellant urge that there was no foundation laid for the proof of the contents of the lost deed by secondary evidence. They contend that the plaintiff should have been examined, as well as Mrs. Allen, the wife of W. W. Allen, concerning the lost deed. They apparently overlook the fact, which is shown by the record, that this deed never came into possession of the plaintiff. The plaintiff and W. W. Allen both testified that at the time Allen conveyed this land to the plaintiff it was agreed that Allen should retain the custody of the deed from Commow to him until such time as the taxes were paid by Allen, and then the same was to be recorded by him. Hence, it would have been useless to have called the plaintiff as a witness concerning the loss of this deed, and, as to the wife of Mr. Allen, there is nothing showing that she had any knowledge concerning the deed. We deem this point untenable. The rule of evidence contended for by appellant's counsel that no evidence shall be given which, from the nature of the transaction, supposes there is better evidence of the fact obtainable by the parties, is elementary, and the foundation of the rule is a supposition of fraud, and, if there is better evidence of the fact, which is withheld, a presumption arises that the party had some secret motive in not producing it. Before

secondary evidence of the contents of a lost instrument is permitted, such diligence should be shown in attempting to produce the original as will leave no reasonable supposition that the original is in existence, or can be produced. The rule is stated by some courts as follows: "The party alleging the loss of a material paper must show that he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him. *Simpson* v. *Dall,* 3 Wall. 460, 18 L. Ed. 265; *Kearney* v. *Mayor,* etc., 92 N. Y. 621; *Loftin* v. *Loftin,* (N. C.) 1 S. E. 837; *Johnson* v. *Arnwine,* 42 N. J. Law, 451, 36 Am. Rep. 527; *Kelsey* v. *Hanmer,* 18 Conn. 311; *Daley* v. *Bernstein,* (N. M.) 28 Pac. 764; *Isley* v. *Boon,* (N. C.) 13 S. E. 795. W. W. Allen testified that he had searched for this deed five or six times; that the first time he made search was about a year ago, at which time he looked through all his old papers, old mortgages, deeds, etc., in all the places where he kept such papers, and could not find it; and that two or three months thereafter he looked every place where he did the first time, and in every place where he thought it could possibly be, and could not find any trace of it; and that a couple of months prior to the trial, and again within ten days preceding the trial, he looked through all the same papers again, and opened all envelopes, and examined each piece separately, to see if it was there, but could not find it; and he looked in every place where he kept any papers at all. The witness states that he is satisfied from the search made by him that the deed was lost. We think this satisfied the rule above referred to. We think the evidence was amply sufficient to show the execution and delivery of this deed; also the fact of its loss, and its contents as found by the trial court. It follows, therefore, from what we have stated, that the plaintiff obtained title to the land in question under the deeds from Commow to Allen and from Allen to him, unless the deed executed by Commow to his daughter, Suzanne, in May, 1892, operated to convey the title to her. Was there a delivery of this deed? If not, of course no title vested in her. It is undisputed that at the time this deed was executed Suzanne Commow, an infant 4 years of age, was residing with one Charboneau. It is also undisputed that Commow held this deed in his possession until August, 1899, when he placed the same on record. It is claimed that Commow intended that such deed should operate as a transfer of the land to his daughter, and that he retained it in his possession on account of the extreme youth of Suzanne. We are of the opinion that there was no delivery of said deed. It is not claimed, and could not be claimed under the evidence, that there was an actual delivery; and hence, if there was any delivery at all, it must have been a constructive delivery. Was there such a delivery? Section 3520, Rev. Codes, provides: "Though a grant is not actually delivered into the possession of the grantee, it is yet to be deemed constructively delivered in the following cases: (1) When the instrument is, by agreement of the parties at the time of the execution, understood to be delivered, and under such circum-

stances that the grantee is entitled to an immediate delivery. (2) When it is delivered to a stranger for the benefit of a grantee and his assent is shown or may be presumed." Subdivision 2 of this section has no application under the evidence, and we must, therefore look to the first subdivision. Under this there are two things essential to a constructive delivery: First, an agreement between the parties at the time of the execution of the instrument that the same is understood as delivered. The evidence of such an agreement having been entered into is wholly lacking. Moreover, Suzanne, being a mere infant at the time, could not enter into an agreement except through a guardian, and there is no evidence of any such agreement having been entered into; second, such agreement must be made "under circumstances which should entitle the grantee to an immediate delivery." The record discloses no circumstances surrounding the execution of this deed which would entitle Suzanne, the grantee, to an immediate delivery. She had parted with nothing, and there is no theory upon which she could compel a delivery. It is, therefore, manifestly true that there was no delivery, either actual or constructive, of this deed, and hence Suzanne acquired no title to the land in controversy, § 3515, Rev. Codes. In view of the explicit language of § 3520 of our Code, above quoted, it would serve no useful purpose to review the many authorities cited in the brief of counsel upon this question. The judgment of the District Court was correct, and the same is accordingly affirmed. All concur.

(87 N. W. Rep. 8.)

JAMES B. EATON *vs.* CASSIUS C. BENNETT.

Opinion filed May 14, 1901.

Taxation—Authentication of Assessment Roll.

Statutary actions to quiet title. Construing § § 1551, 1638-1640. Comp. Laws 1887. Section 1551 required an assessor to attach to his return or assessment roll an affidavit of authentication in the form prescribed by said section. *Held*, that said requirement is vital to the taxes based on the assessment, and that the same is mandatory, and one intended solely for the benefit of the taxpayer, and to safeguard his interests alone.

Jurisdiction of Taxing Officers.

Held, further, that the entire omission to annex any affidavit to the return is fatal to the jurisdiction of the taxing officers, and no valid tax can be extended against property so attempted to be assessed.

Deeds Regular on Their Face—Voidable.

In this case the assessor for Emmons county did not annex any affidavit to his assessment roll in the year 1888. *Held* that the taxes attempted to be charged against the lands involved in that year were wholly void, and that no valid tax could be extended against said lands based on such pretended assessment. *Held*, further, that

the tax deeds set out in the answers as defendant's source of title, and which are issued in pursuance of attempted tax sales for the tax of 1888, are voidable deeds, though regular on their face. Farrington v. Investment Co., 45 N. W. Rep. 191, 1 N. D. 102, distinguished.

Limitation Statute Does Not Run.

Said tax deeds were recorded more than three years prior to the commencement of the above-entitled actions. *Held* that the recording of said deeds did not operate to start running the special statute of limitations found in section 1640, Comp. Laws, and hence these actions are not barred under said section of the statute.

Tender of Void Tax Unnecessary.

Held, the pretended taxes of 1888, being wholly illegal and void, are not such taxes as a suitor is compelled by § 1640 to pay as a condition of relief in an action where he is seeking to avoid a tax deed. Rule announced in O'Neil v. Tyler, 53 N. W. Rep. 434, 3 N. D. 47, adhered to and affirmed. See opinion, page 439, 53 N. W. Rep., and page 63, 3 N. D.

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

Actions by James B. Eaton against Cassius C. Bennett. Judgments for defendant, and plaintiff appeals.

Reversed.

James B. Eaton and *Robert A. Eaton*, for appellant.

H. A. Armstrong, for respondent.

WALLIN, C. J. The actions above entitled are between the same parties, and both are statutory actions, brought to quiet title to real estate situated in the county of Emmons. There are two tax deeds involved, each describing a quarter section of land. Both were issued on the same day and are similar in form and in their effect. The pleadings in the actions are identical in language, except as to the land described. By stipulation the cases were consolidated for all purposes of trial, and in this court the two cases are presented by a single statement of the case. Both cases will therefore be disposed of in this opinion. For convenience of reference, the two cases will be treated as one. The complaint alleges that plaintiff is the holder and owner of a first mortgage on the land described in the complaint, and prays that a certain tax deed referred to in the complaint may be cancelled as an adverse claim. The answer annexes the tax deed, and alleges that the same is a valid deed, and that this action is barred by the statute, for the reason that said deed had been recorded more than three years prior to the commencement of this action. The answer further states that the defendant is the owner of the land, and in the occupancy thereof. The answer also embraces a prayer to the effect that plaintiff's lien be cancelled as a cloud on defendant's title. The judgment entered below sustained the validity of the deed, and canceled the plaintiff's mortgage as a cloud on the title of the defendant. The record includes all the evidence, and a trial anew in this court, is demanded. It is conceded that the decision in this court

must turn entirely upon the question of the validity of the tax deed. The deed bears date February 28, 1893, and was recorded more than three years prior to the commencement of the action. It was issued by the county treasurer pursuant to a tax sale made in 1889 for the taxes of 1888, and the same is in the form prescribed by § 1639 of the Comp. Laws of 1887. The recitals in the deed need not be set out at length, except that the same recites "that said lands were legally liable for taxation, and had been duly assessed, and properly charged on the tax book or duplicate for the year 1888, and that said lands had been legally advertised for sale for taxes, and were sold on the 15th day of November, 1889." Under the terms of § § 1638 and 1639, Comp. Laws, said deed conveyed a fee simple title to the grantee, and the same was made "conclusive evidence of all the facts therein recited, and *prima facie* evidence of the regularity of all the proceedings from the valuation of the land by the assessor up to the execution of the deed." The evidence shows that numerous irregularities occurred in the attempt to lay the tax in question, but we deem it unnecessary to refer to any of these except one, which, in our opinion, is fundamental, and decisive of the case. The evidence shows a total failure on the part of the assessor to verify the assessment roll, and no assessor's oath whatever was attached to the roll, as required by § 1551 of the Comp. Laws, or otherwise. This section of the statute is mandatory in its terms, and was obviously designed to safeguard the interests of the taxpayer. This is its sole design and purpose. It has no bearing whatever upon the matter of expediting or facilitating the dispatch of public business. Under the law the taxpayer is entitled to have his own property and all other property in his taxing district officially valued by an assessor, who acts under the sanction of an oath; and the legislature has carefully framed a form of oath which the assessors are required to attach to their work when the same is completed and returned. There are many cases holding that the omission to annex to the roll the prescribed affidavit and certificate is a fatal omission which goes to the groundwork of the tax, and hence one which defeats the jurisdiction to lay the tax; and cases are not wanting which hold that where the assessor, in annexing the affidavit to the roll, has omitted therefrom some material averment prescribed by sovereign authority, such omission is fatal to the tax. Mandatory provisions—and those intended solely for the benefit of the taxpayer are mandatory—must be substantially complied with by the officials who attempt to impose the tax burden upon the citizen; and the omission to do so, under the decided weight of authority, is fatal to all proceedings based upon such attempted taxation, including tax certificates and deeds issued thereon pursuant to a sale for such pretended taxes. Nor will the statute of limitations begin to run in favor of a tax deed based upon such attempted taxation. The rule that mandatory provisions of the statute must be substantially observed by taxing officers, and that the disregard or violation of such provisions is fatal to the tax, and defeats the jurisdiction of the taxing officers, is well settled in this state, and has

become, therefore, practically a rule of property, and hence a rule which this court is bound to uphold until the same has been modified by constitutional legislation. The authorities cited will fully sustain the following propositions: First, that a valid assessment evidenced by an official return is essential to a valid tax, and that fatal defects in the record of an assessment cannot be aided by evidence aliunde; second, a tax deed based on a void assessment is itself void, and does not operate to start running the statute of limitations; third, where the statutes require an assessor to authenticate his assessment roll by annexing thereto an affidavit in a prescribed form, it will be fatal to omit such affidavit of authentication. See *Newkirk* v. *Fisher*, 72 Mich. 113, 40 N. W. 189; *Railway Co.* v. *Pierce*, 47 Mich. 283, 11 N. W. 157; *City of Grand Rapids* v. *Blakely*, 40 Mich. 367, 29 Am. Rep. 539; *Warren* v. *City of Grand Haven*, 30 Mich. 24; *Morrill* v. *Taylor*, 6 Neb. 236; *Lyman* v. *Anderson*, 9 Neb. 367, 2 N. W. 732; *Bellinger* v. *Gray*, 51 N. Y. 610; *People* v. *Suffern*, 68 N. Y. 321; *Merritt* v. *Village of Portchester*, 71 N. Y. 309, 27 Am. Rep. 47; *Brevoort* v. *City of Brooklyn*, 89 N. Y. 128; *Philleo* v. *Hiles*, 42 Wis. 527; *Marsh* v. *Supervisors*, Id. 502; *Tierney* v. *Lumbering Co.*, 47 Wis. 248, 2 N. W. 289; *Plumer* v. *Board*, 46 Wis. 163, 50 N. W. 416; *Scheiber* v. *Kachler*, 49 Wis. 292, 5 N. W. 817; *Lufkin* v. *City of Galveston*, 73 Tex. 340, 11 S. W. 340; *Martin* v. *Barbour*, 140 U. S. 634, 11 Sup. Ct. 944, 35 L. Ed. 546; *Marx* v. *Hanthorn*, 148 U. S. 172, 13 Sup. Ct. 508, 37 L. Ed. 410; *Abbott* v. *Lindenbower*, 42 Mo. 163; Id., 46 Mo. 291; *Martin* v. *Cole*, 38 Ia. 141; *Magruder* v. *Esmay*, 35 Ohio St. 221; *Farrington* v. *Investment Co.*, 1 N. D. 103, 45 N. W. 191; *Power* v. *Larabee*, 2 N. D. 141, 49 N. W. 724; *Power* v. *Bowdle*, 3 N. D. 107, 54 N. W. 404; *Hegar* v. *De Groat*, 3 N. D. 355, 56 N. W. Rep. 150; *O'Neil* v. *Tyler*, 3 N. D. 47, 53 N. W. Rep. 434; *Meldahl* v. *Dobbin*, 8 N. D. 115, 77 N. W. Rep. 280; *Roberts* v. *Bank*, 8 N. D. 504, 79 N. W. Rep. 1049; *Sweigle* v. *Gates*, 9 N. D. 538, 84 N. W. Rep. 481. See, also, the following cases, decided at the present term: *Douglas* v. *Richards*, 87 N. W. Rep. 600; *Sheets* v. *Paine*, 10 N. D. 103, 86 N. W. Rep. 117, and *Dever* v. *Cornwell*, 10 N. D. 123. We are not unaware of the fact that some of the decisions above cited have been modified by the courts which made them. *Fifield* v. *Marinette Co.*, 62 Wis. 532, 22 N. W. Rep. 705, is an illustrative example. In that case, while adhering to the rule that a void assessment will defeat a tax deed, the court holds that a tax deed will not be set aside until the plaintiff first pleads, and then proves that the tax based upon such void assessment is unjust and unequal. This view seems to beg the question. Where the assessor has valued all the property in his district in a reckless disregard of the law, and has not pretended to act under the sanction of the oath required by law, we are unable to see that his action thus taken, and what is confessedly illegal, nevertheless results in a tax which is *prima facie* just and equal. Nor do we think that a court acting upon sworn testimony, as it must do, is in a position to determine whether a tax

assessed against a given tract of land is just and equal. The mere fact that the tax of A. is not greater than that of B. and C., who are the neighbors of A., proves nothing in the absence of a legal official assessment of all the land in the taxing district. See *O'Neil* v. *Tyler*, 3 N. D. 47, 53 N. W. Rep. 434. In this state the precise point here being discussed has been ruled upon. In *Power* v. *Larabee*, supra, the court held that an alleged tax not lawfully assessed need not be paid or tendered by the plaintiff as a condition to granting relief by a court of equity. In the opinion (page 151, 2 N. D., page 727, 49 N. W. Rep.) the following language was used: "It is, in a broad sense, a moral obligation resting upon every taxpayer to pay a fair and equal tax upon his property. Such obligation, however, does not become legal and enforceable in the courts unless the tax is substantially a legal one,"—citing *Barber* v. *Evans*, 27 Minn. 92, 6 N. W. Rep. 445. It is true that a majority of this court held in *Farrington* v. *Investment Co.*, supra, that a court of equity will not enjoin the enforcement of a tax on the ground that the assessment was irregular or void, in this: that the assessor's oath was not attached to the roll. The reasons for so holding are set forth in the opinion, and were satisfactory to a majority of the court as it was then constituted. But that case will show that the rule there laid down has no application to a controversy such as this, in which public rights are not involved, and where private rights are alone at stake. In the opinion the following language was used at page 119, 1 N. D., page 197, 45 N. W. Rep.: "In possessory actions between the holder of the tax title and the patent title, where the interests of private parties alone are involved, and where the rule of caveat emptor applies in all its strictness, courts of law are scrupulously careful that no man be deprived of his property through tax proceedings that are not in all respects in substantial compliance with the statutory requirements." The late Chief Justice Bartholomew, who formulated the opinion in the Farrington case, also wrote the opinion in *Roberts* v. *Bank*, and concurred in that of *Sweigle* v. *Gates*, supra. In both of the cases last cited tax deeds were canceled and held for naught upon the ground of illegal assessments, and this after the statute had run against the actions. Respondent's counsel cites *Meldahl* v. *Dobbin*, 8 N. D. 115, 77 N. W. Rep. 280, and also *Hegar* v. *De Groat*, 3 N. D. 354, 56 N. W. Rep. 150, and argues that said cases hold or imply that a tax deed regular on its face will start the statute running even if the tax on which the deed issued was void. In the Hegar case the court was dealing with a tax deed confessedly void on its face, and it was there held that such a deed did not operate to start the statute. But in that case the court cited a line of decisions to the effect that a deed issued on a sale for a void tax would be equally impotent. See opinion, page 364, 3 N. D., page 154, 56 N. W. Rep. In the other cases cited by counsel some unguarded language was used, but the writer of that opinion never intended to say that a void tax would uphold a tax deed. See *Roberts* v. *Bank*, supra. Our conclusion is that the judgment of the court below is erroneous, and the same will therefore be reversed. The

court below will be directed to reverse the judgment in both cases, and enter judgment vacating the tax deeds set out in the answers in each case respectively. The appellant will recover his costs and disbursements in both courts. All the judges concurring.

(87 N. W. Rep. 188.)

FRANK E. LITTEL *vs.* B. H. PHINNEY *et al.*

Opinion filed Oct. 9, 1901.

Appeal—Trial De Novo—Statement of Case.

In a case tried to the court without a jury this court is without authority to try the case anew unless the statement of the case embraces all the evidence. The certificate of the trial court to the effect that the statement embodies all the evidence is sufficient prima facie, but is not conclusive of the fact, where the record shows on its face that the statement does not contain all the evidence.

Affirmance Without Prejudice.

Applying these rules to this record, the judgment of the trial court must be affirmed, and the same is affirmed, but without prejudice to further proceedings to determine the rights of the parties with respect to the subject-matter involved in this action.

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

Action by Frank E. Littel against Bunton H. Phinney and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Curtiss Sweigle, for appellant.

Plaintiff's complaint is in the short form to determine adverse claims under § 5904, Rev. Codes. Defendants counterclaimed, alleging title in themselves. The court erred in striking from plaintiff's reply that portion pleaded as a counterclaim to defendants' affirmative cause of action. Ejectment at common law has been abolished in most states, and the statutory action to determine adverse claims has been substituted. *Holland* v. *Challen*, 110 U. S. 15; *Wood* v. *Conrad*, 50 N. W. Rep. 903. Plaintiff's counterclaim asked that the value of improvements built by him on the premises in good faith be allowed him in case his title proved invalid. Where defendant counterclaims in an action to determine adverse claims, the position of the parties is reversed, the defendant becomes the plaintiff and takes the affirmative in pleading and proof, while the plaintiff defends against the claim. *Walton* v. *Perkins*, 10 N. W. Rep. 425; *O'Neil* v. *Tyler*, 3 N. D. 47, 53 N. W. Rep. 439. Defendants should not have been permitted to introduce proof under their answer because they failed to pay or tender plaintiff legal taxes paid by him. § 1640, Comp. Laws; *O'Neil* v. *Tyler*, 3 N. D. 47, 53 N. W. Rep. 434. The assessment of several lots together, belonging to the same owner, does not invalidate the assessment. *People* v. *Morse*, 43 Cal. 534; *People* v. *Culverwell*, 44 Cal. 620; *Sanborn* v. *Mueller*,

35 N. W. Rep. 668; *Johnson Co.* v. *Tierney*, 76 N. W. Rep. 1090; *Mix* v. *People*, 4 N. E. Rep. 783; *Dodge* v. *Emmons*, 9 Pac. 951; *Wright* v. *Cradlebaugh*, 3 Nev. 345. Where a taxpayer lists several parcels as one and they are so assessed, neither he nor his grantee can afterwards object to such assessment. *Russell* v. *Werntz*, 24 Pa. St. 337; *Albany Brewing Co.* v. *Meriden*, 48 Conn. 243; *State* v. *Baker*, 49 Tex. 763-4. Where several tracts were illegally sold together, the running of the statute of limitations will cure a recovery by the owner. *Monk* v. *Corwin*, 12 N. W. Rep. 571; *Bullis* v. *Marsh*, 2 N. W. Rep. 442; *Thomas* v. *Stickle*, 32 Ia. 71; *Douglas* v. *Tullock*, 34 Ia. 262; *Francis* v. *Groat*, 14 Mo. App. 324; *Knox* v. *Cleveland*, 13 Wis. 245; Blackwell, § 918. The taxes being conceded as legal, should have been paid or tendered. § 1640, Comp. Laws. And plaintiff is entitled to judgment for legal taxes. § 1643, Comp. Laws. None of the objections to the deeds went to the groundwork of the tax. *O'Neil* v. *Tyler*, 3 N. D. 47, 53 N. W. Rep. 440; *Farrington* v. *New Eng. Inv. Co.*, 1. N. D. 102.

Freerks & Freerks, for respondent..

Judgment should be affirmed because it appears upon the face of the record that all the evidence offered at the trial of the action has not been incorporated into the record. § 5630 Rev. Codes; *U .S. Sav. & Loan Co.* v. *McLeod*, 10 N. D. 111, 86 N. W. Rep. 110; *Kipp* v. *Angell*, 10 N. D. 199, 86 N. W. Rep. 706. The plaintiff conceded at the trial that the manner in which lots eight, nine and ten were listed was not in conformity to the method prescribed by the statute, and it was conceded that defendants could not avail themselves of these irregularities because more than three years had elapsed since the recording of the tax deeds. The statute under which this publication was made does not permit the treasurer to advertise three different tracts of land together, and set opposite them a gross amount without stating an actual amount due against each description, and the publication cannot be for more than one year. The interest, penalty and cost of advertising must be included in the amount set opposite each description. *Dever* v. *Cornwell*, 10 N. D. 123, 86 N. W. Rep. 227; *Sweigle* v. *Gates*, 9 N. D. 538, 84 N. W. Rep. 487. The defendants alleged facts in their answer which, if true, would make the plaintiff's title unlawful and void. No tender of payment of taxes would be necessary under those circumstances. *Salmer* v. *Lathrop*, 72 N. W. Rep. 574, 10 S. D. 216; *Clark* v. *Darlington*, 63 N. W. Rep. 771, 7 S. D. 148; *Powers* v. *Larabee*, 2 N. D. 141. When the statute under which the sale is made directs a thing to be done, or prescribes the form, time and manner of doing anything, such a thing must be done, and in the form, time and manner prescribed, or the title is invalid, and in this respect statutes must be strictly if not literally complied with. *Whittaker* v. *City of Deadwood*, 82 N. W. Rep. 204; *Chandler* v. *Spear*, 22 Vt. 398; Cooley Taxation, 287; 2 Desty Taxation, 842.

WALLIN, C. J. This action was tried in the district court without a jury, and judgment was entered in that court in favor of the defendants, dismissing the action, and giving other relief. Plaintiff appeals to this court from said judgment, and in the statement of the case, which purports to embody all of the evidence offered at the trial, the plaintiff asks for a trial anew in this court of the entire case. Nevertheless, it appears upon inspection of the record that the statement of the case fails to embrace all of the evidence offered at the trial, and that a portion of such evidence is omitted from the statement. In this condition of the record this court is without lawful authority to try the case anew. Authority to try civil actions anew in this court is derived solely from the statute, and, when the statute is not complied with, this court is devoid of authority to enter upon a new trial of the facts, or upon a reinvestigation of the questions arising upon the evidence. See Rev. Codes 1899, § 5630; also *Loan Co.* v. *McLeod*, 10 N. D. 111, 86 N. W. Rep. 110; *Kipp* v. *Angell*, 10 N. D. 199; *Geils* v. *Fluegel*, 10 N. D. 211. Nor can this court, in cases such as this, proceed to inquire whether the facts embraced in the findings are justified by the evidence, or whether evidence in the record is or is not admissible under the issues. In this case the conclusions of law and the judgment are justified by the findings of fact. It becomes our duty, therefore, to affirm the judgment entered below, but in so doing we deem it proper, upon the facts disclosed in the record in this case, to say that the present action is determined without prejudice to any further action or proceedings between the parties which may hereafter be instituted to determine the rights of the parties relating to the subject-matter of the suit, which are set out in the amended complaint, and are left undetermined in this action. Judgment affirmed. All the judges concur.

(87 N. W. Rep. 593.)

S. J. VIDGER *et al. vs.* AUGUST NOLIN.

Opinion filed Oct. 17, 1901.

Forcible Detainer—Counterclaim.

In an action for the possession of real estate under the forcible detainer act as enacted in § 6677, Rev. Codes, *held*, that no counterclaim can be pleaded in justice's court, except as a set-off for rent or damages in cases where judgment for rent or damages are claimed.

Reply to Counterclaim Is Not Waiver of Objections.

In a case where a counterclaim is interposed by the defendant in an action for possession of real estate under § 6677, no damages nor rent being claimed, *held*, that the right to object to the introduction of any evidence in support of such counterclaim is not waived by replying in place of demurring to such counterclaim. Noble Tp. v. Aasen, 76 N. W. Rep. 990, 8. N. D. 77, distinguished.

Right to Possession of Real Estate.

In such a case, *held*, that the right to the possession of the real estate is the only fact that can be rightfully litigated unless damages or rent is claimed.

District Court on Appeal Succeeds to Justice Jurisdiction.

Section 6779 provides that upon an appeal from justice's court "the action shall be tried anew in the district court in the same manner as actions originally commenced therein." *Held*, that the district court acquires no jurisdiction upon such appeal to try the action anew, nor to litigate a counterclaim, in cases where the justice had no jurisdiction to determine the issues raised by the pleadings or to allow the counterclaim.

Assignments of Error Sufficient.

Assignments of error in the brief considered, and *held* sufficiently specific without referring to the abstract or statement of the case.

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

Action by S. J. Vidger and N. A. Lewis against Angust Nolin. Judgment for plaintiffs in justice court. On appeal judgment rendered for defendant and plaintiffs appeal.

Reversed.

J. W. Tilly, for appellant.

When a verdict appears to be arbitrary, or manifestly and clearly wrong; or when it appears to be the result of passion, prejudice, or misconduct of the jury, and when it is manifestly against the weight of evidence, it is not only within the power, but it is the duty of the court to set it aside. *Belt Ry. Co* v. *Kinmare*, 83 Ill. App. 200; *Marshall* v. *Ry. Co.*, 34 S. E. Rep. 455; *Dempsey* v. *Roan*, 27 S. E. Rep. 668; *Atchison Etc. Ry. Co.* v. *Hine*, 47 Pac. Rep. 190; *Owen* v. *Cook*, 9 N. D. 134, 81 N. W. Rep. 285. In this case, under the provisions of § § 6680, 6779, Rev. Codes, a justice is prohibited from entertaining or passing upon a counterclaim interposed as a defense in an action in forcible entry and detainer, excepting as a set-off to a demand made for damages or rents and profits. If the justice has no jurisdiction to try and determine a counter claim as a defense set up in an action of this character, and an appeal is taken from his judgment to a court of general jurisdiction, the appellate court only acquires such jurisdiction over the case as the justice originally had. 2 Enc. Pl. & Pr. 23; *Gillande* v. *Administrator*, 2 O. St. 223; *People* v. *County Court*, 10 Cal. 19; *Tumkinstein* v. *Elgeutter*, 11 Cal. 328; *Rickey* v. *Superior Court*, 59 Cal. 661; *Wedgewood* v. *Parr*, 84 N. W. Rep. 528; *Yon* v. *Baldwin*, 76 Ga. 769; *Edwards* v. *Copper*, 6 S. E. Rep. 792; *Gage* v. *Manett*, 23 Pa. 337; *Hill* v. *Township*, 19 At. Rep. 855.

M. A. Hildreth, for respondent.

If appellants desired to review any of the orders made in the cause they should have been made a part of his proposed statement of the case properly authenticated, and brought in and made a part

of the record. § § 5719, 5463, 5465, Rev. Codes. The former order dismissing the appeal without prejudice was in no sense a bar to a subsequent appeal, such second appeal having been taken within the time allowed by law. *Murphy* v. *Farnell,* 9 Wis. 102; *Pfenning* v. *Griffith,* 29 Wis. 618; *Ely* v. *Dillon,* 21 Ia. 48; *Minshall* v. *Ry. Co.,* 20 Wis. 644; *Saunders* v. *Moore,* 12 S. W. Rep. 783; *French* v. *Rowe,* 28 N. Y. Supp. 849; *Langley* v. *Warner,* 1 N. Y. 607; *Dooley* v. *Fosten,* 5 Kans. 269; *Myers* v. *Mitchell,* 46 N. W. Rep. 247; *Field* v. *Elevator Co.,* 67 N. W. Rep. 147. By pleading to the merits plaintiff subsequently waived any question as to the jurisdiction of the district court. *York* v. *York,* 3 N. D. 348. The notice of intention to move for a new trial, and the notice of motion for a new trial were both made on the minutes, and the plaintiff failed to specify in his notice of intention to move for a new trial the particular errors of law upon which he would rely, and those that were set forth in his statement of case did not conform to those set forth in his notice of intention. The action of the trial court in striking out of the proposed stated case the errors of law was therefore proper. Subd. 3, § 5475, Code Civ. Proc.; Vol. 3, § 659, Deering's Cal. Code; *Sprigg* v. *Barber,* 122 Cal. 575; *Leonard* v. *Shaw,* 114 Cal. 542; *Bohnert* v. *Bohnert,* 95 Cal. 445; *Pio Rico* v. *Cohen,* 78 Cal. 386.

MORGAN, J. This action was commenced in justice's court under Art. 5, Chap. 3, Justice's Code, relating to forcible detainer of real estate. The complaint states a cause of action for a failure to surrender possession of such real estate after notice to quit had been duly given. The complaint further states that the plaintiffs leased the land described therein to the defendant for farming purposes, for the year commencing November 29, 1898, and ending November 29, 1899; that the plaintiffs reserved the right to sell such lands during said year, but by the terms of the lease bound themselves to give to the defendant the right and opportunity to purchase this land at the same price and terms offered by any other person; that plaintiffs received an offer for said land that was acceptable to them, and communicated the fact of such offer to the defendant, and informed him of the terms of the offer, and that he (the defendant) had the first option to purchase; that the defendant, under the stipulations of the lease, failed to make the purchase, whereupon the plaintiffs terminated the lease pursuant to its terms and provisions. In justice's court the defendant pleaded a general denial, and also a counterclaim for alleged damages. The counterclaim alleged an indebtedness due from plaintiffs to defendant by reason of defendant's having performed services for the plaintiffs and furnished board for their employes, amounting in all to the sum of $196.26. The plaintiffs recovered judgment in justice's court for the possession of the lands involved in the suit. The defendant appealed from such judgment to the district court, and in his notice of appeal demanded a new trial in the district court. Before such appeal was fully per-

fected, the plaintiffs took possession of the premises under an order of restitution issued by the justice. In the district court the defendant procured leave to file a supplemental answer, and subsequently an amended and supplemental answer, wherein another counterclaim was pleaded, setting forth that the defendant had been damaged in a large sum by reason of plaintiff's failure to comply with the terms of the lease wherein the plaintiffs gave the defendant the right to purchase these lands at the same price and terms offered and agreed on by any other proposed purchaser. These answers also placed in issue all the allegations of the complaint, and also set forth the counterclaim for $196.26, which had been pleaded in justice's court. The plaintiffs denied the allegations of each of these counterclaims by replies interposed at the proper time. This brief summary of the issues involved in the case will suffice for the purposes of a decision in this case here. It will be noticed that the complaint did not contain any demand for rent nor for damages by reason of the occupancy of the premises by the defendant. The complaint stated a cause of action for a wrongful detention of the premises simply, and only demanded immediate possession of the premises, with costs. No other relief was asked. It will also be noticed that the plaintiffs did not demur to either of the counterclaims, but issue was thereon joined by replies. On a trial had in the district court the defendant recovered a verdict on both of the counterclaims, on which verdict judgment was thereafter duly entered in the district court. Special questions were submitted to the jury by the court for answers, concerning the facts set forth in the counterclaims, and the jury found that there was due to the defendant from the plaintiffs the sum of $191.26, and interest, on the counterclaim pleaded in justice's court, and found facts concerning the second counterclaim, upon which the court ordered judgment to be entered for the sum of $320 and interest. No general verdict was found by the jury. There was no express finding submitted to it concerning the right to the possession of these premises at the time of the commencement of the action or at any other time. Neither did the judgment in the district court determine any question or fact directly pertaining to the right to the possession of the premises involved in the suit. The judgment rendered related solely to the recovery of the amounts found due as damages upon the counterclaims. There was no express adjudication or finding by the district court as to the right to the possession of these premises. A motion for a new trial was heard upon a statement of the case duly settled by the court. This motion was denied by the court, and judgment ordered and entered in favor of the defendant for the amounts found due by the jury. The plaintiffs appeal from that judgment. The respondent moves to dismiss the appeal, and to affirm the judgment of the district court, upon the ground that no sufficient assignments of error are subjoined to appellants' brief.

We find appended to appellants' brief 19 assignments of error.

which are there denominated in the aggregate as "specifications of error in law occurring at the trial." Assignment or specification No. 12 is as follows: "The court erred in overruling the objection of plaintiffs' counsel to the introductnon of certain evidence on behalf of the defendant, to-wit:" Then follows in the brief a literal copy of the objection made to such evidence during the trial, and as set forth in the statement of the case as settled. Such objection was in the following words, to-wit: "At this time the plaintiffs object to any and all evidence offered on the part of the defendant under the several counterclaims pleaded and set up in their answer and supplemental answer, excepting that certain counterclaim pleaded which the plaintiffs by their reply deny, they pleading settlement in payment thereof, for the reason and upon the ground that such several counterclaims, and all of them, are not proper matters to be pleaded in defense to or as a counterclaim in this action," etc. We deem this a sufficient compliance with rule 12 of the amended rules of this court Strict compliance with this rule will not always be exacted, and its requirements will be relaxed in cases when there is substantial compliance with its terms. In other words, this court is invested by the terms of the rule with discretion as to enforcing a strict compliance with its terms or not. Under the terms of such rule, and under the decision of this court in *O'Brien* v. *Miller*, 4 N. D. 308, 60 N. W. Rep, 841, we deem such assignmnt in the brief sufficient, although it does not contain any reference to the folio or page of the abstract where the objection was made and the motion therefor denied. We will now proceed to consider whether this objection to the introduction of any evidence to sustain the allegations of the amended answers should have been sustained or not. The trial court overruled such objection, and the appellants excepted to such ruling. The ground of the objection to such evidence was that counterclaims for damages of the nature set forth cannot ever be properly pleaded as damages in actions of this kind in this state. The contention advanced by the appellants to sustain this objection is that under the averments of the complaint in this case no issue can be legally raised in such a suit as this save the single one of the right to the possession of the premises at the time the suit was commenced. This form of action is a statutory one, and governed solely by the provisions of the Code relating thereto. The purpose of enacting such a statute was to provide a summary remedy to determine the right to the possession of real estate in the cases specified in the statute, and such purpose would be entirely defeated if other matters might be set forth in the pleadings and new issues thus raised. We therefore hold that the objection should have been sustained. Whether a counterclaim can be properly pleaded in this class of cases, except where rent or damages are sought to be recovered by the plaintiff, has often been decided by the courts, and it is held with great unanimity that counterclaims are not properly pleaded unless rent or damages are sought to be re-

covered. The rule is founded on good reasons. The statutes pertaining to forcible entry or detainer of real estate were enacted to enable possession of real estate to be recovered in a speedy and summary manner. If other issues than the right of possession were permitted to be litigated, the object to be attained through these laws would be thwarted, and the remedy thus intended to be provided would not result in a speedy determination of the right of possession. The following authorities sustain the proposition that counterclaims are not properly litigated in actions of this kind when the right to the possession of the land only is claimed. *Peterson* v. *Krueger*, (Minn.) 70 N. W. Rep. 567; *McSloy* v. *Ryan*, 27 Mich. 110; *Phillips* v. *Lodge No.* 6 (Wash.) 36 Pac. Rep. 476; *Van Every* v. *Ogg*, 59 Cal. 563; *Ralph* v. *Lomer* (Wash.) 28 Pac. Rep. 763. Section 6680 of the forcible detainer code of this state is as follows: "An action under the provisions of this article cannot be brought in connection with any other except for rents and profits accrued or damages arising by reason of the defendant's possession. No counterclaim can be interposed except as a set-off to a demand made for damages or rents and profits." If any doubt exists as to whether counterclaims can be pleaded in this class of actions in states without a similar provision, none can exist in this state. This section contemplates that a set-off may be pleaded when a money judgment is demanded in the complaint for rent or for damages resulting from defendant's possession, and in no other case. We therefore hold that the counterclaims could not be pleaded in this action, and that none can be pleaded in this class of actions unless clearly brought within the terms of the section quoted.

Did the plaintiffs waive their right to object to the introduction of evidence to sustain these counterclaims by reason of their failure to demur to such counterclaims? This court has clearly laid down the rule of law applicable to this question of waiver in cases where counterclaims are not demurred to. See *Noble Tp.* v. *Aasen*, 8 N. D. 77, 76 N. W. Rep. 990; *Bank* v. *Laughlin*, 4 N. D. 391, 61 N. W. Rep. 473. In the case first cited a motion was made to strike out a counterclaim for the reason "that the facts set forth in the alleged counterclaim are not sufficient to constitute a counterclaim against the township." In the opinion in that case the court laid down the rule applicable in such cases as follows: "In so far as the motion raised the question that the facts stated did not constitute a cause of action in favor of appellant and against respondent that could be enforced under any circumstances, it was proper enough. That point is not foreclosed by pleading to the facts, and the exact manner in which it is raised may not be material. But, in so far as it is attempted to raise the point that the facts did not constitute a counterclaim that could be enforced against the town in this particular case, it was abortive, for the reason that such point was waived by pleading to the facts, and no leave was given or asked to withdraw the reply." We may concede that, if the case at bar were similar in its facts to that case, the right to object to any evi-

dence to sustain the counterclaim was waived by replying instead of demurring to the counterclaim. But the two cases are not at all allied in principle so far as the right to counterclaim damages is concerned. In that case there was no statute expressly prohibiting the litigating of counterclaims in determining all the rights of the parties In this case such a statute exists, and is imperative against interposing a counterclaim in the action when the plaintiff seeks possession of the real estate only. By holding in this case that the right to object to the introduction of any evidence in support of the counterclaim had been waived by not demurring would be to hold that the parties may, by their acts or omissions during the trial, entirely nullify the statute. In this case the pleading of the counterclaim set forth in the answer is in direct violation of the terms of the statute so far as the subject-matter of the counterclaim is concerned; hence the court could not lawfully assume jurisdiction to litigate such a counterclaim in any event. Neither would jurisdiction be conferred upon the court by the parties consenting that such counterclaim be litigated. We fail to find any case holding that failure to demur to a counterclaim when such counterclaim is prohibited by law is a waiver of all objections to such counterclaim. We do not think that it is the policy of the law to hold that parties may consent to litigate matters directly prohibited by express statute. We are satisfied that the facts of this case are radically different from the facts under which the decision in *Noble Tp.* v. *Aasen* was rendered, and that this decision is not inconsistent with the rule laid down in that case. In that case there was no express enactment against entertaining the counterclaim. Our conclusion is that there was no waiver of the right to object to the introduction of any evidence to support the counterclaims in this case, and that this case is not the same in principle, nor at all controlled by the decision in *Noble Tp.* v. *Aasen*, supra.

The respondent contends that the district court acquired jurisdiction to litigate the subject-matter of these counterclaims by virtue of § 6779 of the Revised Codes. Such section, so far as applicable, is as follows: "The action shall be tried anew in the district court in the same manner as actions originally commenced therein." A rehearing was granted in this case for the purpose of securing arguments by counsel upon the scope to be given to this enactment upon appeals from justice's court, as it was not brought to the attention of this court upon the first argument, nor mentioned in the original opinion. It is now urged by counsel for said respondent that the section quoted gives the district court original jurisdiction on the appeal, and that the fact that the justice had no power to determine the questions involved in the counterclaims is immaterial. To this contention we cannot agree. Similar enactments are to be found in the justice's codes of several states. The construction given to this provision by the courts of these states is not in all respects in harmony, but upon the question involved in this appeal such decisions generally hold that, where the justice had no jurisdiction of the

subject-matter of the action, the district court could acquire none, and that such district court could not determine the case on the merits by amendment of the pleadings after appeal. In such cases the jurisdiction of the appellate court depends upon the jurisdiction of the justice, so far as the subject-mater of the litigation is concerned. *Cooban* v. *Bryant,* 36 Wis. 605; *Ball* v. *Biggam* (Kan. Sup.) 23 Pac. Rep. 565; *Dicks* v. *Hatch,* 10 Iowa, 380; *Plunket* v. *Evans,* 2 S. D. 434, 50 N. W. Rep. 961; *McMeans* v. *Cameron,* 51 Iowa 691, 49 N. W. Rep. 856. The respondent relies upon the cases of *Yorke* v. *Yorke,* 3 N. D. 343, 55 N. W. Rep. 1095, and *Peering & Co.* v. *Venne,* 7 N. D. 576, 75 N. W. Rep. 926, decided by this court, to sustain his contention that the district court acquired jurisdiction in this case by virtue of such appeal. Both of the cases cited simply hold that a voluntary appearance in an action or an appeal to the district court in a case where there was no service of the summons in justice's court is a waiver of the nonservice of the summons, and gives the court jurisdiction over the person. Nothing was said or determined in either of these cases upon the waiver of jurisdiction so far as the subject-matter is concerned. In considering what scope shall be given to enactments similar to § 6779. above cited, there are many decisions in courts of last resort to the effect that the appellate court may amend the ad damnum clause of the complaint so far as to demand damages in excess of the amount that the justice of the peace had jurisdiction to determine. This is the case only where the justice had jurisdiction of the action and subject-matter determined by him. But in cases where the justice had no jurisdiction of the action, no jurisdiction is conferred on the appellate court by the appeal. This is the general rule. The following authorities sustain this rule: *Felt* v. *Felt,* 19 Wis. 193; *Dressler* v. *Davis,* 12 Wis. 58; *McOmber* v. *Balow,* 40 Minn. 388. 42 N. W. Rep. 83. Such is our construction of § 6779, supra. We are clearly of the opinion that a liberal construction of the terms of that section would not warrant us in holding that the district court can litigate issues on appeal prohibited in justice's court, or beyond the jurisdiction of such court. If such power is conferred upon the district court by such section, then an equitable action to compel specific performance of a contract relating to real estate, or any other action of which the district court has exclusive jurisdiction, might be commenced and determined in justice'c court, and on appeal to the district court its jurisdiction sustained, under such section. We do not think that such was the legislative intent in enacting this section.

In this case one judgment was entered, which included the damages found by the jury upon both counterclaims. The error in admitting the testimony objected to necessitates the reversal of the whole judgment. The judgment is therefore reversed, a new trial ordered, and the cause remanded to the district court for further proceedings according to law. All concur.

(87 N. W. Rep. 593.)

WINNIE L. TAYLOR *vs.* HENRY MILLER *et al.*

Opinion filed Oct. 25, 1901.

Appeal—Statement of Case—Settlement.

In this action the plaintiff has filed a verified petition in this court, requesting this court to settle a statement of the case in the action, and stating, in substance, that the trial court, after trying the case, refused, on request to do so, to settle and allow a statement of the case, "in accordance with the facts." It appears by the petition that after a verdict for defendant a proposed statement of the case was presented by the plaintiff's counsel to the trial court for settlement, and that the trial court refused to sign the same until an amendment was made to the proposed statement, setting out certain matters of fact not found in the proposed statement, and which the trial court claimed to be true and pertinent to the issues. The plaintiff's counsel declined to acquiesce in the amendment as proposed by the trial court, and upon such refusal the trial court refused to settle and allow the proposed statement of the case, and alleged as a ground of such refusal that the proposed statement did not conform to the truth. A preliminary motion was made by respondents' counsel to dismiss the petition on the ground that it did not appear from the petition that the trial court had refused to settle and allow an "exception" according to the facts. This motion is denied upon the state of facts set out in the opinion, and it is *held* that under existing statutes this court has authority to settle a statement of the case, when it appears that the trial court has, on request, refused to do so, "in accordance with the facts."

Jurisdiction of Supreme Court.

Held, further, that until such refusal is shown this court is without authority to settle a statement of the case.

Supreme Court Will Not Settle Case—When.

Upon consideration of the facts set out in the petition and in the affidavits submitted by the respective parties, *held*, that this court will not settle a statement of the case in this action, for the reason that it appears by a preponderance of the evidence submitted to this court that the trial court has not refused to settle a statement herein in accordance with the facts in certain respects appearing in the opinion.

Petition by Winnie L. Taylor against Henry Miller and W. S. Lauder, as judge of the district court of the Fourth judicial district, requesting the court to settle a statement of the case. Case remanded.

McCumber, Forbes & Jones, for petitioner.

Purcell & Bradley, for respondents.

WALLIN, C. J. The plaintiff in this action has filed a verified petition in this court, supported by affidavits, requesting this court to settle a statement of the case in this action, and the matter was brought on to be heard upon notice given by the petitioner, whereupon counsel for the respondents, upon writen notice, moved to dismiss the application and petition "on the ground that the supreme

court has no jurisdiction of such application and petition, for the reason that the application is not made for the allowance of an exception in accordance with the facts, but is made for the purpose of settling controverted questions of fact, other than those relating to exceptions." The preliminary motion to dismiss the application raises a question touching the authority of this court to act in the premises, and a proper disposition of this question will necessarily involve a reference to the moving papers submitted in behalf of the petitioner, and also to certain sections of the Code governing the subject-matter. The petitioner's moving papers include a proposed statement of the case, embracing 95 pages of typewritten matter, which it appears was on or about April 30, 1901, presented for settlement and allowance to the district court of Richland county, then presided over by the Honorable W. S. Lauder, the judge who presided at the trial of the action; counsel for both sides being present when the statement was presented for settlement. It appears by the petition that, when the proposed statement was presented to Judge Lauder for settlement, Judge Lauder desired and offered to incorporate with the statement certain alleged matters of fact not found in the proposed statement as presented; the judge then and there claiming, in effect, that such matters of fact so suggested by him were true and pertinent to the issues, and that the same were essential to a proper understanding of the issues raised by the plaintiff in the proposed statement of the case. Plaintiff's counsel was unwilling to have the statement of fact as proposed by Judge Lauder inserted in the statement of the case, and the judge thereupon declined to sign or settle the statement until such facts as he had suggested should be incorporated therein. In this behalf the petition avers that the matters of fact so suggested and sought to be inserted in the statement of the case by Judge Lauder are "not true or conformable to the truth, and do not truly represent the facts in the case." And the petition states, in effect, that said judge of the district court has refused and does refuse to allow and certify "any statement of the case in accordance with the facts."

To understand precisely the matters of difference involved, it becomes necessary to narrate some of the events which led up to the refusal of Judge Lauder to settle the statement of the case in the form in which it was framed and presented to him for settlement. It apears that the action was at issue and upon the trial calendar at a term of the district court for Richland county which convened in January, 1900, and was continued over the term by consent of counsel. That court again convened for said county on July 3, 1900, with this case and others upon the trial calendar, but at said July term it was generally understood in advance that no jury would be called, and none was called for said term; and this action, which is a jury case, was not tried at said term. Said court again convened for the county of Richland on January 8, 1901, and this case was, with many others, upon the trial calendar of said last-mentioned term of court. Reverting to the term of court which

convened on the 3d day of July, 1900, it is conceded that affidavits of prejudice framed under the provisions of section 5454a, Rev. Codes 1899, were on said day, and before court opened, filed by the plaintiff with the clerk of the district court. It is further conceded that the judge of the district court, Judge Lauder, who was presiding at said term, on or about the second day of said term orally made an order respecting the filing of bonds or making a cash deposit in cases where affidavits of prejudice had been filed in actions then on the calendar of said court. It is argued that this order was not incorporated in the minutes of the court, nor reduced to writing; and it is agreed that the court orally stated at said term, in open court and in the presence of a number of attorneys, that in such cases the moving party would be required to make a cash deposit of $200, or file an expense bond in that amount, approved by the clerk of the district court. But the respondents and the plaintiff are squarely at issue as to whether the court, in making said oral order, further stated that the time in which the expense bond should be filed or the cash deposited in this class of cases would be limited to the first three days of said July term. Respondents insist that such time limit was made by said oral order, and the plaintiff squarely denies the same. Turning now to the term of court which commenced on July 8, 1901, it appears that a like dispute of fact has arisen. At said last-mentioned term it is agreed that the court made a similar order to that made at the preceding term as to a cash deposit or bond, fixing the amount at $200. In fact, an order to this effect is found in the minutes of the January term kept by the clerk of the district court. This order bears date January 8, 1901, but the same is silent as to any time limit within which the order could be complied with. But Judge Lauder claims that, for certain reasons there stated in open court, he did, in connection with said last mentioned order, orally fix a time limit, viz. a limit which extended over the first two days of the term, and no longer. It is agreed that on the fourth day of said last-mentioned term, January 11th, and not before that date, plaintiff caused an expense bond in this action to be approved by the clerk of the district court and filed with that officer, and, further, that said Judge Lauder, on learning the fact of the filing of said bond, immediately directed the clerk to cancel the filing and return the bond to plaintiff's counsel, which was done; and the reason assigned by respondents for so doing is that the bond was filed too late, and in defiance of the orders of the court The case was tried at said last-mentioned term to a jury, Judge Lauder presiding, and a verdict was returned for defendant. The fact appears in the proposed statement, and is not controverted, that when the case was called for trial counsel appeared and made certain specific objections in plaintiff's behalf to further proceedings in the action before Judge Lauder. It will suffice to say that counsel then and there requested Judge Lauder to call in another judge to try the case and then and there objected to

any further proceedings in the action before Judge Lauder. This request and objection were severally based upon the claim of plaintiff's counsel then made that the said Judge Lauder, under the existing facts, was disqualified to preside at the trial, and that such disqualification arose under § 5454a, supra. The request was denied and the objection was overruled, and to these rulings an exception was saved.

From the foregoing recitals, we think it sufficiently appears that the contention between the plaintiff and the respondents has reference chiefly to two matters of fact. These contentions may be presented in the form of questions, viz.: First. Did Judge Lauder at said July, 1900, term of the district court, and on or about July 5, 1900, place a limit of three days (the first three days of the term) upon the time within which the moving parties should make cash deposits or file expense bonds pursuant to § 5454a? Second. Was a limit of two days (the first two days of the term) fixed by an oral order of Judge Lauder on January 8, 1901? As we understand the contention, the Honorable W. S. Lauder takes the position that he did in fact and in open court orally fix the time limit at both of said terms substantially as above uarrated, and this is squarely, denied by the petitioner.

We will here revert to respondents' preliminary motion to dismiss this application. The specific grounds of the motion have already been stated. We are cited by counsel to § § 5462, 5469, Rev. Codes, 1899. The section first cited reads as follows: "An exception is an objection upon a matter of law to a decision made either before or after judgment by the court or judge in an action or proceeding." Section 5469 provides: "If the judge in any case refuses to allow an exception in accordance with the facts the party desiring the statement settled may apply by petition to the Supreme Court to prove the same," etc. Again this section provides that the "statement when proved" must be certified, etc. Counsel for the respondents, if we understand them, argue that the plaintiff is not seeking to incorporate in the statement of the case any exception in accordance with the facts or at all, and, further, that the counsel for the plaintiff is seeking to thrust into the statement a recital of facts which has no relation to any exception which has been either allowed or refused, and that the trial court has not been requested to allow an exception which has not been allowed in fact. It is our opinion that this argument of counsel is specious and untenable. True, it does not appear that the trial court has refused to allow an exception as requested by the plaintiff; but, on the other hand, it does appear that the trial court desires to incorporate a certain version of facts and occurrences connected with the action which may bear closely upon exceptions which are in the proposed statement, and which are not objected to by the respondents. Said exceptions have already been briefly mentioned. The statute in plain terms gives this court authority not only to settle exceptions, but to do so "in accordance with the facts," in cases where this right

has been denied in the court below. The right to have an exception settled would obviously be a barren right if the same did not carry with it the right to have the facts stated upon which the exception rests. The practice of settling exceptions in accordance with the facts existed and was well established in the Supreme Court of the Territory of Dakota, and this court has on more than one occasion been called upon to settle a statement in which matters of fact between counsel and the trial court have been in dispute. In this jurisdiction bills of exception, as connected with civil actions, have disappeared, and are superseded by statements of the case. Under existing statutes errors of law or of fact, or of both, are reviewable through the medium of a statement of the case. See § 5464, Rev. Codes, 1899. This change has been recognized in § 5469, and the substitution of the word "statement for that of the word "bill," as used in § 5085 of the Compiled Laws, clearly confers upon this court the authority to settle statements "in accordance with the facts." Even under the Compiled Laws, where the word "statement" is not used in this connection, the Supreme Court of South Dakota has not hesitated to exercise a supervision over trial courts in the matter of disputes between counsel and the trial court with respect to matters of fact. See *Baird* v. *Gleekler* (S. D.) 52 N. W. Rep. 1097, and *Manufacturing Co.* v. *Person* (S. D.) 79 N. W. Rep. 833. The motion to dismiss this application is therefore, upon the authorities cited, and upon the construction which we place upon existing statutes, overruled.

This brings us to a consideration of the merits of the petition. The papers submitted to this court are voluminous. In addition to the proposed statement of the case presented to Judge Lauder for settlement, the plaintiff has filed in this court a verified petition supported by the affidavits of nine practicing attorneys residing in Richland county, together with one affidavit each from the clerk and deputy clerk of the district court. Respondents have filed in this court twenty-four counter affidavits, nearly all made by practicing attorneys of Richland county, and one each from the clerk and deputy clerk of the district court, and one from the Honorable W. S. Lauder, the presiding judge of said court. In addition to these, the plaintiff has filed seven rebutting affidavits in this court. In this opinion it is impracticable, and we think unnecessary, to discuss the detail of facts set out in this mass of affidavits; but we deem it proper to state that it appears that neither Joseph B. Forbes nor the Honorable P. J. McCumber, who are the attorneys for the plaintiff, were present in court on either the first, second, third, or fourth days of the term of the district court which convened on January 8, 1901, for the county of Richland. These attorneys were necessarily absent on the days mentioned; one being ill, and at Washington, D. C.; the other being sick at home and unable to be in court on said first days of said term. These gentlemen were therefore compelled to obtain from others their information concerning any oral statements claimed to have been made by the judge in open court during the said period

of their absence from the court room. We shall have occasion to consider the averments embraced in the affidavits submitted upon this application only with reference to the general question, viz. whether the proposed statement of the case, when submitted to Judge Lauder for settlement, was conformable to the truth with respect to the matter of fixing a time limit at said July, 1900, and January, 1901, terms of the district court for Richland county, as above explained. This court, under § 5469, supra, acquires jurisdiction to settle a statement of the case according to the facts only in a case where the trial court has refused to do so. It follows that in all such cases this court is required to settle a preliminary question as to the refusal or non-refusal to act in the court below. In the case at bar we consider it our duty upon the affidavits submitted and the showing made in this court to rule that the trial court has not refused to settle a statement of the case in accordance with the facts. The trial court declined to sign and settle the statement presented to Judge Lauder for settlement until the same should embody an amendment setting out, in substance, that the court did, as a matter of fact, orally fix a time limit at said July and January terms of court, as already stated. Upon this matter of a time limit we have little hesitation in holding that the evidence submitted by the respondents, aside from that contained in the personal affidavit of Judge Lauder, preponderates in favor of the view that such time limit was fixed orally as claimed by Judge Lauder. Ordinarily, of course, the recollection of the presiding judge as to a disputed question of fact occurring in his court is of great weight; but in the present case our conclusion as to the time limit would be the same in the absence of the judge's affidavit.

Our conclusion is that we are devoid of authority in this case to settle a statement of the case. The case will be remanded for further proceedings in the district court. All the judges concurring.

(87 N. W. Rep. 597.)

FLORA R. DOUGLAS *vs.* RICHARD O. RICHARDS *et al.*

Opinion filed Oct. 17, 1901.

Appeal—Review—Statement of Case—Retrial of Particular Facts.

This appeal involves the validity of certain taxes charged on the tax list of Cass county against the plaintiff's land in the year 1896, and the validity of a sale made for such taxes in 1897. Plaintiff caused a statement of the case to be settled which embodied all the evidence relating to the validity of said taxes and tax sale, and which also contained a statement to the effect that the appellant desired a retrial in this court of certain questions, seven in number, which the statement denominates "questions of fact." Said questions are set out at length in the opinion. The first and second of said questions are as follows: "(1) Were the town taxes of the town of Raymond legally levied? (2) Were the taxes of school district No. 23 of the town of Raymond legally levied?" Except question 5, which is considered

separately in the opinion, the remaining questions set out in the statement are of similar import to Nos. 1 and 2, above quoted. *Held*, that none of said questions, except No. 5, embody a request to retry any particular fact; the same, and each of them, except No. 5, omitting to specify any fact to be tried in this court as required by § 5630, Rev. Codes 1899.

Question Retried.

Accordingly, *held*, that this court, except as to question No. 5, will not enter upon a retrial of any issue of fact in this case, nor will the court consider or determine any question of law either depending upon the facts or arising upon the evidence embodied in the statement.

Judgment Affirmed.

No findings of the trial court, either of law or of fact, are found in the record transmitted to this court, and no error is assigned or predicated upon the findings of the court below. *Held*, that the judgment must be affirmed.

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

Action by Flora R. Douglas against Richard O. Richards and others. From a part of the judgment, plaintiff appeals. Affirmed.

J. E. Robinson, for appellant.

The sales for the year 1896 were not authorized by law. They were under the revenue law of 1897, which contemplates sales only for taxes levied under that law. § 74, Ch. 126, Laws 1897. Section 77 gives the form of a certificate to be issued, and the sale of the land for taxes, and the former recites that the land was sold for taxes. A certificate of sale, to be valid, must show on its face that the land was sold for delinquent taxes. *Sheehy* v. *Hinds*, 27 Minn. 259, 6 N. W. Rep. 781; *Sherburn* v. *Ritt*, 35 Minn. 540, 29 N. W. Rep. 322;; *Gilfillan* v. *Chatterton*, 38 Minn. 335, 35 N. W. Rep. 583. The revenue law of 1897 was enacted before the taxes for the year 1896 became delinquent, and expressly repealed those sections of the Revised Codes which provide for the sale of delinquent taxes, and which fixed the time when the tax should become delinquent. *Wells Co.* v. *McHenry*, 7 N. D. 246-267. If the law did authorize a sale, yet the sales were void because they were not made under the direction of the board of county commissioners, and because the notice of sale was not published in a newspaper designated by the county commissioners. *Russell* v. *Gilson*, 36 Minn. 366, 31 N. W. Rep. 692; *Cass Co.* v. *Security Imp. Co.*, 7 N. D. 528. The sales were void because there was no levy of school district taxes. § 101, Ch. 62, Laws of 1890; § 21, Ch. 56, Laws 1891; § 721, Rev. Codes. The state tax levy was void because the state board of equalization had no power to levy the same. *Willis* v. *Austin*, 53 Cal. 178; *Parker* v. *Rowe*, 54 Cal. 235; *Houghton* v. *Austin*, 46 Cal. 648. The sale is void because made for an excessive, illegal and unauthorized tax. *Case* v. *Dean*, 16 Mich. 12; *Treadwell* v. *Peterson*, 51 Cal. 637; *Harper* v. *Rowe*, 53 Cal. 152; *Kimball* v. *Ballard*, 19 Wis. 634; *Barden* v. *Supervisors*, 33 Wis. 447; *Barber* v. *Supervisors*, 39 Wis. 447; Cooley on Taxation (2 Ed.) 497. The date when the taxes of

1896 should have become delinquent was fixed by § 1238, Rev. Codes, as the first day of June after the tax became due. That section was expressly repealed by § 110, Revenue Law, 1897. *McHenry v. Wells Co.*, 7 N. D. 246-267. If the taxes are valid, their validity must be made to appear by common law proof. The burden is upon the purchaser. *O'Neil* v. *Tyler*, 3 N. D. 47. The state tax levy has not been legalized by Ch. 159, Laws 1901. *Dever* v. *Cornwall*, 10 N. D. 123, 86 N. W. Rep. 229.

Newton & Smith, for respondents.

This case is appealed under § 5630, Rev. Codes, but there are no questions of fact sufficiently specified to secure a review in this court. *Douglas v. Glazier*, 9 N. D. 615, 84 N. W. Rep. 552; *Ricks* v. *Bergsvendsen*, 8 N. D. 578, 80 N. W. Rep. 769; *Hayes* v. *Taylor*, 9 N. D. 92, 81 N. W. Rep. 49. Section 74, Ch. 126, Laws of 1897, does not justify the contention that all provisions relating to the taxes of 1896 are repealed. Section 74 is general, and clearly relates to all taxes. *State* v *Moorehouse*, 5 N. D. 406, 67 N. W. Rep. 140 The act of 1897 did not wipe out, remit or destroy the taxes levied prior to the date of its passage. Such taxes continued thereafter, and still continue and survive as taxes, and they are a lien upon the real property upon which assessed. § 1239, Rev. Codes; *Gardenhire* v. *Mitchell*, 21 Kans. 83; *State* v. *Savings Bank*, 68 Me. 515. The fact that the twenty cent fee authorized by § 74, page 284, Laws 1887, to be added to each description when advertised, was added as a penalty, does not destroy the publication. The mere fact of designating by a wrong name an imposition authorized by statute will not destroy the sale. *Drennan* v. *Beierlein*, 13 N. W. Rep. 587.

WALLIN, C. J. This action is brought to quiet title in the plaintiff to the real estate described in the complaint, situated in the county of Cass. It is conceded that plaintiff is the fee-simple owner of the lands. The lands were sold in 1897 for certain taxes charged against them on the tax list of 1896. Tax certificates were issued pursuant to said tax sales, and the same are now owned by the three defendants last named in the title of this action. The trial court adjudged, among other things, that the taxes of 1896, as charged against said lands on the tax list of Cass county, were legal and valid taxes, and that the sales for said taxes were regular, and that said tax certificates were in all respects regular and valid. Plaintiff has appealed to this court from a part of said judgment only, viz. that part of the same which sustains said taxes of 1896 and said tax sales and certificates.

Appellant caused a statement of the case to be settled which embodies all the evidence offered at the trial relating to said taxes of 1896 and the sales for said taxes made in 1897; but said statement does not purport to contain all the evidence offered at the trial, nor does it contain any request for this court to retry the entire case.

As to the question to be retried in this court the statement embraces the following requests and no others: "And the appellant desires the Supreme Court to review each and every question of fact and of law which in any way or manner pertains to the tax of 1896 and the sale of said land for the taxes of that year, and to retry the entire case so far as it pertains to the taxes and tax sales for the year 1896." The plaintiff and appellant requests the Supreme Court to review the following questions of fact concerning the tax of 1896: "(1) Were the town taxes of the town of Raymond legally levied? (2) Were the taxes of school district No. 23 of the town of Raymond legally levied? (3) Was there a legal levy of the school-district tax, the town tax, and the road tax charged against said quarter section in the town of Berlin; that is, in town 141 of range 50? (4) Was there a legal levy of the state taxes? (5) Was the said land sold for the taxes of the year 1896 under the direction of the board of county commissioners of Cass county, and was the notice of sale published in a newspaper designated by a resolution of the board of county commissioners of Cass county, and was there in Cass county, in the year 1897, any newspaper called the 'Fargo Argus'? (6) Did the law authorize a sale of said land or of any land for the taxes of the year 1896, and was the sale of said land for the taxes of the year 1896 legal and valid? Was the sale made for a valid tax? (7) And the appellant desires the Supreme Court to review every finding of fact made by the trial court which in any way pertains to the tax of the year 1896, and the sale of said land for such taxes, and to review each and every other question of fact and of law which in any way pertains to the validity of said taxes, and to the validity of the sale of said land for the taxes of the year 1896, and to retry every question of fact and of law which in any way pertain to such tax or to such tax sale. And appellant demands that said tax and tax sale be declared and adjudged to be void."

It is the contention of counsel for the respondents that each and all of the foregoing requests embody a demand for the determination of a question of law, and only a question of law, and that none of the same call for the determination of any question of fact. With respect to this contention of counsel this court finds little difficulty in reaching the conclusion (except as to question numbered 5 in the list, which will be separately considered) that the contention is sound and must be sustained. Each and all of the questions in the list, except that numbered 5, in our opinion, are obnoxious to one and the same criticism, i. e. they each and all call for the determination of a question of law. We think the correctness of this view as to the nature of the several questions asked will be made clear by a brief consideration of question numbered 1 of said list. Question numbered 1 is as follows: "Were the town taxes of the town of Raymond legally levied?" We think it is too clear for

discussion that no intelligent answer can be given to this question, obviously one of pure law, until certain facts are developed, and found to exist or not to exist. Whether any tax charged on the tax list of 1896 has been legally levied or assessed can be ascertained only by an inquiry as to what acts have been done and what acts have been omitted to be done by the official or officials clothed with authority to assess or levy the tax. From the nature of the law question to be detremined, a preliminary inquiry as to official acts done or omitted becomes indispensable as a basis of decision. Again reverting to the language of question No. 1, we discover that the same does not in any way call upon this court to inquire or determine whether the officials of the town of Raymond have acted or attempted to act, or omitted action, in or about the matter of levying the tax in question. Much less does the question attempt to "specify" any particular act or omission of said officials with respect to such tax, and call upon this court to determine the same. On the contrary, no question of fact whatever is either asked or suggested by said question. This court in deciding cases only too frequently has had occasion to iterate and reiterate the declaration that it derives its authority to try issues of fact anew from the statute now embraced in § 5630 of the Revised Codes of 1899, and that this court is without authority to retry questions of fact, and will not do so in any case where the appellant fails to conform substantially to the requirements of said statute. Among the more recent deliverances of this court upon this matter are those found in the following cases: *Douglas* v. *Glazier,* 9 N. D. 615, 84 N. W. Rep. 552; *Security Imp. Co.* v. *Cass Co.,* 9 N. D. 553, 84 N. W. Rep. 447,—both of which are much in point as to both fact and law, and very instructive upon the matter of practice we are here discussing. It seems superfluous to add that § 5630 declares that the party desiring to appeal in this class of cases should cause a statement of the case to be settled, "and shall specify therein the questions of fact that he desires the Supreme Court to review and all questions of fact not so specified shall be deemed on appeal to have been properly decided by the trial court." Tested by this statute, it is clear and obvious that question No. 1 of appellant's list of questions signally fails of meeting the requirements of the enactment.

We regard it as being unnecessary to separately discuss any matters arising under either questions 2, 3, or 4 of said list of questions. Every criticism which has been offered in discussing question No. 1 applies with equal force to Nos. 2, 3, and 4 of the list. Considering questions 2, 3, and 4 together, we are requested thereby to determine no state of facts and no single fact whatever as to the school-district taxes in the town of Raymond or in the town of Berlin, or as to the town or road taxes of the town of Berlin, or as to the state taxes. On the contrary, we are requested to determine, as a naked law question, whether in 1896 taxes were legally levied either by the state or by the minor political subdivisions named in questions 2, 3, and 4. It is manifest that this court can-

not, under the law, proceed to answer any of these questions of law in the absence of any facts upon which their answer must depend.

Question numbered 7 presents a conglomeration of vague and general questions concerning both law and fact, and appertaining both to the validity of the taxes of 1896 and the sale made therefor in 1897, and this without specifying a single question of fact for this court to consider or determine. By question No. 7 we are requested "to retry every question of fact and of law which in any way pertains to such tax or to such tax sale." But, to comply with this sweeping request, we should be compelled to inquire into and ascertain generally what questions of fact and what questions of law do "in any way pertain" either to the validity of the taxes or the tax sale under consideration; and, after this preliminary investigation, we should be compelled to take up the particular facts involved in this case, and which are developed by the testimony in the record. But such inquiries are out of the question in a case like this, in which a retrial of certain facts only is sought. In such cases, as has been seen, it is incumbent upon the appellant to "specify the questions of fact that he desires the Supreme Court to review," and, if none are specified, then the mandate of the statute is that the facts are deemed "to have been properly decided by the trial court."

Question No. 6 of the list embraces several inquiries. The first is as follows: "Did the law authorize a sale of said lands or of any land for the taxes of 1896? This is clearly a legal question, pure and simple, and as such does not embody a specification of any question of fact to be tried anew in this court. The rest of question No. 6 involves two questions, viz. whether the tax in question was a valid tax, and whether the sale for such taxes was a valid sale. As has been seen, these questions are naked questions of law, and their proper answer would depend upon the existence or nonexistence of specific facts, none of which are called to our attention by any question in the statement of the case.

Turning to question No. 5 in the above-quoted list of questions, we find that the same embraces three questions of fact, viz. (1) Was the land sold for the taxes of the year 1896 under the direction of the board of county commissioners of Cass county? (2) Was the notice of sale published in a newspaper designated by a resolution of the board of county commissioners of Cass county? (3) Was there in Cass county in the year 1897 any newspaper called the "Fargo Argus"? Evidence upon all of these questions, in the form of a stipulation, was introduced at the trial, and we have carefully considered the same, and our conclusion is, from the evidence, that each of the questions in No. 5, and above set out, must be answered in the affirmative; and we reach the further conclusion of fact and of law that the notice of the tax sale in Cass county for the year 1897 was regularly published pursuant to the provisions of § 74 of Ch. 126 of the Session Laws of 1897.

Briefly recapitulating what has been said, it appears that the statement of the case embraces no specifications of any fact or state

of facts to be tried anew in this court touching the validity of the tax of 1896, or the sale therefor in 1897, save only the matters of fact found in No. 5 of the list of inquiries contained in the statement, and as to such matters of fact in No. 5 we find no irregularity which would affect the validity of the tax sale in question. It follows, of course, that, with the exception of matters contained in question No. 5, this court finds itself without authority to enter upon a retrial of any of the questions of fact appertaining to the issues which counsel for the appellant has called our attention to in his brief. No attempt has been made by the appellant's counsel to assign errors as required by rule 12 of the rules of this court (74 N. W. Rep. viii.); nor does counsel for the appellant, in his brief or otherwise, predicate error arising upon the findings of the court below or upon the judgment roll proper. The omission of counsel to call attention to the findings of the trial court is not surprising, in view of the fact that no findings whatever, either of fact or of law, can be found in the record transmitted to this court. We do find among the papers sent here a document denominated "Decision," which bears the signature of the presiding judge. This paper shows on its face that the trial court had reached certain general conclusions upon some of the facts and some features of the law of the case, but the same does not purport to embrace the findings, but, on the contrary, directs, in terms, that counsel for the plaintiff should draw his findings of fact and law, and serve a copy thereof upon counsel for the defendants, and further directs, in terms, that the findings in the case would be settled by the court at a future date stated in the decision. Whether findings on either side were ever submitted by counsel, as required in this decision, does not appear. The absence of findings in this case is peculiarly unfortunate. The evidence offered at the trial upon the issues presented to this court is brief and entirely uncontroverted. It points to certain definite conclusions of fact, and none other can be drawn from the evidence. Had findings of fact been properly drawn, no attempt to dispute them would have been legally possible, and there would in that case have been no occasion whatever to settle a statement of the case embracing the evidence, or a demand for a retrial of questions of fact in this court. Had findings, which the statute requires to be made in actions tried to the court, been properly framed and filed and preserved in the record, the case could and would have been heard and disposed of upon statutory judgment roll, and no statement would have been necessary. As the case stands, the facts which give rise to the legal issues are not contained in the record; nor can the facts be retried, and thus be brought upon the record .

Our conclusion is that the judgment must be affirmed, and the costs in this court will be awarded to the respondents. All the judges concurring.

(87 N. W. Rep. 600.)

MARGARET MCCARDIA *vs.* CHRISTOPHER C. BILLINGS.

Opinion field Oct. 31, 1901.

Mortgage—Certificate of Acknowledgment—Clerical Error.

A certificate of acknowledgment of a mortgage by husband and wife of their homestead recited that they (naming them) personally appeared before the notary, and were known by him to be the "person" who "are" described in the foregoing instrument, and who executed the same, and acknowledged that "he" executed the same. *Held*, that the certificate showed an acknowledgment of the mortgage by both.

Use of Singular—Plural Meant.

Upon the facts recited, *held*, that the use of the words "he" and "person" was clearly a clerical error, when considered in connection with the entire certificate.

Contradiction of Signature.

Evidence of the wife, denying that she ever executed the mortgage in question, considered, and *held*, that her testimony does not overcome the probative weight of the notary's certificate by that clear and convincing proof adopted as the rule to determine such cases.

Notice of Foreclosure Sale Under Power—Mistake.

The notice of foreclosure sale required in foreclosures under a power of sale in the mortgage gave the date of the mortgage incorrectly. This incorrect date was given in all foreclosure papers, including the deed. Such notice correctly stated the mortgagor's and mortgagee's names, as well as the correct time and place and volume and page of the recording of the mortgage. The land was also correctly described, and the correct amount due given. *Held*, that the foreclosure was not void in view of the fact that no prejudice was shown or claimed.

Substantial Compliance with Statute.

In such a case it is *held* that substantial compliance with the requirements of the statute as to the contents of notice is necessary only, unless prejudice is shown.

Defective Acknowledgment Legalized.

The deputy sheriff making the sale correctly executed the certificate of sale in the name of the sheriff, per himself as deputy. The acknowledgment was erroneous in that the deputy did not acknowledge it for himself personally and in behalf of the sheriff. *Held*, that the defect, even if fatal, was legalized by § 3585, Rev. Codes, enacted in 1887.

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

Action by Margaret McCardia against Christopher C. Billings and others. Judgment for defendants, and plaintiff appeals

Affirmed.

Spencer & Sinkler, (*Tracy R. Bangs*, of counsel), for appellant.

The mortgage of a homestead must be signed and acknowledged by both husband and wife. § 2451 Comp. Laws, § 3608, Rev.

Codes; *Myrick* v. *Billings*, 5 Dak. 167. Plaintiff testified that she never signed or acknowledged the instrument, and the notary does not certify that she did. Nothing will be presumed in favor of a notary's certificate of acknowledgement. *Harty* v. *Ladd*, 3 Or. 353 *Lindlie* v. *Smith*, 46 Ill. 523; *Danglarde* v. *Elias*, 22 Pac. Rep. 69; *Hand* v. *Weidner*, 25 At. Rep. 38; *Wetmore* v. *Laird*, 5 Biss. 160. Plaintiff not having acknowledged the mortgage, the certified copy has no evidentiary value to prove its execution. *Gale* v. *Shillock*, 4 Dak. 192; *Meskiman* v. *Day*, 10 Pac. Rep. 14; *McGinnis* v. *Egbert*, 5 Pac. Rep. 652; *Maxwell* v. *Higgins*, 57 N. W. Rep. 389; *Hunt* v. *Selleck*, 24 S. W. Rep. 213. The date of the mortgage not having been stated in the notice of sale the foreclosure by advertisement was void. Code, 1877, § 601. This statute is similar to the Minnesota statute. Minn. St. 1894, § 6033; *Clifford* v. *Tomlinson*, 62 Minn. 195, 64 N. W. Rep. 381; *Martin* v. *Baldwin*, 16 N. W. Rep. 447; *Mason* v. *Goodnow*, 42 N. W. Rep. 482; *Peasley* v. *Ridgway*, 84 N. W. Rep. 1024. The advertisement of the sale should fully comply with the terms of the power, and a bare literal compliance is not enough. 2 Jones Mtgs., 1839; *Roche* v. *Farnsworth*, 106, Mass. 509; *Hoffman* v. *Anthony*, 6 R. I. 282. The sheriff's certificate was void because not acknowledged. § 5420, Comp. Laws; § § 5853, 5538, Rev. Codes. The sheriff's deed was not entitled to record because not properly acknowledged. *Gale* v. *Shillock*, 4 Dak. 192; *Meskiman* v. *Day*, 10 Pac. Rep. 14; *Maxwell* v. *Higgins*, 57 N. W. Rep. 389; *Lydiard* v. *Chute*, 47 N. W. Rep. 967; *McGinnis* v. *Egbert*, 5 Pac. Rep. 652. Section 3491a, Rev. Codes, is retroactive and unconstitutional. *Sharpe* v. *Malkenship*, 59 Cal. 288. The statute, if given effect, would take away vested rights. *Moore* v. *Brownfield*, 34 Pac. Rep. 199; *Sear* v. *Choir*, 32 Pac. Rep. 776; *Tacoma Bridge Co.* v. *Clark*, 36 Pac. Rep. 135; *Mecklin* v. *Blake*, 99 Am. Dec. 68. Defendants cannot take advantage of this statute if unconstitutional, because the first payment of taxes was made by grantors of defendant on the 1st day of October, 1890, and the statute did not begin to run in their favor until said day. This action was commenced April 3rd, 1900, and the bar had not fallen. *Lyman* v. *Smilie*, 87 Ill. 259; *Burlton* v. *Ferrie*, 23 N. E. Rep. 60; *Hurbut* v. *Bradford*, 109 Ill. 297; *Beaver* v. *Taylor*, 68 U. S. 637.

C. J. Murphy, for respondents.

A certificate of acknowledgement cannot be impeached except upon proof which clearly shows it to be false and fraudulent. *Percau* v. *Frederick*, 22 N. W. Rep. 235; *Hourentine* v. *Schnoor*, 33 Mich. 274. In the absense of fraud a court will not allow the statutory mode of proving the acknowledgement to be impeached by parol that the parties did not make the acknowledgement as certified by the officer. *Graham* v. *Anderson*, 42 Ill. 514; *Lickmon* v. *Hardinig*, 65 Ill. 505; *Lowry* v. *Orr*, 1 Gilm. 70. The fact that the date of the mortgage in the notice of foreclosure, sheriff's certificate and deed was incorrectly given does not vitiate the foreclosure. *Reading* v. *Waterman*, 8 N. W. Rep. 692; *Lee* v. *Cleary*, 38 Mich. 223; 2 Jones

Mtgs. 1854; *Iowa Inv. Co.* v. *Shepherd,* 66 N. W. Rep. 451; *Bacon* v. *Ins. Co.,* 131 U. S. 131; *Judd* v. *O'Brien,* 21 N. Y. 186; *Hoyt* v. *Powtucket,* 110 Ill. 390; *Candee* v. *Burk,* I Hun. 546. The defective certificate of an acknowledgment upon the sheriff's certificate of sale did not vitiate the foreclosure. The foreclosure transferred the title. The certificate executed pursuant thereto was simply evidence of that transfer. The certificate, and the recording of it, is simply for the protection of third parties. The provisions requiring same are not mandatory but directory only. *Jackson* v. *Young,* 5 Cow. 269; *Barnes* v. *Kerlinger,* 7 Minn. 82; *Robbins* v. *Rice,* 7 Gray 202. Failure on the sheriff's part to record the certificate of sale within ten days is not fatal to the validity of the same. *Johnson* v. *Day,* 50 N. W. Rep 701. If the certificate was not properly acknowledged, still there was an acknowledgement which, at most, can only be said to be defective, and such defectiveness was cured and made proper evidence by statute. § 3585, Rev. Codes, 1899. Had the deputy given the certificate in his own name without mentioning his principal, this irregularity would not have invalidated the sale. *Hodgdon* v. *Davis,* 50 N. W. Rep. 478. Appellant, having slumbered on her rights, if she had any, for over sixteen years, should not be permitted at this day to question the validity of the sheriff's sale on foreclosure, through which respondents claim. After this lapse of time every apparent defect is to be supplied by intendment. *Bergen* v. *Bennett,* 1 Caines Cas. 1; *Demarest* v. *Wynkop,* 3 Johns, Ch. 145; *Butterfield* v. *Farnham,* 19 Minn. 92; *Menard* v. *Crowe,* 20 Minn. 452; *Hamilton* v. *Lubukee,* 51 Ill. 415; *Bacon* v. *Ins Co.,* 131 U. S. 131; *Powers* v. *Kitching,* 86 N. W. Rep. 737, 10 N. D. 254, Section 3491a, Rev. Codes, 1899, is valid though retroactive. It is a statute of limitations. Statutes identical in language have been so held, and sustained as constitutional on that ground. *Irving* v. *Brownell,* 11 Ill. 402; *Woodward* v. *Blanchard,* 16 Ill. 424; *McConnell* v. *Street,* 17 Ill. 255; *McClelland* v. *Kellogg,* 17 Ill. 498; *Harding* v. *Butts,* 18 Ill. 502; *Newland* v. *Johnson,* 19 Ill. 380; *Newland* v. *Marsh,* 19 Ill. 352; *Hinchman* v. *Whetstone,* 23 Ill. 114. The period prescribed in this law within which suit could be brought as to existing causes of action was sufficient. The time allowed for creditors to commence their actions was reasonable, and, whether reasonable or not, it was a question within the exclusive province of the legislature to determine. *Smith* v. *Harrison,* 22 Pick. 430. The following cases illustrate what time has been held reasonable within which suits may be brought under limitation statutes: *Duncan* v. *Menard,* 32 Minn. 460, 21 N. W. Rep. 71; *Berliner* v. *Waterloo,* 14 Wis. 378; *State* v. *Bailey,* 16 Ind. 46; *Parsons* v. *Baird,* 2 Greene (Ia.) 235 *Howell* v. *Howell,* 15 Wis. 60; *Stine* v. *Bennett,* 13 Minn. 153; *Bigelow* v. *Bemis,* 2 Allen 496; *Smith* v. *Harrison,* 22 Pick. 430; *Holcombe* v. *Tracey* 2 Minn. 241; *Turner* v. *New York,* 168 U. S. 90; *Osborne* v. *Lindstrom,* 81 N. W. Rep. 72; *Power* v. *Kitching,* 86 N. W. Rep. 737; *O'Brien* v. *Gaslin,* 30 N. W. Rep. 374; 13 Enc. L (1 Ed.) 696, Note 3. The tax sales alleged to have

been made did not interrupt the running of the statute. *Griffith* v. *Smith*, 42 N. W. Rep. 747; *Parsons* v. *Viets*, 9 S. W. Rep. 909; *Hayes* v. *Martin*, 45 Cal. 559. Payment of taxes may be proved by parol or circumstantial evidence. *Swanson* v. *Mynair*, 79 Fed. Rep. 898; *Hinchman* v. *Whetstone*, 23 Ill. 100. Full possession of the land, under claim of title, was had by the respective owners or claimants continuously for more than ten years prior to suit, and if the doctrine of tacking is permissable under this statute, respondent is within its terms. Titles and possessions may be tacked where there is privity between the parties, and they all flow from an original source. *Brandt* v. *Ogden*, 1 Johns. 156; *Jackson* v. *Thomas*, 16 Johns. 293; *Winslow* v. *Newell*, 19 Vt. 164; *Ward* v. *Bartholomew*, 6 Pick. 410; *Overfield* v. *Christie*, 7 Serg. & R. 173; *Stettnesche* v. *Lamb*, 26 N. W. Rep. 375; *Murray* v. *Romine*, 82 N. W. Rep. 318; *Lantry* v. *Wolff*, 68 N. W. Rep. 494; *Woodruff* v. *Roydsen*, 58 S. W. Rep. 1067; *Webber* v. *Clark*, 15 Pac. Rep. 431; *McNeely* v. *Langan*, 22 O. St. 32; 1 Am. & Eng. Enc. L. 642.

MORGAN, J. This action was instituted for the purpose of determining conflicting claims to the real estate described in the complaint, and for the purpose of securing possession of such real estate. The complaint is in the usual form in such actions, and sets up the ownership of the lands by plaintiff, and that the defendants are in possession thereof, and claim an estate and interest therein adverse to the plaintiff, and that such claim is without any right, and their possession wrongful. The answer alleges that the defendants, Christopher C. Billings and Rebecca E. Billings are in possession of said premises, and entitled to the possession of the same, under the following facts: That on the 10th day of October, 1884, one William McCardia and Margaret McCardia made and delivered their joint mortgage of the premises described to one Joseph Chapman, which said mortgage was by them duly acknowledged and which was duly recorded in the office of the register of deeds of Pembina county on the 16th day of October, 1884. That default was made in the payment of said mortgage, and that said mortgage was by the said Chapman duly foreclosed and sold under a power of sale contained in said mortgage; and that such foreclosure and sale were conducted in accordance with all the conditions and terms of such power of sale, and in compliance with all the provisions of the statute pertaining to foreclosure of mortgage under powers of sale by advertisement. That one Sarah Chapman was the purchaser of said lands under such foreclosure sale on the 8th day of January, 1886. That she received a deed of said lands from the sheriff of said county after the one year provided by law for a redemption from such sale had expired, and on the 25th day of January, 1887. That she immediately thereafter went into possession of such lands, and remained in possession of the same until the 14th day of January, 1889, when she conveyed the same, by deed of warranty, to one Barnaby, and said Barnaby reconveyed said lands to Sarah Chap-

man on the 1st day of September, 1893, and that she remained the owner and in possession thereof until about April 23, 1895, when she sold and conveyed the same to the defendants Billings by a contract for a deed under the crop payment plan; and that said Billings immediately went into possession of said lands under said contract to purchase, and remained in possession thereof continuously ever since. That on June 17, 1899, the said Sarah Chapman conveyed said premises to the defendant Rebecca Billings by a deed of general warranty, pursuant to the provisions of said contract of purchase entered into in April, 1895. The answer further alleges that the defendant Geo. B. Clifford is the owner of one certain mortgage given to him by the defendants C. C. Billings and Rebecca E. Billings to secure the payment of the sum of $1,400, which said mortgage was thus given on May 11, 1899, and duly filed for record, which said mortgage is still in force and unpaid. The plaintiff, by a reply, placed in issue all of the allegations of the answer by a general denial. The trial court, after hearing the evidence, made findings of fact, wherein it found that all of the allegations of the answer were true and proven, and that the plaintiff had no rights to or interest in said lands, and ordered the action dismissed. Judgment was entered pursuant to such findings of fact and conclusions of law. The plaintiff appeals from such judgment, and demands a trial de novo in this court.

On the trial in the district court the defendants offered in evidence a certified copy of the record of the mortgage given by the plaintiff, Margaret McCardia, and her husband, William McCardia, now deceased, upon the lands involved in this suit, being at the time the homestead of the said mortgagors. A stipulation was entered into between the attorneys that such certified copy might have the same force and effect as the original would be entitled to receive if offered in evidence. The plaintiff, however, objected to the introduction of such certified copy upon the ground that the same was incompetent, irrelevant and immaterial, and under such objection it is specifically urged that the acknowledgment of such mortgage was not in compliance with the statute relating to acknowledgments, and did not, therefore, entitle the same to be recorded. The acknowledgement of such mortgage was in form as follows, to-wit: "Territory of Dakota, County of Pembina—ss.: On this 10th day of October, in the year one thousand eight hundred and eighty-four, before me, John V. McIntire, a notary public in and for said county and territory, personally appeared William McCardia and Margaret McCardia, known to me to be the person who are described in and who excuted the within and foregoing instrument, and acknowledged to me that he executed the same. John V. McIntire, Notary Public, Dakota Territory. [Notarial Seal.]" It must be conceded that, if the acknowledgment of the mortgage was so defective that it would not have entitled the mortgage to be recorded in the office of the register of deeds, then the certificate of the acknowledgment alone would not be any evidence of the execution of the mortgage.

There was no evidence in the case of the execution of the mortgage unless the same was furnished by the certificate of acknowledgment. It is also true that the certificate of acknowledgment must contain a substantial compliance with the statute pertaining to acknowledgments; that is, that the certificate must contain a statement of every fact that the statute prescribes shall be incorporated therein. If the statute prescribes a form for a certificate of acknowledgment, as it does in this state, the language prescribed for such certificate need not be followed; but the certificate will be held to be sufficient if the certificate used is the same in substance as that prescribed by the statute. It is also true, as a matter of law, that obvious errors or omissions, clearly appearing upon the face of the certificate to be clerical in their nature, will not invalidate the acknowledgement, and, before the certificate will be held fatally deficient, there must be an absence of some essential fact of a substantial character. Before we enter upon a consideration of the certificate here involved, it may also be conceded that no presumptions or intendments will be indulged in favor of the certificate; on the contrary, it must affirmatively appear from the certificate itself that every fact necessary to be stated therein is stated therein in substance and effect. Courts, however, will construe the language of certificates of acknowledgment liberally, and hold them valid if that can be done by a fair and reasonable construction of the language used.

Turning now to the acknowledgment of the mortgage in question, we find that it unequivocally appears that William McCardia and MargaretMcCardia personally appeared before the notary. The words immediately following their names in the certificate, to-wit: "known to me to be the person," considered in connection with the words "who are described in," show beyond question that the word "person" refers to William McCardia and Margaret McCardia. If it does not refer to these two grantors, then the verb "are" obviously would not have been used. The omission of the letter "s" from the word "person" was obviously a clerical omission. The pronoun "he" refers to the word "person" preceding it in the same sentence. It would render the whole sentence useless and meaningless, so far as Margaret McCardia is concerned, to place upon it the construction that she appeared before the notary, and acknowledged that her husband acknowledged the execution of the mortgage. Either that construction must be placed upon it, or we must hold that the word "he" was not changed to "they" through a clerical oversight. In *Montgomery* v. *Hornberger* (Tex. Civ. App.) 40 S. W. Rep. 628, the word "the" in an acknowledgement should have read "they" With the word "the" in the certificate, it was not expressive of anything, and the court held that leaving off the "y" was a clerical error, and upheld the certificate as sufficient. To invalidate the certificate in this case would be a strained and technical construction of the language used, and a violation of the principle, well established, that substance shall control, and obvious errors be disre-

garded. It follows, therefore, that the instrument was duly acknowledged by the plaintiff, and that such acknowledgment entitled it to be recorded in the register's office, and that the certified copy of the record of such mortgage in the register of deed's office was proof, prima facie at least, of the due execution of the mortgage under the stipulation as to the effect to be given to such certified copy entered into between the attorneys at the trial.

In her testimony the plaintiff denies that she ever signed or executed the mortgage in suit. Her execution of the mortgage purports to have been by making her mark, and to have been witnessed by three persons, none of whom—nor the notary—having been called as witnesses at the trial. So far as the defendants are concerned, proof of the execution of the mortgage rests upon the notary's certificate of her acknowledgment, considered in connection with her conduct in relation to the land involved since the year 1885. So far as respects plaintiff's evidence, to the effect that she never executed the mortgage, it rests solely upon her own uncorroborated denial that she ever signed or executed it. Her testimony to the effect that she did not execute the mortgage is not convincing to our minds. When asked on cross-examination whether she had ever executed an instrument in the presence of the Purdys,—who were subscribing witnesses to the execution of this mortgage, as indicated by the certified copy,—she answered, "Not that I know of." To the question, "You have no recollection?" she answered, "I might have all right enough." Her conduct in reference to the land involved in this suit tends strongly to refute her contention that she did not execute the mortgage, and is strongly corroborative of the certificate of the notary that she executed and acknowledged the execution of the mortgage. She left this land, and removed to Grafton, in the spring of 1885. The land was then mortgaged, there being other mortgages thereon besides the one in suit which was being foreclosed in the latter part of 1885. Her explanation for the abandonment of the land by herself and husband is not satisfactory, and leads to the inference that they left the land on account of the incumbrances on the land. She has resided ever since at Grafton, not very far from the land, and has not paid any attention to it since. It does not appear that she has paid any attention to the land since, nor to the payment of taxes, interest, or the principal indebtedness. Her conduct tends to show an abandonment of the land and a knowledge of the foreclosure. A silence so long continued—nearly 15 years—is not easily reconcilable with her contention now that the mortgage was forged. In view of these undisputed facts, we feel no hesitation in saying that she has entirely failed to overcome the probative force of the certificate of acknowledgment, conceding that such certificate raises only a prima facie presumption of its genuineness by that clear and convincing proof required in this class of cases. The general rule is that the certificate of acknowledgment will be held valid as against the unsupported evidence of the person certified to have executed it. *Oliphant* v. *Liversidge*, 142 Ill. 160.

30 N. E. Rep. 334; I Am. & Eng. Enc. Law (2 Ed.) page 560, and cases cited; *Smith* v. *Allis*, 52 Wis. 337, 9 N. W. Rep. 155. There are cases to be found adverse to this general rule, and it is true that it is difficult, if not impossible, to lay down an invariable rule in this class of cases, as much depends upon the weight to be attached to the testimony of the grantor, considered in view of the facts and circumstances of each particular case.

The notice of sale under which the mortgage was foreclosed, and all papers subsequently executed by the sheriff in connection with such foreclosure, contained a mistake as to the date of the mortgage. The notice and other papers gave the date of the mortgage as October 1st, when it should have been given as October 10th. It is earnestly insisted that such mistake renders the foreclosure sale and all subsequent acts of the sheriff pertaining to the foreclosure void. The statute under which the foreclosure was made (Rev. Codes 1877, § 601) prescribes that the notice of sale must specify the date of the mortgage, and, among other things, the names of the mortgagor and mortgagee, the amount claimed to be due, and a description of the land. The notice in this case correctly gave the names of the mortgagors and mortgagee, the time, place, volume, and page where the mortgage was recorded, and a correct description of the land, together with the correct amount due. A similar question arose in the supreme court of Michigan in 1881: *Reading* v. *Waterman*, 8 N. W. Rep. 691. That court held the foreclosure valid, and used the following language: "We are therefore of opinion that none of the mistakes were substantial, or operated in any way to the prejudice of Waterman." That case was appealed to the supreme court of the United States, and is reported under the title of *Bacon* v. *Ins Co.*, 131 U. S. 258, 9 Sup. Ct. 787, 33 L. ed. 128. That court, after intimating that it would follow the decision of the Michigan court, as involving a construction of a state statute by the highest court of the state, although it might doubt the correctness of the decision as an original proposition, uses this language: "The reasoning of the Michigan supreme court, in our opinion, is sound, and its conclusion correct." In that case the defect in the notice differed from the defect in the case at bar, in this: in that case the date of the mortgage was stated once correctly and once incorrectly. But the identical question involved in this appeal came before the supreme court of Michigan again in *Brown* v. *Burney*, 87 N. W. Rep. 221. In this last case that court says: "The notice contained a correct date of the recording of the mortgage and the volume and page in which it was recorded. This error in setting out the date of the mortgage did not invalidate the notice. No one could be misled by it, as the mortgage was otherwise fully identified." In *Morgan* v. *Joy* (Mo.) 26 S. W. Rep. 670, the notice of foreclosure correctly gave the date of the mortgage, and the book and page where recorded, but failed to state the time of recording. The court says: "But, if the law be construed as meaning that the notice should give the date of the record, still a failure to state the date of the record, the

book and page of the record being stated, would not render the sale void." The precise question involved in this appeal came before the supreme court of Missouri in *Baker* v. *Cunningham*, 62 S. W. Rep. 445. Regarding such omission, under a statute similar to this statute, prescribing what the notice shall specify, the court says: "The trial court properly held that the statement in the trustee's advertisement that the deed of trust was made in 1874, when in fact it was made in 1881, did not mislead the plaintiffs, or any one else, and therefore it was immaterial. The immateriality in this error of date is made more manifest when it is remembered that the trustee's notice described the deed of trust as having been made by Alexander McCausland and Sarah E., his wife, and stated that it was recorded in Book D, at page 562, of the records of Johnson county." The supreme court of South Dakota, in commenting on the essentials of a notice of foreclosure on a matter not at all similar to the point here involved, says: "Evidently the object of the notice contemplated by statute is to fully advise all interested persons and the general public of the existence of conditions which authorize a foreclosure by advertisement; and, even though the words of the statute be not employed, its requirements are sufficiently complied with when such notice is reasonably certain and clear as to the names of the mortgagor and mortgagee, the amount claimed to be due thereon at the time of the notice, the time and place of sale, together with a description of the premises to be sold, which conforms substantially with that contained in the mortgage. Mere inaccuracies, not calculated to be misleading, are insufficient to invalidate a sale in the absence of a claim that any one has been injured. *Investment Co.* v. *Shepard*, 8 S. D. 332, 66 N. W. Rep. 451. In *Judd* v. *O'Brien*, 21 N. Y. 186, the court says in the syllabus: "It is sufficient that the notice of foreclosure of a mortgage specify the place where the mortgage is recorded and the date. A mistake in the number of the mortgage book will not vitiate it if it could not have misled." The rule laid down in that case is that substantial compliance with the provisions of the statute is sufficient. See, also, *Candee* v. *Burke*, 1 Hun. 549. These authorities hold that a strict compliance with the statute regulating what a notice of foreclosure by advertisement must contain is not necesary; that a substantial compliance is sufficient, and that the want of strict and literal compliance with the statute will not be fatal to the foreclosure in a case where no prejudice is shown or suggested. We hold that the statute is substantially complied with when the notice itself states facts correctly pertaining to the record, which record, if examined, would conclusively show the error in the notice. We are aware that the supreme court of Minnesota has, in a number of cases, held that a substantial compliance with the statute is not sufficient, and that it has recently held in *Clifford* v. *Tomlinson*, 64 N. W. Rep. 381, that the remedy provided by the statute pertaining to foreclosures by advertisement must be "strictly and closely pursued." We deem the rule of substantial compliance sustained by the weight of authority more consonant with principles

of justice and less liable to work hardships. Some latitude and liberality in construction is fraught with no evil consequences when the substance of all the requirements of the statute is present in the notice, and no claim of prejudice is made, or of having been misled, It is better, in our opinion, to adopt a construction giving practical effect to this statute, and to so construe it as to give some security to titles, when that can be done without doing violence to the intention of the legislature in enacting that law. The intention was to secure to the mortgagor and to those desiring to bid or to redeem from the sale sufficient information from which they could and can act. In cases of foreclosure by advertisement under a power of sale the power is created by the express contract and consent of the mortgagor. The statute only prescribes what shall be done to effectuate the terms and conditions of the power. The proceedings in such foreclosures are therefore based on the mortgagor's contract, and are largely for his benefit. Hence no such strictness should be or is required in these foreclosures as in cases of proceedings by the state ex parte, and of a hostile nature, such as are taken in tax or other similar proceedings. *Lee* v. *Clary*, 38 Mich. 223.

The foreclosure sale in this case was made by the deputy sheriff, who issued the certificate of sale, and acknowledged the same before a notary. The acknowledgment was by the deputy sheriff without any acknowledgment by the deputy on behalf of the sheriff. The certificate of sale was regularly executed in the name of the sheriff by and through the deputy, but the name of the sheriff was not mentioned in the certificate of acknowledgment. At that time the statute did not prescribe any special form nor requirements as to the manner of acknowledging instruments by deputy sheriffs. The proper way undoubtedly would have been for the deputy to have acknowledged the certificate for himself and also on behalf of his principal, the sheriff. The certificate, as acknowledged, was duly recorded. It is claimed that the failure to properly acknowledge the certificate rendered it inadmissible as evidence of its execution, or of any fact, and that it was void, and rendered the sale void, and that it passed no title. This court has held that the failure to file such certificate within the 10 days fixed by the law during which it may be filed does not affect the sale nor the title of the purchaser, and that the statute regulating the time of filing such certificate is directory, and not mandatory. *Johnson* v. *Day*, 2 N. D. 259; 50 N. W. Rep. 701. We think the reasoning in that case is applicable to the facts in this case; that the failure of the officer to conform to the requirements of the statute should not be held to affect the sale in any way. However, without deciding the effect of such an acknowledgment, and conceding it to have been fatally defective, still the plaintiff could not prevail upon this last contention. There was an acknowledgment by the deputy, and the most that can be claimed against it is that it was fatally irregular in not making the acknowledgment on behalf of the sheriff as well as for himself. Section 3585, Rev. Codes, was passed after the acknowledgment in question

was taken. This law, passed in 1887, expressly cures and legalizes all defective acknowledgments of certificates of sale made by deputy sheriffs theretofore. By its very terms this section refers to all acknowledgments made by deputy sheriffs, "either by or for himself as such deputy or in the name of or for his principal," and such provision clearly covers the alleged defect in the certificate in question, and gives to such certificates the same force and effect as though originally properly acknowledged. As to the power of the legislature to enact a general law curing and legalizing all acknowledgments, no question is made. We therefore hold that the certificate of sale was properly received in evidence.

This disposes of all the objections raised to the foreclosure. It follows that the judgment must be affirmed, and it is so ordered. All concur.

(87 N. W. Rep. 1008.)

NATIONAL BANK OF WAHPETON *vs.* MARTIN HANBERG *et al.*

Opinion filed Nov. 4, 1901.

Chattel Mortgage Foreclosure Appeal—Stay Bond.

In an action in equity to foreclose a chattel mortgage, the plaintiff recovered judgment against defendants as follows: It was adjudged that plaintiff recover judgment for $460.62; and further adjudged that the sheriff should take possession of the chattels described in the mortgage, and sell the same in manner and form as in execution sales, and apply the proceeds of the sale in discharge of said money feature of the judgment. Defendants appealed to this court from said judgment, and, to perfect said appeal, caused the usual undertaking for costs to be filed, and in addition thereto, an undertaking framed under the provisions of § 5610, Rev. Codes 1899, whereby the obligors undertook, in effect, to pay the judgment as entered in the district court in so far as the same should be affirmed in the supreme court. *Held*, that said undertaking operated to stay proceedings in the district court.

Order for Stay—Unnecessary.

Held, further, upon the facts in this record, that it is unnecessary to determine whether, under strict practice, the defendants should have applied to the district court for an order respecting the undertaking, as prescribed in § 5611 or 5616. Had such application been made, the trial court, in the exercise of its judicial discretion, could have gone no further than to direct the defendants to file an undertaking for costs, and also to pay the judgment so far as it should be affirmed. Such an undertaking was voluntarily filed; hence the omission to obtain an order was at most a mere irregularity, and one resulting in no prejudice to the respondent.

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

Action by the National Bank of Wahpeton against Martin Hanberg and others. Judgment for plaintiff, and defendants appeal. Reversed.

Freerks & Freerks, for appellants.

The contention of defendants is, that, under § 5902, Rev. Codes, they had the right to give either form of bond provided for in § 5371, Rev. Codes. They elected to give the last form of undertaking provided for in that section, to the effect that, on demand, they would pay plaintiff the amount of any judgment which it might recover in the action against them, not exceeding the sum specified in the undertaking, with interest. After this undertaking was given the action became a purely money demand, and the question of obtaining possession of the property for the purpose of foreclosing the mortgage was out of the case. By the giving of this bond the lien on the property was released and removed, the suit continued as a personal action only. § 5902, Rev. Codes; *Epsilon* v. *Salorgue*, 6 Mo. App. 352; *Hills* v. *Moore*, 40 Mich. 210; *Wolff* v. *Stix*, 99 U. S. 1; *Barry* v. *Foyles*, 1 Peters, 311; *Brenner* v. *Noyes*, 98 Pa. St. 274; *Fitch* v. *Ross*, 4 Serg. & R. 557; *Albany City Ins. Co.* v. *Whitney*, 70 Pa. 248. The object of the statute is to enable the defendant to supersede the proceedings by giving security to perform the judgment that may be recovered in the action. The giving of the bond put the case on an analogous footing to an attachment proceeding. *McCombs* v. *Allen*, 82 N. Y. 114; *Buckingham* v. *Sweezy*, 61 How. Prac. 266; *King* v. *Childs*, 30 Minn. 366; *Ruchelman* v. *Skinner*, 46 Minn. 196; *Bush* v. *Meyers*, 29 O. St. 120; *Endress* v. *Ent*, 18 Kan. 236; *Wyman* v. *Hallock*, 57 N. W. Rep. 197; *McLaughlin* v. *Wheeler*, 1 S. D. 497; *Fox* v. *McKenzie*, 1 N. D. 298. The dissolution bond changed the character of the suit to one in personam. *Hill* v. *Harding*, 98 Ill. 77; *People* v. *Cameron*, 7 Ill. 468. There is a marked difference between the forthcoming bond and the bond to dissolve the attachment. The first leaves the levy intact; the second dissolves it. *Eddy* v. *Moore*, 23 Kan. 113; *People* v. *Cameron*, 7 Ill. 468.

Purcell & Bradley, for respondents.

Appellants' contention is based on decisions made under attachment laws on proceedings to discharge the attachment by the giving of a bail bond. *Fox* v. *McKenzie*, 1 N. D. 298, construed the attachment law as it existed prior to the revision of 1895. By the revision of the attachment law, § 5009, Comp. Laws, found in amended form in § 5370, Rev. Codes, was substantially changed. Section 5375, Rev. Codes, provides that the giving of any of the undertakings mentioned shall not operate as a waiver of the right to move to discharge the attachment, showing that, under the present law, the bond does not dissolve the attachment. The undertaking given by appellants under § 5371, Rev. Codes, would, at most, operate to discharge and release the warrant on which the sheriff seized the property, and could not take away the lien of plaintiff's mortgage.

WALLIN, C. J. In this case the controlling facts are not in dispute. The action is brought in a court of equity to foreclose a mortgage

given by defendants upon personal property to secure a promissory note executed and delivered by the defendants. The mortgage embodied a stipulation in the usual form, giving the mortgagee the right upon default to take possession of the property, and sell the same in manner and form as the law in such case directs. The litigation in the district court resulted in the entry of a judgment in plaintiff's favor for the relief demanded in the complaint, which judgment embraced substantially the following features: First, the plaintiff recovered a money judgment against the defendants for the sum of $460.62, which sum included the plaintiff's costs and disbursements; second, it was adjudged that said amount was secured by the lien of the mortgage; third, that the plaintiff is entitled to the possession of the personal property described in the complaint and in the mortgage; fourth, that such personal property should be sold by the sheriff of Richland county in the manner provided by law for the sale of personal property upon execution, and from the proceeds of the sale there should be paid the amount due upon the judgment, together with the costs and expenses of such sale; and, finally, it was adjudged that the defendants, and all persons claiming under them, should be forever barred and foreclosed of any and all right, title to, and interest in or to said personal property. From this judgment the defendants appealed to this court by serving and filing the requisite notice of appeal, and by way of perfecting said appeal the defendants gave an undertaking for the costs and damages on appeal to an amount not exceeding $250, and which undertaking embraced the following additional provisions: "And do also undertake that, if the said judgment so appealed from, or any part thereof, be affirmed, or said appeal be dismissed, the said appellant will pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed if it be affirmed only in part, and all damages and cost which shall be awarded against said appellants on said appeal." No exception was taken to this undertaking, nor was an order made by said court, or the judge thereof, fixing the amount or the conditions of such undertaking, on any undertaking to be filed on said appeal. It further appears that after said appeal was taken and said undertaking was filed as above stated the plaintiff caused an excecution to be issued upon said judgment, which was delivered to the sheriff of Richland county for service; and the same embraced, among other things, a copy of said judgment. Pursuant to such execution, the said sheriff seized and levied upon the personal property described in the chattel mortgage and in the judgment. After such seizure and levy was made, a motion was made in the district court in behalf of the defendants for an order vacating said levy and seizure and setting aside said execution, and said order was asked for upon the ground and for the reason that the case had been appealed to this court, and that an undertaking had been given on such appeal, which

operated to stay proceedings in the court below. Upon a hearing upon said motion the trial court denied the same, and from the order denying the motion the defendants have appealed to this court, and the only error assigned by the appellants is predicated upon the action of the trial court in making said order.

The legal question presented for determination is whether the undertaking as given by the defendants upon the appeal from said judgment, operated as a stay of proceedings upon the judgment in the court below. The trial court held it did not so operate, and in a memorandum opinion filed with the papers places its holding upon the ground that the undertaking was not given pursuant to any order of the court or judge thereof, as is required by § 5611, Rev. Codes 1895, which section the court below holds should govern in this case with respect to an undertaking on appeal from the judgment. In this court counsel for the respondent contend that the undertaking must be governed either by § 5611 or 5616 of the Revised Codes of 1895, and that it does not operate as a stay, for the reason that the same was not given pursuant to any order of the judge or the court below, as is required in each and both of said sections last cited. Before proceeding to discuss this question, it will be proper to state that the plaintiff caused a warrant of attachment to issue at the inception of the action, under § 5898, Rev. Codes 1895, and pursuant to which the sheriff of Richland county took the property described in the mortgage into his possession. Immediately upon such possession being taken by the sheriff, the defendants acting and claiming to act respectively under § § 5902 and 5371 of said Codes, proceeded to execute and did execute and deliver to the plaintiff an undertaking framed under § 5371, with sufficient sureties, conditioned to the effect that the parties signing the undertaking would on demand pay the plaintiff the amount of any judgment which might be recovered in the action against the defendants. Upon the delivery of said last-mentioned undertaking the property covered by the mortgage was redelivered to the defendants by the sheriff. The briefs of counsel filed in this court are devoted almost exclusively to a discussion of the legal effects and consequences of giving the last-mentioned undertaking. Appellants' counsel claim that the undertaking under § 5371 had a three-fold effect, viz.: That it operated to require a redelivery of the property to the defendants; second, that it operated as security for the payment of any judgment which plaintiff might recover; and, finally, that the undertaking so operated as to discharge and wipe out the lien of the chattel mortgage. On the other hand, counsel for the respondent strenuously argue that it does not have the effect to discharge the lien of the mortgage. As a corollary of the theory of the appellants' counsel, it is further argued by them that, inasmuch as the lien of the mortgage has been discharged by said undertaking, after such discharge the action can proceed only as an action at law for the recovery of money only, and that despite its terms the

judgment is, in legal effect, only a judgment for money, and hence that the usual bond in such cases given under § 5610 and such as was given in this case would stay proceedings. With respect to these radically divergent views of counsel this court has reached the conclusion that, for the purpose of disposing of all questions arising upon the appeal from said order of the district court, which order is alone under consideration, it is wholly unnecessary to determine precisely what effect follows the giving of the redelivery bond which was given under § 5371, as above stated. The district court, by its judgment, explicitly held and adjudged that the lien of the mortgage was intact and adjudged that the mortgage should be foreclosed by a sale of the property described in the mortgage. This adjudication, whether lawful or not, is a stubborn fact, which speaks for itself; and the judgment, whether irregular or not, must govern in determining the course to be pursued by any party aggrieved by the judgment. If it were true that no such judgment should have been entered, that does not alter the fact that the trial court had complete jurisdiction of the action, and did enter the judgment in fact. We therefore hold that the matter of an undertaking on appeal is in no wise affected by the question whether or not the mortgage lien was in any manner extinguished prior to the entry of the judgment. The undertaking to be given on appeal must, under the statute regulating appeals, be governed wholly by the adjudication actually made, and is not governed by considerations dehors the judgment. But from what has been said we do not wish to leave the impresion that this court is of the opinion that giving a redelivery bond under § 5371 does operate to cancel the lien of a chattel mortgage. We simply hold that that question is immaterial here.

It is conceded that the undertaking filed by the appellants, which fully meets the requirements of § 5610, Rev. Codes 1895, operates as a stay of execution if the judgment appealed from is a mere direction for the payment of money. But the contention is that the judgment cannot be classed with mere money judgments, and hence some other undertaking than that prescribed by § 5610 must be given to obtain a stay of proceedings. Upon this point the members of this court are not in entire accord. The writer is of the opinion that the undertaking actually filed was sufficient, and does operate as a stay. In my opinion, the case does not fall within either of the classes of judgment referred to in § § 5611 or 5616, Rev. Codes 1895. I find no direction in the judgment either to assign or deliver documents or personal property, or to do any particular act or thing within the meaning of § 5616. A delivery of chattels necessarily presupposes three features, viz. the chattels that are to be delivered, the party who is to make the delivery, and the party who is to accept or receive the delivery. In this case, as I conceive it ,all of these features are absent. There are no chattels directed to be delivered by any one. The mandate is that the chattels shall be taken possession of and sold by the sheriff. Nor is there any

direction that any person shall deliver the property to any other person. Again, I fail to find in the judgment any direction to do a particular act or thing, as prescribed in § 5616. The judgment in question embraces only the usual adjudications necessarily embraced in all judgments in chattel foreclosure cases, viz. a judgment for a specific sum of money, followed by a direction that the chattels upon which the mortgage is a lien shall be sold as a means of obtaining the money adjudged to be due the creditor. The sole object in all such actions is to recover money, and to obtain no other relief in equity whatsoever. The equitable features of a judgment in such cases are resorted to only as mere instrumentalities whereby the relief prayed for may be the more certainly obtained. But there is entire unanimity as between members of the court as to the practical effect of filing the undertaking. We are agreed that it operates as a stay, and this, without any order or direction of the trial court or judge, as prescribed in § 5611 or 5616. It will be noticed that under both of the sections last named the trial court or judge, when applied to for an order touching an undertaking on appeal, is called upon to discharge a duty which involves judicial discretion. In such cases it is well established by authority that the discretion is not an arbitrary one, and that the same may be reviewed in cases of abuse. Keeping this fact in view, it is proper to inquire what limits would the law place upon the discretion of the trial court or judge in cases such as this. Would it not have been an abuse of discretion in the trial court to have required the appellant to file an undertaking on appeal obligating the signers thereof to do more than to pay the judgment in full, together with the costs and damages accruing on appeal? In our opinion, any such requirement as that suggested would constitute a manifest abuse of discretion. If it be conceded that the statute conferred the right upon the appellants to apply for an order fixing the conditions of an undertaking on appeal, still the right is a privilege merely, and one which could be waived by the appellants. Any order lawfully made could not have required a greater or more onerous undertaking than that voluntarily filed by the appellants. It is therefore our opinion that the undertaking filed on the appeal from the judgment is sufficient. The case cited below is clearly in point, and we fully approve of and adopt the reasoning of the court in that case in support of our views. See *Johnson* v. *Noonan*, 16 Wis. 687.

Our conclusion is that the trial court erred in entering the order which is appealed from in this case, and this court will accordingly direct that the trial court enter an order reversing the order appealed from, and enter an order quashing the execution issued in this case, and the levy made thereunder, as shown by this record. All of the judges concurring.

(87 N. W. Rep. 1006.)

JOSEPH GUNN *vs.* W. S. LAUDER.

Opinion filed Nov. 21, 1901.

Mandamus to Judge—Disqualification—Failure to Call on Other Judge—Return—Evidence.

In the exercise of its superintending control over courts of inferior jurisdiction, an alternative writ issued out of this court, and was served upon the respondent in this proceeding. The affidavit upon which the alternative writ issued stated in effect, that the respondent had failed and neglected to call in the judge of another district to preside in the plaintiff's cases involved herein, and in which the respondent was disqualified to preside, under the provisions of § 5454a, Rev. Codes 1899. Pursuant to the requirements of the writ, respondent showed cause by answer to said writ before this court at a regular term thereof, which convened at Grand Forks on September 17, 1901. Issues of fact were framed by the answer, whereupon both sides submitted affidavits and proof upon such issues, and thereafter the matter was finally submitted to this court for determination. *Held*, upon the evidence and upon all of the facts and considerations set out in the opinion, that the respondent has neglected to request, arrange for, and procure the attendance of a judge of another district to try the cases involved herein, as he is required to do by said §5454a, and that respondent has not shown cause why he should not be required to attend to such duty. *Held*, further, upon the law and upon the facts as stated in the opinion, that a peremptory writ of mandamus will issue out of this court, requiring the respondent to forthwith perform the duty imposed upon him by said statute with respect to the cases involved in this proceeding.

Application of Joseph Gunn and others for a writ of mandamus to W. S. Lauder, judge of the district court of the Fourth judicial district for the County of Richland.

Writ granted.

McCumber, Bogart & Forbes, for plaintiffs.

W. S. Lauder and *Tracy R. Bangs*, for respondent.

WALLIN, C. J. In this proceeding an alternative writ of mandamus issued out of this court and was served upon the respondent on the 18th day of July, 1901. In substance the writ required the respondent forthwith to obey the command of the writ, or show cause why he should not do so, before this court, at the city of Grand Forks, on the 18th day of September, 1901. On the return day the respondent showed cause by serving and filing an answer to the alternative writ, whereby certain issues of fact were framed. Later in the term the respective parties submitted affidavits upon the issues of fact, and after an oral argument the matter was submitted to this court, upon written briefs, for final determination. The alternative writ, omitting the title, is as follows: "The State of North Dakota to the Hon. W. S. Lauder, as Judge of the District Court of the Fourth Judicial District in and for the County of Richland and State of North Dakota, Greeting: Whereas, it manifestly appears to us by the affidavit of P. J. McCumber, on the part

of said plaintiffs and the parties beneficially interested herein, that the Hon. W. S. Lauder is the judge of said district court; that the said plaintiffs are parties respectively, in the several actions pending in the district court of the Fourth judicial district in and for the county of Richland and state of North Dakota, and on the calendar of said district court for trial at the regular July, 1901, term of said court; that a jury has been impaneled for said term of court; that nearly all of the actions mentioned in said affidavit in which said plaintiffs are interested, respectively, as parties, were on the calendar of said district court for trial at the January, 1901, term of said court, and on previous term calendars; and that some of said actions have been pending for several years; and it further appearing that under the provisions of § 5454a of the Revised Codes of North Dakota, 1899, the said plaintiffs have filed affidavits and undertakings in the respective cases in which they are parties, and requested the above-named defendant, as judge of said district court, to procure the attendance of another judge to preside in the trial of said actions in accordance with the provisions of said section; that at said July term of said district court, and at previous terms of said district court, the judge thereof has refused and neglected to forthwith procure the attendance of another judge, but has so arranged the trial calendar that only those cases which are triable by him are placed for trial at such terms to be tried before any cases in which such affidavits have been filed, and has refused to cause the said actions to be tried in the order in which issue has been joined, and has in previous terms discharged the jury without completing the trial of cases in which affidavits have been made as aforesaid, and that the said judge is about to discharge the jury so impaneled at the close of the trial of cases so to be tried by him in said July term, and without trying the cases in which affidavits have been made as aforesaid; that said judge has failed and neglected to use proper means to secure the attendance of another judge for the trial of such actions in said July, 1901, term, and that by his acts the trial of such cases has been and are being unnecessarily delayed, to the great injury and damage of said plaintiffs; that the said plaintiffs, through their attorneys, have requested the said judge to call in and procure another judge for the trial of such actions, and that the said judge has failed to so do; that thereupon the said plaintiffs gave notice through their said attorneys that such affidavits and applications for the substituted judge would be withdrawn in case the said judge did not secure the attendance of another judge to preside in the trial of said actions, and would ask that the judge of said district court would proceed to try the same; and that the judge of said district court has announced that he would not try any of such cases, and has further announced that he would discharge the jury without the trial of any such actions, or would continue the term over until sometime in the fall. The plaintiffs have no other adequate remedy at law than the allowance of a writ of mandamus and prohibition as prayed for in said affidavit of P. J. McCumber:

Now, therefore, we command you that immediately after the receipt of this writ you proceed forthwith to request, arrange for, and call in another judge to preside at the trial of all of the actions above entitled wherein affidavits of prejudice have been filed pursuant to § 5454a, Revised Codes, and, in case such affidavits of prejudice and application for a change of judges shall be withdrawn in any case, that you proceed to try said case or cases, or proceed forthwith to request, arrange for, and call in another judge to try the same, or that you show cause before said supreme court at the court house in the city of Grand Forks, in the County of Grand Forks and state of North Dakota, on the 18th day of September, 1901, at the hour of 10 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, why you have not done so."

The subject-matter contained in the alternative writ will require a construction of the provisions of a statute of recent origin, and now embraced in § 5454a, Rev. Codes 1899, which reads as follows: "When either party to a civil action pending in any of the district courts of the state shall, after issue joined and before the opening of any term in which the cause is to be tried, file an affidavit, corroborated by the affidavit of his attorney in such cause and that of at least one other reputable person, stating that there is good reason to believe that such party cannot have a fair and impartial trial of said action by reason of the prejudice, bias or interest of the judge of the district court in which the action is pending, the court shall proced no further in the action, but shall forthwith request, arrange for and procure the judge of some other judicial district of the state to preside at said trial in the county of the judicial subdivision in which the action is pending. The actual expenses of such judge while in attendance upon the trial of the cause for which the change was had and the extra expense of the court and jury, incurred by reason of said change, shall be paid by the person asking for the change, in advance, or a bond to be approved by the clerk of the district court given therefor, the amount of said bond being fixed by the presiding judge; provided, that not more than one such change shall be granted on application of either party." It appears from the recitals in the alternative writ that the substance of the charge as made by the plaintiffs against the respondent is that the respondent has persistently and wilfully neglected and refused to request and arrange for and procure the attendance of a judge of some other judicial district to preside at the trials of cases in Richland county in which affidavits of prejudice and undertakings have been filed pursuant to the statute above set out. In support of this accusation, as well as by way of defense against the same, voluminous affidavits have been submitted to this court by the respective parties setting out divers matters of fact having reference not only to cases on the trial calendar of the district court for Richland county at the term which convened on the 2d day of July, 1901, but also to cases on the trial calendar at previous terms of said court.

viz. those convening in said county in January, 1900, in July, 1900, and in January, 1901. It is the theory of the plaintiffs' counsel that the affidavits and proofs submitted to this court tend to show that at the terms of court which convened prior to the July, 1901, term, the respondent wilfully neglected and refused to call in another judge to try cases in which the respondent was disqualified to preside under said statute; while, upon the other hand, it is claimed in behalf of the respondent that the evidence submitted to this court shows to the contrary, and tends to establish the fact that the respondent fully discharged the duties imposed upon him by the statute at such prior terms of court. The proofs submitted in plaintiff's behalf touching the respondent's conduct and his mental attitude towards counsel for these plaintiffs, as manifested by the respondent at said prior terms of court, was offered for the evident and avowed purpose of showing the animus of the respondent, and to show that the respondent, in neglecting and refusing to call in an outside judge to preside in the so-called "prejudice cases" which were on the calendar for trial at said July, 1901, term, did so deliberately, and from motives of malice and personal hostility toward counsel for the plaintiffs. But in disposing of the case this court has put aside and wholly disregarded the mass of testimony bearing upon either the conduct or the animus of the respondent as manifested at terms of court anterior to that of July, 1901. Nor shall we attempt to analyze, in the light of the evidence, the facts occurring at terms of court prior to said July term, with a view to locating responsibility or fixing blame. From the court's point of view, the legal question which must be solved in this proceeding is within a narrow compass, and is one which, from the nature of the remedy sought, is clear-cut and sharply defined. Nor is the court embarrassed in this case by any controversy concerning any of the facts which we deem to be essential to a proper decision of the case. These facts may be briefly stated: It appears that all or nearly all of the array of cases involved, and in which the plaintiffs herein were respective parties, were on the trial calendar at a term of the district court for Richland county held in the month of January, 1901. A large majority of such cases were jury cases, and a relatively small number were equity cases, triable to the court. It is conceded that the respondent, under said statute, was disqualified to preside at the trial of any of the cases in question; and, the cases being upon the term calendar at said January, 1901, term, it follows that the respondent, who is the resident judge, and who presided at said January term, was fully advised of the fact that he could not lawfully preside at the trial of any of said cases at the July term. Nor is this proposition controverted by the respondent. Respondent admits that under said statute he was without authority to try any of said cases, and further concedes that he was required by the terms of the statute in each and all of them to request, arrange for, and procure the judge of some other judicial district to preside at the trial of said cases. Nor do counsel differ at all as to the interpreta-

tion which should be placed upon the language of the statute. Both sides agree that, with respect to the cases involved here, the respondent had a duty to do, the performance of which was specially enjoined by law; and counsel practically agree, also, that if performance was in fact neglected or refused by respondent, as charged, the writ of mandamus could be invoked to compel the performance of such duty. An attentive perusal of the statute cited shows that the duty required of the judge who is disqualified is clearly set out, and is one not difficult of comprehension. The duty enjoined by the statute is administrative in its nature, and one which, in its performance, requires the exercise of only ordinary common sense and judgment. It is true that conditions sometimes exist where the mandate of the statute cannot be fully executed within a limited period of time; that is to say, the attendance of another judge to try a case or cases may not be procured or procurable within a limited period. The statute provides no machinery whereby the attendance of an outside judge can be compelled by the judge who is disqualified. Nothing of the kind is contemplated by this enactment. Nevertheless, we can see no unsurmountable obstacles which can prevent a full performance of all the duties enjoined by this statute upon the judge who is disqualified. He is required to request and arrange for the attendance of another judge and the terms of the requirement are, also, that he shall do so "forthwith." But the term "forthwith," as contained in this statute, while it requires promptness of action, does not demand the impossible. The term "forthwith," in statutes regulating official duties, has generally been construed as meaning that the duty is to be performed promptly and with all convenient dispatch," but this requirement is always modified by the circumstances and the nature of the duty to be performed. See *Anderson* v. *Goff* (Cal.) 13 Pac. Rep. 73; *Moffat* v. *Dickson*, 3 Colo. 313. The duty required by § 5454a is that the judge who is disqualified shall, after the statute has been fully complied with by the moving party, proceed promptly, diligently, and in good faith to request and arrange for the attendance of another judge to preside at the trial of the case or cases in which he cannot sit. There are at present seven district judges in the state, all of whom, under the statute, are qualified, upon proper request so to do, to perform judicial duties outside of their respective districts. Rev. Codes, 1899, § 5179. The chief purpose of § 5454a is to secure an impartial tribunal for every suitor in civil actions in the district court; but a further and incidental purpose of the statute is to prevent, as far as practicable, vexatious delays, which it appears were anticipated and might result from the attempt to secure such impartial tribunal. To this end the lawmaker used words of no doubtful meaning. As soon as the suitor, by complying with the terms of the statute, has placed himself within the benefits of the enactment, the law makes provisions which are obviously designed to expedite a hearing before an impartial tribunal. The suitor who has fully

complied with the statute is at once placed in a position where he may demand prompt and energetic action on the part of the judge who is disqualified. Nor does the law tolerate the notion that the judge who is shown to be prejudiced, and is therefore disqualified, may, either wilfully or by his dilatory action, interpose obstacles or create difficulties to be encountered by the suitor in his quest for an impartial tribunal. The words of the statute are mandatory and imperative. The tribunal which can no longer discharge judicial functions is required to take action "forthwith" in the way of requesting, arranging for, and procuring the attendance of another judge.

We turn now to a consideration of the facts which are, in our opinion, decisive of this case. Respondent admits that he made no effort whatever to call in another judge in the vacation period which intervened between the adjournment of the district court for Richland county in January, 1901, and its reassembling for the July, 1901, term in that county. We think that no valid excuse is offered by the respondent for this lengthy period of inactivity. Counsel argue that it was necessary to wait until court convened in July, 1901, and until the calendar had been called for that term, before it could be known to the court what cases were for trial at the July term. We regard this excuse as inadequate to justify the respondent's failure to act in the vacation period. The array of cases (some 30 in number) in which the respondent was disqualified under the statute were at issue and on the trial calendar in January, 1901. Under the law and the practice of the district court, these cases were severally entitled to a place on the trial calendar at the July term next ensuing, and they were in fact duly placed on that calendar for trial. There arises no presumption of either law or fact that said cases, or any of them, would be settled in the interregnum. The presumption is that a case which is at issue and on the calendar and not disposed of at one term will be on the calendar for disposition at the next ensuing term, and all interested parties are required to act upon this presumption. Under such circumstances, the respondent was chargeable with notice that such cases would be on the calendar for trial in July, and with the further notice that suitors in said cases would, under the law, be entitled to have certain action taken by him with a view to calling in an outside judge to preside in such cases. But in this expectation suitors were grievously disappointed. No action whatever looking towards the performance of his duty in this behalf was taken by the respondent before court convened in July. Nor did the court volunteer to inform suitors on the first day of the July term that nothing had been done by him looking towards calling in another judge. Even when applied to by counsel for information upon this vitally important matter, no information was given, beyond the meager general statement that the court, when it had information to give as to this matter, would impart the same to counsel. But, as a matter of fact, the respondent had no information to impart on the first day of the July term concerning the matter, and this absence of

information is entirely referable to the respondent's own neglect to act in the premises in manner and form as the statute directs. Whatever the truth may be as to the respondent's intentions in the premises, it appears in this case that counsel for the plaintiffs became satisfied at or about the beginning of the July term that the respondent deliberately intended to disregard the order of the cases on the trial calendar of that term, and, after trying cases in which the respondent was not disqualified, proceed to discharge the jury without making arrangements for the trial of the array of cases in question; and so it turned out, as will be seen hereafter. We cannot agree with counsel who argue that the respondent rested under no particular obligation to promptly and fully advise counsel in this class of cases, as soon as court convened, what had been done, if anything, in the matter of calling in another judge to preside in such cases. It is entirely clear that counsel in these cases, as in others, must be at all times ready to proceed to trial when cases are called in their order; and, to be ready, counsel are entitled to know all facts which are within the knowledge of the trial court which have a bearing upon the subject-matter of their preparations for trial. Hence in these cases it was the obvious duty of the respondent to inform counsel on the first day of the term that no arrangement whatever had, up to that time, been made for calling in another judge to try their cases. Counsel are not at liberty to suppress facts or information which has a bearing upon the duties of the presiding judge, and this salutary rule, we think, applies with equal force to the presiding judge.

Reverting to the term of court which convened on July 2, 1901, we will now inquire what the respondent did, and what he omitted to do, after court convened, relative to calling in another judge in these cases. Upon this point we shall quote at length from the brief of respondent's counsel. The court announced that it would first try jury cases, civil and criminal, in which he could preside, after which, if possible, he would have another judge there to take up the other cases. Referring to the first day of the term, counsel say: "On this same day, as soon as the respondent could possibly estimate the time when an outside judge could be used, he wrote to Judge Pollock, of the Third district,—he being the nearest judge to the respondent,—requesting his attendance in the trial of the prejudice cases. On July 3d Judge Pollock answered, stating that it would be after the 1st of August before it would be possible for him to attend. His letter is shown as Exhibit A, attached to respondent's return. On receipt of the answer from Judge Pollock, the respondent immediately corresponded with Judge Glaspell, of the Fifth district. His answer is shown as Exhibit C, attached to the return, and shows conclusively that his atendance could not be secured. Even before receiving the reply from Judge Glaspell, and in his effort to secure the attendance of some judge to sit in the trial of cases in which affidavits had been filed, the respondent communicated with Judge Fisk, of

the First district, and received from him an answer dated July 10th, shown as Exhibit B, attached to the return, in which it is stated that it would be impossible for him to be present before the 19th of August. Immediately upon receipt of the letter from Judge Glaspell, and before hearing from Judge Fisk, the respondent communicated with Judge Kneeshaw, of the Seventh district, receiving an answer under date of July 13th, shown as Exhibit D, attached to said return, to the effect that Judge Kneeshaw could not be present until some time in August. Thus it will be seen that the respondent had been very prompt and persistent in his efforts to scure the attendance of an outside judge. The respondent then communicated with Judge Cowan, of the Second district, receiving a telegram from Judge Cowan on the 16th or 17th of July (it is immaterial which) to the effect that he had to go into the northern part of his district for a day or two, and would then come to Wahpeton." This presentation of evidence offered to show deligence on the part of the respondent must be supplemented by an affidavit made by the Honorable W. H. Winchester in plaintiffs' behalf, which, so far as material, is as follows: "I further swear that I have had no commnuications whatever from Honorable W. S. Lauder, the above-named defendant, in reference to presiding at the trial of any cases in the July, 1901, term of the district court of the Fourth judicial district, in and for Richland county, of said state. I further swear that if the said Honorable W. S. Lauder had so requested of me, and had given me a week's or ten days' notice, I believe I could have arranged my business so as to have presided in the trial of cases at such portion of the said July term as the said Honorable W. S. Lauder might have requested, and would have done so." The undisputed evidence shows that no judge from another district was in fact present at the July term, and none of the prejudice cases here involved were tried at said term. It is conceded that the respondent, after disposing of cases in which he could lawfully preside, discharged the jury and adjourned the term until October 15, 1901; and respondent alleges in his answer that he had arranged with Judge Fisk, of the First district, to preside at the trial of court cases at said adjourned term, but the answer fails to show that an arrangement had been made for the trial of any of the numerous jury cases involved in this proceeding. No such claim is made.

The circumstances attending the adjournment of the July term must be stated, for the reason that it is strenuously contended in behalf of the respondent that such adjournment, in the surrounding conditions, was a sound and proper exercise of the discretion vested in all courts, viz.: the discretion to adjourn court either for a short or a long period, as the court may, in the exercise of sound discretion, determine. It apears that one of the plaintiff's attorneys was in court immediately preceding the adjournment, and then and there, in a respectful manner, earnestly remonstrated against the adjournment then about to be made, and urged the respondent to refrain from any adjournment of court

at that time, and calling the respondent's attention to the large array of cases long delayed, and then on the calendar for trial, and in which suitors were clamoring for trial. Counsel also invited the respondent's attention to the fact that the respondent had a duty to perform with respect to calling in another judge to try these cases, and that such duty had not then been performed. But these appeals and remonstrances of counsel were unheeded by the respondent, and the district court was then adjourned despite the same; and such adjournment was made after a telegram was received by respondent from Judge Cowan which, in effect, definitely informed the respondent that he (Judge Cowan) would be at liberty to attend and hear these cases on the request of the respondent to do so. Under these circumstances court was adjourned, and Judge Cowan was not requested to attend and preside in the cases in question. It appears that on July 17, 1901, in Richland county, hay was in a condition to be cut and cared for, and that some of the cereals were also ready to be cut and harvested; that the jury then in attendance was largely composed of farmers, and the jury were then urging the respondent to discharge the jury, and thereby enable them to attend to their farming interests. These conditions are presented to this court as an all-sufficient excuse for the conceded nonperformance of the statutory duty to arrange for and procure another judge to try the cases in question. We are far from conceding the validity of this excuse. Terms of court are appointed by law, and the legislative assembly, representing the whole people, is presumed to have fixed the times of holding court with reference to the interest of all the people. It is to the regular judicial tribuals that the citizen and taxpayer may look, and not elsewhere, for the redress of grievances, and for the protection of life, liberty, and property. The interests of suitors are especially safeguarded by the law, and every lawyer knows that repeated and vexatious delays in the courts are often tantamount to a denial of justice. But the adjournment of the district court on July 17th is only an incident in this case pointing to the fact that at and prior to said adjournment no arrangement had been made for the trial of the cases in question; no judge had been arranged for or procured.

The writ was served the next day after the district court adjourned, and since such service the respondent has had full opportunity to show cause why he has failed to perform the duty laid upon him by the statute. Has the respondent succeeded in showing cause? We are constrained by the undisputed facts in this record to answer this question in the negative. It is conceded that no outside judge has ever apeared in Richland county to try any of these cases, except Judge Fisk alone, who was called in after said adjournment to try court cases at the adjourned term in October. No claim is made that any judge has been arranged for or procured to try the large majority of the cases, i. e. the jury cases. We have seen that the defendant wholly failed and neglected to act in the

premises at any time within the long period which elapsed between the adjournment of his court in January and when it reconvened on July 2, 1901. We have further noticed the leisurely way in which, after court convened in July, the respondent went about the duty of requesting outside judges, one at a time, to attend for the trial of these cases. Finally we have seen that, after the respondent was duly informed that Judge Cowan would attend and preside in these cases at once on respondent's request therefor, the respondent then and there promptly adjourned his court, and by such adjournment effectually defeated the very purpose for which the request had been previously made by the respondent. By this adjournment the respondent effectually defeated the very arrangement which law and duty required him to consummate, and which, professedly, at least, the respondent had attempted to consummate. But the respondent has neglected to avail himself of a privilege accorded to respondents in this class of cases. He has not attempted to show by evidence or allegation that since the alternative writ was served upon him he has proceeded to do his duty in the premises, and has in that behalf arranged to call in another judge to sit in these jury cases. It therefore appears that in such cases there is no arrangement yet made for the attendance of another judge to try the same. Nothing of the kind is claimed by counsel, but counsel offers as an excuse for this delay and disregard of the law the bald assumption that no duty rests upon the respondent to act at the present time, and that no duty in these cases is required of the respondent until court shall reconvene in Richland county in January, 1902. We think this assumption of counsel is without foundation either in reason or in the statute, and that the excuse of the respondent resting upon the assumption is evasive and wholly inadequate. From the standpoint of this court, it is very clear that a proper discharge of the duties imposed by the statute requires a resident judge who becomes disqualified to act promptly and with vigor, and continue to so act until the prescribed duty is fully performed, in so far as the resident judge can be called upon to discharge the same. On being advised by his records that he is disqualified to act judicially in such case, the resident judge should proceed to take action under the statute "with all convenient dispatch," and then not intermit his endeavors until the arrangement is consummated. When the arrangement is once fully made, the resident judge is exonerated from further blame or responsibility in the premises, and if delays thereafter occur the blame therefore cannot fall upon the resident judge. But it is obvious that in cases where issues of fact are to be tried the arrangement contemplated by this statute necessarily includes the calling in of a judge during a term of court, and this is a vital feature of any such arrangement. And, as in these cases, if it so happens that jurors in attendance at any such term are desirous of being relieved from duty and discharged from further attendance as

jurors, the local judge will not be called upon to determine or exercise discretion whether the jury ought or ought not to be discharged, to attend to their pressing private affairs. The entire responsibility in such cases must fall upon the shoulders of the incoming judge. He, and he alone, can exercise any discretion invested in the district court with respect to all cases in which he lawfully presides.

But counsel has invoked a very elementary rule of law in mandamus proceedings, requiring that the peremptory writ shall, in matters of substance, conform in its requirements to the alternative writ. Under this rule, counsel insists that no peremptory writ can issue in this case, because, as he claims, the alternative writ was issued to require the respondent to call in an outside judge to preside at the July, 1901, term, and no other term of court, and, that term being now ended and over with, it becomes according to this view of counsel, impossible to legally require the respondent to call in an outside judge for that term. But there is no basis of fact for this argument to rest upon. The relief sought in this proceeding is primarily and essentially to require the respondent to perform his statutory duty with respect to specified cases in which respondent was disqualified to preside, and which were on the calendar of the July term in 1901. When the alternative writ issued, the duty of the respondent as to such cases had not been performed, and the alternative writ directed the respondent to perform the same, or show cause why he should not do so. The proofs submitted to this court show that the same identical duty which was referred to and required to be performed by the terms of the alternative writ is still unperformed. So far as has been shown, no arrangement has yet been made for calling in a judge to try the jury cases which are referred to in the first writ. It is true that the plaintiffs hoped that the writ might so operate that a trial of these cases could be had in July. In this they were thwarted, but this circumstance in no wise militates against their right to the substance of the relief which they originally sought, and which they now are seeking at the hands of this court. There was no mandate in the alternative writ requiring respondent to call in a judge for the July term, or for any particular term of court. This will be apparent from a reading of the mandatory part of the alternative writ already set out. We can see no difficulty in this case which can prevent the issuing of the peremptory writ, and much less do we concede that such writ, when issued, will be, as counsel claims it will be, "unavailing" and "fruitless." It is further true that the ancient and stricter rule in mandamus has been relaxed by modern adjudications, under which a final writ "may be in any form consistent with the case made by the complaint presented, and embraced within the issues." See *State* v. *Weld*, (Minn.) 40 N. W. Rep. 561. The statute embraced in § 5454a, Rev. Codes 1899, is essentially a remedial statute, and no rule of construction is better established than that requiring

such statutes to be liberally construed, with a view to the attainment of the remedy contemplated by the enactment. But the rules of law which control this case have long since become firmly settled, and are therefore elementary and entirely familiar to the profession, and hence we shall not further extend this opinion by a needless citation of authority in support of our views.

Our conclusion is that the peremptory writ should issue in this case, and be served upon the respondent, and that such writ should conform substantially to the mandatory feature of the alternative writ, excepting therefrom only the order to show cause. It will be adjudged accordingly. All the judges concurring.

(87 N. W. Rep. 999.)

PATRICK WHITE *vs.* W. S. LAUDER.

Opinion filed Nov. 21, 1901.

Mandamus to Judge—Disqualification—Failure to Call Other Judge.

Application of Patrick White and others for a writ of mandamus against W. S. Lauder, judge of the district court for the County of Richland. Writ granted.

Freerks & Freerks, for plaintiffs. *W. S. Lauder*, in pro per., and *Tracy R. Bangs* for respondent.

PER CURIAM. The facts in this case are substantially the same as those involved in the case of Gunn against the respondent herein 12 N. D. *Ante*, (87 N. W. Rep. 999), which was submitted at the same time as this case, and the decision in that case governs this. The peremptory writ should issue in this case, and be served upon the respondent, and such writ will conform substantially to the concluding and mandatory feature of the alternative writ, excepting therefrom only the order to show cause. It will be adjudged accordingly.

(87 N. W. Rep. 1135.)

ADDIE P. WILLARD *vs.* MONARCH ELEVATOR COMPANY.

Opinion filed Oct. 25, 1901.

Chattel Mortgage—Conversion.

Plaintiff leased a cultivated farm to one Jepson for the farming season of 1896, under a written lease, which contained the following special provision, to-wit: "The second party to hold five hundred bushels of first party's one-half of wheat until the plowing is done, and shall be a lien on same for that amount; the tickets for the above five hundred bushels to be deposited with R. P. Sherman." *Held*, that such provision is a chattel mortgage, and not a pledge, nor an agreement for a pledge, so far as the wheat is concerned.

Demand Unnecessary—Where Conversion Shown.

At the time of the delivery of the 500 bushels at the elevator, or immediately thereafter, and before the elevator company had issued tickets for such wheat, or made any disposition of it, plaintiff personally notified the company of her claim, and asked it to hold such tickets until Jepson did the plowing. The elevator agent then agreed to hold the tickets for her. Thereafter the agent turned such tickets over to Jepson, and on demand therefor later by the plaintiff refused to deliver them to plaintiff. *Held*, that turning the tickets over to Jepson, without authority, after such express notice, was a conversion of the wheat, and no demand therefor was necessary before the commencement of the action.

Evidence of Value—Estoppel.

The value of the wheat at the time of the delivery at the elevator was agreed on by stipulation of counsel at the trial. No evidence of value at any other time was offered. It was also stipulated by counsel at the trial that the tickets for this wheat were turned over to Jepson, but the stipulation was silent as to the time when so delivered. The trial court, without objection, and pursuant to such stipulation, adopted the price of the wheat when delivered as the measure of damages. *Held*, that appellant cannot urge after the trial that there was no evidence of the value of the wheat at the time of the conversion.

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

Action by Addie P. Willard against the Monarch Elevator Company. Verdict for plaintiff. From an order denying a new trial, defendant appeals. Affirmed.

P. H. Rourke, for appellant.

Plaintiff, by the stipulations in her contract for lease, agreed that Jepson should pay her half of the crops raised, to be delivered at the time of threshing, free of expense, in the elevator at Buffalo, she to hold 500 bushels of his half of the wheat until the plowing was done, the tickets for the 500 bushels to be deposited with R. P. Sherman. The contract was a pledge, or agreement for a pledge of wheat. § § 4745, 4751, 4746, Rev. Codes; Story on Bailment, § 286; *Luckett* v. *Townsend*, 49 Am. Dec. 730. It is the essence of such contract that delivery of custody of the pledged property be made to the pledgee, he to continuously retain the possession. *Bank* v. *Nelson*, 38 Ga. 391; *Casey* v. *Cavaroc*, 96 U. S. 467; *Luckett* v. *Townsend*, 49 Am. Dec. 730. The contract being an agreement for a pledge was inadmissible in evidence under a complaint declaring on a chattel mortgage. By treating the contract as one of chattel mortgage, plaintiff thereby agreed to the delivery of the wheat into the elevator of appellant, consenting that the tickets be delivered to Sherman. Appellant, having dealt with the wheat with respondent's consent, cannot be held for conversion except on proof of demand for the property and a refusal to deliver. *Plano Mfg. Co.* v. *Elevator Co.*, 53 N. W. Rep. 202 *Stanford* v. *Elevator Co.*, 2 N. D. 2; *Towne* v. *Elevator Co.*, 8 N. D.

200; *Valentine* v. *Duff*, 34 N. E. Rep. 553. There was no proof of value at the time of the alleged conversion, or afterwards, proof of value being as of a date two months prior to the alleged demand. *Towne* v. *Elevator Co.*, 8 N. D. 200; § 5000 Rev. Codes. Under the contract the wheat tickets were to remain in the hands of Sherman to await performance of the conditions of the lease. Plaintiff, to recover in conversion, must be in possession or entitled to possession of the property at the time of the conversion. Under this contract she was not in possession or entitled to possession. *Clendening* v. *Hawk*, 8 N. D. 419; *Parker* v. *Bank*, 3 N. D. 87.

Newman, Spalding & Stambaugh, (*Duerment & Moore* of counsel), for respondent.

Appellant's contention fails to give effect to the clearly expressed intention of the parties that respondent was to hold this wheat and have a lien thereon. This clause creates a lien without any other or further act on the part of the tenant. § § 4673, 4680, 4681, 4701, 4713, 4745, Comp. Laws; *Bidgood* v. *Monarch Elevator Co.*, 9 N. D. 627. The contract was not one of pledge for the reason that all the essentials of a pledge were lacking. The clause in question clearly amounted to a chattel mortgage. *Harris* v. *Jones*, 83 N. C. 317; *Mitchell* v. *Badgett*, 33 Ark. 307; *Whitney* v. *Eichelberger*, 16 Ia. 422. Counsel, by stipulating that the value of the wheat at the time it was delivered was fifty-six cents, conceded that damages were to be fixed as of that day. Having led the court to act upon this stipulation he cannot now insist that a different theory be adopted. *Parish* v. *Mahaney*, 81 N. W. Rep. 295, 12 S. D. 278.

A state of affairs once shown to exist is presumed to continue. If the value of wheat was lower appellant was entitled to avail itself of that fact and could have shown it. *Howland* v. *Davis*, 40 Mich. 545. Both parties having moved for a directed verdict at the conclusion of plaintiff's testimony, each consented that the court determine the case without a jury. *New England Mfg. Co.* v. *Elevator Co.*, 6 N. D. 407, 71 N. W. Rep. 130; *Stanford* v. *McGill*, 6 N. D. 536, 72 N. W. Rep. 738; *First Methodist Church* v. *Fadden*, 8 N. D. 162, 71 N. W. Rep. 615; *Rosenbaum* v. *Hayes*, 8 N. D. 461, 79 N. W. Rep. 987; *Buettell* v. *Magone*, 157 U. S. 154, 15 Sup. Ct. Rep. 566.

MORGAN, J. This is an action for the conversion of wheat, on which it is alleged that the plaintiff had a chattel mortgage. One Jepson leased a half section of land from the plaintiff for farming purposes in the year 1896. The lease was in writing, and was duly filed in the office of the register of deeds for Cass county, and contains the following special provision, which is claimed to be a chattel mortgage, to-wit: "Said Matthew Jepson agrees to pay Addie P. Willard the one-half (½) of all crops raised upon said premises, to be delivered at the time of threshing to Addie P. Willard, free of expense, in the elevator at Buffalo, or in the granary on

said premises. Said Addie P. Willard agrees to give Matthew Jepson one (1) acre free as a garden. Said Matthew Jepson agrees to plow back all lands five (5) inches deep, except forty (40) acres of breaking, which shall be subsoiled one-half (½) inch. The second party to hold five hundred (500) bushels of first party's one-half (½) of wheat until the plowing is done, and shall be a lien on same for that amount. The tickets for the above five hundred bushels to be deposited with R. P. Sherman." The lease contained other stipulations providing that, in case of default in the conditions of the lease as to matters not contained in the provision quoted above, the plaintiff might take possession of all of the crops, and sell them, and apply the proceeds towards the performance of the stipulations of said lease not performed by said Jepson; the residue of such proceeds to be paid over to said Jepson. The lease also contained a provision that the title and possession of the wheat and all crops grown thereon should be and remain in the lessor until a division thereof was made. The complaint states a cause of action for the wrongful conversion of the 500 bushels of wheat alleged to have been covered by said mortgage after actual notice of the existence of such mortgage on said 500 bushels and after demand that the wheat or proceeds be turned over to the plaintiff. The complaint also alleges that the said Jepson failed and refused to plow the land as agreed to by him in said lease, whereby the condition in said contract as to the security for the plowing of the land became operative and of force; that, in consequence of such failure on said Jepson's part to plow said land, she was compelled to cause the same to be done, and did cause the same to be done, to her damage in the sum of $280 and interest. The answer was a general denial of the allegations of the complaint. At the close of the taking of testimony on the part of the plaintiff, and after denying a motion made by the defendant for a directed verdict in his favor, the trial court directed a verdict in favor of the plaintiff. A motion for a new trial was duly made by the defendant, based upon a settled statement of the case, and denied. The defendant appeals from such order refusing to grant a new trial.

There was no evidence offered at the trial on the part of the defendant. It is first contended by the appellant that the provision of the lease, hereinbefore set out in detail, constituted it a pledge or an agreement for a pledge and not a chattel mortgage. "Every contract by which the possession of personal property is transferred as security only, is to be deemed a pledge." Section 4745, Rev. Codes. "The lien of a pledge is dependent on possession and no pledge is valid until the property pledged is delivered to the pledgee or to a pledge holder as hereinafter described." § 4746, Rev. Codes. By the terms of these sections, which are declaratory of the common law on the subject of pledges, no valid pledge can be made unless there be a transfer of the possession of the property pledged at the time. A change of possession of the article

pledged is of the very essence of such a transaction, and a prerequisite to the valid creation of the relation of pledgor and pledgee. In this case this essential—the transfer of possession—was wanting, and impossible to be complied with, at the date of the contract or lease. The subject of the special provision—the wheat—was not in existence, and a delivery of possession thereof was not possible. Hence, although the language of this special provision could be construed as creating a pledge or a mortgage, it is nevertheless the duty of the courts to give effect to the intentions of the parties in their negotiations, and such negotiations should not be construed to be meaningless, or of no effect, when their language is reasonably susceptible of a construction that gives effect and force to all the provisions thereof. Under the terms of the special provision every essential to the making of a valid chattel mortgage of the wheat is to be found in the provision. A lien is expressly created by this contract as security for the performance of the conditions of the contract and it provides how these conditions shall be performed in case of default by the lessee. Looking at the provisions of the instrument, and construing them together, it is clear to us that the relation of mortgagor and mortgagee was created by its terms. *Harris* v. *Jones*, 83 N. C. 317; *Mitchell* v. *Badgett*, 33 Ark. 387; *Whiting* v. *Eichelberger*, 16 Iowa, 422. The special provision is not an agreement for a pledge, for the reason that Jepson was not obligated to do anything concerning these 500 bushels after the threshing under the terms of this contract was done. His duty as to this ended when the threshing was done. The plaintiff was to hold these 500 bushels, and to have a lien thereon. It was not his duty, even, to put this wheat into the elevator. It is true that, if tickets had been procured for this wheat, and placed in the hands of Sherman, a pledge of the tickets would have been created. But this was never done, and not done because of the wrong of the defendant. This makes it necessary to set out what the evidence shows as to the disposition of the wheat and tickets. The threshing of this wheat was done about September 1, 1896. The plaintiff was not on the premises at the time the threshing was done, but arrived there on the day the threshing was finished. The wheat was hauled from the threshing machine to the elevator by Jepson. A division of the wheat was made by the parties at the elevator. The plaintiff received the tickets for her share, less what was left in the granary, according to the terms of the contract. At this time the plaintiff notified the elevator agent that she had a claim against his (Jepson's) wheat. The plaintiff says, as to notifying the agent, "I notified the agent, Mr. Fellows, that I had a claim against the wheat," and the agent said that "he would hold it for me." A witness testifying as to what was said by her to the agent at this time says: "Mrs. Willard told Mr. Fellows that she had a lien on the crop,and she told him she didn't want him to deliver the tickets until Jepson had plowed. Mr. Fellows said she need not worry." This was before Jepson had

received the tickets for his share of the wheat. If Jepson had previously received the tickets, or the proceeds of the wheat, the agent would not have agreed to hold the tickets for the plaintiff until Jepson had done the plowing. The effect of this notification must be held to be that the defendant company was apprised by actual notice of the claims and rights of the plaintiff to a lien upon that amount of Jepson's share of the wheat. The fact of sufficient notification is not denied by counsel for the appellant. The evidence shows that at a later period—the exact time not being given—the elevator agent turned all the tickets over to Jepson, and, when the tickets were demanded subsequently, the plaintiff was informed by the agent that he could not deliver the tickets to her, as he did not have them.

To summarize, it is shown by the evidence that the following facts are proved: (1) That the plaintiff had a mortgage lien upon 500 bushels of Jepson's share of the wheat to secure the performance of the conditions of the lease as to plowing. (2) That Jepson delivered the wheat at the elevator rightfully, as provided by the terms of the contract, or, if not strictly in accordance with the terms of the contract, that his actions in that behalf were acquiesced in by the plaintiff. (3) An express notice to the defendant's agent that the plaintiff had a lien on the 500 bushels, and the right to hold that much of the wheat, and an agreement by the defendant to hold it. (4) A turning over of the tickets to Jepson contrary to instructions, contrary to the terms of the contract, without right, and without any authority. These facts are, in our opinion, sufficient to establish a conversion by the defendant of the wheat in question. Conversion is a completed act, by which property is disposed of without authority by another than the owner contrary to the rights of the owner, or one having a lien or mortgage thereon. Although the possession of this wheat by the defendant in this case was at first not wrongful, it was wrongful to turn the tickets over to Jepson. The defendant had express notice of plaintiff's interest in the wheat and had agreed to hold the tickets until Jepson had performed the stipulations of the contract as to plowing. The language of this court in *Towne* v. *Elevator Co.*, 8 N. D. 200, 77 N. W. Rep. 608, is directly in point in this case, and we adopt the language used in the opinion in that case as applicable and controlling under the facts of this case. The language referred to is as follows: "We are disposed to accept the view of respondent's counsel, and sustain their contention as to the abstract legal proposition that the act of delivering the storage tickets, and the whole thereof, to Murray, and in his name, if done after notice of plaintiff's rights, was an act adverse to the rights of the plaintiff, and of such a prejudicial nature as would constitute a conversion of property for which an action would lie. This proposition is elementary." In this case the plaintiff had a lien on this wheat, and the defendant knew it. It was claimed by the plaintiff as security for the doing of the plowing, and the defendant knew it. The plowing had

not been done at the time notice was given, and the defendant knew that fact. The turning over of the tickets to Jepson under the circumstances was subversive of plaintiff's rights, and constituted of itself a conversion of the wheat, and the defendant is liable without the necessity of a demand preliminary to the suit. We so decide without determining whether, under all the evidence in this case, there was a demand of the wheat, although it is practically undisputed that there was a demand for the tickets before the suit was commenced. At the time of the notice to the agent in the presence of the witness Lowry the plaintiff had a right to demand the tickets for the purpose of putting them into Sherman's hands, or the right to insist that the agent put them into Sherman's hands, as provided by the lease, of which lease the defendant's agent had actual and constructive notice of its terms. The lease is not specific as to who was to turn the tickets over to Sherman. We think a fair construction of the lease, in connection with the facts that transpired between the parties, that the plaintiff, and not Jepson, was the person to turn them over to Sherman. The plaintiff was the person who held the mortgage lien, and entitled to hold the wheat. So far as disposing or controlling this 500 bushels covered by the mortgage lien, Jepson had no more right over it than a stranger. The title of all the wheat was in the plaintiff. She was always entitled to its possession up to the time of the division, and entitled to hold this wheat (the 500 bushels) afterwards; and it is plain to us that after its storage in the elevator she was entitled to hold the tickets, and to receive them for the purpose of turning them over to Sherman. Whether she was the one entitled to receive these tickets for the purpose of turning them over to Sherman is not a controlling fact in this case. It is sufficient for a disposition of this case that Jepson had no right to these tickets,—a fact which we find from a construction of the contract. The following authorities will be found to sustain the proposition that no demand is necessary to establish a conversion in cases based upon facts in effect similar to the case at bar: *Velsian* v. *Lewis*, (Or.) 16 Pac. Rep. 631, 3 Am. Rep. 184; *Carter* v. *Kingman*, 103 Mass. 517; *Harpending* v. *Meyer*, 55 Cal. 557; *Eldred* v. *Oconto Co.*, 33 Wis. 133; *Rosum* v. *Hedges*, 1 S. D. 308, 47 N. W. Rep. 140, 9 L. R. A. 817; *Irrigation Co.* v. *Hawley*, 7 S. D. 229, 63 N. W. Rep. 904; *Kendrick* v. *Rogers*, 26 Minn. 344, 4 N. W. Rep. 46.

The appellant assigns as further error that there is no evidence in the case to show what the value of the wheat was at the time of the conversion of the wheat. This assignment is based upon the erroneous conclusion that a demand was necessary in this case. There is a stipulation in the record that the value of the wheat in question was 56 cents per bushel at the time of the delivery of the wheat at the elevator. The wheat was delivered at the elevator early in September. There is also a stipulation in the record that the tickets were turned over to Jepson by the elevator agent. This stipulation is silent as to the time when delivered. It is contended

by appellant's counsel that, inasmuch as there was no demand for the wheat before November, proof of value in September would not be competent proof of the value in November. If such were the facts, we should so hold under the recent decision of this court in *Towne* v. *Elevator Co.,* supra. We have found in this case that the delivery of the tickets to Jepson was an act so inconsistent with plaintiff's rights to the wheat as to amount to a conversion of the wheat by the defendant at the moment of the delivery of such tickets to Jepson irrespective of any previous demand. The stipulation shows such a delivery to Jepson without stating the time of such delivery. In other words, that the refusal to deliver the wheat after demand does not constitute the conversion in this case. On the contrary, the conversion became absolute at the moment of turning the tickets over to Jepson, and suit could thereafter have been brought immediately without any demand. Had the value of the wheat been shown at the time of the delivery of the wheat in September, and no conversion had been made of the wheat or tickets until after a wrongful refusal to turn over the wheat after demand in November, the rule in the Towne Case would be applicable. But we have no such facts here, and the rule in that case cannot be invoked. The evidence in the case shows what the value of the wheat was at the time of its delivery at the elevator in September. This evidence was acted upon by the trial court pursuant to a stipulation of counsel made in open court. By such stipulation the court must have been led to believe that the value of the wheat at the time of the delivery to the elevator was the proper measure of damages. The court's attention not having been called to the fact that the value of the wheat was not to be measured according to the facts stipulated, the appellant must be held to have consented that the damages be measured as of the time of delivery, and it is too late to suggest a different rule on an appeal or on a motion for a new trial. *Warder, Bushnell & Glessner Co.* v. *Ingli,* 1 S. D. 155, 46 N. W. Rep. 181; *Becker* v. *Becker,* 45 Iowa 239; *Colrick* v. *Swinburne,* (N. Y. App.) 12 N. E. Rep. 427; *Rosum* v. *Hodges,* 1 S. D. 308, 47 N. W. Rep. 140, 9 L. R. A. 817; *Parrish* v. *Mahany,* 12 S. D. 278, 81 N. W. Rep. 295, 76 Am. St. Rep. 604; 8 Enc. Pl. & Prac. p. 211, tit. "Evidence," and cases cited. The stipulation admitted that the value of this wheat, when delivered, was 56 cents per bushel. It does not appear from the evidence when the tickets were turned over to Jepson and the wheat thus converted. Under the statute (Rev. Codes, § 1790) regulating the delivery of tickets for wheat stored, and under the well-known custom in dealings between parties in such matters, and in view of the said stipulation, we refuse to hold that the value of the wheat as fixed by this stipulation was not its value when the tickets were turned over to Jepson, which, in the usual course of business, was undoubtedly very soon after delivery at the elevator. The evidence of value having been introduced without objection, and under a mutual stipulation, and considered by counsel and court as competent and material at the trial, error in

acting upon it cannot be raised after the trial, under the circumstances of this case. 8 Enc. Pl. & Prac. pp. 231, 236, and cases cited; 2 Enc. Pl. & Prac p. 216, and cases cited; *Parsons* v. *Hedges*, 15 Iowa, 119.

This disposes of all the assignments of error urged in appellant's brief which we deem of sufficient merit to warrant consideration. Order denying new trial affirmed. All concur.

(87 N. W. Rep. 996.)

MINNEAPOLIS THRESHING MACHINE CO. *vs.* HUGH MCDONALD.

Opinion filed Nov. 6, 1901.

Sales—Refusal to Accept Damages.

Plaintiff and defendant entered into a written contract for the purchase by the defendant of a separator and attachments on June 14, 1899. The contract provided, among other things, that security by chattel mortgage should be given on the property purchased and on an engine and six horses. The defendant therein agreed to pay the freight on the property in advance of its delivery to him. Defendant refused to accept the property on August 17th, being dissatisfied with giving security on the horses. He offered to take the property if security were taken without including the horses. This offer was refused by the plaintiff; the property being deemed insufficient as security, there being a $600 mortgage on the engine. The plaintiff brought an action for damages on account of such refusal to accept the property.

Freight Element of Damage.

Held, that the plaintiff could recover for the freight charges paid by its agents, and properly pleaded in the complaint.

Irrelevant Testimony.

That defendant was not entitled to testify on the trial as to the circumstances under which he signed the contract, the answer having alleged no affirmative defense.

Opinion Evidence—Foundation.

That the defendant was not competent to testify as to the value of the property purchased by him, no sufficient foundation having been laid.

Measure of Damages.

That the measure of damages, under the facts, is the difference between the contract price agreed upon and the market value of the property at the time and place of the refusal to accept the property pursuant to the terms of the contract.

Incompetent Evidence.

That it was not error to refuse to submit such offer to take the property on less security to the jury, to determine whether such offer should have been accepted by the plaintiff.

Duty to Minimize Damages.

That it was not an error to refuse to submit such offer to the jury for determination as to the amount of damages.

The rule of law applicable under some circumstances in actions for damages, that it is the duty of the person claiming damages to minimize such damages to the lowest sum possible, is not applicable under the facts of this case.

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

Action by the Minneapolis Threshing Machine Company against Hugh McDonald. Judgment for plaintiff, and defendant appeals. Affirmed.

Freerks & Freerks, for appellant.

The evidence offered by defendant of its willingness to repurchase the machinery on different terms should have been received and submitted to the jury, because it was plaintiff's duty to minimize damages upon defendant's breach of contract. *Sherman* v. *Port Huron Engine Co.*, 82 N. W. Rep. 413. A resale, in order to hold defendant for damages, in case of a deficiency, would have to be made according to the custom existing in the market at the time. *Pollen* v. *LeRoy*, 30 N. Y. 549, 556. It was plaintiff's duty, upon the breach of the contract by defendant, to accept defendant's offer to buy, even on different terms, in order to minimize the damages, because it is the duty of one whose contract rights are violated to do all in his power to mitigate the damages. *Lawrence* v. *Porter*, 63 Fed. Rep. 62; *Hamilton* v. *McPherson*, 28 N. Y. 72; *Dillon* v. *Anderson*, 43 N. Y. 231; *Warren* v. *Stoddard*, 105 U. S. 224; *Frick* v. *Falk*, 50 Kan. 644, 32 Pac. Rep. 360; *Lumber Co.* v. *Sutton*, 46 Kan. 334, 26 Pac. Rep. 444; *Town Co.* v. *Leonard*, 26 Pac. Rep. 717; *Heckscher* v. *McCrea*, 24 Wend. 304; *Miller* v. *Trustees*, 20 Am. Dec. 341; *Grindle* v. *Express Co.*, 24 Am. Rep. 31; *Champlain* v. *Detroit Stamping Co.*, 68 Mich. 238; *Hanies* v. *Beach*, 90 Mich 563; *Mather* v. *Butler Co.*, 28 Ia. 259; *Heavilon* v. *Kramer*, 31 Ind. 241; *Williams* v. *Coal Co.*, 60 Ill. 149; *Green* v. *Williams*, 45 Ill. 206; *Dobbins* v. *Dequid*, 65 Ill. 464. In an action for damages for breach of contract, evidence that an offer was made to place the plaintiff in a position where his damages would be materially lessened is admissible. *Beymer* v. *McBride*, 27 Ia. 114; *Lawrence* v. *Porter*, 63 Fed. Rep. 62.

Purcell & Bradley, for respondent.

When defendant refused to accept and settle for the machinery ordered according to the contract, the right to bring suit at once attached, just as if the contract required an absolute payment in cash. *McCormick* v. *Basil*, 46 Ia. 235; *Barron* v. *Mullin*, 21 Minn. 374, 21 Am. & Eng. Enc. L. 588 & Note 2. Upon the breach of contract appellant had any one of three remedies. 2 Sedg. on Dam. 753; *Dustan* v. *McAndrew*, 44 N. Y. 72; *Hayden* v. *Demets*, 53 N. Y. 426. Under the statute, respondent was entitled to recover the difference between the contract price and the value to the seller.

§ § 4988, 5009, Rev. Codes; *Stanford* v. *McGill*, 6 N. D. 536, 72 N. W. Rep. 938. Respondent was under no obligation, legal or moral, to resell to appellant on different terms or for a different price, in order to save appellant from the consequences of his own act. *Ward* v. *Begg*, 18 Barb. 139. It is immaterial in this case whether respondent resold the machinery in question or not. A resale of goods is only a means of taking advantage of the seller's real remedy, that is, the recovery of his actual damages, when the resale is not made in such a manner as to indicate that the price obtained is the fair market value, the seller is not allowed to recover the entire difference between the price which he gets on the sale and the contract price. 2 Schuyler's Per. Prop., 519; *Chapman* v. *Ingram*, 30 Wis. 290; *Rickey* v. *Ten Broeck*, 63 Mo. 563; *Andrews* v. *Hoover*, 8 Watts, 39. The goods being the vendor's he could resell or not at his pleasure. Benj. Sales, § 758. The vendor had the right to keep the goods at their market value and sue the buyer for damages measured by the difference between the market value and the contract price. Benj. Sales, § § 716, 717; *Bridgeford* v. *Crocker*, 60 N. Y. 627; *Canda* v. *Wick*, 100 N. Y. 127; *Hayden* v. *Demets*, 53 N. Y. 426. There is no evidence in the case tending to show that the property was resold pursuant to § 4833, Rev. Codes, so as to make subdivision one, § 4988, Rev. Codes, applicable as a proper measure of damages.

MORGAN, J. In this action plaintiff seeks to recover damages from the defendant on account of his refusal to comply with a certain contract for the sale of a threshing machine outfit, including separator and accompanying attachments. The contract was in writing, and signed by the defendant. It was an order for a separator and necessary attachments, dated on June 14, 1899, and it contained a detailed contract for the purchase of the same. The defendant therein agreed "to pay the advance freight on the machine and attachments, ordered herein," and therein further "agreed to receive the above-described machinery on arrival." The order also provided that the defendant was to give to said plaintiff certain second-hand machinery and his two notes, for the sum of $360 each, as purchase price, and to secure such notes by chattel mortgage upon property specifically described therein. The security was to be given before the purchased machinery was to be delivered to the defendant. No question is made by the defendant as to the making of, nor as to the terms of, the contract. The complaint states a cause of action for a wrongful refusal to comply with the terms of such contract, and claims damages on account of such refusal in the sum of $38, freight necessarily paid, and the further sum of $390 as general damages for the breach of the contract, and demands judgment for the sum of $428 and interest. The answer was a general denial. At the close of the taking of the testimony the trial court directed a verdict in favor of the plaintiff for the sum of $372.08. The defendant excepted to such direction of a verdict. Judgment was duly entered upon such verdict. A statement of the

case was duly settled, in which are assigned various errors alleged to have occurred during the trial.

A brief statement of the evidence will be necessary for an understanding of the case and of the errors assigned. The agreed price of the machinery purchased was $930. Secondhand machinery was to be accepted as part payment of this $930, and such secondhand machinery was of the agreed value of $210. Two notes and a chattel mortgage were to be given for the balance; that is, for $720. The security agreed to be given for the payment of these notes, aside from the purchased machinery, was as follows: One 25 horse power Pitts traction engine, bought in 1897; six good work horses. The defendant was notified of the arrival of this machine as soon as it arrived. He called at the office of the plaintiff's local agents at Wahpeton, and had a conversation with one of such agents. The gist of this conversation was that he (defendant) was not satisfied to give security on the horses, and thought the security was too much; that he thought security on the engine enough; that he then refused to give security on the horses. Later the same conversation, substantially, occurred between defendant and the other member of plaintiff's local agents. At this last conversation the defendant offered to take the machine purchased, if allowed to give security on the engine and the machinery bought, without including the horses. This offer was refused for the reason that there was already a mortgage of $600 on the engine. At this last conversation he refused to carry out the contract as entered into on June 14th, and further negotiations ceased in reference to the transaction. This refusal occurred on August 17, 1899. There is no conflict between the parties as to what occurred during these negotiations. Seven assignments of error are urged as grounds for a reversal of the judgment.

The first assignment of error is based upon the fact that the trial court permitted plaintiff to prove that it had paid the freight charged, through its agents, and allowed such payment as an item of damages recoverable against the defendant. In the contract the defendant specifically agreed to pay all freight charges in advance. The plaintiff appropriately pleaded damages on account of such payment. The object of the suit was to recover damages that would compensate plaintiff for every detriment caused by the failure of the defendant to fulfill his contract. The plaintiff will be compelled to pay these freight charges, and could not fully be compensated as to its damages unless this outlay were allowed in its favor.

Error is urged because the court sustained an objection to the question asked of the defendant to the effect that he should state the circumstances under which he signed the contract. We think there was no error in sustaining this objection. There was nothing pleaded in the answer to which an answer to such a question would have been responsive. The defendant had previously admitted in his testimony that he had signed the contract. Nothing was pleaded or suggested to the effect that there was fraud, duress, or mistake in the execu-

tion of the contract. The contract was admitted to have been entered into, and the circumstances under which it was signed were wholly immaterial and irrelevant, under the pleadings. *Pollen* v. *Le Roy*, 30 N. Y. 559.

It is also assigned as error that the court sustained an objection to a question asked of defendant as to the value of the machinery purchased by him of the plaintiff. The objection to the question was that the defendant had not shown himself competent to testify as to such value. The only evidence on which he based his competency to so testify was the following: "My business is farming and threshing. I have been engaged in the threshing business 25 or 30 years." No testimony that he had any knowledge concerning the value of any kind of machinery, nor that he was ever engaged in buying or selling such machinery as was involved in the subject of the inquiry. No valid reason can be urged in favor of admitting his answer to such question, in view of the meager foundation laid. Furthermore, it was the market value of the machinery at the city of Wahpeton at the time of the refusal to comply with the contract that was in issue in the case. The question asked called for an answer as to the value of the machinery, no time being given.

The remaining assignments may be considered together, as they involve the same subject,—the refusal of the trial court to submit the case to the jury. As before stated, it appears from the evidence that the defendant offered to take this machinery about the time of his refusal to comply with the contract of purchase if the plaintiff would accept security the same as originally agreed upon, less the security on "six good work horses." This the plaintiff refused to do, because there was a $600 unpaid mortgage on the engine which was a part of the offered security on this proposed new contract. The appellant now claims that this offer should have been submitted to the jury, as it was for the jury to determine whether or not this offer to repurchase was such an offer as a reasonably prudent person engaged in the business of selling machinery in the city of Wahpeton should have accepted. His contention is that the plaintiff was under a legal duty to so act as to reduce the defendant's damages on account of his failure to perform his contract to the very lowest sum, and he claims that, had he then resold the machinery to defendant, no damages would have resulted. Under the facts of this case we cannot accede to either of these propositions. Immediately upon the refusal of the the defendant to receive the separator and attachments, the plaintiff was wholly absolved from any such duty towards the defendant in respect to the transaction. Defendant had broken his contract, and plaintiff could not legally be forced to deal with him on the basis of less security, which he deemed insufficient and liable to be followed by loss. The title to such property was still in the plaintiff. He could deal with it, under the facts of this case, as though he had never contracted to sell it to the defendant. He could not, of course, sell the property wrongfully and at a sacrifice,

and then claim the price received as a basis on which to found his damages. But, so long as he only claims damages based on the market value of his property, it is immaterial whether he sold it or not. He dealt with it as his own property, and had a right to do so. The plaintiff sold the property in August, 1900, but the evidence does not show at what price. The evidence shows, without any conflict, what the market value of this property was at Wahpeton at all times from the day of the defendant's refusal to receive it up to the summer of 1900. As we view the law of this case, the question of reselling by the plaintiff is not necessarily involved. Of course, the plaintiff might have proceeded to sell it, under § 4833, Rev. Codes. If it had done so, then the price received on such reselling would have been controlling as a basis from which to determine the damages by reason of the refusal to receive the property. But the evidence shows that that was not the theory on which the case was tried, and the trial court adopted the rule that the plaintiff was entitled to damages equal to the excess of the contract price over the market value of the property at the time of defendant's refusal to receive it. However, we need not dwell upon the rule of damages to be followed in this case. The plaintiff relies upon the measure of damages laid down in § § 4988, 5009, Rev. Codes. This court has held that said sections apply in cases of this kind. *Stanford* v. *McGill*, 6 N. D. 536, 72 N. W. Rep. 938, 38 L. R. A. 760. The defendant concedes that this case would govern, had not the defendant offered to take the property sold upon the new conditions proposed, —that of taking less security. As before stated, the defendant claims that this new offer of less security should have been submitted to the jury for determination as to whether it was a reasonable offer to buy on reasonable and usual terms. We do not understand that it is a province of a jury to determine whether a person owning property shall sell it on security not satisfactory to him, nor that a jury can say that a person shall not be allowed to make his own contracts in the way most advantageous to himself, without consulting the interests of the person with whom he had previously contracted. This is the logical conclusion to which the defendant's proposition leads. To so hold would be to place a premium on violations of contracts. If the defendant could force the plaintiff to abide by the verdict of a jury as to whether he should have accepted this new offer, then why not if still less or even no security had been offered? The defendant claims that the plaintiff should have accepted this new offer for the purpose of lessening the injury to the defendant caused by his own wrong as much as possible. This proposition is also based upon the erroneous supposition that a person cannot dispose of his own property upon such security as his judgment dictates, without regard to the effect upon the person with whom he is dealing, who has injured such person by a violation of his contract. It is true that under some circumstances the law will compel a person to so act towards one who has wrongfully violated his contract as to lessen such person's damages when his own rights

will not, and with certainty cannot, be jeopardized. For instance, in this case, if the plaintiff had refused to deliver this machine agreeably to the contract, and the defendant had been offered another machine an attachments exactly similar to the one contracted for with the plaintiff, upon exactly the same terms, then the defendant could not refuse such offer, and claim damages thereafter from the plaintiff for his failure to carry out his contract. Clearly, the defendant could show no damages beyond possibly the merest nominal damages. Such is the case of *Lawrence* v. *Porter,* 11 C. C. A. 27, 63 Fed. Rep. 62, 26 L. R. A. 167, cited by appellant. Likewise in cases where defenses of breach of warranty are interposed, and damages claimed. If damages are claimed for some trifling defect, which could readily and inexpensively have been remedied, a person will not be allowed to claim damages which he could have so easily avoided. *Frick Co.* v. *Falk,* (Kan.) 32 Pac. Rep. 360. The case of *Haines* v. *Beach,* 90 Mich. 563, 51 N. W. Rep. 644, cited by defendant, is not in point. In that case the court says, "and that it was the plaintiff's duty to use reasonable effort to re-establish himself in business, and to reduce this loss to a minimum." In other words, the plaintiff could not remain idle, without any endeavor to repair the injury done him, and then claim full reparation to himself, thus based in part upon his own wrong. The case of *Sherman* v. *Thresher Co.,* (S. D.) 82 N. W. Rep. 413, is confidently relied on by the defendant as decisive of this case in his favor. A reading of that decision convinces us that it is not at all in point. In that case plaintiff sought to recover from the defendant on account of commissions claimed to have been earned by him in selling certain engines as agent for the defendant, under a written contract. The defendant contended that it had the absolute right, under the contract, to reject any or all orders sent to it by its agents, the plaintiffs. The plaintiffs contended that it did not have such right. The court held that the defendant did not have an absolute right to reject that order, and the question should have been submitted to the jury to determine under the evidence whether the defendant wrongfully refused to fill the order. There is nothing in the case which in any way involves the rights of purchaser and seller. It settles simply the rights of principal and agent under a written contract as involved in that case only. It is far from being an authority that the adequacy or sufficiency of offered security as beteween buyer and seller, when they are negotiating as to a resale of property when a former contract has been broken, shall be submitted to a jury to determine whether such security was sufficient; and it is far from being an authority holding that the plaintiff in this case should have accepted such offer, that defendant's damages to plaintiff on account of the breach of the contract might be reduced to the lowest degree. The plaintiff was under no obligation to resell to defendant, nor to any one else, before proceeding against the defendant for damages. The cause of action for damages on account of the refusal of defendant to accept the machine became complete at once

upon defendant's refusal to accept. *McCormick* v. *Basal*, 46 Iowa 235; *Barron* v. *Mullin*, 21 Minn. 374. "As the computation of damages is tested by the market value, the result would be the same whether the seller resold the goods, or retained them, as he might do, at a market valuation." 2 Schouler, Pers. Prop. § 519. The fact that the defendant is claimed to have been financially responsible has no bearing upon the question at all. We therefore hold that the defendant's offer to take this property on new terms, by tendering less security, considered insufficient by the plaintiff, was no offer at all, as a matter of law, and that the plaintiff, by refusing to accept, did not wrongfully violate any of the defendant's legal rights. The defendant did not have the right to have such offer submitted to the jury for any purpose, and there was no error in striking out the testimony relating to such offer, and no error was committed in directing a verdict for the plaintiff.

The defendant claims that, inasmuch as this property was sold on credit in the first instance, a resale should have to be made according to the custom existing in the Wahpeton market, and, as substantiating such contention, showed that threshing machines are there sold on credit in a majority of cases, and that such sales on credit are the usual custom. We do not think that such custom can affect this case. No custom was shown that sales or resales are there made on security that is not acceptable to the person selling. He cites the case of *Pollen* v. *Le Roy*, 30 N. Y. 549, as in point. We do not so interpret it. In that case the plaintiffs resold the property after the defendants had refused to receive it, and the court held that the resale must be made in good faith, and under a proper observance of the usages of the particular trade. In that case the defendants claimed that the property should have been sold by auction. The court says: "The ordinary usage of the trade is to effect sales of pig lead through the negotiation of brokers. This usage the plaintiffs were bound to adopt, to obtain the full and fair value of the article." Certainly this cannot be an authority that the plaintiff in this case must resell upon security deemed by him insufficient.

The contract price was not in dispute, nor the fact of a breach of the contract. The market value of this property at Wahpeton at the time of the refusal to receive it under the contract was also an undisputed fact. Hence there was no question of fact in dispute in the case. No error was committed at the trial.

The judgment of the district court is affirmed.

All concur.

(87 N. W. Rep 993.)

ZERLINA S. EAKIN *v.* L. C. CAMPBELL.

Opinion filed Oct. 16, 1901.

Appeal—Trial De Novo—Statement of Case.

To secure a trial ne novo in this court in actions tried to the court without a jury, under §5630, Rev. Codes 1899, it is necessary that the statement of case settled shall in fact contain all of the evidence offered and proceedings had at the trial, as well as the specifications required by said section. It is accordingly *held* that the failure of appellant to incorporate in the statement certain exhibits, which were offered in evidence in the trial court, or to have the same officially identified as constituting a part of such statement, precludes this court from trying the case anew.

Election Contest—Evidence Supports Finding.

This is an election contest. The trial court found that the plaintiff and contestant had a majority of the votes cast upon the official precinct return; further, that she also had a majority upon a count of the ballots of the only precinct in dispute. It is *held* that these findings support the judgment appealed from, which declares the plaintiff to have been elected and awards to her the office in dispute.

Appeal from District Court, Foster County, *Glaspell*, J.

Action by Zerlina S. Eakin against L. C. Campbell. Judgment for plaintiff. Defendant appeals. Affirmed.

C. E. Leslie and *Newman, Spalding & Stambaugh*, for appellant.

F. Baldwin, for respondent.

YOUNG, J. This is an election contest. The plaintiff and defendant were rival candidates for the office of superintendent of schools for Foster county at the general election held November 6, 1900, and their names appeared upon the official ballots at said election, in their respective party columns. In canvassing the precinct returns, the county canvassing board determined that 431 votes had been cast for plaintiff, and 433 votes for defendant, or a majority of two for defendant. In accordance with such canvass, a certificate of election was issued to the defendant. Thereafter, and within the time allowed by law, the plaintiff, Zerlina S. Eakin, instituted this contest under the provisions of article 12 of chapter 8 of the Political Code (Rev. Codes, 1899, § § 563, 575). The correctness of the returns and canvass as to 12 of the 13 precincts into which the county is divided is not challenged. Plaintiff in her notice of contest attacks one precinct only, namely, Carrington precinct. As to this she alleges that, if the legal votes cast at said precinct were properly counted and canvassed, she would have a majority of all votes cast for said office. The issues joined by the notice of contest and defendant's answer thereto, so far as material, relate entirely to Carrington precinct. The trial court found, upon an inspection of the ballots of that precinct, that the plaintiff had a majority of seven of all votes cast for said office. This result was reached by adding to the unchallenged returns of the 12 precincts the vote of Carrington precinct, as determined by an examin-

ation of the ballots returned by the precinct officers. Judgment was ordered and entered directing the county auditor to issue a certificate of election to the plaintiff. From that judgment, the defendant prosecutes this appeal.

A statement of case is contained in the record transmitted to this court, which was apparently settled with a view to securing a retrial in this court such as may be had in civil actions tried under the provisions of § 5630, Rev. Codes, 1899. The statement has a certificate of the trial judge attached thereto reciting that it contains all of the evidence offered and proceedings had, and contains a statement that the appellant desires this court to review the entire case. An examination of the statement shows that it does not contain all of the evidence offered. None of the exhibits, which are shown to have been offered in evidence at the trial—and they are 26 in number—are contained in the statement. Neither are they otherwise officially identified as constituting a part of such statement. These include the poll books, precinct returns, and such disputed ballots from Carrington precinct as were submitted to the trial court. Upon this state of facts, this court is without jurisdiction to try the case de novo under the section of the Revised Codes above referred to. Appellants who would avail themselves of the right to a retrial in this court under said section must see to it that the statement of case settled does in fact contain all that is necessary to authorize such retrial. Where a review of the entire case is demanded, and such is the demand in this case, the statement must contain all of the evidence offered and proceedings had; otherwise the power to retry or review the evidence does not exist. It is imperative that exhibits offered shall be actually embodied in the statement, or be officially made a part thereof, when it is not feasible to physically embody them therein. This has been the uniform holding of this court in a long series of decisions. The judge's certificate that the statement contains all of the evidence offered and proceedings had is not conclusive. *Bank* v. *Davis*, 8 N. D. 83, 76 N. W. Rep. 998; *Register Co.* v. *Wilson*, 9 N. D. 112, 81 N. W. Rep. 285 and cases cited in opinion; also *Loan Co.* v. *McLeod*, 10 N. D. 111, 86 N. W. Rep. 110; *Giels* v. *Fluegel*, 10 N. D. 211, 86 N. W. Rep. 712.

A number of miscellaneous papers have been filed in this court with the record in the case which constitute no part of the judgment roll. Among them are certain shorthand notes and files in another election contest case, also certain poll books and ballots, which may be the poll books and ballots referred to in the statement as having been offered in evidence. They are, however, in no way connected with the statement by any official identification by the trial judge. The only marks upon them by which any one could possibly identify them are certain shorthand characters, which are wholly unintelligible to us. Under these circumstances, we would not be warranted in assuming that these loose and unidentified papers are the exhibits actually offered, and thus proceed to determine the rights of these

litigants to the office in question upon a mere assumption as to what constitutes the evidence of their rights. C. E. Leslie, one of the attorneys for appellant, has filed an affidavit in this court stating that, at the settlement of the statement of case in the district court,he inclosed the several exhibits in a large envelope or "pocket,"and that this "was attached to the balance of the settled statement of the case to which the judge's certificate was attached." The affidavit does not state how the envelope was attached. But, in any event, it is not important to consider what attempts were made in the district court to bring the exhibits into the statement. *Kipp* v. *Angell,* 10 N. D. 199, 86 N. W. Rep. 706. We are governed by the record filed in this court, and the statement as presented to this court does not contain the exhibits, and they are not identified by the trial judge as constituting a part of such statement. A trial de novo cannot, therefore, be had.

The only question before us for consideration is whether the judgment of the trial court awarding the office to the contestant is sustained by the findings. It is entirely clear that it is, and the judgment must accordingly be affirmed. The findings establish the fact that the official precinct returns of the several precincts of the county gave the plaintiff a majority of nine of all the votes cast for the office of county superintendent; further, that an actual count of the ballots of Carrington precinct, together with the unchallenged returns of the other twelve precincts, gave her a majority of seven votes for said office. The error of the county canvassing board, through which the defendant obtained her certificate of election, was made by going outside of the official statement of election returned by the election officers of Carrington precinct, and counting a large number of votes for both candidates from certain tally lists which were found in the poll books of that precinct. This was improper. In *State* v. *Mackenzie,* 10 N. D. 132, 86 N. W. Rep. 231, decided since this appeal was taken, we reached the conclusion that, under the election laws of this state, "tally lists" constitute no part of the precinct returns. It is the duty of county canvassing boards to canvass the votes as certified by the precinct officers, and the returns must stand until such facts are proven as show that they are not true. McCrary, Elect. § § 412, 571. In this case the evidential effect of the certificate of election issued to the defendant is overthrown by the fact that the precinct returns upon which it is based show that plaintiff, and not defendant had a majority of all the votes cast for said office. While the official returns are binding upon canvassing boards, that is not true as to courts in election contests where the purpose is to ascertain the true vote. On this Judge Cooley in his Constitutional Limitations (page 625) says: "Back of the prima facie case [made by the certificate of election] the courts may go, and the determination of the state board may be corrected by those of the district board, and the latter by the ballots themselves, when the ballots are still in existence, and have been kept as required by law." Counsel for appellant contend that the ballots of Carrington precinct had lost their evidential character by reason of the manner in which they were kept. This as-

signment relates entirely to their admissibility in evidence, and is not reviewable upon the findings; but if this question could be reviewed, and we should hold that they were not in fact admissible for the reason assigned, it could not affect the result, for in that event the precinct returns would stand unimpeached, as declaring the true vote. The precinct returns show that the contestant received a majority of nine, and the count of the ballots which is objected to gives her a majority of seven. Upon the facts of this case as they appear in the findings, it is not necessary to discuss or determine whether the precinct returns or the ballots constituted the best evidence of the true state of the vote, as in either event the contestant received a majority.

Judgment affirmed. All concur.

(87 N. W. Rep. 991.)

GEORGE P. FLATH *vs.* J. P. CASSELMAN.

Opinion filed Oct. 19, 1901.

Appeal—New Trial—Sufficiency of Evidence.

In reviewing an order of a trial court overruling or granting a motion for a new trial, where the motion is based entirely upon the insufficiency of the evidence to sustain the verdict, this court will only inquire whether there is evidence of a substantial character supporting the verdict.

Evidence Sustains Verdict.

In this case it is *held* that there is substantial evidence to sustain the verdict, and that the trial judge did not abuse his discretion in overruling defendant's motion for a new trial.

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

Action by George P. Flath against J. P. Casselman. Judgment for plaintiff. Defendant appeals. Affirmed.

Bosard & Bosard, for appellant.

Tracy R. Bangs, for respondent.

YOUNG, J. Action on two promissory notes executed and delivered by the defendant, Casselman, and one George Miller, as part payment for a Lambert gasoline threshing engine. Both notes are dated September 7, 1899. One is for $80, and is payable to the plaintiff. The other note is for $400, and is payable to the Lambert Gas & Gasoline Engine Company or order. The defense interposed is that the engine was sold under an express warranty; that there was a breach thereof, and rescission of the contract by the defendant. The trial was to a jury, and resulted in a verdict for plaintiff for the amount demanded in his complaint. A motion for a new trial was made by defendant. This was overruled, and judgment ordered and entered on the verdict for plaintiff. Defendant appeals from the judgment,

and specifies as error the order of the trial court overruling his motion for a new trial.

The sole ground of the motion for new trial is the alleged insufficiency of the evidence to justify the verdict. The warranty upon which defendant relies to defeat a recovery is contained in the following allegations of his answer: "The defendant alleges that the said plaintiff and one J. W. Lambert at the time of negotiating the sale of said engine to defendants made certain statements and representations, and guaranties in regard to said engine, as follows: That said engine would with one gallon of gasoline per horse power (that is, twelve gallons of gasoline per day), develop sufficient power to operate a certain separator which the plaintiff, who was the agent of the Peerless Threshing Machine Company, sold to the defendant at such time, and that, unless said engine would develop such sufficient power by consuming twelve gallons of gasoline per day, that the defendant could rescind said contract, and that said Lambert Gasoline Engine Company would return to him his notes." To sustain this defense, it was necessary for the defendant to establish (1) that there was an express warranty of the engine in the particulars alleged; (2) that the engine did not fulfill the requirements of such warranty; and (3) that the defendant notified the seller that the engine did not comply with the warranty. The position taken by the defendant in the trial court upon his motion for new trial was that all of the foregoing facts were established by uncontradicted evidence, and that is his contention on this appeal. If this contention is sustained, and the record discloses that the evidence is uncontradicted, as claimed, then it is patent that the order of the trial court refusing a new trial was erroneous. If, on the other hand, it shall appear that there is a substantial conflict in the evidence as to any facts material to the defense interposed, then the order overruling defendant's motion must be sustained; for the rule is well settled that this court will not weigh conflicting evidence, and that it will not disturb the order of a trial court granting or denying a new trial where there is a substantial conflict in the evidence. This is a rule of appellate tribunals generally. *Magnusson* v. *Linwell*, 9 N. D. 157, 82 N. W. Rep. 743; *Howland* v. *Ink*, 8 N. D. 63, 76 N. W. Rep. 992; *Muri* v. *White*, 8 N. D. 58, 76 N. W. Rep. 503; *Bishop* v. *Railroad Co.*, 4 N. D. 536, 62 N. W. Rep. 605; *Taylor* v. *Jones*, 3 N. D. 235, 55 N. W. Rep. 593; *Dickey* v. *Davis*, 39 Cal. 569; *Bank* v. *Wood*, 124 Mo. 72, 27 S. W. Rep. 554; Hayne New Trial & App. § 288. See, also, 2 Enc. Pl. & Prac. 391, and cases cited. And it is not absolutely necessary to create a conflict in the testimony that the witnesses shall explicitly contradict one another. A conflict may be created by evidence tending to establish other facts which are inconsistent with the existence of the facts relied upon. *Black* v. *Walker*, 7 N. D. 414, 75 N. W. Rep. 787.

We will now turn to a consideration of the evidence, and in doing so we find it unnecessary to go beyond that relating to the alleged warranty of the engine. At the date of the transaction in question

the plaintiff was the resident agent for the sale of Lambert gasoline engines, and had his office with J. E. Cooley and John Cooley, in the city of Grand Forks. The Cooleys were agents for the separator which was purchased by the defendant with the engine in question. The plaintiff fixed a price on the engine at which the agents for the separator were authorized to sell the same, and all preliminary negotiations for the sale to defendant were conducted by said agents. Neither the plaintiff, nor J. W. Lambert, by whom the alleged warranty is claimed to have been made, were personally connected with the sale prior to the day upon which the notes in suit were executed. The witnesses agree that the defendant did not purchase or agree to purchase the engine and separator until the notes were given; also that he took the same from the railroad station on September 1st to his farm for the purpose of trying the same pursuant to authority received from Ed. Cooley. On this defendant, Casselman, testifies as follows: "Mr. Ed. Cooley stated to us that we could take that machine and run it for ten days if we wanted to. * * * When I took the engine from Northwood to the farm, I didn't say anything about buying. I took it there on trial. * * * There was no contract made with John Cooley or Ed. Cooley on that day. They told me to go out and take the machine and try it. After I hauled the machine to my farm, I had it in my possession merely for the purpose of trying it." Ed. Cooley testifies: "I told him he could go and take the machine and try it, and if it was satisfactory he could settle for it; he could have a trial of the machinery first. * * * He said he wouldn't give any order for the machine; that he would take the machine and try it, and if it was all right he would settle for it with his notes. * * * I never told him he could take the machine, and try it for ten days. I just gave him the figures. I wrote them down, and told him to go and take the machine and try it, and if it was satisfactory he could settle for it." There is no evidence in the record tending to contradict the facts testified to above. It is therefore uncontradicted that the engine was delivered into defendant's possession for the purpose of trial on September 1st, and that such was his relation to it up to the day the notes were executed, at which time the sale was consummated, and the warranty was made by plaintiff and Lambert, if at all. Five persons were present at the settlement, and their testimony is before us.

We will now consider the evidence relative to the warranty al-alleged to have been made at this settlement. On the part of the defense the defendant, George Miller, and Harry Miller all testify positively that both Flath and Lambert, at the time the notes were executed, made the representations and guaranty substantially as alleged in the answer and heretofore quoted. The defendant gives his version of the circumstances under which the notes were given in the following language: "When Mr. Flath and Mr. Lambert were there, we signed the notes. * * * At that time, when we went into the house, and he figured up and said he wanted to take notes for the separator and engine. I objected

and said we had not given it sufficient trial; that we had to have a good thorough trial before we gave the notes. Then he said it did not make any difference; if the machine did not work just as they said it would, that we did not have to keep it. Both Mr. Flath and Mr. Lambert told me if the engine did not work I could return it. That statement was made by both of them at the table in the house when we went in to determine on what we would do. They made the remark numerous times while we were there that, 'if our machines don't work just as we say they do, people do not have to keep them.' They made general remarks of that kind. * * * After we had tried that machine for one hour, we settled with Mr. Flath and Mr. Lambert, and gave the notes conditionally." The testimony of George Miller and Harry Miller is, in substance, the same as that just quoted.

We now turn to the testimony of Flath and Lambert, so far as it relates to the settlement. Flath's version of the transaction is as follows: "I have heard Mr. Casselman's testimony. I was in Nelson county in September, and made a settlement with him for a certain Lambert gasoline engine, and a separator that went with it. After testing this separator and engine after we got there, giving it all the test that Mr. Casselman required, I said to him and Mr. Miller, 'Do you gentlemen want to call this outfit yours?' They said they did. 'Well,' I said, 'let us go up to the house and settle for it,' when we proceeded up to the house and made settlement for the engine and for the separator and for freight, according to the agreement with Ed. Cooley. The machine had been running before I had this talk with Casselman and Miller. It had threshed all they required to thresh that day. Neither Mr. Lambert nor myself said anything of the character that, if the machine did not run, they need not keep it. I told them they would probably have some trouble with the engine and in case they did, they were at liberty to call upon me at Grand Forks, and I would come out and help them out of their difficulty. I said there would certainly be some slight thing that they didn't just understand; * * * I did not hear Mr. Lambert make any statement out there that this machine would develop twelve horse power on twelve gallons of gasoline per day. I do not remember that either of us said anything to Casselman as to the amont of gasoline this engine would consume. Neither before nor after signing the notes was there any agreement between Casselman and Miller and ourselves in my presence that it was agreed that, if the machine did not operate as it had been stated, that they need not keep it." J. W. Lambert says: "I never met any of these people until after the engine had been delivered into their possession. On September 7th I went with Flath to Casselman's farm to start the engine; gave Casselman and Miller instructions how to operate and handle the engine in question. At the same time we threshed, possibly, three or four loads of barley. After this was through, Mr. Casselman came and told me to stop the engine; he said that the outfit was satisfactory to him. We went up to the house, and

Casselman and Miller made out the notes to Flath for the full settlement. I told Casselman the engine would not use less than a gallon of gasoline per indicated horse power for each ten hours' run. I told him it was a twelve horse power engine, while it would develop over twelve horse actual power. The indicated horse power is greater than the actual horse power. The engine in question produced between fourteen and fifteen actual horse power, and indicated twenty-two horse power. I told them it would take one gallon of gasoline for each indicated horse power; that is, not less than twenty-two gallons to run that engine in its full capacity for the period of ten hours. I made no other statement, guaranty, warranty, or representation whatsoever. * * * I never made any statement to the defendants that they could rescind the contract if the engine did not develop sufficient power by consuming twelve gallons of gasoline per day. I never made any representations to the defendants as to what the engine would do."

There is other evidence in the record which might have some weight in determining the truth as to what was done at the settlement. But, as has already been stated, our duty in reviewing the order of the trial court overruling the defendant's motion for a new trial does not go to the extent of authorizing us to assume the functions of the jury and weigh conflicting evidence, or even to assume the discretion the trial court had in ruling on the motion. We are limited to the single inquiry as to whether there is a substantial conflict in the evidence as to the material facts which are necessary to establish the defense pleaded; and in pursuing this inquiry we have reached the conclusion that there is a direct conflict on a vital fact, namely, as to the making of the warranty upon which defendant relies. This conflict is sufficiently shown by the evidence heretofore quoted. If, on the one hand, the jury would give full credit to the testimony of the defendant and the witnesses George and Harry Miller, they would necessarily find that the warranty had been made by Flath and Lambert as alleged in the answer. But, on the other hand, if they believed the testimony of Flath and Lambert, they could properly conclude therefrom that no warranty was made, and that the engine was purchased after a test made to determine whether it was satisfactory, and that the notes were given as an unconditional settlement. Briefly stated, the defendant's evidence tends to establish a warranty, while the testimony of the plaintiff tends to establish an unconditional settlement after a test and without a warranty. The facts are inconsistent, and the evidence tending to sustain the same is of a substantial nature.

We cannot say on this state of the evidence that the trial judge abused his discretion in denying the motion for new trial. It follows, therefore, that the judgment must be affirmed, and it is so ordered. All concur.

(87 N. W. Rep. 988.)

KIDDER COUNTY *vs.* WILBUR F. FOYE.

Opinion filed Oct. 26, 1901.

Striking Out Irrelevant and Frivolous Matter.

In disposing of a motion to strike out portions of an answer as irrelevant and frivolous the legal sufficiency of the answer as a pleading is not involved, and the court can only inquire whether the matter sought to be eliminated is relevant to the issues, and, if relevant, whether the same is frivolous in character.

Relevant Matter Improperly Stricken from Answer.

Applying this rule to the facts of this case appearing in the opinion, *held*, that the order of the trial court striking from the answer certain parts thereof referred to in the opinion is erroneous, and must be reversed.

Improper Order—Directing Amendment.

The trial court, on motion, made an order directing the answer to be so amended as to make the third paragraph of the same more definite. Upon grounds stated in the opinion, *held* that the third paragraph of the answer is reasonably definite, and that the order is erroneous, and must be reversed.

Appeal from District Court, Kidder County; Winchester, J.

Action by the County of Kidder against Wilbur F. Foye. From an order striking out part of an answer and directing that a particular paragraph thereof be amended, defendant appeals. Reversed.

Charles H. Stanley and *Pollock & Scott,* for appellant.

J. W. Walker, for respondent.

WALLIN, C. J. The record in this case discloses the following facts: The action is brought to recover of defendant the sum of $123.33, with interest, which amount the plaintiff alleges represents an overpayment by the plaintiff to the defendant on account of his salary as county treasurer of Kidder county. The complaint, after excluding its immaterial parts, is as follows: "(3) That the defendant was the duly elected, qualified, and acting county treasurer of and for the plaintiff, the said county of Kidder, at all times between the 7th day of January, A. D. 1895, and the 4th day of January, A. D. 1897 inclusive of a part of each of said two days. (4) That the total amount of the collections made by the defendant as such county treasurer during the year A. D. 1895, exclusive of the amount received by him from his predecessor in said office, was thirty-three thousand six hundred and fifteen dollars ($33,615.00), and did not exceed that amount; and that there was paid by the plaintiff to the defendant, for and as the defendant's salary as such county treasurer for and during the year A. D. 1895, by the warrants of said plaintiff county upon its treasury duly ordered, drawn, and issued to said defendant and in his favor, the full sum of eleven hundred and sixty-six dollars and sixty-seven

cents ($1,166.67), all of which warrants were afterwards duly paid, with interest by the treasurer of the plaintiff county; and that, on the 1st day of January, A. D. 1896, there was not any sum of money due or owing by the plaintiff to the defendant, as such salary. (5) That the total amount of the collections made by the defendant as such county treasurer from and inclusive of the 1st day of January, A. D. 1896, to and inclusive of the 4th day of January, A. D. 1897, was twenty-one thousand nine hundred and sixty-three dollars and sixteen cents ($21,963.16), and did not exceed said amount, and that there was paid by the plaintiff to the defendant, for and as the defendant's salary as such county treasurer for the period beginning with January 1, 1896, and ending on the 4th day of January, 1897, by the warrants of said plaintiff county upon its treasury duly ordered, drawn, and issued to said defendant, and in his favor, the full sum of eleven hundred dollars ($1,100.00), all of which warrants were afterwards duly paid, with interest, by the treasurer of said plaintiff county; and that on the 4th day of January, A. D. 1897, there was not any sum of money due or owing by the plaintiff to the defendant as such salary. (6) The plaintiff avers that on the 7th day of January, A. D. 1897, after the duly-constituted board of county commissioners of the plaintiff county had then in regular meeting made settlement with the defendant as such county treasurer, and after the defendant's said term of office as such county treasurer had fully expired and he had for several days ceased to be or act as such county treasurer and had several days before been succeeded by one J. J. Haves, his successor in office, as such county treasurer, the board of county commissioners of such plaintiff county, to-wit, of the said county of Kidder, while then sitting in regular meeting, did, without any authority of the law, audit and allow to the defendant a claim for the sum of one hundred and twenty-three dollars and thirty-three cents ($123.33) for and as a pretended balance then and there claimed by the defendant to be due him on and of the defendants salary as such county treasurer for and during his said term of office as such officer, which said claim the defendant did then and there duly make and file before said board; and that the said board of county commissioners did then in due form, but without any authority of law, order that the warrants of the plaintiff county, to-wit, of the said county of Kidder, be drawn, executed, issued, and delivered to the defendant, in favor of the defendant for the said sum of one hundred and twenty-three dollars and thirty-three cents ($123.33), for and as payment of said pretended balance of such salary so claimed by him; that thereupon the two several warrants of said plaintiff county, to-wit, of said county of Kidder, were, under and by virtue of said order of said board, duly drawn, executed, certified, issued, and delivered to the defendant, each and both of said warrants being drawn in favor of the defendant, and made payable to his order,—one thereof being for the sum of thirty-eight dollars and thirty-three cents ($38.33), and drawn on the interest and penalty fund of said county and the other being for the sum of eighty-five dollars, and

drawn on the general funds of said county,—each and both of said warrants being signed by the chairman of the board of county commissioners of said plaintiff county, and attested by the county auditor of said county, and by him certified and delivered to the defendant; that, thereafter, on the 8th day of January, A. D. 1897, the said warrants were duly presented by the defendant to the county treasurer of the plaintiff county, to-wit, of the said county of Kidder, and that on said day last mentioned the said warrant that was drawn on the interest and penalty fund of said county, to-wit, the warrant for $38.33, was paid in full by said county treasurer, and that on said 8th day of January, A. D. 1897, said other warrant, to-wit said warrant drawn on the general fund of said county for $85.00, was presented by the defendant to said county treasurer of said county for payment, and was duly entered and registered by said treasurer and that said last-mentioned warrant was thereafter, to-wit, on the 16th day of November, A. D. 1897, fully paid by the county treasurer of said county, together with interest on the said principal sum thereof from and after said date of its registration, and that each and both of said warrants were so paid for and as the aforesaid pretended balance to the defendant on and of his said salary as county treasurer, as aforesaid. But the plaintiff avers that at the time when the said board of county commissioners ordered said payment as aforesaid there was not any money whatever due or owing by the plaintiff to the defendant of, for, or as his salary as county treasurer as aforesaid; that there was not at any time during the year A. D. 1897 any balance or sum of money owing by the plaintiff to the defendant on, of, or for salary as county treasurer of the plaintiff county, to-wit, the said county of Kidder, of or for any term, year, or period whatever, that each and both of said warrants last hereinbefore mentioned were ordered, drawn, executed, and delivered to the defendant without any authority of law, and that said sum of one hundred and twenty-three dollars and thirty-three cents, and said interest thereon, was paid to the defendant, without any authority of law whatever. Wherefore the plaintiff demands judgment against the defendant for the sum of one hundred and twenty-three dollars and thirty-three cents ($123.33), and interest thereon from and since the 8th day of January, A. D. 1897, at the rate of seven per cent. per annum, and for its costs and disbursements herein expended, and for general and all further relief as may be just and equitable in the premises, and as the plaintiff may show itself to be legally or equitably entitled." To which complaint the defendant answered, which answer, after excluding immaterial parts, is as follows: (2) "The defendant admits that as such county treasurer during the year A. D. 1895, exclusive of the amount received by him from his predecessor in said office, he collected the sum of thirty-three thousand six hundred and fifteen dollars ($33,615) as alleged in paragraph 4 of said complaint, and that during the year 1896, and prior to and until January 7, 1897, as such county treasurer, he collected the sum of twenty-one thousand and nine hundred sixty-three and 16-100 dollars ($21,963.16),

as alleged in paragraph 5 of said complaint, but denies that in the year 1895 he was paid the sum of eleven hundred sixty-six and 67-100 dollars ($1,166.67), as alleged in paragraph 4 of said complaint, and alleges that the total amount paid to him out of said county treasury for the year 1895 for salary was eight hundred thirty-two and 81-100 dollars ($832.81); and denies that for the year 1896 and the first seven days of Janaury, 1897, there was paid to him as salary the sum of eleven hundred dollars ($1,100) out of said county treasury, and alleges that for said term there was only paid to him the sum of five hundred eighty-eight dollars and thirty-three cents ($588.-33). (3) The defendant admits the allegations contained and set forth in paragraph 6 of said complaint, as follows: That on the 7th day of January, A. D. 1897, the duly constituted board of county commissioners of the plaintiff county, in regular meeting, made a settlement with the defendant as county treasurer, and did then and there allow to defendant a claim for the sum of one hundred twenty-three and 33-100 dollars ($123.33), and ordered that the warrants of the plaintiff county be issued and delivered to the defendant for such sum, and that thereupon the two several warrants of said plaintiff county were, under and by virtue of the order of said board, duly drawn, executed, issued, and delivered to this defendant—one for the sum of thirty-eight and 33-100 dollars ($38.33) on the interest and penalty fund of said county, and the other for the sum of eighty-five dollars ($85.00) on the general fund of said county; that the said warrant for said sum of thirty-eight and 33-100 dollars ($38.33) was paid by the county treasurer of said county to this defendant on or about the 8th day of January, A. D. 1897, and that the said warrant for the said sum of eighty-five dollars ($85.00) was, on said last mentioned date, registered by said treasurer; and the defendant denies each and every allegation in said paragraph 6 of said complaint made and contained, save and except as above specifically admitted. (4) The defendant, further answering said complaint, denies each and every allegation therein contained, and each and every part thereof, save and except as hereinbefore admitted, qualified or explained. (5) The defendant, further answering said complaint, and as and for a defense to said action, respectfully shows to the court and alleges; That during the last half of the year 1896 the duties of the office of county treasurer of said plaintiff county imposed and required so much work that it was impossible for one person to discharge the duties of the office and perform the work thereof, and that this defendant, with the knowledge, consent, and acquiescence of the board of county commissioners of said county, and by and under authority granted by said board to him, did employ and procure assistance in the discharge of the duties of said office, and did procure additional help to so perform and discharge such duties, reasonably and fairly worth, and for which this defendant did pay, the sum of two hundred dollars ($200.00), and that this defendant did settle and pay for such additional help and services with the knowledge, consent,

and acquiescence of said board of county commissioners, and with, under, and by authority from such board. That thereafter, and on the 7th day of January, A. D. 1897, said board of county commissioners had a settlement with this defendant with reference to all claims, matters, and things between the said plaintiff county and this defendant arising and growing out of his salary as such county treasurer, as well as with reference to any and all claims which he then had or might have against said county for money so expended as aforesaid for and in behalf of said county; and it was then and there agreed by and between said board of county commissioners and this defendant, after a full and fair consideration and settlement of all claims for salary and disbursements had been had by and between said county commissioners and this defendant, that there was fairly due and unpaid to this defendant from said county on account thereof the sum of one hundred twenty-three and 33-100 dollars ($123.33), and that said sum was actually so due and unpaid and owing from and by said county to this defendant; and the said board of county commissioners then and there audited and allowed to this defendant, in full payment thereof, the said sum of one hundred twenty-three and 33-100 dollars ($123.33), and caused to be issued to him therefor the said warrants for thirty-eight and 33-100 dollars ($38.33) and eighty-five dollars ($85.00), respectively, as described and set forth in said complaint. That thereafter there was paid by the said county, through and by its county treasurer, to this defendant, the said sum of thirty-eight and 33-100 dollars ($38.33) upon the one warrant so issued, but that no sum of money was ever paid by said county to this defendant upon the warrant for the said sum of eighty-five dollars ($85.00) issued and delivered to this defendant, as in said complaint alleged. Wherefore defendant demands judgment for his costs and disbursements."

The answer was successfully assailed in the trial court by two separate motions made in behalf of the plaintiff, which motions were, respectively, as follows: First, a motion was interposed to strike out of the answer certain averments contained in paragraph numbered 2 thereof, which are as follows: "But denies that in the year 1895 he was paid the sum of eleven hundred sixty-six and 67-100 dollars ($1,166.67), as alleged in paragraph 4 of said complaint, and alleges that the total amount paid to him out of said county treasury for the year 1895 for salary was eight hundred thirty-two and 81-100 dollars ($832.81), and denies that for the year 1896 and the first seven days of January, 1897, there was paid to him as salary the sum of eleven hundred dollars ($1,100) out of said county treasury, and alleges that for said term there was only paid to him the sum of five hundred eighty-eight and 33-100 dollars ($588.33)." And also to strike from the answer its fifth paragraph, and the whole thereof. These motions were based upon the complaint and answer. The district court granted the motion, and by its order struck out of the answer each and all of the parts thereof as above indicated. The grounds and

reasons for striking out said portions of the answer, as stated in said order of the trial court, are that said portions of the answer "are irrelevant and irresponsive to any of the allegations of the plaintiff's complaint and frivolous."

The plaintiff's other motion was leveled exclusively at the third paragraph of the answer. The plaintiff, in its notice of motion, asked for an order of the district court directing, in effect, that paragraph No. 3 of the answer be so amended as to make the same more definite and certain with respect to certain particulars which are enumerated in the moving papers; but such particulars, from our point of view, need not be further mentioned in this connection. The last-mentioned motion was likewise granted, and the trial court, by its order granting the same, directed that, after being amended in the third paragraph in respect to the particulars set out in the order, the answer should be served upon the plaintiff's counsel. The two motions were heard and decided at the same time, and the orders granting the same bear the same date. Defendant has appealed to this court from each and both of the orders, and, as they are closely related, they may conveniently be discussed and disposed of together.

Error is assigned in this court predicated upon granting said motions of the plaintiff, and making each of the orders appealed from. It is our judgment that the plaintiff's assignments of error are entirely sound and must therefore be severally sustained. It is well established that averments contained in pleadings should be liberally construed with a view to expediting a speedy trial upon the facts and merits in furtherance of justice. From our standpoint the answer of the defendant as framed and served squarely and fully meets the issues of fact tendered by the complaint, and we confess that we are wholly unable to understand upon what principle of law or upon what rule of construction the trial court reaches the conclusion that the averments in paragraph 2 of the answer, which are directed to be stricken out, are obnoxious either as irrelevant or frivolous averments We cannot accept this conclusion of the trial court.The matters stricken from paragraph 2 of the answer are, in our opinion, responsive to specific statements of fact contained in the complaint. The complaint alleges, in substance, that the defendant received and was paid as salary the sum of $1,166.67 in the year 1895, and received and was paid as salary in 1896 the sum of $1,100; and further alleges that these amounts, respectively, fully paid all claims of the defendant for salary as county treasurer for each of said years. The averments ordered stricken out of paragraph 2 of the answer have reference to the alleged payments of salary in the years 1895 and 1896, and such averments, we think, most explicitly deny that such payments were made to the amount stated in the complaint, and allege in terms that only certain smaller amounts were paid defendant in said years as salary, and the answer states in terms the several amounts which defendant alleges were paid to him as salary in those years. The averments stricken out, in our opinion, sharply raise an issue of fact invited in the complaint, viz. whether the amount due defendant as

salary for the years 1895 and 1896 was paid in full, as alleged in the complaint; or, on the other hand, whether the defendant's salary as county treasurer was paid only to the extent set out in paragraph 2 of the answer.

Turning now to a consideration of paragraph 5 of defendant's answer, we are compelled to say with respect thereto that we cannot accept the conclusion of the trial court to the effect that this paragraph is either irrelevant or frivolous. Paragraph numbered 4 of the answer embodies a general denial of the allegations of the complaint except those qualified, explained or admitted by the answer. This general denial includes a denial of plaintiff's statement, reiterated in the complaint, to the effect that no salary was due the defendant when he presented a claim to the county board on January 7, 1897. Paragraph 5 (that stricken out) clearly alleges that defendant had a claim on account of salary at said date, and that said claim, together with another claim of defendant, was presented to the county board, and that as a result of the presentation of such claims an accounting was had, and a compromise was reached as between the defendant and the plaintiff which resulted in the allowance of the claims of the defendant to the amount sued for in this action. We think paragraph 5 should stand in the answer as a basis upon which the defendant can offer evidence either to show that his claim for salary was just and legitimate, in whole or in part; or, on the other hand, to show that the amount he received on such settlement was due him in whole or in part on account of the other claim of defendant referred to and set out in paragraph 5 of the answer. The plaintiff has brought an action for money had and received, and has alleged that the amount sued for was an overpayment to defendant on account of salary, and plaintiff alleges that no salary was due at the time the claim was allowed by the commissioners, and paid out of the plaintiff's treasury. The defendant is clearly entitled to have a jury pass upon the questions of fact raised by the complaint and answer, and is entitled to show that the claim allowed and paid to him was not an overpayment on account of salary, or that it was, on the other hand, a payment of some other lawful demand of his against the county. It should be kept in mind that in disposing of the plaintiff's motion to eliminate portions of the defendant's answer the trial court was not, and this court is not, called upon to carefully weigh and consider the answer with a view to determine its legal sufficiency as a pleading. Whether the answer does or does not embody a legal defense to the cause of action set out in the complaint was in no wise raised by the plaintiff's motions to strike out parts of the answer as irrelevant and frivolous. The legal sufficiency of a pleading can be raised by a demurrer, but cannot be raised by such a motion as this. As we have already said, we deem the matter stricken from the answer to be entirely relevant and pertinent to the issues, and we think that the same is far from being frivolous in character. Authority in support of our views in this

feature of the case is, in our judgment, quite unnecessary, and hence none will be cited.

There remains for consideration the order of the district court, above referred to, directing the answer of the defendant to be amended in such a manner as to make the third paragraph thereof more definite as regards certain particulars which are enumerated in the motion papers, but which it is not deemed necessary to set out at length in this opinion. The paragraph ordered to be made more definite has reference exclusively to the averments and matters of fact embodied in the sixth paragraph of the complaint. Both of these paragraphs have been set out in full in this opinion. A comparison of the two will show that the third paragrph of the answer consists, first, of specific admissions of certain facts alleged in the sixth paragraph of the complaint, and then winds up with a denial of "each and every allegation in said paragraph six of said complaint, save and except as above specifically admitted." The only construction which we have been able to place upon the language of the third paragraph of the answer is that said language, when considered as a whole, consists of admissions and denials which are reasonably responsive and definite when considered with reference to the matters of fact pleaded in the sixth paragraph of the complaint.

Our conclusion is that the orders appealed from were erroneously made and that the same should be reversed, and this court will so direct. All the judges concurring.

(87 N. W. Rep. 984.)

FREEMAN ORCUTT *vs.* AMY CONRAD.

Opinion filed Oct. 25, 1901.

Affidavit of Prejudice—Disqualification of Judge.

In a civil action, where affidavits and an expense bond have been seasonably filed, as provided by § 5454a, Rev. Codes 1899, the resident judge of the district court within which the action is pending is thereafter disqualified to exercise further judicial functions in the action. The mandate of said section is that "the court shall proceed no further in the action." When so disqualified, the resident judge has certain ministerial duties to perform connected with the calling in of an outside judge, but is inhibited by the statute from exercising any judicial functions in the action.

Court Cannot Exercise Judicial Function—When.

Accordingly *held*, that the resident judge who appointed a receiver in this action, after being disqualified to act therein, was not a competent court, and hence was devoid of authority to act in the matter of appointing a receiver.

Order Appointing Receiver—Void.

The order appointing a receiver is therefore reversed.

Certain Questions Not Determined.

Whether a resident judge, who has been disqualified to act by reason of filing affidavits of prejudice, can be reinvested with jurisdiction, and, if so, how this can be accomplished, is not decided.

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

Action by Freeman Orcutt against Amy Conrad, formerly Amy Shippam. From an order appointing a receiver defendant appeals. Reversed.

McCumber, Forbes & Jones and *George H. Gjertsen*, for appellant.

Freerks & Freerks, for respondent.

WALLIN, C. J. In this action the defendant has appealed from an order of the district court appointing a receiver in the action to take charge of certain real estate situated in the city of Wahpeton, which is the subject-matter of the litigation.

A brief recital of the uncontroverted facts appearing in the record will suffice to develop the questions of law which, in our judgment, are decisive of the case. The object of the action, as stated in the complaint, is to obtain a partition of the real property in question by a sale thereof. It appears that upon the complaint, which is verified, and upon an affidavit made by the plaintiff, an application was made to the district court for Richland county for an order requiring the defendant to show cause why a receiver should not be appointed in the action to take charge of the property involved pending the litigation. This order required cause to be shown on the 8th day of January, 1901. The hearing did not occur on the return day of the order, but was postponed by the court, upon its own motion, until January 16, 1901, at which time the matter came on to be heard before the court; the Honorable W. S. Lauder, who is judge of the district court in which the action was pending, presiding at the hearing. On the date last mentioned counsel for the respective parties appeared in court. The defendant, Amy Conrad, appeared specially, and objected to the jurisdiction of the district court, as then constituted, to hear or determine the matters involved in the order to show cause. In support of this objection, the defendant brought to the attention of the trial court the following state of facts, none of which are in dispute: It appears that after the order to show cause was issued, and on January 4, 1901, an issue of fact was joined in the action by the service of an answer to the complaint by the defendant Amy Conrad, the other defendant not appearing in the action. It further appears that prior to the hearing upon the order to show cause, and after the service of said answer to the complaint, the defendant Amy Conrad caused to be filed in this action affidavits of prejudice and an expense bond with the clerk of the district court, pursuant to the provisions of § 5454a of the Revised Codes of 1899, relating to the calling in of an outside judge. The filing of said affidavits and expense bond, as above stated, is conceded, nor do counsel in any way attack the same, or question their sufficiency as to form or substance or otherwise.

The objection to the jurisdiction of the court, as above set out, was then and there overruled; whereupon the trial court proceeded to hear and determine the matter of appointing a receiver, and later, by an order dated January 21, 1901, the trial court appointed one R. N. Ink receiver in the action of the real estate in question. From such order, the defendant, Amy Conrad, has appealed to this court, and counsel for the appellant in their brief have assigned the following errors: (1) The Honorable W. S. Lauder, of the Fourth judicial district, had no authority to make the order appointing the receiver; (2) the facts presented did not justify the appointment of a receiver.

In determining the question of jurisdiction presented by the first assignment of error, it becomes necessary to examine the statute above cited, upon which the appellant's counsel base their objection to the jurisdiction of the trial court to hear and determine the matter of appointing a receiver. For convenience of reference, we quote § 5454a in full: "When either party to a civil action pending in any of the district courts of the state shall, after issue joined and before the opening of any term at which the cause is to be tried, file an affidavit, corroborated by the affidavit of his attorney in such cause and that of at least one other reputable person, stating that there is good reason to believe that such party cannot have a fair and impartial trial of said action by reason of the prejudice, bias or interest of the judge in the district court in which the action is pending, the court shall proceed no further in the action, but shall forthwith request, arrange for and procure the judge of some other judicial district of the state to preside at said trial in the county of the judicial subdivision in which the action is pending. The actual expenses of such judge while in attendance upon the trial of the cause for which the change was had and the extra expense of the court and jury, incurred by reason of said change, shall be paid by the person asking for the change, in advance, or a bond to be approved by the clerk of the district court given therefor, the amount of said bond being fixed by the presiding judge; provided, that not more than one such change shall be granted on the application of either party."

As already stated, the fact is conceded that after issue was joined in the action the defendant, Amy Conrad, fully complied with the provisions of this section of the statute by filing affidavits of prejudice, together with the requisite bond to meet any expense incident to calling in an outside judge. No question of practice is presented, and, all disputed questions of fact being eliminated, there is left for solution only a question of law. The question presented is whether, upon the conceded facts, the Honorable W. S. Lauder, the resident judge who appointed the receiver, was or was not qualified to act in the mater. In our judgment, this question admits of but one answer. We have no hesitation in saying, upon the facts in this record, that the Honorable W. S. Lauder was, by the terms of the statute, ousted of jurisdiction, and was without lawful authority to preside in the

matter of the appointment of a receiver in the action. Whatever the fact may have been, when abstractly considered, it is nevertheless true, under the plain reading of the statute, that the filing of the required affidavits operated to judicially establish the fact of the existence of bias or prejudice, or both, in the mind of the resident judge, with respect to this case, and further operated to oust that judge of all authority to act judicially in this action after the affidavits were filed. The legislature has declared, in terms, that after the prescribed affidavits are filed "the court shall proceed no further in the action, but shall forthwith request, arrange for and procure the judge of some other judicial district of the state to preside at said trial in the county of the judicial subdivision in which the action is pending."

In this case it appears that the defendant has in all particulars complied with the terms of this statute, which are obligatory upon her, and, having done so, it cannot be doubted that she has thereby entitled herself to the benefits of the enactment. The benefits are twofold. She is entitled to be relieved entirely from the great embarrassment which would result from presenting her cause to a judge shown to be prejudiced in the case; and, on the other hand, she is entitled, under this law, to have an outside judge called in to try her case. Upon this record the defendant claims, and we think with perfect justice, that, in overruling her objection to the jurisdiction of the resident judge to hear and determine the order to show cause, the trial court has deprived her of the chief benefit intended to be conferred by this remedial enactment, viz that of presenting her cause to an unprejudiced tribunal.

The facts in this record do not require this court to determine or to consider just what is required of the resident judge in the matter of requesting and arranging for the attendance of another judge. Nor does the exigency of the case at bar demand at the hands of this court any construction of the provisions of § 5454a upon the very interesting question as to whether, in a case where the authority of a resident judge to act judicially has been once lost by the filing of affidavits of prejudice, it can in turn be restored, either by the laches of the moving party with respect to advancing the expense or filing an expense bond, or by his express consent to a restoration of jurisdiction or otherwise. The one point involved here is whether the court which attempted to appoint a receiver in this action had jurisdiction to do so, under the facts of this case. To this question we have unhesitatingly given a negative answer. As to the single question involved in this case, we think the provisions of the statute are unambiguous and entirely decisive. The language of the lawmaker is explicit. When affidavits of prejudice have been filed, the mandate of the statute is that "the court shall proceed no further in the action." Disregarding this inhibition of the statute, the resident judge has in this case proceeded, against objection seasonably interposed, to take cognizance of, and hear and determine, an important question arising in the cause.

Counsel for the respondent has omitted in their brief to suggest

any construction of § 5454a, leading to a conclusion different from that which this court has reached. They have contented themselves by a citation of a single case, that of *Noble Tp.* v. *Aasen*, 10 N. D. 264, 86 N. W. Rep. 742, decided by this court. Counsel claim that this decision is "decisive," and in their brief quote the following excerpt from the opinion in support of their contention: "We are clear that the defendant was not entitled to have an outside judge called in to hear this proceeding. The sections of the Code relied upon by defendant (5454a and 8120) have reference either to a civil or criminal action proper, and this proceeding is neither the one nor the other."

From our standpoint, the case cited may be readily distinguished from the case at bar, and the same in our judgment, is not at all in point. The facts and conditions existing in the two cases are widely separated and have little resemblance to each other. In the case cited, unlike the case at bar, no attempt was made to file affidavits of prejudice before the opening of the court at which the case was to be tried, nor were such affidavits offered to be filed at any time, in the case cited until long subsequent to the entry of final judgment therein. Hence under no possible circumstances could affidavits be filed in that case, under the provisions of § 5454a. It was obviously too late in that case to file affidavits of prejudice at the time counsel filed the same and this fact, though not referred to in the opinion, would alone fully justify the conclusion reached in that case on this point. The trial judge who tried the case, not being disqualified under the statute, was therefore competent to hear and decide any motion or proceeding in the action. In the case cited it was very difficult to ascertain from the record whether the contempt proceeding was originally instituted as a civil remedy, or, on the other hand, was instituted for the purpose of vindicating the authority of the court; but, in either event, the remedy of contempt is summary and quasi criminal in character, and hence, as was said in the opinion, is neither a civil nor a criminal action proper. For this reason, therefore, the court held that affidavits of prejudice could not be filed in that proceeding.

In the case at bar the facts are radically different. Proper affidavits and an expense bond having been filed within seasonable time, the resident judge thereby became disqualified to sit in the cause, either to try the case upon the merits or to exercise any judicial functions whatever therein. The statute, in terms, declares that upon such a state of fact "the court shall proceed no further in the action."

Our conclusion is that the court which appointed a receiver in this action was not, when presided over by Judge Lauder, a competent court, and hence that the order appointing a receiver was made without authority of law. The order will, therefore, be reversed, and the case will be remanded to the trial court for further proceedings according to law, and before a court of competent jurisdiction. All the judges concurring.

(87 N. W. Rep. 982.)

STATE *ex rel.* SHEEKS *vs.* MAY G. HILLIARD *et al.*

Opinion filed Oct. 31, 1901.

Intoxicating Liquors—Sales by Pharmacists.

The authority conferred upon county courts to issue permits to registered pharmacists to sell intoxicating liquors for medicinal, mechanical, and scientific purposes, by chapter 63 of the Penal Code, is limited to granting permits to sell at the particular place petitioned for. It is accordingly *held* that sales made at a place other than that for which the petition was granted are unlawful sales, and the person making such sales is not exempt from the consequences imposed by said chapter for unlawful sales, even though the seller's permit does not specify the particular place for which issued.

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

Action by the state, on relation of H. Sheeks, against May G. Hilliard and others. Judgment for plaintiff, and defendant Hilliard appeals. Affirmed.

Purcell & Bradley, for appellant.

Defendants carried on their business as druggists, and sold intoxicating liquors in compliance with law, except that they sold at a place other than that specified in the petition for license. The petition asked the right to sell intoxicating liquors as druggists in the village of Lidgerwood. Hilliard, at the time of leasing the building, saw and read the permit, and relied thereon as authority to Koch & Phillips to sell intoxicating liquors in the premises. A license to sell liquors is not void because it fails to specify the house where the liquors are sold. *Goforth* v. *State,* 60 Miss. 766; *State* v. *Walker,* 16 Me. 241; *State* v. *Gerhardt,* 3 Jones (N. C.) 178. A license protects the holder so long as it remains uncancelled. *Commonwealth* v. *Graves,* 18 B. Mon. 33. If the license specifies the place it will not justify sales in any other place. *State* v. *Prettiman,* 3 Harr. 570; *State* v. *Hughes,* 24 Mo. 147. The above cases are cited as illustrating the principles by which § 7594, Rev. Codes, should be construed.

Bosard & Bosard, for respondent.

A person holding a permit issued on petition will be protected in the sale of liquors under § § 7594, 7596, Rev. Codes, only when he sells in the place in the town, village or ward, set forth in his petition for the permit. A sale under a license, in another place than that which the license was issued to cover is not within its protection. *Creckmore* v. *Com.,* 12 S. W. Rep. 628; *Com.* v. *Holland,* 47 S. W. Rep. 216; *Com.* v. *Ashbury,* 47 S. W. Rep. 217; *Pearce* v. *State,* 32 S. W. Rep. 697; *State* v. *Fredricks,* 16 Mo. 382; *Com.* v. *Welch,* 147 Mass. 374; *State* v. *Gerhardt,* 33 L. R. A. 313. The claim of good faith will not protect appellant any more than such a claim would protect him against a sale to minor or a person in the habit of

becoming intoxicated. *McCoy* v. *Clark,* 81 N. W. Rep. 159; Good faith is no defense where the act was done without authority. *State* v. *Bain,* 75 N. W. Rep. 403; *Bartell* v. *Hobson,* 78 N. W. Rep. 689.

YOUNG, J. This action is prosecuted on behalf of the state to abate an alleged liquor nuisance kept and maintained by the defendants Lewis W. Koch and Henry A. Phillips in a building situated upon lot 7, in block 11, in the village of Lidgerwood, in Richland county which lot and building they occupied under a lease from May G. Hilliard, the other defendant herein, contrary to the provisions of chapter 63 of the Penal Code, prohibiting unlawful dealing in intoxicating liquors. Judgment was entered in the district court abating said alleged nuisance, and for costs, which were taxed and allowed in the sum of $196.25, and were adjudged to be a lien on the premises. May G. Hilliard, the owner of the property, alone appeals from the judgment. The errors upon which she relies are based upon the judgment roll proper. The findings of fact made and filed by the trial judge are not challenged. The sole contention is that the conclusions of law based thereon are erroneous.

The trial court found that intoxicating liquors were sold on the premises above described by appellant's tenants, and that such sales were without authority of law, and in violation of chapter 63 of the Penal Code, above referred to, whereby, under § 7605, Rev. Codes, embraced in said chapter, such premises became and were a common nuisance. Appellant's contention is that the sales of intoxicating liquors by her tenants on said premises were made under the authority of a druggist's permit, issued by the county judge of Richland county, authorizing the sales which were made, and that, therefore, such sales were not unlawful, and her premises were not a common nuisance. Concededly, appellant's position is correct, on the facts of this case, if her tenants had the protection of a druggist's permit, for no sales appear to have been made which would be in violation of the restrictions placed upon sales by druggists holding permits. The sole question, then, is, did her tenants have a druggist's permit to sell intoxicating liquors on the premises in question? This question is to be detemined as one of law from the following facts: Koch was a registered pharmacist, and had a druggist's permit, which was issued by the county judge of Richland county, by its terms authorizing him to sell intoxicating liquors in the village of Lidgerwood, which permit was issued prior to the occupancy of appellant's premises, and for another place in said village, to-wit, lot 14 in block 17. The trial court found that this permit was granted upon "a petition made by said Louis W. Koch, with the signers as required by law, for a permit to sell intoxicating liquors as a druggist, and in said petition named as the particular place in said village of Lidgerwood where he was to conduct said business another property than the property described in the complaint, to-wit, lot 14, in block 17, in the said village of Lidgerwood, and the said Louis W. Koch had no other permit to sell intoxicating liquors as a druggist in Lidgerwood than the one issued upon the said petition for

lot 14 in block 17, and the said Henry A. Phillips had no permit of any kind to sell intoxicating liquors; that when defendant Hilliard leased said premises to defendants Koch & Phillips she saw and read the permit introduced in evidence, and relied thereon as authority in said Koch & Phillips to sell intoxicating liquors on said premises; * * * that the only violation of the prohibitory liquor law * * * consisted in the sale of intoxicating liquors by said defendants Louis W. Koch and Henry A. Phillips in all respects in accordance with law, except that such intoxicating liquors were sold upon a permit which did not specify the particular place in the village of Lidgerwood at which said sales were to be made and at a place different from the place specified at which sales were to be made in the petition of said Louis W. Koch for such permit. Briefly stated, the facts are these: Koch had a permit under which he and Phillips as copartners operated a drug store and sold intoxicating liquors on lot 14 in block 17. Later they leased the premises in question, lot 7 in block 11, from the appellant, and continued selling intoxicating liquors in the new place of business without further authority than that given by the permit formerly issued. Were such sales lawful The trial court found as a conclusion of law that the defendants had no valid druggist's permit to sell intoxicating liquors on lot 7 in block 11, being the premises in question. This is assigned as error. We reach the conclusion without hesitation that the trial court was correct in this conclusion. Reference to § 7593, Rev. Codes, will show that sales of intoxicating liquors are made unlawful generally, and § 7605 declares that all places kept and maintained for the forbidden purposes are common nuisances, and are subject to be abated in accordance with said section. An exception is made, however, in favor of druggist's, whereby they may sell and do so lawfully. § 7594 prescribes the steps which they must take to become authorized to make lawful sales, and said section is the source of the power of county courts to grant such authority. Said section, among other things, provides that, "in order to obtain a druggist's permit under this act, the applicant shall file in the office of the county judge of the county wherein he is doing business, * * * a petition signed by the applicant and twenty-five reputable freeholders, having the qualifications of electors of the town, village, township or ward of any city and twenty-five reputable women over twenty-one years of age, who are residents of the town, village, township or city wherein such business is located. All petitions shall set forth: The town, village, city or township and particular place therein wherein such business is located. That said applicant is a pharmacist as aforesaid and is lawfully and in good faith engaged personally in the business of a druggist as the proprietor thereof, at the place designated in the petition. * * * If satisfied that the signatures of such petition were signed by such persons, and that such petitioners are freeholders or citizens of such town, village, township, city or ward as above expressed and that the statements in such petition are true the county judge may in his discretion grant a permit to the appli-

cant to sell intoxicating liquors for medicinal, mechanical, and scientific purposes only; and such permit shall be recorded upon the journal of the county court, and a certified copy thereof pasted in a conspicious place in the store wherein said business is carried on before it shall be of any validity." The same section also provides for a cancellation of such permit upon petition of residents of "the town, village, township, city or ward in which the business of druggist is carried on," and § 7599 provides that the permit is forfeited when the number of freeholders and women who signed the petition shall fall below the number required by law "by removal from the state, county, city or town, or by death, or at the end of any year by the withdrawal of their names from the petition, unless a new petition shall be filed," etc. It seems too clear for argument that the power conferred upon a county judge to grant permits is restricted to granting them for the particular place named in the petition, which place must be in the particular town, village, township, or ward of any city wherein the applicant's place of business is located and the petitioners also reside. He is authorized to act only upon petitions for a permit for a particular place as well as for a particular person, and he is not given authority to grant a permit to any other person or for any other place than the person and place named in the petition. Clearly, he has no authority to grant permits in all portions of his county generally, in disregard of the restrictions above quoted. A permit granted under the provisions of the statute will protect the druggist who holds the same in sales which are made thereunder in accordance with the restrictions imposed by the statute, but it is entirely clear that a permit to sell at one place does not authorize sales to be made at a place other than that for which the permit was granted, or render such sales lawful. In this case the permit issued did not specify the particular place petitioned for, but in terms extended to the village of Lidgerwood. It would have been proper to have designated the particular place in the permit. But the omission of the county judge to describe the particular place did not make it available to the holder as legal authority to sell at any place he might choose in the village of Lidgerwood. The permit which was granted was that petitioned for, and that was for lot 14 in block 17, and the county judge was without authority to grant it for any other under the law. This the defendants were bound to know, and the fact that the appellant may have innocently believed when she leased her property to the other defendants that the permit conferred authority to sell on said premises can afford her no protection. Her ignorance of the law presents no excuse which can be recognized as valid. The right of a druggist to sell under a permit is similar to the right of a saloon keeper to sell under a license. It is generally held in such cases that a sale of intoxicating liquors under a license at another place than that for which it was issued is not protected by the license, and the person making such sales may be prosecuted as though he had no license. *Commonwealth* v. *Welsh*, 147 Mass. 374, 17 N. E. Rep. 895; *State*

v. *Fredericks*, 16 Mo. 382; *Pearce* v. *State*, (Tex. Cr. App.) 32 S. W. Rep. 697; *Commonwealth* v. *Asbury*, (Ky.) 47 S. W. Rep. 217; *Commonwealth* v. *Holland*, (Ky.) 47 S. W. Rep. 216; *Creekmore* v. *Commonwealth*, (Ky.) 12 S. W. Rep. 628. The trial judge did not err in concluding that the permit issued to Koch upon his petition for a privilege to sell intoxicating liquors on lot 14 in block 17 gave him no authority to sell in the building subsequently leased from appellant.

Finding no error in the record, the judgment of the district court is affirmed, and it is so ordered. All concur.

(87 N. W. Rep. 980.)

NICHOLS & SHEPARD CO. *vs.* JOHN E PAULSON, *et al.*

Opinion filed Nov. 6, 1901.

Judgments—Collateral Attack.

Judgments which are merely erroneous, and not void, are binding upon the parties thereto until reversed or modified, and cannot be impeached collaterally.

Claim and Delivery—Form of Judgment.

A judgment in claim and delivery, awarding the return of a certain threshing engine to the defendants, contained this condition: "If the same cannot be delivered to the defendants in as good condition as the same was at the time of the taking thereof, that the defendants recover of plaintiff the sum of $600"—and also gave $50 damages for the taking and detention. *Held*, that such judgment is not void, and that a tender of the engine to defendants two years after the same was taken from them, in a condition materially worse in substantiated particulars than when taken, did not have the effect of satisfying the judgment.

Judgment for Return or Value and Damages.

Under the statutes of this state, a defendant from whom property has been taken in a claim and delivery action, when he prevails, may recover judgment (1) for a return of the property, or its value, in case a return cannot be had, and (2) damages, if any are shown, for the taking and detention by plaintiff. The right to have his property or its value, and the right to recover damages for the wrongful taking and detention, are separate rights. It is therefore *held* that the fact that the defendants claimed and were awarded damages for the taking and detention of the engine in the judgment does not impair their right to recover the property or its value, also given by the judgment.

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

Action by Nichols & Shepard Company against John E. Paulson and A. E. Paulson. Judgment for plaintiff. Defendants appeal. Reversed.

John Carmody and *C. E. Leslie*, for appellants.

Turner & Lee, for respondent.

YOUNG, J. The defendants have appealed from a judgment rendered by the district court of Traill county, canceling a judgment in claim and delivery formerly rendered in the action, which judgment so cancelled was in defendant's favor, and awarded to them the return of a certain threshing engine involved in the action, or its value, together with damages for the taking and detention, and for costs. To avoid confusion, it is proper to state that the judgment vacated and judgment here appealed from were both rendered in the same action, namely, in the claim and delivery action above entitled. While it is true the judgment appealed from is prepared with the formalities of a judgment in a civil action, and was entered as such by the clerk of said court in the judgment book, and is based upon findings of fact and conclusions of law made by the trial judge, yet it is in legal effect a mere order in the action made after judgment, and will be treated as such. The proceedings which culminated in this so-called "judgment" were initiated by an affidavit entitled in the action, and presented to the district judge, setting forth that defendants had caused a levy to be made upon its property under an execution issued on said claim and delivery judgment, and were about to sell the property so levied upon, and that said plaintiff had paid and satisfied said judgment by returning and tendering to said defendants the engine awarded to the defendants by said judgment, and had also paid all costs adjudged against them. Upon this affidavit the district judge ordered the defendants to show cause before the court "why the judgment in the action should not be discharged and satisfied of record, and restitution made to said plaintiff of that certain personal property now in the hands of the sheriff of said Traill county under an execution issued in said cause." On the hearing, oral evidence, also evidence in the form of affidavits, was offered both in support of, and in opposition to, plaintiff's application to cancel the judgment. On April 2, 1901, thereafter the court made and filed findings of fact and conclusions of law, and directed the entry of a judgment canceling said judgment and for costs, in pursuance of which direction the judgment here in question was entered. All of the evidence and papers upon which the order of the trial judge was based are before us on this appeal in a statement of case properly settled.

The sole ground of plaintiff's application to vacate and cancel said judgment is that it had satisfied the same by a tender of the engine to defendants, and had paid or tendered all costs and damages adjudged against it in the action. It is obvious that, if such a tender was made as would in law satisfy the conditions of the judgment awarding a return of the engine to the defendants, they could not arbitrarily refuse to receive it, and proceed to enforce payment of the alternative money judgment for its value. If the tender was sufficient, the order of the trial judge canceling the judgment was proper, and should be sustained. But if, on the other hand, the tender was not sufficient in law or fact, the defendants were

not bound to receive it, and such tender did not satisfy the judgment, and the order would in that event be erroneous. It is apparent, from what has already been stated, that the decisive question is the sufficiency of the alleged tender. Before discussing this qustion it is necessary to state some preliminary facts.

On August 29, 1895, the day the claim and delivery action was commenced, plaintiff took the engine from the defendant's possession in Hillsboro, in said county. Defendants did not rebond. Both parties in their pleadings claimed the ownership and right of possesson of the engine, and alleged that it was of the value of $600. The defendants also alleged that they had sustained damages by reason of the taking and detention by plaintiff in the sum of $200, and demanded judgment for (1) a return of the engine, or for the sum of $600, the value thereof, in case a return could not be had; (2) $200 damages for the detention thereof; and (3) for costs and disbursements. The case was tried before the court without a jury, on August 25, 1896. Thereafter the court made findings of fact to the effect that the defendants were at all times the owners of said engine, and entitled to the possession of the same; that when said engine was taken from defendants it was of the value of $600; that by reason of such taking defendants lost the sale of the same; and that the defendants had been "damaged by the taking of said engine by the plaintiff in the sum of $50." The court further found that after said engine was taken by plaintiff, and before the trial, plaintiff had allowed it to remain exposed to the elements and unprotected during the entire winter of 1895 and 1896, and that it was injured thereby at least to the value of $50. As conclusions of law, the court found that defendants were entitled to judgment against plaintiff for the possession of the engine, "or, if the same cannot be delivered to the defendants in as good condition as the same was at the time of the taking thereof, that the defendants recover of the plaintiff the sum of $600," the value of said engine at the time it was taken from the defendants, "with interest thereon at the rate of 7 per cent. per annum from and after the 29th day of August, 1895." together with the sum of $50 damages and costs and disbursements. Judgment was ordered in accordance with such findings, and on February 12, 1897, the judgment in question was entered, and embraced the particular language of the conclusions of law above quoted. Plaintiff appealed from the judgment, and the same was affirmed by this court. See *Nichols & Shepard Co.* v. *Paulson*, 6 N. D. 400, 71 N. W. Rep. 136.

The alleged tender of the engine was made after such judgment of affirmance, and on July 20, 1897, almost two years after it was taken. It is entirely clear from the record before us that the engine was not in the same condition when it was tendered to defendants as it was when taken from them, and therefore the tender was not sufficient under the terms of the judgment, which required it to be in the same condition as when taken. It was not in the same condition, even at the time of the trial of the action; for the trial

judge found that prior thereto it had been injured by exposure to the elements with a resulting damage of at least $50. So, that, had a tender been made at that time, it would not have been a compliance with the judgment requiring it to be returned in as good condition as when taken. It is also shown that the condition of said engine was materially worse when tendered than it was at the time of the trial. Plaintiff shipped it to Wahpeton, and in August or September, 1896, which was after the trial, sold it to William W. Wallace, who took it 26 miles into the country, and run it for 30 days during the threshing season of 1896, and also used it for about seven days in the spring of 1897. Upon the affirmance of the judgment of the district court by this court the plaintiff took the engine from Wallace, reshipped it to Hillsboro, and made the tender relied upon.

The testimony submitted on the question of the condition of the engine when tendered conclusively shows that it was not in the same condition as when taken from defendants, in numerous and substantial particulars. Some parts were gone, some replaced, and others materially injured by breakage and use. In the opinion of several witnesses, it was not worth more than half as much as when taken from defendants, because of its changed condition. Most clearly it was not in the same or as good condition as when taken from defendants, and was not the property which the court had valued at $600. Under these circumstances, the tender was without effect upon the judgment, for it could only be satisfied by a return according to its terms. Cobbey, Repl. § 1177. The judgment provided that the engine should be in as good condition as when taken, if its return was to defeat a recovery of the value. Such a return was not made. Indeed, it is not claimed that the engine was in the condition required by the judgment. The contention of plaintiff's counsel is that the requirement that the engine should be in as good condition as when taken should not have been inserted, and that the judgment should have been merely for a return of the engine, or its value ($600), in case a return could not be had. Considered merely as a criticism of the form of the judgment, we might agree with counsel. But this would not aid the plaintiff in any way. The judgment is not void. Had the judgment failed entirely to provide for a return, and been for the recovery of the value only, it would not have been void. At most, the inclusion of the condition complained of was merely erroneous. It is the judgment of a court having jurisdiction of the parties and subject-matter, and no attempt has been made to alter or reform it in the particular complained of, and being, at most, erroneous, it is not open to attack or impeachment collaterally. 1 Black, Judgm. § 245.

We had occasion to consider this particular feature of this judgment in *Paulson* v. *Nichols & Shepard Co.*, 8 N. D. 606, 80 N. W. Rep. 765, wherein these defendants sought to recover the value of this engine in an independent action, and thus avoid the tender

here relied upon. A recovery was denied by the trial court, and in affirming the lower court we said, referring to the judgment in question: "The former judgment settled the rights of these parties respecting the engine. On the appeal to this court (6 N. D. 400, 71 N. W. Rep 136) no question was made on the form of the judgment. Each party was satisfied therewith, and each party must abide thereby. It is perhaps true that, under the record in that case, no alternative judgment for the return of the property was required (Shinn, Repl. § 664); and it may be true, also, that, if the informality in the judgment was caused by respondent's wrong, it can take no advantage of it (Id. § 658). But these matters are not before us. Appellants proceed upon the theory that no tender of the engine has been made under the terms of the judgment. If they are wrong, then their judgment has been satisfied by the tender; if they are right, they can proceed to satisfy their judgment by execution; if they are entitled to any judgment, they already have it, upon their own showing and are not entitled to another. They cannot refuse to accept or receive the property under the judgment, and at the same time recover damages accruing either before or after the rendition of the original judgment." The conclusion we reached on the above appeal, in denying these defendants a right to recover, in a separate action, the value of the engine in question, and damages for the taking and detention, was, in effect that both parties were bound by the judgment, and must comply with its conditions. Nothing has been advanced on this appeal to cause us to alter that conclusion, from which it follows that the tender relied upon, not complying with the conditions of the judgment, did not have the effect of satisfying it.

Plaintiff's counsel contend, however, that the judgment, with the objectionable language included in it, is not enforceable, for the reason, as they claim, that it is not a final judgment, inasmuch as the question whether the property can be returned in as good condition as when taken is left undetermined. This contention is without merit. Every alternative judgment in a claim and delivery action had the same uncertainity. It is never known, and in the nature of things cannot be known, when the judgment is rendered, whether the property can be returned. An officer acting under an execution on the judgment in question has a more certain guide as to his duty than if the conditions objected to were omitted; for he is distinctly informed just what kind of a return of the property would satisfy the conditions of the judgment, namely, a return in as good condition as when taken from defendants.

The further claim is made that defendants are estopped from objecting to the condition of the engine, because of "having claimed damages, and having entered a judgment providing for the payment to them of damages for the taking of the engine." We are unable to discover any grounds for invoking the doctrine of estoppel against the enforcement of this judgment. Under the statutes of this state, a defendant in a claim and delivery action, from whom

property has been taken by the plaintiff, when he prevails in the action, is entitled to judgment for two things: First, "a return of the property, or the value thereof, in case a return cannot be had"; and, second, "damages for the taking and detention thereof." See § 5484, subdivision 3, § 5447, Rev. Codes. The right to recover the property taken or its value is entirely independent of the right to recover damages for the taking and detention. The former restores to one from whom his property has been taken the property itself or its value; the latter compensates him for the loss resulting from the wrongful act of taking and the wrongful detention. The rights are entirely independent of each other. Clearly, that part of the judgment awarding damages for the wrongful taking and detention can be satisfied only by payment of the sum there awarded, and it would not be affected or impaired either by a return of the property or payment of its value. Neither, on the other hand, will the payment of the damages awarded for the taking and detention of the property release or affect in any way the other portion of the judgment requiring a return of the property or payment of its value as of the time of the taking, with interest.

As to whether the trial court properly charged the plaintiff with damages for the taking and detention we are not concerned. It is sufficient to say that the judgment awards damages in the sum named, and that it is binding upon both parties. It is entirely clear upon the record presented that the tender of the engine, in the condition it was when tendered, did not satisfy or affect the defendants' rights under the judgment in any way whatever. The trial court erred therefore, in causing the judgment appealed from to be entered, and the same is therefore in all things reversed.

All concur.

(87 N. W. Rep. 977.)

PATRICK WHITE *et al. vs.* W. S. LAUDER JUDGE.

Opinion filed Nov. 21, 1901.

Application of Patrick White and others for a writ of mandamus against W. S. Lauder, judge of the district court for the county of Richland. Writ granted.

Freerks & Freerks, for petitioners.

W. S. Lauder, in pro per. and *Tracy R. Bangs*, for respondent.

PER CURIAM. The facts in this case are substantially the same as those involved in the case of Gunn against the respondent herein 10 N. D. 389, (87 N. W. Rep. 999), which was submitted at the same time as this case, and the decision in that case governs this. The peremptory writ should issue in this case, and be served upon the respondent and such writ will conform substantially to the concluding and mandatory feature of the alternative writ, excepting therefrom only the order to show cause. It will be adjudged accordingly.

(87 N. W. Rep. 1135.)

NICHOLS & SHEPARD *vs.* GEORGE CHARLEBOIS, *et al.*

Opinion filed Nov. 7, 1901.

Notice to Produce—Secondary Evidence.

When the pleadings disclose that the contents of a document in the possession of the adverse party will necessarily have to be proven in order to establish a link in the proof of the other party's cause of action or defense, a notice to produce such document at the trial is not necessary, in order to permit the introduction of secondary evidence of its contents.

Warranty—Notice of Breach of Warranty.

A warranty given on the sale of machinery required the purchaser, in case the machinery failed to conform to the warranty, to give written notice to the vendor and its agent, stating particularly what parts and wherein it fails to fill the warranty. The notice in this case stated that the separator failed to clean the grain without wasting the same. This was the only defect complained of. *Held*, that the notice was sufficient.

Vendees Sufficiently Complied with Contract.

The warranty required the vendees, in case of defects in the machinery, to give the vendor a reasonable time to get to the machine and remedy the same. *Held*, that the evidence shows that the vendees complied with the conditions of the warranty in this respect.

Sale of Threshing Outfit an Entire Contract.

A contract for the sale of a threshing rig, consisting of an engine, separator, weigher, self-feeder, and other articles constituting a complete threshing outfit, for one lump sum, without fixing a price on each separate article, *held* an entire contract.

Pleading—Amendment on Trial.

Defendants attempted to amend their answer at the trial so as to recover for certain freight paid by them on said threshing rig, or to recover back a note given by them to plaintiff's agent for the amount of the freight advanced by him. *Held* such attempted amendment unavailing, and the evidence offered thereunder insufficient to warrant a recovery therefor.

Appeal from District Court, Rolette County; *Morgan*, J.

Action by Nichols & Shepard Company against George Charlebois and others. Judgment for defendants, and plaintiff appeals. Modified.

John Burke and *Turner & Lee*, for appellant.

P. J. McClory, for respondents.

FISK, D. J. This is an action commenced in the district court of Rolette county, for the purpose of foreclosing two certain mortgages executed and delivered by the defendants, George Charlebois and Bolevard Brunut, to the plaintiff to secure the payment of three certain promissory notes, for $940 each, representing the purchase price of a certain threshing rig purchased by said defendants from

the plaintiff in September, 1899, consisting of an engine, separator, weigher, self-feeder, driving belt and water tank. The complaint is in the usual form. The answer admits the execution and delivery of the notes and mortgages, and by way of defense alleges, in substance, that said machinery was purchased by them under an express warranty that the same was well made, of good material, and that it was capable of doing well the work for which the same was made and sold, and that if it did not comply with such warranty it might, under certain conditions, be returned by them to the place where it was received, and the defendants would in such event be released from all liability on account of the purchase price thereof. They further allege that said machinery failed to comply with the terms of the warranty, and that they returned the same to plaintiff, and they allege full compliance on their part with the terms of the contract of warranty. The trial court found in favor of the defendants upon all of the issues, and judgment was rendered directing the cancellation of said notes and mortgages, and for the costs and disbursements of the action. From this judgment the plaintiff has appealed to this court, and asks a trial de novo of the entire issues.

The following are conceded facts in the case:

On July 22, 1899, the defendants, Bolevard Brunut and George Charlebois, signed an order for this machinery, the material provisions of which are as follows:

"Rolla, N. D., July 22nd, 1899. Nichols & Shepard Company, Battle Creek, Mich.: You will please ship for the undersigned, to or in care of James O'Laughlin, at Rolla, N. D., by the route you consider best and cheapest, on or about the 1st day of August, 1899, with the fixtures and extras as you usually furnish them: 1 22-horse simple S. B. traction engine; 1 Perfection weigher, Dak. style; 1 belted separator, with 41-inch cylinder, 64-inch rear, and 18-foot stacker; 1 Nichols & Shepard self-feeder; 1 rubber drive belt, 150 feet long, 8 inches wide; 1 water tank, with trucks. The undersigned agree to receive such machinery on its arrival subject to all the conditions and agreements printed below, and pay in cash the freight and charges thereon from the factory, and also agree to pay to your order, at the time and place of delivery, the further sum in cash and notes, as follows: [Here follows a description of the three $940 notes.]

"Warranty. This machinery is purchased and sold subject to the following express warranty, viz.: That said machinery is well made, of good materials, and, with proper management, capable of doing well the work for which the machines, respectively, are made and sold; conditioned that if, within five days from its first use, it shall fail to fill this warranty, written notice shall be immediately given by the purchaser to Nichols & Shepard Company, at Battle Creek, Mich., by registered letter, and written notice also to the local dealer, through whom the same was received, stating particularly what parts and wherein it fails to fill the warranty.

Reasonable time shall be allowed the company to get to the machine, with its workmen, and remedy the defect, if any there be, the purchaser to render friendly assistance and co-operation. * * * If, after giving the notices above provided, any part of the machinery cannot be made to fill the warranty, that part which fails shall be returned immediately, to place where it was received with the option of 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 or notes which have been received by the company for the same, and thereby rescind the contract to that extent, or the whole, as the case may be, and be released from any further liability herein. The failure of any separate machine or any part thereof shall not affect the contract or liability of the purchaser for any other separate machine, or for any parts of such machine as are not defective. It is expressly agreed that said company shall be liable only for the return of cash and notes payable to its order actually received by it, and not for any machinery or other property taken herein as part payment. * * * Independent stackers, automatic weighers, baggers, wagon loaders, and self-feeders, when ordered, are furnished as extra attachments, at stipulated separate prices, and subject to this warranty and its provisions. * * * If any such attachment fails to fill the warranty, * * * such attachment may be returned to the place where received; * * * but such failure and return of any such attachment shall not affect the contract for any of the other machinery or the liability of the purchasers thereof. * * * Failure to render friendly assistance and co-operation, or failure to give any of the notices in writing as provided for herein, or keeping the machinery after the five days allowed as above provided, shall be a waiver of the warranty, and a full release of the company.

"[Signed.] Bolevard Brunut,
"George Charlebois."

On the 8th day of September, 1899, the said defendants received said machinery and settled for same by executing and delivering to plaintiff three notes, for $940 each, and the machinery was taken to the farm of the defendants, and on the 9th day of September an attempt was made to operate it, and the separator would not properly separate the grain from the straw. No claim is made that the other machinery would not work to the satisfaction of the defendants. The separator failed to comply with the warranty, and on or about September 29th the entire rig was returned by defendants to the place where it was received.

The questions for determination on this appeal are—First. Have the defendants complied with all the conditions precedent to be by them complied with before they have a right to rely upon a breach of the warranty. Second, in case they have complied with all the conditions precedent to be by them performed, have they taken the proper steps to enforce such right, and are they now entitled to relief.

The warranty contains certain conditions which must be complied with by the defendants before they can rely upon a breach thereof. One of these conditions was that within five days from its first use, if the machinery failed to fill the warranty, written notice should be given to the plaintiff at Battle Creek, Mich., by registered letter, and also written notice to the local dealer, stating particularly what part and wherein the machinery failed to fill the warranty. Did defendants comply with this condition? They claim that on the 13th day of September, which was within five days from the time they commenced to operate the machinery, they registered a letter to the plaintiff at Battle Creek, Mich., containing a notice that the separator did not comply with the warranty, stating wherein it did not comply. The burden was upon the defendants to prove the giving of this notice. Have they done so? At the trial the defendants' counsel demanded from plaintiff's counsel the production of the letter sent to the plaintiff. Plaintiff's counsel stated in open court that it was too late to demand such letter and that counsel had no such letter, and that if the same was in existence it was more than a thousand miles from the place of trial. Defendants then offered in evidence a registry receipt, issued at the postoffice at Rolla, purporting to be for a letter sent to plaintiff on September 13th. Defendant Charlebois then testified to the contents of this letter; plaintiff objecting upon the ground that the same was incompetent, irrelevant, and immaterial, and no foundation laid for the introduction of secondary evidence, for the reason, as stated, that no notice was served on the plaintiff to produce the original. The defendant Charlebois then testified that the letter in question informed plaintiff that the separator did not separate the grain from the straw. Similar testimony was introduced regarding the contents of the letter sent to the agent, and the same objection was made to the introduction of this testimony. Was this testimony competent? The general rule is that notice to produce must be given before secondary evidence can be received as to the contents of a written document in the possession of the adverse party, but there is a well-settled exception to this rule. Where the issues framed by the pleadings necessarily disclose to the adverse party that proof of the document will be necessary at the trial, it is well settled that notice to produce the document is not necessary in order to admit secondary evidence of the contents of such document in case the original is not produced. The adverse party is bound to take notice from the pleadings that the production of the document at the trial is required, and in case it is not produced secondary evidence must be resorted to. The answer in this case necessarily informed the plaintiff that the defense relied upon was a breach of the warranty, and therefore the plaintiff was bound to know that in proving such defense the defendant would necessarily be required to prove the contents

of the notice sent in this registered letter. The reason for the rule requiring a notice to produce the original, therefore, did not apply. See 1 Jones, Ev. par. 24; *Kellar* v. *Savage*, 20 Me. 199.

Counsel for appellant contends that the notice was insufficient, in that it did not particularly call to plaintiff's attention wherein the machinery failed to comply with the warranty. We must overrule this contention. The trial court found that such notice was sufficient in this respect, and we think the evidence fully warrants such finding. The notice informed plaintiff that the separator did not clean the grain properly, without wasting the same, and we do not well see how the defect could have been pointed out more particularly than this.

Appellant further contends that the conditions of the warranty requiring defendants to allow plaintiff a reasonable time to get to the machine with its workmen and remedy the defect was not complied with. The evidence upon this question is conflicting, but the trial court found in favor of the defendants, and we are not disposed to disturb this finding, as we consider the evidence sufficient to sustain the same. The defendants gave the plaintiff sufficient time to remedy the defect, but the plaintiff wholly ignored defendants' letter, and no attempt was ever made to remedy the defect in the separator after the notice was given. We therefor think the evidence justifies us in holding, as we do, that defendants complied with the conditions precedent to be performed by them in order to entitle them to rely upon a breach of the warranty.

This brings us to the principal question in the case, which involves a construction of the contract between the parties. The contention of counsel for appellant is that the contract is divisible, and hence that the failure of the separator to conform to the warranty did not authorize defendants to rescind the contract as to the engine and other property purchased by them, and which complied with the warranty. If the contract was divisible, then, of course, the failure of the separator to comply with the warranty would not authorize defendants to rescind the contract in toto, especially in view of the express provisions of the contract to the contrary. It will be noticed that the contract is for a complete threshing outfit, at the stipulated price of $2,820 and freight. No price was fixed, either in the written contract or otherwise, on any of the separate articles. We are therefore confronted squarely with the question as to whether or not a contract for the purchase of several distinct articles for one consideration may be a divisible contract. The general rule enunciated by the authorities is that if the contract is for the sale of several distinct things, but all for one consideration, it is entire. 7 Am. & Eng. Enc. Law (2d Ed.) p. 96, and cases cited. See, also, *Katz* v. *Bedford*, (Cal.) 1 L. R. A. 826, and note (s. c. 19 Pac. Rep. 523). "Whether a contract is entire or severable depends, in general, upon the consideration to be paid, not upon its subject. If the consideration is single, the contract is

entire; but, if the consideration is expressly or by necessary implication apportioned, the contract is severable. When the consideration is entire and single, the contract must be held to be entire, although the subjects may be distinct and independent items." See numerous authorities cited in the note to 1 L. R. A. 826.

The supreme court of Iowa in a recent case, in disposing of this question, said: "Plaintiffs claimed the price of the perfection weigher in any event, because they say there was no breach of warranty as to it. But it was included in the order for the thresher at a gross price of $450. A rescission of the sale affected all the property covered by the order. There was a clause in the written order to this effect: 'Clover hulling attachments, baggers, weighers, wagon loaders, self-feeders, and other extra attachments are furnished at stipulated separate prices, and are subject to the above warranty.' We think the provision in the order to the effect that the failure of the warranty as to any separate part or attachment of the machine should not affect the liability of the purchaser, except as to such part or attachment, must be limited to a part or attachment furnished at a separate fixed price." *Robinson* v. *Berkey,* (Iowa) 82 N. W. Rep. 972.

Tested by this rule, which we believe to be supported by the great weight of authority as well as reason, the contract in the case at bar must be held to be an entire contract. By the failure of the parties to fix a price on the separate articles, they have made it impossible for the court to treat the contract as divisible, although certain language in the contract indicates that such was their intention. Counsel for appellant rely upon the cases of *Aultman & Taylor Co.* v. *Lawson,* (Iowa) 69 N. W. Rep. 865; *Nichols & Shepard Co.* v. *Wiedman,* (Minn.) 75 N. W. Rep. 208, 76 N. W. Rep 41; *Same* v. *Chase,* (Wis.) 79 N. W. Rep. 772.

In the case of *Aultman & Taylor Co.* v. *Lawson* the written contract was similar to that in the case at bar, but the evidence disclosed that the lump sum agreed upon was the aggregate of prices agreed upon as to the different parts. The court said: "True, the consideration is stated in one lump sum, but the evidence shows that sum was the aggregate of prices agreed upon as to the different parts. The contract does not show the prices on different parts, but, being silent on that subject, it was competent to prove what the agreement was in that respect, such proof not being in contradiction of such contract." The facts of this case are clearly distinguishable from those in the case at bar. Counsel for appellant in the case at bar offered certain evidence as to the list prices of these separate articles, but there is no evidence in the record that the parties ever agreed upon such list prices or any other prices as to each separate article. There is even nothing to show that defendants ever had any knowledge of such list prices, and therefore the objections urged to this testimony by defendants' counsel were well founded. In *Nichols & Shepard Co.* v. *Wiedman* the opinion does not disclose whether or not the price of each separate article was

agreed upon, but the case of *Aultman & Taylor Co.* v. *Lawson* is cited as an authority, and it is therefore fair to presume that the facts were similar in the two cases. The case of *Nichols & Shepard Co.* v. *Chase* is just as clearly not in point. While the written contract in that case is similar to the one in the case at bar, still the opinion discloses that plaintiff proved that just before and at the time that Mr. Chase signed the order for the machinery he and plaintiff's agent thoroughly talked over the prices of each of the separate articles mentioned therein, and the supreme court of Wisconsin in that case properly held it error for the lower court to exclude testimony tending to prove that each of the machines was put in the order at a separate and stipulated price, and as to what such price was. That court did not hold the written contract to be divisible. It simply held, as did the Iowa court in *Aultman & Taylor Co.* v. *Lawson,* that parol testimony was admissible to show that a separate price was agreed upon as to each separate article. In the case at bar, as we said before, no competent evidence was offered tending to show that a price was agreed upon as to each separate article, and hence the contract before us is for the sale of several distinct articles for one gross sum, and we must therefore hold such contract to be entire. It follows, therefore, that defendants had a right to rescind the contract in toto by returning the entire rig, as they did. In fact, this was necessary, if they desired to rescind at all.

Upon the trial defendants asked leave to amend their answer by adding to paragraph 3 thereof the following: "And also a certain note for $205, the consideration for which was the payment of freight upon said machine;" and by adding to paragrph 1 of the prayer for judgment the following: "And that said note for $205, referred to in paragraph three, be cancelled and returned to defendants, or that said defendants have judgment against said plaintiff for the amount of said note, together with interest from date thereon;" to which proposed amendment plaintiff objected for the reason, as stated, "that the evidence does not show there was a note given to the plaintiff in this case, and it does not show there was a note for $205 given to any person in connection with the transaction for the purchase of this threshing machine." No ruling was made at the time allowing or disallowing the proposed amendment, but judgment was subsequently ordered in favor of defendants, directing the return of said note to defendants for cancellation, and ordering judgment for the amount thereof, with interest in case the same is not so returned. The learned trial court, therefore, treated said amendment as allowed. The only testimony offered in relation to the subject-matter of this amendment was to the effect that this note was given to James O'Laughlin, who furnished the money to pay the freight on the rig. Was this amendment and the relief granted thereunder proper? We think not. The note was not executed to the plaintiff, and did not represent any portion of the purchase price of the rig. It was given to O'Laughlin, who, as the evidence shows,

advanced for defendants the money necessary to pay the freight on this rig from the factory to Rolla. True, O'Laughlin at the time was plaintiff's agent, but there is nothing to show that this note belonged to plaintiff or that plaintiff had anything to do with the freight transaction. The contract required defendants to pay the freight in cash. Whether, as a matter of fact, any freight was paid or not does not appear, either from the amendment or the evidence. If defendants paid the freight, then, under proper pleading and proof of such payment, they would be entitled to recover the same back from plaintiff, on the theory that the same was a part payment on the purchase price of the rig. Such was evidently the theory of counsel in making the amendment, but we think they have fallen far short of accomplishing their purpose.

There is but one other question requiring notice. Counsel for respondent made a motion in this court to strike out the statement of case, which motion was made upon the ground that the statement embraces a complete transcript of the reporters' notes instead of the substance thereof. In view of our holding upon the merits in this case, a decision of this motion is rendered unnecessary; but see *Bank* v. *Davis*, 8 N. D. 83, 76 N. W. Rep. 998, where it was held that § 5630, Rev. Codes 1899, as amended by chapter 5, Laws 1897, no longer requires that the evidence shall be reduced to narrative form in the statement of the case.

The judgment of the district court will be modified by eliminating therefrom that portion wherein it is adjudged that defendants recover from plaintiff the sum of $205 and interest, or the return of the note for $205 given by defendants for alleged payment of freight, and when so modified said judgment will be affirmed; the appellant to recover his costs in this court. All concur.

MORGAN, J., being disqualified, took no part in the decision; Judge C. J. FISK, of the First judicial district, sitting by request.

(88 N. W. Rep. 80.)

TALLAK BROKKEN *vs.* HENRY J. BAUMANN, *et al.*

Opinion filed Nov. 14, 1901.

Public Lands—Entry—Mortgage—Validity—Homestead—What Constitutes.

A married man in poor circumstances, and physically crippled, and not contributing enough towards the entire support of his family, filed upon and made final proof for 160 acres of government land, upon proof satisfactory to the land department of the government of five years' residence and cultivation of such land. His residence and his improvements thereon were meager, and his shanty thereon was not habitable at all times of the year. Soon after submitting such proof he moved the shanty away from the land. His wife never actually resided on the land. The husband never resided there after submitting such proof. About five months after the making of the proof he made a loan, secured by a mortgage, on such land, the wife refusing to join in such mortgage. *Held*:

1. That the mortgage was valid.

2. That the land was never occupied or resided upon as a homestead, under § 3605, Rev. Codes, and was not exempt.

3. That, before the homestead right attaches to land under such section, there must be actual or constructive residence on the land, with a view to making it a home.

4. Mere intention to occupy such land is not sufficient, in the absence of some acts indicative of carrying such intention into immediate execution to some extent.

5. That the action of the land officers in accepting such proof and issuing a certificate had no conclusive effect as to anything as continuing after the acceptance of such proof.

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

Action by Tallak Brokken against Henry J. and Nellie V. Baumann. Judgment for defendants, and plaintiff appeals. Reversed.

A. J. Bessie and *L. B. Everdell*, for appellant.

Abandonment is a mixed question of intention and fact. *Kuhnert* v. *Conrad*, 6 N. D. 215, 69 N. W. Rep. 185. Abandonment of realty will be presumed where the party leaves no property or improvement to indicate his intention to return and resume the occupancy of the land. *Burke* v. *Hammond*, 79 Pa. St. 172. It is the use with intent combined which impresses the homestead stamp upon real estate. *Clark* v. *Evans*, 60 N. W. Rep. 862; Waple's Homesteads, 190; *Leonard* v. *Ingraham*, 10 N. W. Rep. 804. The homestead which the statute exempts is the land with the dwelling house thereon and its appurtenances owned and occupied by a resident of the state. To call the premises the homestead of the debtor and his family, when the debtor resides elsewhere and leaves the premises vacant, would be a misnomer. *Tillotson* v. *Millard*, 7 Minn. 424; *Folsom* v. *Carli*, 5 Minn. 333; *Kelly* v. *Baker*, 10 Minn. 124; *Grange* v. *Gough*, 4 Pac. Rep. 1177; *Koons* v. *Rittenhause*, 28 Kas. 258. A mere vague intention to return some time in the future, which may be entirely consistent with the fact of having gained a new homestead, will not be sufficient to preserve the homestead right. *Donaldson* v. *Lamprey*, 11 N. W. Rep. 121; *Savings Bank* v. *Kennedy*, 12 N. W. Rep. 479; *Schoffen* v. *Landauer*, 19 N. W. Rep. 95.

J. A. Dwyer and *Charles E. Wolfe*, for respondents.

Homestead statutes are to be construed liberally in favor of the exemption. *Kingman* v. *O'Callaghan*, 4 S. D. 628. Five months before the making of the mortgage in question the land was proved up as a homestead by Henry Baumann, such proof showed actual residence upon the tract for five years preceeding proof. § 2299 Rev. St. U. S. The fact of the establishment of the homestead of the defendants on the land was found by the officers of the land department in a proceeding properly before them. Such finding will not be disturbed. *Parsons* v. *Venske*, 4 N. D. 451 and 469; *St. Louis Smelting Co.* v. *Kemp*, 104 U. S. 657; *Minter* v. *Crommelin*, 18 How. 87; *Bagnell* v. *Broderick*, 13 Pet. 448. The fact that the wife does not reside on the place is immaterial. *Rosholt* v. *Mehus*, 3 N. D. 513.

Griffen v. *Nichols,* 17 N. W. Rep. 63. If the wife, by reason of cruelty of the husband, leaves him and the homestead, she forfeits none of her rights to the homestead thereby. *Barker* v. *Dayton,* 28 Wis. 367; *Keyes* v. *Scanlan,* 63 Wis. 345; *Rosholt* v. *Mehus,* 3 N. D. 513; 9 Am. & Eng. Enc. L. 487. A tract of land does not cease to be a homestead, within the meaning of the law, simply because, at a particular time, there is no house upon it fit to live in. *Edmonson* v. *White,* 8 N. D. 72. The homestead right cannot be waived by the husband alone. *Beecher* v. *Baldy,* 7 Mich. 488; *Dye* v. *Mann,* 10 Mich. 291; *King* v. *Moore,* 10 Mich. 538; *Comstock* v. *Comstock,* 43 Mich. 515. The acts of Henry Baumann, claimed by plaintiff to be evidence of abandonment, were done after his desertion of Nellie Baumann, and after they had ceased to live together by reason of his neglect, cruelty and desertion, her right was not thereby forfeited. *Phillips* v. *Stauch,* 20 Mich. 369; *Bruner* v. *Bateman,* 66 Ia. 488; *Lies* v. *DeDiabler,* 12 Cal. 329. Defendant's abandonment of the homestead was temporary merely with intention to return, manifested by his voting in the township, claiming it as his residence, in November, 1900. *Clark* v. *Evans,* 60 N. W. Rep. 862; *Holden* v. *Pinney,* 6 Cal. 234; *Dunn* v. *Tozier,* 10 Cal. 171; *Bradshaw* v. *Hunt,* 57 Ia. 745; *Griffen* v. *Nichols,* 17 N. W. Rep. 63; *Reske* v. *Reske,* 16 N. W. Rep. 895.

MORGAN, J. This is an action to foreclose a mortgage on real estate. The facts material to the issues are as follows: Some time in the year 1892 the defendant Henry J. Baumann made an entry of the land involved, being 160 acres, under and by virtue of the homestead laws of the United States, at the United States land office at Fargo. He was then a single man, but on January 21, 1896, he and the defendant Nellie V. Baumann intermarried, and commenced living together as husband and wife, but not on the land on which he had made homestead entry. They first went to living at her mother's, but for how long does not appear. After that they lived at his father's for six weeks. She then moved back to her mother's, and lived there. Later he followed her to her mother's, but how long he remained there does not appear. Her mother lived about 12 miles from the husband's homestead claim. He had a shanty on such claim, 14x16, of rough boards, not sided, but tar-papered. The furniture kept in this shanty was a stove, some chairs and a bed. The husband had some personal property besides, consisting of two horses, a colt, and a buggy, but it does not appear that such personal property was kept on his homestead claim. The wife never actually lived on this homestead claim, nor was she ever on the land, either before or after the proof. She gave birth to two children after their marriage, only one of them being now alive. The wife has been in poor health at times since their marriage, and unable to do any work for months at a time. The husband is a cripple, having lost one leg, and is not able to do any kind of work on the farm that requires walking. He did not sup-

port his wife, but gave her some money at times. She was supported by her mother to a great extent. Their married life was not a happy one, he being cross and disagreeable to her. Some part of this land was under cultivation, and was put into crop each year by one of the neighbors, the husband getting one-fourth share of such crop, until the year 1899. In 1900 and 1901 the land was rented by the defendant Nellie V. Baumann to a tenant, and she received a share of the crops. On September 4, 1897, he received a final receiver's receipt for this land from the Fargo United States land office, after having submitted testimony as to residence on, and cultivation of, the land for five years. Very soon after submitting such final proof he moved the shanty from this land to her mother's place, and fixed it up as a granary. In the fall of 1897, or during the winter of 1898, the husband commenced negotiating for a loan on the land in question from the plaintiff. The loan was made, and the mortgage executed and delivered on February 3, 1898. The note and mortgage in suit purport to have been signed by both defendants, the husband and wife. The wife did not sign the note or mortgage nor acknowledge the execution of the mortgage. Her name attached to these instruments were forgeries. Both the plaintiff and his agents acted without any knowledge or intimation of such forgery. The mortgage was duly recorded in the office of the register of deeds of Richland county. Upon the mortgage was indorsed a certificate by a notary public of the facts, sworn to by a person puporting to have witnessed the signature of the defendant Nellie V. Baumann, as provided by § 3580, Rev. Codes. The affidavit made by such person as such subscribing witness is conceded by the plaintiff to have been wholly false, and nothing is claimed as based on such certificate. The wife was requested to sign such mortgage by persons representing her husband, but she refused to so do, saying that the homestead was hers, and that she wanted it, or at least some of the money they were going to get on the loan. The husband never lived on the land after submitting his testimony to the land office upon his final proof. The date of the receiver's receipt was September 4, 1897. Some time in the fall of 1897 or the winter of 1898 he went into the hotel and restaurant business at Sisseton, S. D. After leaving Sisseton he engaged in selling medicines as a peddler in various localities. The wife received none of the money that was received by him from the loan made of the plaintiff. About September 18, 1900, the defendant Nellie V. Baumann commenced an action for a divorce against the defendant Henry J. Baumann, alleging his failure to support her, willful desertion, and extreme cruelty. The defendant appeared in such action by his attorneys, but such appearance was withdrawn on February 25, 1901, and on February 26, 1901, the court ordered a decree of divorce to be entered. In this action the court assigned the land in question to the wife and awarded her the custody of the infant child. In such findings the land involved in this case, and which was assigned to the

wife, was found to have been "the legal and actual homestead of the plaintiff and defendant." Since this divorce was granted and this land assigned to her the plaintiff has not resided thereon but has leased the same to another, she to receive one-fourth of the crop raised on the tillable land, and the same proportion of the hay cut therefrom. The person to whom this land was leased by her did not reside on the land. The defendant Henry J. Baumann did not appear at all in this action. The defendant Nellie V. Baumann appeared and answered by way of general denial, and further answered that at the date of the mortgage attempted to be foreclosed she was the wife of the defendant Henry J. Baumann, and that the land described in such mortgage was then the actual homestead of herself and husband, and that she has never conveyed and waived her rights to, or interest in, the same. The trial court found in her favor upon all the issues involved, and dismissed the action. The plaintiff appeals from such judgment of dismissal, and requests a trial anew of all the issues involved.

There is but one question involved on this appeal, and that question is, was the land in question the homestead of the defendants on February 3, 1898, the date of the mortgage attempted to be foreclosed under the laws of the state of North Dakota? If it was their homestead, then the mortgage was not valid as to either of the defendants; if it was not, then the mortgage was valid by virtue of the execution and acknowledgment of the husband, without the signature or concurrence of the wife thereto. To decide this question, it will be necessary to determine whether the land in question was ever the homestead of the defendants, under the laws of the state of North Dakota. In order to do this, we will consider the evidence relating to the occupancy of the land in question, as it has a direct bearing upon the actions of the defendant Henry J. Baumann at the time of submitting his final proof and immediately thereafter. In so considering such evidence, it is done solely with a view of a proper determination of his relation to the land at the time of, and immediately after, such proof. So far as this case is concerned, the decision of the land office is conclusive that the title to the land is in the defendant Henry J. Baumann. The decisions of the land department of the federal government in such matters are not reviewable by the courts in collateral proceedings The decisions of such department, when it has jurisdiction, are conclusive as to questions of fact, and cannot be assailed except in direct proceedings, where fraud or mistake or imposition is alleged. *Refining Co.* v. *Kemp*, 104 U. S. 636, 26 L. Ed. 875; *Parsons* v. *Venzke*, 4 N. D. 469, 61 N. W. Rep. 1036, 50 Am. St. Rep. 669. Therefore the title of the defendant could not be disturbed in this suit, although the action of the land department might have been erroneous.

The evidence as to the residence of the defendant Henry J. Baumann on the land in question prior to September 4, 1897, is the following: As to such residence his father testified as follows:

"He went up from my place out each night, and didn't come back until morning. He did that frequently. I cannot remember how many times during the year [1897], but more than twice. I do not remember but he was particular to be there every so often, as the law requires. He went there just before he made final proof, and took some boys with him from my home,—any boys that stayed with him at that place overnight." Another witness testified, in part, as follows: "I think Henry J. Baumann proved up on this land the 6th or 7th of August, 1897. Before and since that time I worked it. He came there once in a while but I never saw him. He probably came around every year once or so. He has been around since he first filed on the land, but not since he proved up." This witness lived 30 rods from the land in question. On cross-examination he said: "I can't say that he ever lived on this land. He went there once in a while and stayed there. Whether he stayed overnight I can't swear. I don't know. I don't know whether he had any other home. He always stayed with the old folks." Another witness, after stating that from appearances the shanty on the claim was not habitable the year around, says: "During my visits I never met them, or either of them, on that tract. I have been over the tract five or six times during the year, and never met them there, nor saw any one residing on it or in the house." This witness lived two miles from the land in question. On cross-examination he testified: "He never, to my knowledge, lived a day on that land. I don't know whether he did or not. I simply testify to what I have seen. He may have been there two or three days at a time and I not know it. The only difference I noticed in his relation to the land before the proof and after the proof was that he moved the shanty away."

The foregoing is all of the evidence bearing on the question of his residence on the land in question. The evidence as to the shanty that was on the claim is described by one witness as "a claim house, not sided or anything; just tar paper, I think." Another witness says it was not habitable at all times of the year. As to the furniture in the shanty, the evidence shows it consisted only of a stove, bed, and chairs. There is no evidence that there were any cooking utensils there, nor any evidence that any meals were ever prepared there. There is no showing that he had ever remained there save as stated, at night. He never slept there after the proof was submitted. Very soon after his proof was submitted by him he tore the shanty down, and hauled the lumber to his mother-in-law's place, where it was used to fix a granary. A careful reading of the whole testimony convinces us that this land was never occupied by the defendants, or either of them, as a homestead, or as a home, under the state law. When occupied by the defendant it was solely for the purpose of making proof before the land office. It was an occupancy for the purpose of getting title to the land, and not for the purpose of making for himself or family a home. He never occupied it after the title passed from the

government to him. All of his actions, so far as the record shows, conclusively show that there never existed in his mind any intention of retaining even the appearances of occupancy after he proved up.

When he moved the shanty to his mother-in-law's place there was no declaration that he intended to build another house or to ever live on the land, nor was there ever filed in the office of the register of deeds a declaration of homestead, as provided for by § 3620, Rev. Codes. Not from the day that he made his homestead proof up to election day, 1900, did he ever intimate in any way that he claimed that as his home. On election day he desired to vote, and was about to be challenged as a voter, when he said that he claimed the homestead as his home. But for over three years it could not have been his home, as there was no kind of habitation on the land. The record will be searched in vain for any expression or act of his indicating that he ever had the idea in his mind of a permanent occupancy of this land as his home, either for himself or family. Title to the land is all that he ever sought, and before that was secured his occupancy thereof ceased, as shown by acts not of any doubtful meaning.

He never having occupied the land as his homestead, under the laws of the state, his wife could acquire no homestead rights therein. It never became their homestead by actual or constructive occupancy. Residence of some kind is a necessary prerequisite to obtaining homestead rights to lands. In *Edmonson* v. *White,* 8 N. D. 72 76 N. W. Rep. 986, this court has held that the presence of a house on the land in all cases, at all times is not necessary. Fires or storms may destroy the dwelling house. The absence of the occupants during the time of rebuilding in such cases is not an abandonment or a forfeiture of homestead rights, and courts will construe efforts and intentions to build on and to occupy premises liberally. But mere intentions alone to build will not save the homestead after long lapses of time. There must be present some acts indicating that parties are acting in good faith towards occoccupying the land, besides the intention. The authorities are about unanimous on this proposition. *Swenson* v. *Kiehl,* 21 Kan. 533; *Scofield* v. *Hopkins,* 61 Wis. 374, 21 N. W. Rep. 259; *Woodbury* v. *Warren,* (Vt.) 31 Atl. Rep. 295, 48 Am. St. Rep. 815; *Evans* v. *Calman,* 92 Mich. 427, 52 N. W. Rep. 787, 31 Am. St. Rep. 606; *Ingels* v. *Ingels,* 50 Kan. 755, 32 Pac. Rep. 387; *Davis* v. *Kelly,* (Neb.) 87 N. W. Rep. 347. It is claimed that the defendant's refusal to support his wife, and his desertion of her, would be sufficient grounds for holding that her homestead right attached without actual occupancy. We do not understand that this would be the case where neither ever occupied the homestead nor made any efforts to do so after ownership of the premises. Had the wife actually occupied the homestead, and been compelled to leave it because her husband had deserted her or failed to support her this contention would be sustained.

The grounds of our decision are that there never were any homestead rights gained in this land by either under our laws. Granting all the presumptions allowable to the action of the land department, still the facts are that there was no homestead right gained to this land under the state law, and no presumptions arising by virtue of such accepted final proof that the occupancy continued for another purpose entirely different from the purpose in view in gaining title under the government laws. These premises were never actually or constructively occupied by husband or wife as a home, and until there is such occupancy or residence the homestead right does not attach under our statute. § 3605, Rev. Codes. The cases are numerous bearing out this principle also. *Borchaim* v. *Byrne,* 83 Cal. 23 23 Pac. Rep. 212; *Woolcut* v. *Lerdell,* 78 Iowa 668, 43 N. W. Rep. 609; *Kelly* v. *Dill,* 23 Minn. 435; *Power* v. *Burd,* 18 Mont. 22, 43 Pac. Rep. 1094; *Scofield* v. *Hopkins,* 61 Wis. 370, 21 N. W. Rep. 259.

It is contended that because the defendant voted in November, 1900 and then claimed this homestead as his home, that fact shows that it was then his homestead. We cannot give that effect to that fact. The fact of voting is competent evidence to show where a man's residence is, but slight evidence of that fact, and has no weight with us in this case, in view of the other facts found in the record. Abb. Tr. Ev. p. 137. If the fact of voting did show such intention, it would still be insufficient, without some act towards the land showing an active effort to occupy the premises. If he was a legal voter there, it could only have been by virtue of residence at his father's. At times the wife, also, made some vague statements that she would have occupied the premises with her husband if she were able to, but such statements are not ever considered sufficient, alone to initiate homestead rights without some accompanying acts showing that such intentions are made in good faith. These vague statements by the wife were mostly made at the trial as to what her past intentions were, and were not made at any time prior, save when asked to sign the mortgage, when she refused to sign, saying that the place was her home, and that she would not sign unless she got some of the money that was to be received on the loan. Although the wife's rights are zealously guarded by courts when they have attached to the homestead, we find no cases going to the extent of creating rights that have never existed as to husband and wife, thus defeating liens that have attached. Had either of the defendants ever resided on this land, under the state laws, and been unable to continue living thereon, their and her rights to the homestead could have been preserved by filing a declaration of homestead. This was not done, and tends to show that they never intended to reside thereon. See *Foogman* v. *Patterson,* 9 N. D. 254, 83 N. W. Rep. 15.

The judgment is reversed, and the district court is directed to order a decree of foreclosure pursuant to the demand of the complaint. All concur.

(88 N. W. Rep. 84.)

OLE P. KULBERG *vs.* C. T. GEORGIA.

Opinion filed Nov. 7, 1901.

Specific Performance of Parole Contract Denied—Complaint Insufficient.

Plaintiff alleges that in 1897 he made a parol contract with defendant for the purchase of certain real property, the same to be paid for on or before five years from November 1st of said year. He also alleges that said contract was to be reduced to writing after certain improvements were made on the property by plaintiff, and he alleges further that he has made such improvements, but that defendant refuses to sign said written contract, and he prays that he may be compelled to do so. There is no allegation that plaintiff, prior to the commencement of the action, tendered or offered to perform his part of the agreement. *Held*, that the complaint fails to state a cause of action.

Performance by Plaintiff—Averments Necessary.

A court of equity will not compel parties to sign contracts; nor will they compel specific derformance of contracts unless plaintiff shows a full performance on his part, or an offer of such performance, and a readiness and willingness to perform, prior to the commencement of the action.

Appeal from District Court, Towner County; *Morgan*, J.

Action by Ole P. Kulberg against C. T. Georgia for specific performance. Judgment for plaintiff. Defendant appeals. Reversed.

Brennan & Kennedy, for appellant.

The agency of Brown for Georgia, if one existed, was verbal, no written authority whatever having been given by Georgia to Brown. The agency and alleged contract were repudiated by Georgia in the only letter Brown ever received from him. A real estate broker, with whom lands are listed for sale by the owner, has no authority to make contract for sale thereof, which will bind the owner, in the absence of written authority signed by such owner authorizing him to do so. Subd. 5, § 3887, Rev. Codes; *Ballou* v. *Bergsvendsen*, 83 N. W. Rep. 10, 9 N. D. 285, and cases cited. Where there is an issue as to the existence or contents of a letter to sell realestate the proof must be clear. *Stadelman* v. *Fitzgerald*, 15 N. W. Rep. 234. Kulberg cannot be allowed to take unlawful possession of the land and rely on acts without authority to take a parol contract of an agent out of the statute of frauds. *Pawlak* v. *Granowski*, 55 N. W. Rep. 831; *Condon* v. *Osgood*, 65 N. W. Rep. 1003; *Guldner* v. *Burdock*, 37 Am. Dec. 317. The agreement to take the $600 note was not a waiver of any excess that was over. *Turnley* v. *Michaels*, 18 S. W. Rep. 913.

Maglone & Middaugh, (*Bosard & Bosard* of counsel) for respondent.

In the absence of a statute requiring an authority to an agent to sell real estate to be in writing, an oral authorization is sufficient. 1 Am. & Eng. Enc. L. 955. The statute, § 3960, declaring

an agreement for the sale of real property invalid unless the same, or some note or memoranda thereof, is in writing, subscribed by the party to be charged, does not abridge the powers of a court to compel specific performance of the agreement for the sale of real property in case of part performance thereof. Pom. Eq. Jur. § 1409. The possession of Kulberg was constructive notice to Georgia of his rights. *O'Toole* v. *Omlie*, 8 N. D. 444, 79 N. W. Rep. 819.

FISK, D. J. This is an appeal from a judgment rendered by the district court of Towner county, and the case is in this court for trial de novo. The cause of action as stated in the complaint is, briefly, as follows: That on May 24, 1897, defendant was seized in fee simple of certain real property (describing same); that on said date plaintiff and defendant entered into a parol agreement whereby the plaintiff agreed to buy and defendant agreed to sell said property for the sum of $750, to be paid for on or before five years from November 1, 1897, that said sale and purchase were made upon crop contract plan and provided among other things that the plaintiff should during the year 1897 break and prepare for crop for the year 1898, 83 acres of said land; that plaintiff did so break said number of acres during said year, and had the same ready for crop at the time of the commencement of this action; that thereafter, in accordance with the terms of said agreement, plaintiff made and executed his certain crop contract for the sale of said lands, in writing, but that said defendant fails, neglects, and refuses to sign, execute, and deliver the same, although due demand has been made that defendant keep and perform his part of said contract; that said agreement provided, among other things, that said defendant should make, execute, and deliver said contract after this plaintiff had broken, backset, plowed, and cultivated said 83 acres, and prepared the same for crop for the year 1898; that immediately after entering into said agreement, and under and by virtue thereof, plaintiff entered into possession of said premises, and ever since has been and now is in possession thereof; and that he is complying with the terms of said contract on his part to be kept and performed, and that plaintiff is still ready and willing to perform all the conditions on his part in said contract to be performed; and the prayer for judgment is that the defendant be compelled to execute to the plaintiff a sufficient contract in writing for the sale to plaintiff of the premises described, and for general relief. The action was tried and judgment rendered in the district court in favor of the plaintiff adjudging, among other things, that defendant make, execute, and deliver to plaintiff forthwith a contract in writing for the sale by him and the purchase by plaintiff of the real property in question, and that such contract do have the same force and effect as though the same had been made and delivered on May 24, 1897. It was further adjudged that, in case of the failure of said defendant to make and deliver forthwith to plaintiff a contract

as above set forth, then the judgment shall operate as such contract and stand in lieu thereof; and adjudging that plaintiff shall be entitled to a deed of said premises upon full performance by him of the terms and conditions of said contract on his part to be kept and performed.

The view we take of the case renders it unnecessary for us to examine any of the questions of law or fact determined by the trial court and we shall refrain from so doing, as the questions cannot properly be litigated in this action. We are of the opinion that the complaint fails to state a cause of action. The relief prayed for and which was granted in the lower court is to compel defendant to execute and deliver to plaintiff a certain written contract for the sale and purchase of real property. Such relief will not be granted. Parties will not be required to make contracts. Courts may enforce, but not make contracts. See 22 Am. & Eng. Enc. Law, p. 932, and cases cited. A court of equity in certain cases will compel specific performance of contracts, but we know of no authority holding that a court of equity will compel parties to sign contracts, and then decree specific performance thereof. The plaintiff must always allege and prove full performance on his part, or a tender and offer of performance, prior to commencing his action. The plaintiff in the case at bar not only has not performed or tendered performance on his part, but the time for such performance had not arrived when this action was commenced. We do not understand that specific performance will be adjudged in advance of the time when performance is required under the terms of the contract, and hence this action is permaturely brought.

Plaintiff's rights, if he has any, under the alleged contract, will not be impaired by lapse of time. He is in possession of the land, and this is notice to the world of whatever rights he may have, and until such time as his cause of action for specific performance accrues he may take proceedings to perpetuate the testimony as to his rights; but, having seen fit to rest the contract in parol, he cannot ask a court of equity to compel the other party to reduce the same to writing, and then, in advance of performance on his part, or tender of such performance, and in advance of the time when performance is required from the defendant under the terms of the contract, ask the court to decree specific performance. We know of no principle authorizing such relief under these facts.

In justice to the learned judge who tried this case in the district court, we desire to say that this point was not raised or suggested in that court.

For the foregoing reasons, the judgment of the district court must be reversed, and the action dismissed; and it is so ordered.

WALLIN, C. J. I concur in the opinion as formulated by Judge FISK, but I deem it my duty to go further, and say that from my standpoint there is no evidence in the record tending to show that the plaintiff has at any time or in any manner entered into any valid agree-

ment with the defendant to buy the land in question upon the terms set out in the complaint. The plaintiff dealt with an alleged agent of the owner of the land, and did not deal with the defendant, who owns the land. I can find no evidence in the record that the alleged agent had any authority to sell the land, resting either in writing or in parol, upon the terms stated in the complaint. As I see it there is no shadow of evidence of any authority to sell the land upon the crop payment plan. I therefore am of the opinion that the plaintiff cannot, under the alleged agreement, acquire title to the land in suit at any time or under any circumstances. Nor, in my opinion, will a court of equity at any time in the future decree a specific performance of the alleged contract.

(88 N. W. Rep. 87.)

STATE *ex rel.* W. E. WEST *vs.* JAMES COLLINS, *Sheriff.*

Opinion filed Dec. 12, 1901.

Habeas Corpus—Right to Bail—Capital Case.

Habeas corpus to obtain bail. Construing § 6 of the state constitution and § 8446, Rev. Codes 1899, *held*, that in capital cases the accused is entitled to bail before trial, as a matter of absolute right, unless the proof of guilt is evident, or the presumption thereof is great.

When Bail Matter of Discretion.

Held, further, that in other capital cases bail may be granted or withheld as a matter of judicial discretion, to be exercised either by the district or the supreme court, or by the judges thereof.

Bail Refused.

Held, further, upon the facts here presented and for reasons stated in the opinion, that bail will not be granted in this case upon this application, either as a strict legal right or as a matter of discretion.

Application of William E. West for writ of habeas corpus. Denied.

Cochrane & Corliss, for petitioner.

The petitioner has been committed without bail after a preliminary examination, upon a charge of murder in the first degree. Habeas corpus is his proper remedy. § 8685, Rev. Codes. This court has original jurisdiction to issue the writ. § 5165, Rev. Codes. And this notwithstanding a similar application has been refused in the district court. *Carruth* v. *Taylor*, 8 N. D. 166, 77 N. W. Rep. 615.

Petitioner is accused of a capital offense but is entitled to be admitted to bail because the proof of his guilt is not evident nor is the presumption great. § 6 Const.; § § 8445-8446, Rev. Codes; *Ex parte Curtis*, 28 Pac. Rep. 223; *Ex parte Heffron*, 27 Ind. 87; Kerr on Homicide, 325, § 289. All the evidence taken on the prelim-

inary examination is attached to the petition, and it is proper for this court to examine this evidence and determine whether a capital conviction could be sustained upon it, otherwise the proof is not evident or the presumption great. *Ex parte Curtis,* 28 Pac. Rep. 223; *In re Trola,* 64 Cal. 152; *In re Wolfe,* 57 Cal. 94; *In re Losasso,* 24 Pac. Rep. 1080; *Thrasher* v. *State,* 7 So. Rep. 847; Church on Habeas Corpus, § § 402-403; *State* v. *Summons,* 19 O. 139; *Ex parte White,* 9 Ark. 224; *Ex parte Kendall,* 100 Ind. 599. The word evident, as here used, means manifest, plain, clear, apparent. *Ex parte Boyett,* 19 Tex. App. 17; 3 A. & E. Enc. L. 669; *Ex parte Foster,* 5 Tex. App. 625; Church on Habeas Corpus, § 402. The evidence shows that defendant was assaulted by deceased and knocked down, kicked, his feet seized and his body dragged on the floor in the public office of the hotel, and this without any provocation by petitioner and without warning from deceased; that petitioner was a much smaller man than his assailant. When deceased was caught and pulled away he was in the act of pounding petitioner. That upon gaining his feet petitioner drew a revolver and immediately shot, killing his assailant, who was at the time within ten feet of and facing accused. These facts negative a "premeditated design to effect death" necessary to murder in the first degree. Subd. 1, § 7058, Rev. Codes; *Ex parte Wolfe,* 57 Cal. 94. Such design must precede the killing by some appreciable space of time, a time sufficient for reflection or consideration upon the matter, for choice to kill or not to kill, and for the formation of a definite purpose to kill. *People* v. *Conroy,* 97 N. Y. 76; *People* v. *Majone,* 91 N. Y. 201; Kerr on Homicide, 75; *State* v. *Hill,* 69 Mo. 452; *State* v. *Wieners,* 66 Mo. 13; *Lang* v. *State,* 5 Am. St. Rep. 324; 4 So. Rep. 193; *Commonwealth* v. *Drum,* 58 Pa. St. 9. The facts disclose that the killing was done in heat of passion produced by adequate provocation and without cooling time, reducing the grade of the offense to manslaughter. *Maher* v. *People,* 10 Mich. 218; *Minton* v. *Commonwealth,* 12 S. W. Rep. 688; *Ty.* v. *Bannigan,* 1 Dak. 447; 46 N. W. Rep. 597; *State* v. *Maines,* 37 S. E. Rep. 615; *Ex parte Moore,* 30 Ind. 198; *Hurd* v. *People,* 25 Mich. 405; *State* v. *Moore,* 1 Greene's Cr. R. 611; *Rex* v. *Lynch,* 24 Eng. Com. L. 586. The evidence as to the shooting, the position of the parties, the point where the ball struck and its direction through the body, all negative any design to effect death and bring the case fairly within the terms of Subd. 2, § 7084, Rev. Codes.

J. B. Wineman, State's Attorney, for the state.

A design to effect death sufficient to constitute murder may be formed instantly before committing the act by which it is carried into execution. § 7061, Rev. Codes. The question of provocation is for the jury. *Maher* v. *People,* 10 Mich. 212; *Hooker* v. *State,* 99 Ala. 166. Bail should be refused if the court would sustain a conviction upon the evidence before it. *Ex parte McAnally,* 53

Ala. 495; 25 Am. Rep. 646; *Ex parte Brown,* 65 Ala. 446; *Ex parte Sloan,* 95 Ala. 22. And when the proof is evident or the presumption great in a capital case it is discretionary with the court to refuse bail. *People* v. *Tinder,* 19 Cal. 539; *Ex parte Wolfe,* 57 Cal. 94; *Ex parte Bridewell,* 57 Miss. 39; *Ex parte Bird,* 24 Ark. 275; *Lynch* v. *People,* 38 Ill. 494; *In re Alexander,* 59 Mo. 599; *U. S.* v. *Hamilton,* 3 Dall. 17; *State* v. *Rockefellow,* 6 N. J. L. 332; *Ex parte Goans,* 99 Mo. 193; *State* v. *Crocker,* 40 Pac. Rep. 681. The burden is on the accused to show that the proof is not evident and the presumption not great. *Rigdon* v. *State,* 26 So. Rep. 711; *Ex parte Jones,* 31 Tex. App. 422; *Ex parte Heffron,* 27 Ind. 87; *Ex parte Winthrop,* 40 Pac. Rep. 751; *Ex parte Jones,* 55 Ind. 176. The maxim that every man is presumed innocent until found guilty does not apply to the question of bail, but on an indictment for murder accused is presumed guilty until the presumption is overthrown by proof. *People* v. *Goodwin,* 1 Wheeler Cr. Cas. 434; *Ex parte Vaughan,* 44 Ala. 417. The presumption is that the district court properly exercised its discretion in refusing bail. *Ex parte McCrary,* 22 Ala. 65; *Ex parte Allen,* 55 Ala. 258; *Ex parte Osborne,* 24 Ark. 185; *Ex parte Turner,* 112 Cal. 627; *Ex parte Clawson,* 5 Pac. Rep. 74.

WALLIN, C. J. In this proceeding the petitioner, William E. West, by his attorneys, Messrs. Cochrane & Corliss, has presented to this court a verified petition, asking that a writ of habeas corpus shall issue out of this court, directed to the sheriff of Grand Forks county, commanding him to produce before this court the body of the petitioner, and to show cause by what authority the petitioner is detained without bail, and this to the end that the petitioner be admitted to bail by this court. At the time of the presentation of said petition the state was represented by J. B. Wineman, Esq., state's attorney for Grand Forks county, and the petitioner was represented by his said attorneys, Cochrane & Corliss; whereupon it was stipulated between counsel in open court that the writ need not issue in the first instance, and that the facts and merits of the application should be presented to the court, and heard and determined by the court, upon the application for the writ, and that the evidence and matters of fact, as embodied in the petition for the writ should be held and considered by the court in all respects as if the same had been embraced in a return made by the sheriff in response to the writ.

The uncontroverted facts, as set out in the petition as grounds for the relief which is sought by the petitioner, are as follows: Upon a warrant of arrest issued by a justice of the peace of Grand Forks county, the petitioner was arrested and brought before said justice of the peace on the 3d day of December, 1901; whereupon, after a preliminary examination of the petitioner was had before said justice of the peace, an order and finding was entered in the docket of said justice of the peace to the effect that the crime of murder had

been committed in Grand Forks county, and that there was probable cause to believe that the petitioner was guilty thereof; and said finding and order also embraced the following provision: "It is therefore ordered that the defendant, W. E. West, be held to the district court of Grand Forks county, N. D., to answer to any indictment or information that may be filed against him touching said charge, and be committed to the custody of the sheriff of said county without bail." Pursuant to said order and finding of the justice of the peace, a warrant of commitment was issued by the justice, under which the sheriff received the petitioner into his custody, and now holds the petitioner as a prisoner. The petition further shows that on the 4th day of December, 1901, the petitioner made application to the district court of the First judicial district, Hon. Charles J. Fisk presiding, for a writ of habeas corpus, to the end that the petitioner might be admitted to bail upon said charge, and a hearing was then had before said district court upon such petition, upon all the evidence adduced and proceedings had before the justice of the peace, and upon no other facts and evidence, said evidence consisting of the testimony adduced upon the part of the state at the preliminary examination, and the same evidence and proceedings, and none other, are embodied in the petition presented to this court. At the hearing had upon the application made to the district court, the petitioner and the state were represented by their said counsel, and after hearing counsel the district court refused to issue the writ, and refused to either admit the petitioner to bail or to fix the amount of his bail, and said court directed that the petitioner be continued in the custody of the sheriff without bail.

Upon this state of facts the question first arising upon this application is whether the petitioner is entitled to bail as a matter of strict legal right. Counsel for the petitioner contend that he is, and cite section 6 of the state constitution, and section 8446 of the Revised Codes of 1899 in support of their contention. The first sentence of section 6 of the constitution is as follows: "All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great." In our judgment, the constitution, by its own terms, guarantees the right to bail before trial in capital cases, unless the proof of the commission of the capital offense is evident or the presumption thereof is great; and we are further of the opinion that said section of the state constitution does not forbid bail in a capital case where the proof of guilt is evident or the presumption thereof is great. As we read section 6 of the constitution, that section is silent as to granting or with holding bail in a capital case where the proof of guilt is evident or the presumption thereof is great. On the one hand, the constitution itself does not give the right to bail in the class of cases last mentioned; and, on the other hand, the constitution does not inhibit the legislature from doing so. In support of our views upon this feature of the case we cite *People* v. *Tinder,* 19 Cal. 539, 81 Am.

Dec. 77. In that case Mr. Justice Field, speaking for the court, and in construing a constitutional provision identical with that under consideration, uses the following language: "The admission to bail in capital cases, where the proof is evident or the presumption is great, may be made a matter of discretion, and may be forbidden by legislation, but in no other cases. In all other cases the admission to bail is a right which the accused can claim, and which no judge or court can properly refuse."

We are therefore required to examine the evidence presented upon this application with a view of ascertaining whether, under the constitution and as a matter of strict legal right the petitioner is entitled to bail. In performing this duty all members of this court have given the evidence and the law applicable thereto a careful consideration, and the conclusion has been reached that the petitioner is not entitled to bail as a matter of strict legal right. We have also reached the further conclusion that any extended presentation or discussion of the evidence at the hands of this court, in advance of the trial of the case upon the merits would be manifestly improper. In capital cases the question of whether the homicide resulted from the premeditated act of the accused is ordinarily one of fact, to be determined by the jury under proper instructions to be given to the jury by the trial court. In such cases the pivotal question of the grade of the homicide ought not, in our judgment, to be made the subject of collateral inquiry and determination in advance of the trial, except in cases where there is little or no ground for a difference of opinion as to the grade or degree of the homicide. In our opinion, this court would be trenching upon delicate and dangerous ground should it attempt to pass upon the crucial question to be deteremined hereafter by the jury impaneled to try and decide upon the entire matter of the guilt or innocence of the accused, including the matter of the nature and the degree of the homicide. Upon such considerations we are constrained to refrain from any discussion of the evidence or the law applicable thereto.

But, in ruling that the petitioner is not entitled to bail as a matter of strict legal right, this court does not hold that bail may not be granted the petitioner at all or for any reason. In our opinion, the petitioner, under section 8446, supra, is entirely at liberty to apply either to this court or to the district court for bail. But in that event the application may be either granted or refused, in the exercise of a sound judicial discretion. In the case as now presented to this court, counsel have insisted upon the right to bail as a matter of strict legal right, and have omitted to present to this court any facts or considerations of a special nature which would appeal to the discretion vested in this court, or which would in any way enlighten this court with respect to the granting or refusing of bail under the circumstances surrounding this case. Hence we are not in a position in this case to grant bail at the present time. But our refusal to do so does not operate as a bar to any future appli-

cation for bail by the petitioner. He is entirely free to make another application; but, in the event of his doing so, the application should be first made to the district court, as that tribunal is convenient to the parties, and is also in a better position to understand existing local conditions and all the facts and circumstances bearing upon the matter of granting or refusing bail in this particular case.

In reaching the conclusions which have been advanced in this opinion there has been entire unanimity of opinion on the part of the members of this court, except upon the point of whether the petitioner is entitled to bail as a matter of strict legal right. As to that point a conclusion is reached by a divided court.

The writ prayed for in the petition is denied.

(88 N. W. Rep. 88.)

PETER PICKTON *vs.* CITY OF FARGO, *et al.*

Opinion filed Nov. 1, 1901.

Municipal Improvements—Illegal Assessment.

Construing the provisions of chapter 41, Laws 1897, as amended by chapter 42, Laws 1899: The city engineer of the city of Fargo on April 24, 1899, filed with the city auditor of said city a document embracing an estimate for a special assessment for a tax to cover the cost of paving and other improvements upon certain streets and avenues of said city lying within a district of the city denominated "Improvement District No. 2," in which district the plaintiff owned a certain lot, which is described in the complaint. The city officials of said city in the year 1899, basing their action upon said estimate of the city engineer, and acting and claiming to act under § 7 of the original act, as embraced in said chapter 41, Laws 1897, attempted to assess a special tax upon the several lots and parcels of land situated in said improvement district No. 2, including a tax upon the plaintiff's lot. *Held*, that said attempted assessment was illegal and void, for the reason that § 7 of the original act of 1897 had been repealed long prior to the date of the filing of the engineer's estimate for said assessment, and on March 1, 1899, and that such repeal operated to sweep away all power and authority of any city engineer with respect to any such tax, or estimate therefor, which existed under § 7 of the original enactment.

Assessment Void.

Held, further, for reasons set out in the opinion, that the attempted assessment of the city officials in 1899 would have been illegal and void if the amendment which took effect on March 1, 1899, had never been enacted.

Contractors' Warrants Not Impaired by Amendment of Statute.

The city council authorized said improvements to be constructed in the year 1898, and on September 20th of that year a contract in writing was entered into between the city and one J. K. whereby the latter agreed to construct the improvements upon terms stated in the contract. Before the commencement of this action said contractor had received under said contract, of the bonds and warrants of said city, an aggregate of $14,449.15. *Held*, that the amendment of the

original act, as embraced in chapter 42, Laws 1899, did not so operate as to impair the rights of said contractor, nor to impair the validity of said warrants and bonds.

Statute Directory—"Forthwith" Construed.

The word "forthwith," found in the first line of § 7 of the amended act, construed, and *held* to be directory merely, and, further, that there was no legal impediment to prevent the city officials from assessing a tax in 1899 under the terms of the amended act, which took effect on March 1st of that year.

Curative Act—Effect.

The curative provisions of § 17 of the act of 1897 considered, and *held* that said section has no application to the facts of this case, inasmuch as the city officials did not attempt to either assess or levy any special tax under the only law then in force authorizing them to make such an assessment. This record presents a case of total failure to act under the law, and does not present a case of merely irregular action.

Action by Taxpayer—Injury Presumed.

Held, further, that, under the rule established in this jurisdiction, "substantial injury" and prejudice to the suitor will be presumed, without special evidence being offered for that purpose, in all cases where the taxing authorities attempt to levy or assess a tax either in the absence of legal authority to do so, or where there are substantial errors or omissions of duty on the part of the officials which are fundamental to the tax.

Statute as to Passage of Ordinance—Mandatory.

Section 2143, Rev. Codes 1899, construed, and *held* that the provision requiring that on the passage of all ordinances the yeas and nays shall be called and entered upon the journal of the proceedings of the city council is mandatory, and not discretionary.

Purpose of Requiring Yeas and Nays.

Held, further, that the purpose of this requirement is to fix individual responsibility upon members of the council, and to do so, it is essential that the journal entries shall show not only the number of votes cast, and the fact that the yeas and nays were called, but likewise the names of the members voting upon the passage of the ordinance, and how each voted—whether yea or nay.

Minutes of Council Must Show Compliance with Statute.

Held, further, that the fact that certain members of the council who are named in the journal entries were present when the council meeting assembled, and answered to their names on roll call, will not warrant the presumption that such members remained until a given ordinance was put upon its passage, and voted thereon.

Parol Evidence Inadmissible to Supply Omissions.

Held, further, that oral evidnce is inadmissible, either in lieu of the journal entries, or to supply omissions in the same.

Journal Must Show How Each Member Voted.

Held, further, that where, as in this case, the journal entries of the proceedings show only that upon the passage of an ordinance the yeas and nays were called, and a certain number of votes—a majority

of the council—were cast, but omit to show the names of members voting, or how each voted, such entries are insufficient to establish the fact that the ordinance was adopted by the city council.

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

Action by Peter Pickton aainst the city of Fargo and others. Judgment for defendants, and plaintiff appeals. Reversed.

Turner & Lee, for appellant.

There is no valid ordinance creating the Improvement District, for the reason that no record of the yeas and nays was made upon the vote of the council on the passage thereof. *Steckert* v. *East Saginaw*, 22 Mich. 104; *Sprangler* v. *Jacoby*, 14 Ill. 297; *Supervisors* v. *Peoples*, 25 Ill. 183; Dillon's Mun. Corp. (2 Ed.) § 229; 15 A. & E. Enc. L. 1036; *McCormick* v. *Bay City*, 23 Mich. 457; *Morrison* v. *Lawrence*, 98 Mass. 219; *Brophy* v. *Hyatt*, 15 Pac. Rep. 399; Tiedeman Mun. Corp. 98; *Commissioners* v. *Snuggs*, 39 L. R. A. 439; *Union Bank* v. *Commissioners*, 34 L. R. A. 487; *Preston* v. *Cedar Rapids*, 63 N. W. Rep. 577; *Sullivan* v. *Leadville*, 18 Pac. Rep. 736; *O'Neil* v. *Tyler*, 3 N. D. 47. No ordinance was passed providing for the details necessary to the full exercise of the power granted to the council to pave, curb and grade. Ch. 102, Subd. 7, Laws 1897; § § 2148, 2333, Rev. Codes; *Engstad* v. *Dinnie*, 8 N. D. 1. The resolution passed by the council directs the engineer to prepare plans, declares the improvement necessary and authorizes the advertising for bids and the letting of the contract; but the record is silent as to the entire matter of details of grade, material, etc. For this reason the assessment is void. § 2279, Rev. Codes; *Engstad* v. *Dinnie*, 8 N. D. 1, 76 N. W. Rep. 292; *Sterling* v. *Galt*, 7 N. W. Rep. 471; *McLaurin* v. *Grand Forks*, 6 Dak. 397, 43 N. W. Rep. 710; *McCrowell* v. *Bristol*, 20 L. R. A. 653; *Mason* v. *Sioux Falls*, 2 S. D. 640, 51 N. W. Rep. 770; Dillon Mun. Corp. § § 91-98. Not only was there no ordinance covering the details of the improvement, but the whole matter of details was delegated absolutely to the City Engineer. This is a delegation of legislative and discretionary power, and illegal. Dillon Mun. Corp. § 96; *McCrowell* v. *Bristol*, 20 L. R. A. 653 & note; *Hydes v. Joyes*, 96 Am. Dec. 311; *Thompson* v. *Schemerhorn*, 55 Am. Dec. 385; *Bolton* v. *Gilleran*, 38 Pac. Rep. 881; *San Jose Imp. Co.* v. *Auzerais*, 39 Pac. Rep. 859; *Schwieson* v. *Mahon*, 6 Pac. Rep. 683; *Ricketson* v. *Milwaukee*, 81 N. W. Rep. 864; *Wells* v. *Burnham*, 20 Wis. 119; *Kneeland* v. *Milwaukee*, 18 Wis. 411. The statute does not make it the duty of the City Engineer to do anything of this work. His plans and specifications are not notice to the public. *Sterling* v. *Galt*, 7 N. W. Rep. 471. No appropriation was made by the council covering the item of one-fifth of the cost which, under the law, is paid by the city. *Roberts* v. *City of Fargo*, 10 N. D. 230, 86 N. W. Rep. 726.

H. F. Miller (*John E. Greene*, of counsel), for respondent.

At the meeting of the council, July 5th, when the ordinance was first read, there were ten aldermen present whose names were recorded, and they all voted yea on the first reading of the ordinance. The record of the vote on the final passage shows eight members voted yea, being the whole number present. This is sufficient compliance with the statute. § 2143, Rev. Codes; *Bayard* v. *Barker*, 40 N. W. Rep. 818.

WALLIN, C. J. This action is brought to annul a city paving tax of the city of Fargo, and to enjoin the county treasurer of Cass county, and his successors in office, from collecting said tax. The tax in question was attempted to be assessed by the officials of the city of Fargo pursuant to the provisions of chapter 41 of the Session Laws of 1897; and a consideration of the questions presented in the record will require a construction of said chapter, as well as chapter 42 of the Sessions Laws of 1899. The case is here for trial de novo, but there is practically no dispute as to the existence of the decisive facts of the case. In substance, the plaintiff alleges that he is the owner of a certain city lot described in the complaint, which fronts on Ninth street in the city of Fargo, and which is also situated within a certain territorial area of said city, designated by the city officials as "Improvement District No. 2." It is alleged and conceded that subsequent to the 19th day of September, 1898, certain public improvements consisting of grading, curbing, and paving, were constructed upon all the avenues and streets lying and being within said improvement district No. 2, including the said Ninth street, and in front of plaintiff's said lot; that all of said improvements were made by one James Kennedy, and acording to plans and specifications furnished by the city engineer of said city, and that said Kennedy has been paid therefor in bonds or warrants drawn upon the so-called improvement district No. 2 fund, and so paid to the amount of $14,495.15. Said improvements were made by said Kennedy under the terms of an agreement in writing signed by him on the one part, and by the city of Fargo, by its acting mayor, on the other part, and said writing was signed and dated on September 20, 1898. It is alleged and conceded that after said agreement was signed the tax in question was assessed in the manner hereinafter stated, and that the same has not been otherwise assessed, or attempted to be assessed. The city engineer, acting and assuming to act pursuant to the provisions of § 7 of chapter 41 of the Sessions Laws of 1897, proceeded to estimate and calculate the amount necessary to be assessed upon the several lots and parcels of land lying within said improvement district, as a means of levying a tax with which to pay the cost of said public improvements. Said estimate of said city engineer was reduced to writing and dated on the 24th day of April, 1899, and on said date was filed with the city auditor of said city. It is further conceded that said estimate and calculation for said tax so made and filed by said city engineer was apportioned upon the basis of the superficial feet in each of said lots and parcels situated within said im-

provement district No. 2. It is further conceded that on the day said city engineer filed his said estimate with the city auditor, viz. on April 24, 1899, the city council of said city met and took action with respect to advertising said estimate of the city engineer as follows: "Alderman Lewis moved that the auditor be instructed to publish the paving assessment for the improvement districts numbered 2, 4, 5, and 6, according to law." Whereupon notice of a meeting of the city council was duly advertised for May 8, 1899, to hear objections, if any were made by taxayers, to said engineer's estimate for assessment in said improvement districts. Pursuant to such notice the city council met on said May 8th, and it appears from the official record of said meeting that the plaintiff and 28 other property owners had filed a protest and petition, which was considered by the council, and which is referred to in the record of the meeting as follows: "A protest and petition signed by twenty-nine property owners in improvement district number 2 protesting against the excessive assessment of said district, and petitioning that said improvement districts numbers 2, 3, 4, and 5 be consolidated in one district, was read." Whereupon "Alderman Clary introduced and moved the adoption of the following resolution: 'Whereas, the city engineer has proceeded to calculate the amount specially assessed for grading, paving, and curbing each lot and parcel of land within improvement districts Nos. 1, to 6, inclusive, of the city of Fargo, N. D., under the Laws of 1897 of North Dakota, and filed the same with the city auditor of said city; and, whereas, the law of 1897 relative to the assessment of such grading, paving, and curbing has since been amended; and, whereas, there is grave doubt as to the legality of the assessment made as aforesaid; Therefore be it resolved, that the assessment heretofore made be, and the same is hereby, disregarded, and the special paving assessment committee heretofore appointed by this council be requested to forthwith assess all lots and parcels of land within said improvement districts Nos. 1 to 6, inclusive, of the city of Fargo, according to law.'" Said resolution was adopted by the council after excluding district No. 6 therefrom. It is conceded that no action with respect to this assessment was ever taken by any "special paving assessment committee," as was directed to be done by the above resolution of the city council, or otherwise. It is further alleged and admitted that on May 22, 1899, at a meeting of the city council of said city said estimate for assessing the cost of said improvements, as made and filed by the city of engineer on April 24, 1899, was approved by resolution duly adopted by the city council; said resolution, so far as material, being as follows: "Now, therefore, be it resolved that the said assessment as made and returned returned by the city engineer and published by the city auditor are hereby approved; and the city auditor is hereby directed to make assessment rolls describing the property assessed and publish the same as required by law." Pursuant to the last-mentioned resolution of the city council, assess-

ment rolls were prepared by the city auditor, and after being certified and advertised pursuant to the provisions of § 8 of chapter 41 of the Laws of 1897, said assessment rolls were filed in the office of the city auditor, where they still remain on file; said assessment rolls being and constituting the only assessment rolls and the only assessment or attempted assessment ever made as a basis for the paving tax in question. Pursuant to said assessment, and after said completed assessment rolls were filed with the city auditor as before stated that officer certified said tax to the county auditor of Cass county; and in due course, and pursuant to said chapter 41 of the Laws of 1897, said tax was placed upon the tax list for the year 1899, and turned over to the county treasurer of Cass county for collection as other taxes are required to be collected. It will be observed that the entire process of estimating and assessing the tax in question, from its inception to its termination, was initiated and carried forward under and pursuant to the statute of 1897, above cited, and that in assessing said tax no attention whatever was paid by the taxing officers of the city of Fargo to an amendment of said act which by its terms went into effect on March 1, 1899. See § 6, c. 42, Laws 1899.

Upon these facts the appellant claims that the attempted assessment of the plaintiff's lot for the paving tax in question is illegal and void, and his counsel contends that after the amendatory act took effect (March 1, 1899) the city engineer was wholly devoid of authority to act, and therefore had no right to make or file the estimate and calculation dated and filed on April 24, 1899; and counsel's further contention is that even under the act of 1897, and without reference to any amendment thereof, the assessment is void, because the taxpayers never were permitted to be heard or to present their grievances to the council, based upon the engineer's estimate, for the reason that, at the session of the council duly appointed for that purpose, the council by its own deliberate action and resolution, disregarded the estimate of the city engineer, and then and there directed that the "special paving assessment committee be requested to forthwith assess all lots and parcels of land within said improvement districts Nos. 1 to 6 inclusive." Those contentions of counsel, based as they are upon the uncontroverted facts contained in the record, raise questions of law of serious importance and which may be broadly stated as follows: (1) Was the assessment of plaintiff's lot properly and lawfully made under the provisions of the original enactment, or, on the other hand, should the assessment have been made to conform to the act as amended in 1899? (2) If the original act, unamended, was in force when the attempted assessment was made, did the city officials of Fargo omit to substantially conform to the provisions of the original act with respect to the assessment in question?

Inasmuch as this court has unanimously reached the conclusion that the attempted assessment of the tax in question is illegal and

wholly void for the reason that the same was not made or attempted to be made under or pursuant to the statute as amended in 1899, which amendment, we hold, was in force when the city officials attempted to assess the tax, it will be unnecessary, in strictness, to answer question numbered 2, as above stated; but we are constrained to say that, in our opinion, the assessment, when tested by the requirements of the original statute, was wholly insufficient in matter of substance which is fundamental to the tax. We hold as to improvement district No. 2 that no sufficient hearing, such as the law contemplates, was ever accorded to the taxpayers with respect to the estimate made by the city engineer and filed on April 24th. While it is true that a meeting for this purpose was advertised, and the council met at the time stated in the notice, it is not true that the taxpayers were accorded a proper hearing at that meeting upon the justice of the estimate of the engineer then under consideration. The taxpayers at that meeting claimed and represented to the council that the estimate or assessment of the engineer was excessive, and petitioned the council to consolidate other districts with improvement district No. 2. What was the result? The council then and there deliberately, and by a resolution placed upon its records, assured the taxpayers represented at the meeting that no further action would be taken by the council based upon the engineer's estimate then under consideration, and that said estimate should be, and then was, wholly "disregarded" and set aside. The resolution of the city council went further and directed that the "special paving assessment committee" theretofore appointed by the council should proceed to make a new assessment of the property, as a basis for the tax in question. We hold that this amounted to a declaration on the part of the council that any hearing as to grievances based upon the engineer's estimate would be superfluous; and further, the action of the council was tatamount to a solemn official assurance made by the council to such taxpayers that the latter would be again heard as to any future special assessment before both the special assessment paving committee and before the council, as provided by the terms of the amendment to the act. This promise and official assurance to the taxpayers was never kept. No opportunity was ever thereafter given for a hearing before the paving committee or the council. It is scarcely necessary to say that the rule is well settled in this jurisdiction that a tax upon real estate which is attempted to be assessed without permitting the taxpayer to be heard before the legally designated tribunal is a void tax. See *Power* v. *Larabee*, 2 N. D. 141, 49 N. W. Rep. 724; also the exhaustive concurring opinion of Chief Justice Corliss on page 152, 2 N. D., and page 727, 49 N. W. Rep.

This brings us to a consideration of question No. 1 as above set out. As has been said, it is our opinion that the amendatory enactment, which by its own explicit declaration took effect on March 1, 1899, was in full force and vigor at the time the assessment in ques-

tion was attempted, and that the assessment should have been made under the amended act. That the assesssment was not made under the amended act is conceded. It is true, the city engineer testified, in effect, that, immediately after the contract to make the improvements had been let to Kennedy, he began the work of making an estimate for the assessment,as was required by the terms of the original act then in force. He further testified that he had completed his work prior to February 1, 1899. But this statement of the witness must be considered in connection with another fact which is a conceded fact in the case, viz., that the estimate for the tax as made by the engineer bears date on April 24, 1899, and was filed with the city auditor on that date. As so qualified, therefore, the testimony of the engineer goes no further than a declaration by him that he had begun and partially completed the duty of making an estimate for this tax prior to March 1, 1899. The most important part of his work was not performed prior to said date, nor until a month and 24 days after said amendment took effect. The work of the engineer was valueless and wholly without legal significance as a basis for a tax until the same had assumed a visible and tangible shape in the form of a public document placed on file with the city auditor. Assessments must be evidenced by a record. But counsel for respondent say that inasmuch as the contract with Kennedy was let under the provisions of the original act, and while the same was in force, all subsequent steps in and about the subject-matter, and especially as to the mode and manner of distributing the tax by an assessment, must necessarily be taken pursuant to the requirements of the original act. To this broad conclusion of counsel we are unable to assent. In our judgment, to do so would be to disregard well-established principles of the law relating to the control of the legislature over municipal bodies of its own creation, and especially in relation to such control in matters of taxation. We think it is fundamental that a subordinate municipal corporation may, while engaged in the process of assessing and levying a tax pursuant to authority, be deprived of its power to consummate the process of taxation by legislative fiat; and it is, in our opinion, also well established that a minor political body may by the same supreme authority be deprived of all right or power to collect a tax, even after the same has been legally assessed and laid. Upon this point, see *State* v. *Railway Co.*, 9 Mo. App. 532; *Gravel Road Co.* v. *Sleeth*, 53 Ind. 35. See, also, Cooley, Tax'n (2d Ed.) p. 18; 25 Am. & Eng. Enc. Law (1st Ed.) p. 590, and note 1. In the case at bar the legislative assembly, after the contract for the construction of the improvements was entered into, so modified the original mode of assessing the tax as to abrogate all the power or authority given thereunder to the city engineer, and in lieu thereof made provision for the assessment of the tax through other agencies created by the amendatory act, viz., through a "special assessment paving committee," composed of three citizens, who were required to make the original assessment, and before whom taxpayers had a right to be heard as to grievances.

It is urged by counsel that the change in the original mode of assessing the tax made by the legislature in 1899 should be so construed as to be held inapplicable to the Kennedy contract, which was made prior to the date at which the amendment took effect; and it is contended by counsel that if the amendment is held to be in force from and after March 1, 1899, the result will be an impairment of the obligations of the contract, and hence that the amendment would be unconstitutional legislation, as applied to that contract, or to any other entered into under the act at a date prior to March 1, 1899. But we cannot accept this conclusion of counsel. We fail to see how or wherein the amendment, if fully acted upon, would or could deprive Mr. Kennedy of any rights secured by the contract with the city. It is conceded that, in payment for the work done under his contract Mr. Kennedy received before this action was commenced a large amount ($14,495.15) in warrants and bonds drawn on the fund of improvement district No. 2. It is equally clear that the contractor was not by the amended act deprived of his right to perform his contract by putting in the improvements, nor was he deprived of any right with respect to receiving compensation therefor in manner and form as provided by the terms of the contract. The amendatory act does not attempt to deal either with the terms of any contract for putting in improvements, or with the subject-matter of compensation to contractors. The whole matter of letting contracts and receiving compensation thereunder stands untouched, and we think wholly unaffected, by the amendment of 1899. Under § 6 of the original statute the burden of the cost of the improvements was divided between the taxpayers of the district and the city; the taxpayers to sustain four-fifths of the burden, and the city one-fifth thereof. The amendment of 1899 leaves all these features of § 6 intact. Nor are we able to understand how any securities which have been lawfully issued under contracts made prior to the date of the amendatory act can be impaired or affected by the fact that the legislature has seen proper to inaugurate a new and different mode of assessment, and of distributing the burden of the tax as between individual property owners in the taxing district. Under either and both modes of distribution the property within the improvement district must bear four-fifths of the total burden, and the city is required to bear one-fifth thereof. Hence we are unable to see that any substantial impairment of contract rights is to be apprehended as resulting from the amendment of the statute. At all events, it is certain that this record contains no facts upon which any such result may be predicated, and it is equally clear that none of the parties to this action could be injuriously affected if the provisions of the act as amended did impair the value of the warrants or bonds delivered to the contractor; and he is not complaining. See *People* v. *Bond*, 10 Cal. 563; *Tennessee* v. *Sneed*, 96 U. S. 69, 24 L. Ed. 610.

But counsel have taken the further position that the act as amended must be construed as having a prospective operation only,

and that it cannot be legitimately construed to act retrospectively as to a contract entered into six months prior to the date at which the amendment took effect. This postulate of counsel is sought to be fortified by the phraseology employed in the first part of § 7 of the amendment, which, in substance, requires the city council upon the letting of a contract to proceed "forthwith" to appoint a special assessment paving committee. We think it will suffice to say, as to this feature of the contention of counsel, what was said by this court in construing a similar provision of another statute. See *Emmons Co.* v. *Lands of First Nat. Bank*, 9 N. D. 583, 589. 84 N. W. Rep. 379. In that case we were considering the same word, "forthwith"; and it was there used, as in this statute, to indicate when an act was to be done by an officer in connection with tax proceedings. We there quoted with approval a general rule of construction as laid down by Sedgwick as follows: "Statutory prescriptions in regard to the time, form, and mode of proceeding by public functionaries are generally directory, as they are not of the essence of the thing to be done, but are given simply to secure system, uniformity, and dispatch in the conduct of the public business." Applying this rule of construction to the facts under consideration, we are clear that the word "forthwith," as used in § 7, should be held to be directory, merely. If the city council, after the amended act took effect, on March 1, 1899, had proceeded to act with reasonable promptness, there would have been no difficulty with respect to time consummating all the proceedings in and about the matter of assessing the tax under the act as amended. Had such proceedings been taken by the city council under the amended act, the tax would have become a lien and been certified to the county officials for collection in the year 1899, and thus no time would have been lost, and no creditor would have been delayed and no right would have been impaired. But this course was not pursued, and, on the other hand, the city council elected to ignore the very radical legislation which took effect on March 1, 1899, and proceeded to attempt to make the assessment in question pursuant to the provisions of the original act, which was not in force, and was repealed by said act of 1899. The power of a city to make special assessments has no existence unless it is expressly conferred, and when so conferred the mode and manner, if prescribed, must be pursued; otherwise an attempted assessment will be abortive. 2 Dill. Mun. Corp. § 769, and notes.

In support of the assessment in question, counsel further and finally insist that the same must be upheld by this court under the provisions of § 17 of the act of 1897. It will be conceded that this section of the statute is intended to be curative as to the tax proceedings, and its language is quite as broad as that found in any similar statutory provisions which have come under our observation. It declares in effect that no errors or omissions in assessing or levy-

ing any tax under the act "shall vitiate or in any way affect any such assessment unless it shall appear that by reason of such error or omission substantial injury has been done to the party or parties claiming to be aggrieved." Counsel, with respect to this provision, call attention to the fact that no evidence was offered at the trial tending to show that the plaintiff had suffered any substantial injury on account of the attempted assessment. As to this claim, while it is true that the plaintiff has offered no evidence of pecuniary loss as resulting from the pretended assessment, we cannot concede that he has suffered no "substantial injury" as to his rights as a tax payer. We think he has suffered such injury, and has been prejudiced, in that a pretended assessment has been made without authority of any law, and whereby a heavy financial burden has been laid or attempted to be laid upon his property without due process of law. We are aware that some courts, and those of the highest respectability, hold to the doctrine that the taxpayer should receive no relief from any alleged tax in a court of equity until he has first alleged and proved that the tax complained of is substantially unjust or unequal. Other courts do not accept this doctrine. In this jurisdiction the contrary rule is firmly established by repeated adjudications. In the cases cited below, relief in equity against illegal taxes was granted to suitors without exacting from them, as a condition, proof that any pecuniary injury had resulted to them by reason of the action taken by taxing officials. We cite only a few out of a large number of such cases: *Farrington* v. *Investment Co.*, 1 N. D. 102, 45 N. W. Rep. 191; *Power* v. *Larabee*, 2 N. D. 141, 49 N. W. Rep. 724; *O'Neil* v. *Tyler*, 3 N. D. 47, 53 N. W. Rep. 434. As was said in the opinion in *Power* v. *Larabee*, page 150, 2 N. D., and page 726, 49 N. W. Rep.: "From grave considerations of public policy, the law will presume an injury;" and in the same case the rule laid down in *Barber* v. *Evans*, 27 Minn. 92, 6 N. W. Rep. 445, was applied, and relief was granted in equity unconditionally. To this should be added the consideration that upon the record before us we do not discover mere errors and omissions in and about the matter of assessing a tax. On the contray, we find from the record a pretended assessment, only, and one not attempted to be made under the provisions of any existing law governing the matter of assessments. The law in force required that the assessment should be made by a paving committee of three citizens, and, further, that any objecions or grievances of taxpayers should be heard, after due notice, before such committee. These fundamental provisions were severally and wholly ignored by the city officials. The record presents a case of total failure to act under the law, and does not present a case of mere irregular action.

The judgment of the district court will be reversed, and this court will direct the entry of judgment for the relief demanded in the complaint. All the judges concurring.

Addenda: The foregoing opinion was handed down on November

1, 1901, and no petition for a rehearing in this court has ever been filed; but within the time therefor a request has been filed, in which counsel on both sides join in urging this court to pass upon certain questions arising upon the record, and to which reference has not been made in the opinion handed down. We have decided, for various reasons to accede to this request only in part. In the decision already made, this court has held that the paving tax of which the plaintiff complains is illegal and void, and this holding gives the plaintiff the full measure of relief which he is entitled to receive from the courts. But the city officials are in a widely different position. They are naturally and properly desirous of acting intelligently with reference to the legal status which now exists, and which has resulted from their efforts, hitherto abortive, to assess a tax to cover the expense incurred in putting in the improvements upon the streets of the city, as shown by the evidence in this case. We have, therefore, under the circumstances of this case, concluded to pass upon one further matter to which our attention has been particularly called by counsel on both sides.

It appears that a certain ordinance was attempted to be enacted by the city council creating and establishing certain districts within the city, denominated "Improvement Districts," and which districts were numbered from 1 to 7 inclusive. The contention of the plaintiff is that this ordinance was never legally adopted by the city council. This ordinance, at a regular meeting of the council, was given its first reading on July 5, 1898, and was read a second time and put upon its final passage at a regular meeting of the city council held on July 13, 1898. The official record of the proceedings had with reference to the final passage of the ordinance was put in evidence, and it is conceded that the same embraces the only record ever made in reference to the matter of adopting the ordinance. This record is as follows: "July 13th, 1898. Adjourned regular meeting of city council. Present at roll call Aldermen Allen, Ames, Craig, Cummings, Hill, Ostbye, Stanford, and Stern. The ordinance entitled 'An ordinance creating and establishing improvement districts numbers 1, 2, 3, 4, 5, 6, and 7, in the city of Fargo, and defining the boundaries of the same,' read the first time July 5th, was read the second time and placed upon its final passage, on call of the roll eight members voting 'Yea.'" The validity of the ordinance is challenged upon the ground that the official record of the proceedings of the city council does not show that the yeas and nays were taken upon the passage of the ordinance. It will be conceded that oral evidence would be inadmissible upon this point, and none was offered in this case. The decision of the question presented turns upon the construction to be placed upon § 2143, Rev. Codes, 1899, governing the adoption of city ordinances. The section provides as follows: "The yeas and nays shall be taken upon the passage of all ordinances * * * which shall be entered upon the journal of its proceedings." This statute clearly embraces two requirements,

viz.: First, that the yeas and nays shall be taken upon the passage of all ordinances; second, that the same (the yeas and nays) shall be entered on the journal of the proceedings of the council. It appears from the entries in the journal of the proceedings that eight aldermen, whose names appear in the journal, were present at roll call when the council assembled on July 13th, 1898, but the statute we are considering does not require entries to be made in the journal showing who were present at the opening of a meeting of the city council. The mandate of the statute lays hold of the very act of passing an ordinance, and when that act occurs the statute requires the entries to be made in the official journal, showing that the yeas and nays were called upon the passage of the ordinance. Statutes which are identical in meaning with § 2143, supra, will be found in many city charters, and the same have received a construction in the courts of several states, and there are conflicting judicial interpretations of the statute. In New York the courts have held that the statute is directory merely and hence, that the mere form or manner of passing the ordinance is of subordinate importance. See *Striker* v. *Kelly*, 7 Hill, 29, affirmed in 2 Denio, 323; *Elmendorf* v. *City of New York*, 25 Wend. 693. But the better opinion, and the decided weight of authority, is that such statutes are designed to accomplish an important public purpose, and hence their strict observance cannot be dispensed with. The purpose of the lawmaker is to fix upon individuals personal responsibility for city legislation. In the cases cited below the courts have held that the statute is to be considered as a mandatory enactment. *Morrison* v. *City of Lawrence*, 98 Mass. 219; *Steckert* v. *City of East Saginaw*, 22 Mich. 103; *Tracey* v. *People*, 6 Colo. 151; *Brophy* v. *Hyatt*, 10 Colo. 223, 15 Pac. Rep. 413; *Sullivan* v. *City of Leadville*, 11 Colo. 483, 18 Pac. Rep. 736; *Cutler* v. *Town of Russellville*, 40 Ark. 105; *Rich* v. *City of Chicago*, 59 Ill. 287; *Town of Olin* v. *Meyers*, 55 Iowa, 209, 7 N. W. Rep. 509; *O'Neil* v. *Tyler*, 3 N. D. 47, 53 N. W. Rep. 434. The rule as laid down in the series of cases last cited is approved by Judge Dillon. See 1 Dill. Mun. Corp. § 291. In the case at bar the journal shows that when the ordinance was placed upon its final passage the roll was called, "eight members voting 'yea.'" But it will be observed that this entry in the journal conveys no information as to the personnel of the eight aldermen who cast the affirmative vote. Their names are not given in the journal entry. Under the authorities, no presumption of fact arises that aldermen who were present when the council convened, and answered to their names, remained until the vote was taken. The leading case is *Steckert* v. *City of East Saginaw*, supra, inwhich Judge Cooley, speaking for the court, uses this language: "The actual attendance on such a body will frequently be found to change materially from hour to hour, so that a record that a vote was passed unanimously would be very slight evidence that any particular member present at the roll call voted for it." Further

on in the opinion the court say: "What is designed by this statute is to fix upon each member who takes part in the proceedings on these resolutions the precise share of responsibility which he ought to bear, and that by such an unequivocal record that he shall never be able to deny either his participation or the character of his vote. But, manifestly, we cannot determine in the present case, with any certainty, that any one of the aldermen named—Alderman Buckhout, for example—actually voted for the resolution in question. We know he was present when the council convened, but we have no record which points specifically to his individual action afterwards." The reasoning in this case cannot well be improved upon, and as the same meets with our entire approval, we shall not undertake to enlarge upon the question. Under the authority of the cases cited, we shall be compelled to hold that the evidence in this case fails to show that the ordinance in question was legally enacted. In requiring the yeas and nays to be entered upon the journal of the proceedings of the city council, it was the legislative purpose that such entries should be a lasting memorial of the individual action of the members of the local legislative body. This vital feature is lacking in the case before us, and we are not at liberty, under the authorities, to supply the omission by mere presumptions as to who voted for the ordinance and who did not. The law in force as construed by the courts, required that the names of aldermen should appear in the journal entries. In no other way can individual responsibility be fixed upon members of the council.

It may be proper to add that what was said in the opinion first handed down concerning the contract in question, and the bonds and warrants delivered to the contractor in payment for the improvements in question, must be strictly limited to the features of the case then being discussed by the court, wherein we said in substance, that the amendatory statute of 1899 did not, in our opinion, so operate as to impair the obligation of the contract to do the work, or impair the value of the securities issued in payment therefor. Whether the fact that the ordinance creating the improvement district in question—No. 2—is adjudged to be void will or will not operate to destroy the value of any such securities now outstanding is a question not before this court, and upon which we refrain from expressing an opinion. All the judges concurring.

(88 N. W. Rep. 90.)

ARTHUR B. LEE *vs.* IRA CRAWFORD.

Opinion filed Nov. 21, 1901.

Ejectment—Limitations—Tax Deed.

This action was brought to recover the possession of real estate which at and prior to the commencement of the action was in the defendant's possession. Plaintiff, by his complaint, alleged title in

himself in fee simple. Defendant answered, denying plaintiff's title, and alleging title in fee in the defendant. At the trial plaintiff offered as his sole evidence of title a certain tax deed which was issued by the county treasurer of Cass county in the year 1892, pursuant to a tax sale of the land made November 4, 1889, for a tax charged against the land in 1888. This action was commenced more than three years after the tax deed was recorded. *Held*, that the statute of limitation contained in § 1640, Comp. Laws 1887, does not operate as a bar to this action.

Assessor's Return—Irregular Verification Not Fatal.

The defendant put in evidence the assessor's return for the year 1888, which embraced a description of the land described in the tax deed. The assessor's return was attempted to be verified by an affidavit subscribed by the assessor and affixed to the return. This was headed: "Territory of Dakota, County of Cass—ss." Its jurat was as follows: "Suscribed and affirmed to before me this 28th day of January, 1888. S. M. Edwards, Town Clerk." *Held*, that the venue of the affidavit is inartificial, in this: that it fails to show on its face that the town clerk administered the oath within the town in which he held office; but *held*, further, that such defect, under the more modern rule, is not a fatal defect. The court will presume, prima facie, in support of the affidavit, that the officer acted within his territorial jurisdiction in administering the oath.

Assessment Void in Fact.

Held, further, that inasmuch as the return shows on its face that it was verified long prior to the date at which the assessment could lawfully be commenced under § 1546, Comp. Laws 1887, the assessor's return was not verified in fact, and hence the assessment was wholly void, under the rule established in Eaton v. Bennett, 10 N. D. 276, 87 N. W. Rep. 188.

Sale for Excessive Amount.

The treasurer sold the land on which the deed issued on November 4, 1889, for the sum of $6.92, which fact is recited on the face of the deed put in evidence by the plaintiff. This sum was 96 cents in excess of all taxes due with interest and penalty added, together with all costs and charges legally due and collectible against the land at the date of sale. *Held*, that the sale for this excessive amount operated in law to render the entire sale illegal and void, and to defeat the tax deed issued upon the sale.

Insufficient Description to Identify Land.

In the tax list of 1888, as certified to the treasurer for collection, the land in dispute was described as follows: "S. W. 4 of S. E. 4 of section 32, town 141, range 50." No evidence was offered showing how the land was described in the published notice of tax sale upon which the deed issued. *Held*, that, in the absence of testimony to the contrary, this court will presume that the published notice of sale contained a description of this land as found in the tax list, inasmuch as the treasurer, in selling, is governed by the list from which alone, under the law, he derives authority to sell for taxes. Upon this assumption, *held*, that the description as published was insufficient to identify the land advertised to be sold, and that the sale and tax deed are alike null and void, because the notice of sale was insufficient in law and in fact to describe and identify the land.

Irregularities Not Cured.

Held, further, that nothing found in § § 1638, 1639, or 1640 of the Compiled Laws of 1887 operates to cure said irregularities in the tax proceedings.

Prima Facie Character of Deed Destroyed.

Held, further, that under § 1639 said tax deed is prima facie evidence of the regularity of the tax proceedings upon which it was issued, but that the evidence in the record destroys the prima facie effect of the deed. Such deed, under the statutes, does not operate as conclusive evidence of title, or of the regularity of the tax proceedings antecedent to the deed.

Appeal from District Court, Cass County, *Pollock*, J.

Action by Arthur B. Lee against Ira Crawford. Judgment for defendant, and plaintiff appeals. Affirmed.

Newman, Spalding & Stambaugh, for appellant.

The issuance of the tax deed foreclosed all inquiry into the irregularities named, and such deed is conclusive evidence of the truth of all facts recited therein. *Roberts* v. *Bank*, 8 N. D. 504. The tax sale created a contract between the territory and the purchaser, and the rights of the purchaser became fixed at the time of the sale. *Roberts* v. *Bank*, 8 N. D. 504. The only facts which are beyond legislative control are those over which such control is limited by the constitution. *In re Van Antwerp*, 56 N. Y. 265; *Matter of Trustee*, 31 N. Y. 584. All tax proceedings not removed from legislative control by constitutional limitations are exclusively within legislative regulation. *Smith* v. *Buffalo*, 159 N. Y. 432; *Terrell* v. *Wheeler*, 123 N. Y. 80. Legislative power within the territory of Dakota was vested in the Congress of the United States, Art. 4, § 3, U. S. Const., and the territorial legislature, under authority given it by congress, was competent to make tax sale certificates and tax deeds conclusive evidence of the regularity of tax proceedings exclusively with in legislative control. *Roberts* v. *Bank*, 8 N. D. 504. Defects and irregularities in tax proceedings which are jurisdictional can exist only as to those proceedings required by the constitution to be had in a particular mode. *Ensign* v. *Barse*, 107 N. Y. 329; *Terrell* v. *Wheeler*, 123 N. Y. 76; *People* v. *Turner*, 145 N. Y. 457; *Van De Venter* v. *Long Island*, 139 N. Y. 136. The listing of the property for assessment in the name of Crawford does not invalidate the sale. § 1544, Subd. 2, § § 1593, 1582, 1641, Comp. Laws; *Iowa & Dakota Co.*, v. *Barnes County*, 6 N. D. 601; *Tyler* v. *Cass County*, 1 N. D. 395. The assessments and levy being valid, all provisions of the statute providing the mode and manner of enforcing or collecting the tax are directory. § 1639, Comp. Laws; *Smith* v. *Cleveland*, 17 Wis. 573; *Pillow* v. *Roberts*, 13 How. (U. S.) 472. The constitution of the state was not in force at the time of the sale in this case. Its subsequent adoption could not alter the contract of the parties. *Railroad Co.* v. *McClure*, 10 Wall. 511, 19 L. Ed. 997; *Ohio Ins. Co.* v. *Dilvett*, 14 L. Ed. 1002; *New Orleans Gas Light Co.* v. *Louisiana Co.*, 115 U. S. 650, 29 L. Ed. 516. Appellant claims title under the act of the territorial legislature (§ § 1638 and 1639, Comp. Laws), passed under authority derived from con-

gress of the United States. The decision of this court can be reviewed by the Supreme Court of the United States in this case. § 709, U. S. Rev. St. The Federal decisions, therefore, are controlling. *Carson* v. *Dunham,* 121 U. S. 421, 30 L. Ed. 995; *Cook* v. *Avery,* 147 U. S. 375, 37 L. Ed. 212; *Shevely* v. *Bowlby,* 152 U. S. 1; *Bank* v. *Yankton,* 101 U. S. 129, 25 L. Ed. 1046. The title of plaintiff is based solely upon the acts of the territorial legislature which had authority under the acts of congress, to adopt the statutes under which, and under the operation of which, appellant's title originated, and under which he claims. *Bank* v. *Yankton,* 101 U. S. 129; *Murphy* v. *Ramsey,* 114 U. S. 15; *State Corporation* v. *United States,* 136 U. S. 1; *Benner* v. *Porter,* 9 How. 235; *Insurance Co.* v. *Cotton,* 1 Peters 511; *United States* v. *Gratiot,* 14 Peters 511. The acts of the territorial legislature were the acts of the government of the United States subject to be altered or repealed by congress, and must therefore be considered as acts of congress. *Bank* v. *Yankton,* 101 U. S. 129. Congress might, by legislative enactment, have fixed the value of all lands in the territory for the purpose of taxation. It might have disposed of any of the proceedings complained of in this action. Neither was jurisdictional or required by the constitution of the United States. *Ramsey* v. *R. L. Lewis Co.,* 85 N. W. Rep. 211; Cooley on Taxation, (2 Ed.) 344.

J. E. Robinson, for respondent.

The appellant failed to move for a new trial, and having failed to predicate error on the order denying a motion for a new trial this court should not review the evidence and appeal when the judgment presents no question of fact for review. *Pierce* v. *Manning,* 2 S. D. 517; *Murphy* v. *Bank,* 83 N. W. Rep. 575; *Plow Co.* v. *Bellon,* 4 S. D. 384; *Carson* v. *Funk,* 27 Kan. 524; *Struthers* v. *Fuller,* 45 Kan. 735; *Evenson* v. *Webster,* 3 S. D. 382. Appellant claims under a deed based on a sale for the tax of 1888. The sale was made for an excessive amount. It was made under § § 1621 and 1622, Comp. Laws, which authorized the sale only for the amount due. The statutory power to sell for lawful taxes, if exceeded by including unlawful items, renders the sale void from the manifest impossibility of saving the sale in part when the invalidity extends to the whole. Cooley on Taxation, 497; *Baker* v. *Supervisors,* 39 Wis. 447; *Mileage* v. *Coleman,* 47 Wis. 184; *Kimball* v. *Ballard,* 19 Wis. 634; *Barden* v. *Supervisors,* 33 Wis. 447; *Harper* v. *Rowe,* 53 Cal. 233; *Wills* v. *Austin,* 53 Cal. 152; *Fredweld* v. *Peterson,* 51 Cal. 637; *Case* v. *Dean,* 16 Mich. 12; *Riverside* v. *Howell,* 113 Ill. 259; *Gage* v. *Plumpelly,* 115 U. S. 462. The land was not assessed in the name of the owner, and it was not assessed to unknown owners, hence the pretended assessment was void. *Sweigle* v. *Gates,* 84 N. W. Rep. 481, 9 N. D. 538. The assessment was not verified. § 1551, Comp. Laws. An affidavit must appear on its face to have been taken in compliance with the legal requisites. Without a venue an affidavit

is a nullity, though sworn to before an officer whose residence is mentioned in the jurat. *Cook* v. *Statts,* 18 Barb. 407; *Lane* v. *Morse,* 6 How. Prac. 394; *Thompson* v. *Burhaus,* 61 N. Y. 52; *Ladow* v. *Groom,* 1 Denio 429. In possessory actions between the holder of the tax title and the patent title, where the interests of private parties are involved, the rule of caveat emptor applies in all its strictness. Courts are careful that no man be deprived of his property through tax proceedings that are not in all respects in substantial compliance with the statutory requirements. *Sweigle* v. *Gates,* 9 N. D. 538, 84 N. W. Rep. 482; *Farrington* v. *Insurance Co.,* 1 N. D. 119; *March* v. *Supervisors,* 42 Wis. 518; *Gautzhausen* v. *Kachler,* 42 Wis. 332; *Morrill* v. *Taylor,* 6 Neb. 236; *Clark* v. *Crane,* 5 Mich. 151, 71 Am. Dec. 776; *Van Rensellaer* v. *Weltbeck,* 7 N. Y. 401; *Silsbee* v. *Stockle,* 44 Mich. 461; *Dickenson* v. *Reynolds,* 48 Mich. 158; *Brevoort* v. *Brooklyn,* 89 N. Y. 128; *McClure* v. *Warner,* 16 Neb. 448; *Plummer* v. *Marathon County,* 46 Wis. 179; *People* v. *Giles,* 68 N. Y. 326. The assessment is defective because it does not show the year for which it was made. § 1582, Comp. Laws. The sale is void because the land was not described on the tax list sufficiently. *Power* v. *Bowdle,* 3 N. D. 107; *Power* v. *Larabee,* 2 N. D. 141; *Hegar* v. *DeGroat,* 3 N. D. 354. The sale was made without a tax warrant. § 1596, Comp. Laws; Cooley on Taxation, 424. There is no evidence that the land was ever advertised for sale. The burden of making such proof was on plaintiff. The tax deed lost its character as evidence when it appeared that in an essential particular the tax proceedings on which it depended were irregular. *O'Neil* v. *Tyler,* 3 N. D. 47; *Lacey* v. *Dows,* 4 Mich. 140; *Case* v. *Dean,* 16 Mich. 12; *Cooper* v. *Sheperdson,* 51 Cal. 209; *Bidleman* v. *Brooks,* 28 Cal. 75; *Thompson* v. *Ware,* 43 Ia. 453; *State* v. *Tax Cases,* 15 Wall. 306; *French* v. *Edwards,* 13 Wall. 514; Blackwell on Tax Titles, 83; 2 Desty on Taxation, 961, 969; *Johnson* v. *Elwood,* 53 N. Y. 431.

WALLIN, C. J. This action is brought to recover the possession of land situated in the town of Berlin, in Cass county, described as follows: "The southwest quarter of the southeast quarter of section 32, in township 141, of range 50. The complaint states that the plaintiff is the fee-simple owner of the land, that the defendant is unlawfully in possession thereof, and that he unlawfully withholds such possession from the plaintiff. The answer denies the plaintiff's allegation of ownership, and alleges, as a counter claim, that the defendant owns the land in fee simple; and defendant demands, as affirmative relief, that the title be quieted in the defendant. Plaintiff, by way of reply, denies the allegations of the answer, and alleges that the defendant is barred by the statute of limitations from asserting any defense against the plaintiff's title. Defendant offered no evidence of title, but it is conceded that the defendant was in possession of the land when the action was commenced, and had been in possession

for cropping purposes for several years before the suit was instituted. It appears, also, that the land was assessed in 1888 in the name of the defendant, and had been so assessed for several years prior to 1888. The plaintiff's title depends solely upon a tax deed which was delivered to plaintiff's grantor by the county treasurer of Cass county. The deed was put in evidence by the plaintiff, and it bears date January 15, 1892, and was recorded on February 8, 1892. The deed purports to be based upon a tax sale made in 1889 for the taxes assessed against the land in 1888. Plaintiff rested his case after putting the tax deed in evidence together with a deed of quitclaim from plaintiff's grantor to the plaintiff.

The sole contention arises upon the validity of the tax deed. At the trial defendant sought to impeach the tax deed as evidence of title in the plaintiff, and for this purpose defendant put in evidence certain records connected with the assessment and sale of the land for the taxes of 1888. The assessor's return for the town of Berlin, so far as the same related to the land in question, was put in evidence. Attached to the return was an affidavit of the assessor. At the top of this paper the venue of the affidavit is stated as follows: "Territory of Dakota, County of Cass." The affidavit purports to have been made by one C. A. Gardner, assessor in and for the town of Berlin. The body of the affidavit is not criticised. It is subscribed as follows: "C. A. Gardner, Assessor." The certificate or jurat, which follows the signature is as follows: "Subscribed and affirmed to before me this 28th day of January, 1888. S. M. Edwards, Town Clerk." The tax list for the taxes of 1888, as turned over to the treasurer for collection, as far as the same relates to this land, was introduced in evidence. The land in question was described in the list as follows: "S. W. 4 of S. E. 4 of section 32, town 141, range 50." As has been seen, the affidavit annexed to the assessor's return showed by its venue that the oath was taken within the territory of Dakota, and in the county of Cass, but failed to show the town in which the oath was administered, or that it was administered within any town. Counsel for the respondent contends that the return is not shown to have been verified by affidavit, as required by section 1551, Comp. Laws 1887. This contention is important in this jurisdiction, for the reason that the rule is established here that the affidavit of verification is essential to the validity of an assessment return. See *Eaton* v. *Bennett*, 10 N. D. 346, 87 N. W. Rep. 188, and cases cited. But we cannot assent to the proposition of counsel that the return in this case was not verified. The strict rule established by the earlier cases, and that which still seems to obtain in the state of New York, is that an affidavit, to be valid, must show on it face that the oath was administered within the territory in which the officer who administered it had authority to act officially. See cases in 1 Enc. Pl. & Prac. p. 313. But this rule has been relaxed in many states. See *State* v. *Henning*, (S. D.) 54 N. W. Rep. 536, and numerous cases there cited. The modern and more liberal rule, as laid down in the cases

cited, meets our approval. This rule requires this court to presume, prima facie, that the officer administering an oath acted in doing so within his territorial jurisdiction. The authority of town clerks to administer oaths is expressly conferred by statute. Comp. Laws 1887, § 776. In this case no testimony was offered to show that S. M. Edwards, in administering the oath, acted outside of his town; and, under the more liberal rule, we shall indulge the presumption which supports the validity of the affidavit.

But the jurat of this affidavit presents another defect, which, in our judgment, is much more serious. The jurat is as follows: "Subscribed and affirmed to before me this 28th day of January, 1888." The date of the affidavit, as stated in the jurat, if it be the true date shows beyond doubt or question that the assessor's return of 1888 was not in fact verified by the oath or affirmation of the assessor. It is physically as well as legally impossible that it should have been verified on January 28, 1888. No assessment for the year 1888 could have been lawfully made and incorporated in the return as early as January 28, 1888. Assessors were expressly forbidden to commence the assessment before the first day of May of each year. Comp. Laws 1887, § 1546. Whether the law would permit so important a record as the return of an assessor to be corrected by evidence aliunde is very doubtful, but this need not be discussed in the case at bar, as no evidence was offered for this purpose. It might be argued that the error is an obvious clerical error, and that this court should so construe it, in favor of the tax-title holder. But, in our opinion, this course is not open to the court. If we should by our construction of the language of the jurat expunge the date (January 28, 1888), the affidavit would then be devoid of a date, and from it, therefore, no one would be informed whether the affidavit was affixed to the return at or prior to the date of filing the same with the county auditor or whether it was affixed at some later date in that year or in some subsequent year. Nor could this court in the absence of testimony upon the point, venture to insert some other date in the jurat in lieu of that actually stated. Besides, it should not be overlooked that all tax proceedings are in theory and in fact in invitum and ex parte. The rule is well settled that all the essential steps of the process of taxation must appear upon some record, and the further rule is equally well established that a bidder at a tax sale is chargeable with notice of all defects in tax proceedings which lead up to and include a tax sale. We are therefore driven to the conclusion that this record shows that the assessor's return for the year 1888 was not verified. This omission compels the court to hold, under the rule laid down in *Eaton* v. *Bennett*, supra, that the alleged assessment of the land was and is void.

But this court has reached the further conclusion that the tax deed is invalid for other and independent reasons. The deed shows on its face that it was issued pursuant to a tax sale made by A. H. Burke, as county treasurer, and the deed recites, in effect that said

treasurer issued a tax sale certificate to the plaintiff's grantor, who was the purchaser at the sale, and from which certificate it appears that the land was sold for the sum of $6.92, and that such sale was made for "the taxes, costs, and charges for the year 1888." It is our opinion that the evidence in this record shows, when read in the light of the statute then in force, that the land could not have been lawfully sold for so large a sum. The total tax, with interest and penalty added, charged against the land, as shown by the treasurer's tax list, was $5.26. To this the treasurer could lawfully add only such "costs and charges" as the statute authorized the treasurer to collect and receive from the purchaser. We do not find authority in the statute authorizing the treasurer to collect any sum or sums over and above the tax proper, with interest and penalty added, except the sum of 20 cents for advertising, and the further sum of 50 cents for the tax certificate. These charges seem to be legitimate, and we find none others which are so. See Comp. Laws 1887, § § 1620, 1627. The total of the costs and charges cannot, we think, exceed 70 cents. This total, when added to the original tax, with interest and penalty included, makes an aggregate of $5.96, which sum, when deducted from the amount for which the land was actually sold, leaves a difference of 96 cents. In brief, we find, under the law, from a consideration of the evidence, that the treasurer sold this land for the amount of 96 cents more than the aggregate taxes, costs, and charges legally due at the time of the sale. From this fact we deduce the conclusion, as a matter of law, that the sale was illegal and void; and the further conclusion must follow that the tax deed, which rests upon such illegal tax sale, is of no legal validity. It is a firmly established rule of law that a tax sale of lands for an amount in excess of all sums legally chargeable against the same renders the sale wholly illegal. This salutary and most important rule of law is laid down by Judge Cooley as follows: "And, if a valid levy were to be increased afterwards by unlawful additions, the sale would be equally bad. The statutory power is a power to sell for lawful taxes and lawful expenses, and, if it is exceeded by including unlawful items of either class, the power is exceeded, and its exercise is invalid in toto, from the manifest impossibility of saving the sale in part when the invalidity extends to the whole." Cooley, Tax'n (2d Ed.) p. 497, and cases in note 2. See, also, Desty, Tax'n p. 972, and cases there cited. But this rule of law is so entirely elementary that we deem further citation of authority in its support to be unnecessary.

We turn to another question which arises upon this record. It appears that the parcel of land in dispute was described in the tax list as certified to the county treasurer for collection, as follows: "S. W. 4 of S. E. 4 of section 32, town 141, range 50." It further appears that the tax charged against this description was never paid, and that to collect the same, with certain costs and charges added, the county treasurer sold the land on November 4, 1889. Before

such sale or any tax sale could have been lawfully made, a legal notice of sale was an essential prerequisite; and the statute regulating the sale required that the notice of sale, as published, should embrace a "list of the land to be sold." Comp. Laws 1887, § 1620. This provision of the statute makes it imperative that the notice of sale should contain a description of the lands to be sold. Its purpose is to identify the particular tracts of land to be sold at public sale, and the provision is obviously one intended to benefit the taxpayer. If complied with, the owner, as well as the general public, will be seasonably advised of the contemplated sale of lands so advertised. These provisions are uniformly construed by the courts as mandatory enactments and this court has recently decided that a published notice of a real estate tax sale which was invalid in this, that it did not sufficiently describe the land in dispute, conferred no authority to sell such land, and, further, that any deed issued upon such illegal sale would necessarily be null and void. *Sweigle* v. *Gates*, 9 N. D. 538, 84 N. W. Rep. 481. That case was decided under the statute which governed the sale in the case at bar, and the case cited was a much stronger case than this, for the reason that the statute of limitations would have barred that action if it had ever been set in motion. In the case at bar the statute of limitation (§ 1640, Comp. Laws 1887) has no application, and hence any safeguards founded upon the provisions of that section cannot be invoked in aid of the plaintiff's tax deed. It will be conceded that the county treasurer, in selling the land at tax sale, derived his authority to sell from the certified tax list sent to him by the county commissioners, and that he had no authority to sell any piece or parcel of land unless the same was described in such tax list. If the land in question was sufficiently described in the list, and if the taxes charged against the same were not paid, the land could have been sold by the treasurer for such delinquent taxes; otherwise it could not be lawfully sold for taxes. Under the authority of numerous cases decided in this court, we are compelled to hold that the attempted description of the land involved, as found in the treasurer's tax list, was insufficient as a description of land, and as such the descriptions, when published in the notice of sale, did not sufficiently describe or identify the land advertised to be sold. See *Power* v. *Larabee*, 2 N. D. 141, 49 N. W. Rep. 724, and *Same* v. *Bowdle*, 3 N. D. 107, 54 N. W. Rep. 404, 21 L. R. A. 328, 44 Am. St. Rep. 511. In publishing the notice of tax sale the treasurer is limited to lands described in the list, and is also governed by the descriptions of the parcels which are contained in the list, and hence we shall assume that the land was in fact described in the notice as it was described in the list. If evidence had been offered in this case showing that the land was in fact properly described in the notice of sale, a different question would have been presented, but no such evidence was offered. But counsel argue that when this court decided the cases last cited it was considering assessments, and was

not passing upon the validity of any tax sale. This is true. But in the case at bar we are called upon to determine whether an attempted description of land which this court has held to be insufficient for the purposes of assessment is or is not sufficient to describe and identify the land in a notice of tax sale. From our point of view, the reasoning upon which the former cases rest applies with equal, if not greater, force to a published notice of sale, and therefore we shall refrain from reiterating here the grounds upon which we place our ruling upon this branch of the case.

But counsel cite the case of *Iowa & D. Land Co.* v. *Barnes Co.*, 6 N. D. 601, 72 N. W. Rep. 1019, and argue that this court held in that case that it was neither a "mistake nor wrongful act" upon the part of a county treasurer to sell land at a tax sale upon descriptions similar to that found in this case. But this case, as we view it, is not at all in point. We were not passing in that case upon the validity of any tax deed as such, or upon the validity of any tax sale as such. We held in that case that the county treasurer could not be held responsible under the statute for sales of land so described, because he did not fabricate the descriptions, and was not responsible for the same. But counsel for the appellant, in a brief filed in this court, embracing 36 printed pages, have bestowed comparatively little attention upon the question whether the irregularities in the tax proceedings which appear in this record are of a serious character or otherwise, or whether they exist in fact, or do not exist. This indifference of the appellant's counsel to the irregularities pointed out by counsel for the respondent is, however, explained by the fact that, from the standpoint of the plaintiff's counsel, such irregularities, if they exist at all, have been wiped out by curative legislation enacted, or which could be enacted, for the express purpose of curing all such irregularities as are here complained of. Counsel cite *Roberts* v. *Bank*, 8 N. D. 504, 79 N. W. Rep. 1049, as sustaining the general proposition of law that a tax sale operates as a contract, in which the law governing the same enters as a constituent part To this proposition we assent. But counsel's next premise is that the contract made by the tax sale in question was a contract between the purchaser and the territory of Dakota, and hence was and is a contract governed by the law in force during the territorial regimen, and hence that such law is in no respect hampered by any restrictions upon legislative action which may be found in the constitution of the state of North Dakota. To this proposition we may not assent, for the reason that it involves a mistake of fact. The tax sale in question was made on November 4, 1889. At that time the state of North Dakota had emerged from a condition of territorial vassalage, and was in the full enjoyment of its status as a sovereign state of the Federal Union. See section 11 of the state constitution; also the proclamaion of the president of the United States admitting the state of North Dakota into the Union; Rev. Codes 1895, p. 55. It therefore appears that the contract resulting from the tax sale

was one which was made with reference to provisions found in the statute which were not in conflict with the organic law of the state. But for all the purposes of this case it may be conceded that the sale was made during the territorial period. Such a concession, in our judgment, would yield nothing to the plaintiff's advantage. It is the chief postulate of counsel for the appellant in this case that during the territorial status no restrictions existed either in the constitution of the United States or in the organic law of the territory, as framed by congress, which in any manner limited the power of either the territory or congress in the matter of enacting curative statutes sweeping in character, and sufficient to cure and wipe out any irregularities in tax proceedings such as are claimed to exist in this case. And counsel seem to cling to this postulate as a veritable anchor of hope. But, from our standpoint, this assumption of counsel, if it were to be conceded as sound, is wholly worthless unless it is followed up by a showing that this vast and almost omnipotent legislative power which is claimed to exist in congress and in the territorial legislature has been exercised in fact. Dormant power never put forth is not sufficient, and cures nothing. Counsel must put his finger upon the statute existing at the time of the sale, or since enacted, which embraces any curative legislation upon which he relies to cure the irregularities in the tax proceedings in question. Counsel seems to take it for granted that the law in force at the time of the sale embraced curative provisions under which the tax deed upon which the plaintiff depends must be upheld as a valid conveyance of title. Still, counsel has cited no such provisions of the statute, and, if any existed at the time of the sale, we have failed, after a diligent search to discover the same. Nor have we overlooked §§ 1638, 1639, and 1640 of the Compiled Laws of 1887. As has been seen, § 1640 has no application to the case at bar. Section 1638 authorizes a county treasurer to execute a deed in fee simple pursuant to a tax sale, but it goes without saying that this language simply means that the treasurer can execute such a deed only in cases where, under the law governing the sale, he has power to do so. This limitation is in fact clearly expressed in the statutory form of deed in its habendum clause. See § 1639. But the last section cited does contain provisions upon which counsel no doubt rely as curing the irregularities existing in the tax proceedings which culminated in the plaintiff's deed. Said section makes a tax deed evidence. As to mere facts, as such, when recited in a tax deed, the deed is made conclusive evidence. Just what facts are here referred to need not be particularly pointed out, for the reason that the legislature has evinced a clear and unmistakable purpose not to make a tax deed conclusive evidence of either title or the regularity of the tax proceedings upon which the deed issues. The very explicit declaration of the lawmaker is to the contrary effect. It reads as follows: "Such deed shall be * * * prima facie evidence of the regularity of all the proceedings from the valuation of the land by the assessor up to the

execution of the deed." Thus it appears that the territorial legislature very properly refrained from any attempt to make a tax deed conclusive evidence either of title or of the regularity of the tax proceedings antecedent to the delivery of the tax deed. From this statute we can gather no intent to make a void or voidable tax deed a valid conveyance of title. It is evident that such was not the legislative purpose. The legislature in passing this statute intended to go and did go no further than to enable the holder of a tax deed to make out a prima facie title under the deed by putting the same in evidence. Such a statute is not a curative statute, and does not purport to be such, except as to certain mere formal matters of fact, and as to such matters of fact the deed cannot be held to be conclusive if the same in any wise relate to any step involving the validity of the tax proceedings. It is true that where the bar of a statute of limitations has fallen the courts will not allow mere irregularities to defeat a tax deed. But in this case the bar of the statute has not fallen as against the plaintiff's right to institute the action. Nor can the defendant in this action be debarred by said statute from showing by competent testimony that the tax proceedings are either irregular or wholly void, and thereby defeating the plaintiff's prima facie title under his tax deed. This, as we have seen, the defendant has done, and hence the judgment of the trial court dismissing the action must be affirmed. All the judges concurring.

(88 N. W. Rep. 97.)

STATE *ex rel* IDA KOL *vs.* THE NORTH DAKOTA CHILDREN'S HOME SOCIETY.

Opinion filed Dec. 19, 1901.

Statute—Subject Expressed in Title.

Chapter 87 of the Laws of 1897, entitled "An act relating to societies organized for the purpose of securing homes for orphans, or abandoned, neglected or grossly illtreated children, by adoption or otherwise, and providing rules for the regulation of the same," does not violate § 61 of the state constitution, which requires that "no bill shall embrace more than one subject which shall be expressed in its title. * * *" It is *held* that said act embraces but one subject, namely, the securing of homes for children of the classes named, and such subject is expressed in the title of the act.

Constitutional Law—Probate Courts—Jurisdiction.

Neither does said act conflict with § 111 of the state constitution, which, among other things, confers upon county courts exclusive original jurisdiction in probate matters, the appointment of guardians, and settlement of their accounts, etc. The duties placed upon county courts by said act are not in violation of, but in aid of, their constitutional jurisdiction over guardians. A children's home society to whose custody children have been committed by a county court, occupies the legal relation of a substitute or temporary guardian to such children; and, as such temporary or substitute guardian, its acts

are subject to the approval or disapproval of the court making the appointment, and such appointment may be revoked as in other guardianships.

Judges—Judicial Duties.

It is also *held* that said act does not impose nonjudicial duties upon the judges of the supreme court, in violation of § 96 of the state constitution.

Habeas Corpus—Guardian of Children—Home Society.

The county court of Griggs county, after a judicial investigation upon notice, determined that the petitioner for a writ of habeas corpus herein, to recover the custody of her three minor children, was leading a lewd and immoral life, and that by reason thereof she was an unfit person to continue as the natural guardian of said children, and ordered them placed in the custody of the North Dakota Children's Home Society, located at Fargo. It is *held* that said court had jurisdiction to make such order, and that the same is not void. The present custody of said children is therefore legally in the respondent, and the writ prayed for must be denied.

Habeas corpus by Ida Kol against the North Dakota Children's Home Society to recover possession of applicant's minor children. Writ denied.

Taylor Crum, for petitioner.

Pollock & Scott, for respondent.

YOUNG, J. A petition has been filed in this court by Ida Kol asking that a writ of habeas corpus issue, directed to the North Dakota Children's Home Society, of Fargo, and its agent, B. H. Brasted, commanding them to produce the bodies of her three minor children, John Kol, Harold Kol, and Herman Kol, and to return the cause of their detention, to the end that they may be restored to their liberty and to the custody and control of the petitioner. The petition is based upon the affidavit of the petitioner and Taylor Crum, her attorney. A similar application was made on October 14, 1901, to the Honorable Charles A. Pollock, judge of the Third judicial district, wherein said children are now detained and upon such application the writ was issued. That court, however, after a hearing upon the merits, denied the petitioner's request to restore to her the custody of said children. Preliminary to the application which is now made to this court, counsel for the petitioner and the respondent have stipulated that the writ shall not issue in the first instance, and that the application to this court shall be heard and determined upon the merits as they shall appear from the petition presented to the lower court, and the return of the respondent thereto.

It appears from the affidavit filed in support of the petition that the petitioner is a married woman, and that her husband, Charles Kol, is now living, but that she lives separate and apart from him; that John Kol, Harold Kol, and Herman Kol are the children of the petitioner and her said husband; that said children are of the ages of 11, 9, and 7 years respectively; that for several years last past the

petitioner has resided with her said children in the village of Cooperstown, in Griggs county; that her said husband has been absent from Griggs county for three years; that in the month of August, 1901, the children were taken from her custody, without her consent and against her wish and placed in the care and custody of the respondent, as she claims, without warrant or authority of law. The respondent made return to the writ that they had said children in custody at the home of said society in the city of Fargo, and that such custody was under and by virtue of a certain decree or process issued by the county judge of Griggs county; that the said North Dakota Children's Home Society is a corporation organized and existing under and by virtue of chapter 87 of the Laws of 1897, and the amendments thereto; that B. H. Brasted is the duly elected, qualified, and acting superintendent of said society. Copies of the proceedings had in the county court of Griggs county are contained in the return to said writ. These records disclose the following facts: On August 24, 1901, a written petition was presented to the county court of said county, signed by the three trustees of the village of Cooperstown, setting forth that this petitioner was unfit to have the charge and custody of said children because of her immoral and lewd life, and praying that the care and custody of said children be given to the North Dakota Children's Home Society, of Fargo. Upon the filing of said petition a citation issued out of said court, directed to this petitioner and her husband, requiring them to show cause on the 27th day of August, 1901, at 10 o'clock a. m., why said children should not be taken from the said petitioner's possession and provided for under the statute. The sheriff's return shows that the citation was served upon the petitioner on the 24th day of August, 1901, and that her husband could not be found within the county. On August 29, 1901, the county court cited nine witnesses to appear on August 30th to testify in said proceeding. The sheriff's return shows that eight of these witnesses were served. On August 30, 1901, said court rendered its judgment and order upon said petition as follows: "The petition of the trustees of the village of Cooperstown, in the county of Griggs and state of North Dakota, asking that the above named children be taken from the custody of Ida Cole and placed in charge of the North Dakota Children's Home Society, for the reason that said Ida Cole is an unfit person to have the care and custody of said children, having come on to be heard after due notice to said Ida Cole, the state's attorney, Benjamin Tufte, appearing for said petitioners, and Ida Cole appearing in person, and after hearing all the evidence produced by both parties, and after duly considering the same, the court now finds as a fact: That said minor children were born in the United States, and are of German descent, and are of the ages as follows, to-wit: John Cole, eleven years old; Herole Cole, nine years old; Herman Cole, seven years old. That the father, Charles Cole, has been for three years last past absent from the county

and has done nothing for the support of said children; that the mother, Ida Cole, by reason of her violent temper, immoral habits, language, and associations, is an unfit and improper person to have the care and custody of said minor children. Thereupon, on motion of Benjamin Tufte, of counsel for said petitioners, it is hereby ordered, adjudged, and decreed that the said minor children, John Cole, Herole Cole and Herman Cole be and they are hereby, ordered to be delivered to the North Dakota Children's Home Society, or its agent, and to be thereafter subject to the rules and regulations of said society; and, in case of the refusal of said Ida Cole to deliver up said minor children, the sheriff of the county of Griggs is hereby ordered to take possession of said minor children and deliver the same to the said North Dakota Children's Home Society, or its duly authorized agent."

The respondent claims no further right to the custody of the children than is given by the order of the county court of Griggs county, above set out. It is therefore apparent that the question as to which of the contending parties is entitled to the custody of these children depends entirely upon the validity of the order of the county court of Griggs county. If the order of that court placing said children in the custody of the respondent is valid, then its possession is rightful. But if, on the other hand, the order is invalid, then the right of the petitioner, as the natural guardian of her children, to have their possession and control, has not been cut off, and she is entitled to their custody. Counsel for the petitioner contends that the order of the county court of Griggs county was made without authority of law and without jurisdiction. It is urged that the entire act which authorizes county courts to place children of the classes to which these children belong, in societies, is an unconstitutional and void enactment. The right of the present custody of these children depends upon a solution of this question. The order was made under chapter 87 of the Laws of 1897, now known as §§ 3199a-3199f of the Revised Codes of 1899. It is urged that the act violates § 61 of the state constitution, which provides that "no bill shall embrace more than one subject, which shall be expressed in its title." As we understand counsel, his position is that the act embraces more than one subject, and that neither of the subjects embraced in the act is expressed in the title. We are of opinion that the act in question is not vulnerable to the objections urged. The title of the act is as follows: "An act relating to societies organized for the purpose of securing homes for orphans or abandoned, neglected or grossly illtreated children, by adoption or otherwise, and providing rules for the regulation of the same." The act consists of six sections, and the provisions of each of said sections relate to and are in furtherance of the object or purpose of the act, which is to provide homes for the classes of children described in the title. The purpose of the legislation is commendable, for it is recognized in all civilized countries that it is not only the right, but also the

duty, of the state to interfere in particular cases for the protection of infants, and to exercise its supreme prerogative jurisdiction over their persons for their benefit. Section 1 of the act clothes corporations which have been or shall be organized under the laws of this state for the purpose of securing homes for children of the classes mentioned in the title, by adoption or otherwise into private families, with authority to receive the same for such purposes. This was necessary and in furtherance of the purpose of the act, for at common law such corporations were without the power to act for such purposes, and it is only by virtue of the statute that they can do so. Further, it is patent that the humane end of the law can be accomplished only through the aid of such benevolent associations, inasmuch as the infants whom it seeks to aid are without means of support. Section 2 defines the powers and duties of such societies in reference to children so received. Section 3 limits the expense which such societies may charge to persons in whose home the children may have been placed. Section 4 requires a careful supervision of all the children placed in homes. Sections 5 and 6 make it the duty of county judges, upon complaint of two officers of a county, city, village, or township, to investigate the facts in reference to children which are alleged to have been neglected, abandoned, etc., and to enter findings in reference thereto, and, if it shall be determined that such children belong to the classes enumerated, he shall enter an order directing that they be turned over to one of these societies for the purpose of adoption into private families, or otherwise as to such society shall be deemed best. The said sections also provide for the service of a citation upon the parents, if they can be found; for the attendance of the state's attorney of the county; for the attendance and examination of witnesses, and directions to the sheriff. All of these several provisions relate to and are directly in furtherance of, a common and single purpose, namely, the procuring of homes for children of the classes named. That is all that is necessary. The constitution only requires that the act shall contain a single subject or object of legislation, and that such subject or object shall be expressed in the title. It is not intended, neither is it required, that the separate means or instrumentalities necessary to accomplish the object of legislation shall be embodied in separate acts. "Such a requirement would be absurd, rendering legislative acts fragmentary, and they would often fail of their intended effect, from the inherent difficulty of expressing the legislative will when restricted to such narrow bounds." The section of the constitution under consideration is found in the constitution of a majority of the states, and it is universally held, and we think necessarily, that an act which has but a single purpose, and that purpose is expressed in its title, may embrace all matters which are naturally and reasonably included in it, and all measures which will or may facilitate the accomplishment of the purpose of the legislation. Such has been the uniform in-

terpretation given by this court. *State* v. *Woodmansee*, 1 N. D. 246; 46 N. W. Rep. 970, 11 L. R. A. 420; *State* v. *Haas*, 2 N. D. 202, 50 N. W. Rep. 254; *State* v. *Nomland*, 3 N. D. 427, 57 N. W. Rep. 85, 44 Am. St. Rep. 572; *Richard* v. *Stark Co.*, 8 N. D. 392, 79 N. W. Rep. 863; *Power* v. *Kitching*, 10 N. D. 254, 86 N. W. Rep. 737; *Divet* v. *Richland Co.*, 8 N. D. 65, 76 N. W. Rep. 993; *Paine* v. *Dickey Co.*, 8 N. D. 581, 80 N. W. Rep. 770. This court in *State* v. *Woodmansee*, supra, in speaking of the rule of interpretation to be applied to this section, said: "Similar constitutional provisions may be found in most, if not all, of the states, some of the states using the word 'object,' instead of 'subject,' as it appears in our constitution. This provision is intended to forestall what Judge Cooley denominates 'logrolling' legislation, and prevent legislation not fully understood by members of the legislature, as well as to prevent all surprises or misapprehensions on the part of the public. But it has been uniformly held that such provisions should receive a reasonable, and not a technical, construction, and that no matter should be held to invalidate a statute so long as such matter related exclusively to the same subject, or was germane or auxilliary thereto." *State* v. *Morgan*, 2 S. D. 32, 48 N. W. Rep. 314; *Supervisors* v. *Heenan*, 2 Minn. 330 (Gil. 281); *State* v. *County Judge of Davis Co.*, 2 Iowa 280.

Having reached the conclusion that the provisions of the act are congruous and relate to a common subject, we will now inquire whether that subject is expressed in the title. We are agreed that it is. Mr. Justice Harlan, in construing a similar provision found in the constitution of the state of New Jersey, in *Montclair Tp.* v. *Ramsdell*, 107 U. S. 147, 2 Sup. Ct. 391 27 L. Ed. 431, said: "It is not intended by the constitution of New Jersey that the title to an act should 'embody a detailed statement, nor be an index or abstract, of its contents. The one general object, the creation of an independent municipality, being expressed in the title, the act in question properly embraced all the means or instrumentalities to be employed in accomplishing that object. As the state constitution has not indicated the degree of particularity necessary to express in its title the one object of an act, the courts should not embarrass legislation by technical interpretations based upon mere form or phraseology. The objections should be grave, and the conflict between the statute and the constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that it embraced more than one object, or, if but one object, that it was not sufficiently expressed by the title." The section of the constitution is fully complied with when the law has but one general object, which is fairly indicated in its title. *People* v. *Mahaney*, 13 Mich 495. On this subject the supreme court of South Dakota, in *State* v. *Morgan*, supra, said: "The title need not index all the details of the act. It is sufficient if the language used in the title, on a fair construction, indicates the purpose of the legislature, so that, making

every reasonable intendment in favor of the act, it may be said that the subject of the law is expressed in the title. As said by the supreme court of Illinois in the case of *Johnson* v. *People*, 83 Ill. 436: "The constitution does not require that the subject of the bill shall be specifically and exactly expressed in the title; hence we conclude that any expression in the title which calls attention to the subject of the bill, although in general terms, is all that is required. The constitution authorizes one subject and any number of matters, provided they have any natural or logical connection with each other in legislation." It is also held that the generality of a title is therefore no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection. Cooley, Const. Lim. p. 174; Suth. St. Const. § § 86-88.

Testing the title of the act in question by the foregoing rules, we have no hesitation in holding that the subject of the act is sufficiently expressed in the title. The title is extremely crude. Fewer words would have been sufficient to have expressed the purpose of the legislation, and those employed could have been more aptly arranged. It is patent, however, from the title that the general purpose of the act is to provide means for securing homes for abandoned, neglected, or grossly illtreated children. All reference to children's home societies in the title could have been properly omitted, for such societies are clearly instrumentalities utilized by the state to accomplish its purpose to secure homes for children of the classes named. The fact that they are named, however, does not mislead or conceal the general object of the act, which is otherwise sufficiently expressed. Indeed, counsel for petitioner does not contend otherwise. He states in his brief that "the title indicates that it is for the purpose of securing homes for children." His contention is that "the act really makes provision for securing children for homes." This contention is sufficiently disposed of by the conclusion already announced,—that all of the provisions of the act are germane to the common purpose of securing homes for children of the classes referred to. The securing of homes for such children naturally and necessarily requies the aid of such legal means as may be necessary to accomplish that object: One of the means so employed is the investigation conducted by the county court. It is apparent, also, that the purpose of the legislature to provide homes for such children could not be accomplished in the absence of provisions authorizing them to be taken from their abandoned condition or from parents who had forfeited their rights as parental guardians. These provisions are clearly germane and in furtherance of the general purpose of the act. The act in question, including the title, was copied literally from Minnesota. Chapter 17, Gen. Laws Minn. 1893. Important amendments have been made by the legislature of that state, but the act, in its substantial features, still continues in force; and, while that state has the same constitutional provision as is found embodied in section 61, it

does not appear to have been challenged as unconstiutional thereunder.

It is also urged by counsel for petitioner that the act conflicts with section 111 of the state constitution. This section, among other things, confers upon county courts exclusive original jurisdiction in probate and testamentary matters, and for the appointment of guardians and settlement of their accounts, and such other probate jurisdiction as may be conferred by law. It is claimed that the act in question confers upon county courts other and further jurisdiction than is granted by the constitution. We are of opinion that the duties enjoined by the statute in question upon county courts come within the constitutional jurisdiction of such courts, in the matter of guardianship. But, even were this not so, the exclusive jurisdiction not being vested in other courts by the constitution, it was within the province of the legislature to confer this jurisdiction upon county courts.

A more serious criticism is directed against those provisions of the act which seemingly confer upon societies receiving children of the classes named an unrestricted authority over them, including the right to do with them as they see fit, and to bind them out up to the age of 16 in the case of girls, and 18 years of age in the case of boys. It requires no argument to show that no such unlimited authority and discretion as to the control of infants can be conferred either upon private individuals or corporations organized for the purposes named. Such a provision would not only impair the constitutional juridiction of county courts over infants, but would be repugnant to every consideration of justice and reason. We are of opinion, however, that this authority is more apparent than real. This act, in legal effect, makes the society the temporal or special guardian of children received by it upon order of a county court; that is it occupies a guardianship relation in reference to children received by it under appointment of the county court. In this state jurisdiction over the persons and property of infants is lodged exclusively in county courts. These courts have plenary jurisdiction and authority over guardians and infants. They may appoint and remove them and may appoint new guardians, and they have complete control of the guardians so appointed. The act in question merely creates a new kind of guardian, of a special and temporary nature, and must be construed with reference to kindred statutes relating to the guardianship of infants and the duties of guardians, as well as the powers of county courts in reference thereto. If this view is correct,—and we think it is,—the acts of these societies are restricted and controlled by the superior power of the county court having juridiction of the children. As was said by the supreme court of South Dakota in *McFall* v. *Simmons*, 81 N. W. Rep. 898. "The county court does not lose jurisdiction to appoint a guardian or discharge him by reason of the making of one order or judgment. It may make a new order, and appoint, remove, or dis-

charge a guardian, whenever the circumstances of the case require such action on the part of the court." In this view, the acts of societies which receive children under this statute are expressly subject to the control of the county court committing such children to their custody; and such acts may be approved or disapproved by such court, and for sufficient cause the court may revoke its order committing such children to the temporary guardianship of the society. But if we should adopt a different construction of the provisions referred to, and hold that they are not restricted by the supervisory authority of county courts, and are therefore invalid, it would not affect this case, or the present right to the custody of these children, for the reason that they have not been bound out, and are not held by respondent under said objectionable provision, but are held under the order of a county court having full jurisdiction to place them in the custody in which they now are, independent of such objectionable provision.

Section 1 of the act requires such society, after incorporating, to procure and file with the secretary of state "a certificate signed by the governor and three or more members of the supreme court * * * of their confidence in the trustworthiness of said corporation for such puropses," as a condition to the power to legally receive children thereunder and to have the legal relation authorized by the act. It is claimed that this imposes a nonjudicial duty upon the members of this court, in violation of § 96 of the state constitution, and renders the act void. There is no merit in this contention. There is no legal duty imposed upon the members of the court. The obligation is placed upon societies to get this certificate of trustworthiness as a condition of having the legal status contemplated by the statute. But no legal obligation is placed upon the judges of this court to make such certificates. They may make them, or refuse, at their option, and in so doing would violate no requirement of the law. The duty, if duty at all, is a moral one only, and not a legal duty.

It is also claimed that the statute provides for an involuntary servitude which is not a punishment for a crime, and this without due process of law. Neither contention is sound. The act provides for a judicial investigation of the condition of children of the classes named, after notice, and the custody provided for such children is not servitude, as referred to in the constitution. We quote with approval the following from Ryan, C. J. in *Milwaukee Industrial School* v. *Milwaukee Co. Sup'rs*, 40 Wis. 328, 22 Am. Rep. 702: "The political necessity and duty of the sovereignty to make provision for the care of subjects or citizens unable for any cause to take care of themselves, and destitute of other care, has been too long recognized in all civilized countries, too well established under the state governments of this country, to be regarded as an open question. All public asylums, here and elsewhere in the country, for the poor, for the insane, for orphans, for the helpless and destitute by any cause, are witnesses to the political necessity of public charity. And we

assume as a principle underlying every consideration in this case, that it is the duty and policy of the state to provide efficient means, in its discretion, for the care of all destitute and helpless persons within it; that public charity, in such cases, is not 'imprisonment,' and not 'without due process of law.' We cannot understand that the detention of the child at one of these schools should be considered as imprisonment, any more than its detention in the poor house; any more than the detention of any child at any boarding-school, for the time, in loco parentis to the child. Parental authority implies restraint, not imprisonment. And every school must necessarily exercise some measure of the parental power of restraint over children committed to it. And when the state, as parens patriæ, is compelled by the misfortune of a child to assume for it parental duty, and to charge itself with its nurture, it compelled also to assume parental authority over it. This authority must necessarily be delegated to those to whom the state delegates the nurture and education of the child. The state does not—indeed, we might say could not—intrude this assumption of authority between parent and child standing in no need of it. It assumes it only upon the destitution and necessity of the child arising from want or default of parents. And, in exercising a wholesome parental restraint over the child, it can be properly said to imprison the child no more than the tenderest parent exercising like power of restraint over children."

In this case it appears that the county court of Griggs county, in the proper exercise of its jurisdiction, and after an investigation and hearing, determined that the petitioner, because of her lewd and immoral life, was unfit to longer sustain the relation of natural guardian to her children, and, pursuant to the authority conferred by the statute ordered them to be placed in the custody of the respondent. Whether all of the proceedings in the county court which culminated in the order were strictly regular we need not inquire. For it is well settled that courts will not review mere errors upon an application for a writ of habeas corpus, where the court has jurisdiction of the person and subject-matter, as in this case. The order under which respondent retains the custody of petitioner's children was made by a court having jurisdiction of the children, and clothed with authority to make the order in question. Neither did the making of such order exhaust and terminate the jurisdiction of said court over these children, as counsel for petitioner mistakenly assumes. That jurisdiction is continuous during their infancy, and extends to the making of such new and further orders concerning their care, education, and custody as shall be deemed necessary and proper. That court is open to the petitioner, as well as to others, to correct or check any abuses of said children by the respondent or any other person to whose custody they may be committed. It is also open to hear her application to be restored to her relation as their natural guardian, upon proof, satisfactory, that she has become fit to sustain that relation, which by her lacivious conduct she has

forfeited. On this point, see *McFall* v. *Simmons,* (S. D.) 81 N. W. Rep. 898.

For the reasons stated, it follows that the writ will be denied. All concur.

(88 N. W. Rep. 273.)

WALLACE GROVENOR *vs.* GEORGE A. SIGNOR, *et al.*

Opinion filed Dec. 4, 1901.

Negotiable Instruments—Joint Debtors—Limitations.

This action originated in a justice's court, and is brought upon a promissory note executed and delivered by the defendants, and payable to the plaintiff. The note matured, by its terms, on October 1, 1889, but the complaint alleges that certain amounts were paid on the note in the years 1892, 1894, and 1895. The note, in its language, is strictly a joint obligation, and contains no words importing a several liability. The note is concededly outlawed unless the running of the statute has been interrupted by said alleged payments thereon. The defendants appeared and answered separately. The answer of Elmer L. Signor raised certain issues of fact, but did not set up the statute of limitations as a defense to the action. George A. Signor, by his answer, denied making the alleged payments, and, after stating that he never paid anything on the note, set out the statute in bar of the action. To this answer the plaintiff demurred on the ground that the same did not state facts sufficient to constitute a defense. The justice sustained the demurrer. *Held,* that such ruling was error.

Payment by One Joint Debtor—Effect as Revivor.

A payment made by one joint debtor does not operate as a new promise which will interrupt the running of the statute as against another joint debtor.

Supplemental Answer—Separate Judgments.

The issues of fact raised by the answer of E. L. Signor were, against the objection of George A., tried first and separately, and a judgment was entered against E. L. S. for the amount of the note. After the entry of such judgment, George A. filed a supplemental answer, setting out as a defense the fact that judgment in the action for the full amount claimed had been rendered, and that for this reason no further proceedings could be had in the action against him. A demurrer to the supplemental answer for insufficiency was sustained by the justice, and the defendant George A. stood on his two answers, whereupon the justice entered judgment against George A. for the amount due by the terms of the note. Whether this ruling sustaining the demurrer last mentioned was error, not decided, for reasons stated in the opinion.

Demurrer to Answer Overruled.

George A. Signor alone appealed to the district court from the judgment entered against him by the justice, and such appeal was taken upon questions of law alone. The appellant specified two errors of law in his notice of appeal, viz: That the justice erred in sustaining the plaintiff's demurrer to the appellant's separate answer; and, secondly, that it was error to sustain the demurrer to the supplemental answer of the appellant. The district court, after

hearing counsel upon the questions of law presented by the notice of appeal, entered an order overruling both of said demurrers, and thereupon, without hearing any evidence, directed the entry of a judgment reversing the judgment of the justice entered against George A. Signor; and also directed the entry of a judgment dismissing the action as against George A. Signor, with costs, and judgment was entered accordingly in the district court. From such judgment plaintiff has appealed to this court. *Held*, that the order of the district court overruling the demurrer to the separate answer of George A. Signor, in which answer the statute of limitations was pleaded, was a proper order.

Issue of Fact for Jury.

Held, further, construing § § 6771a, 6779, Rev. Codes 1899, that the district court erred in not proceeding to hear the evidence of the parties to determine whether the defense of the statute of limitations, as set out in the answer of George A. Signor, was true in fact.

Trial in District Court.

Held, further, the decisions overruling the two demurrers operated to reopen the case for the trial of issues of fact within the meaning of § 6771a, supra.

New Trial Ordered.

Held, further, that the judgment of the district court must be reversed, and the case remanded for further proceedings in the district court.

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

Action by Wallace Grovenor against George A. Signor and Elmer L. Signor. From a justice's judgment in favor of plaintiff against E. L. Signor, which was reversed on appeal to the district court, plaintiff appeals. Reversed.

Pollock & Scott, (*Smith Stimmel*, of counsel) for appellant.

It was proper for the court to render a several judgment against Elmer L. Signor, one of the defendants, and proceed to the determination of the separate issues raised by the separate answer of the other defendant. Subd. 3, § 5481, and Subd. 3, § 5251 Rev. Codes; *Hempy* v. *Ransom*, 33 O. St. 312; *Roby* v. *Rainsberger*, 27 O. St. 674; *McIntosh* v. *Ensign*, 28 N. Y. 169. The question whether or not payment by one joint debtor arrests the running of the statute of limitations as to the other is to be determined upon the question as to whether the payment was made with the knowledge and consent of the other. *Clarbin* v. *Brown*, 83 N. W. Rep. 352; *Granville* v. *Young*, 85 Ill. App. 167. The common law rule that in actions against joint defendants on contract, the judgment must be against all or none, is subject to the exception that where one joint debtor pleads matter which goes to his personal discharge, or which is a bar to the action as against himself alone, and of which his co-defendant could not take advantage, judgment may be entered for such defendant, it being only essential that the defense be so pleaded as a personal defense. 11 Enc. Pl. & Prac. 850; *Fuller* v. *Robb*, 26 Ill.

246; *Baker* v. *Cocks,* 50 N. Y. 689; *Coe* v. *Hamilton,* 1 Morris, (Ia.) 319; *Hathaway* v. *Crocker,* 7 Metc. 262.

William B. Douglas, for respondent.

Plaintiff in pleading on a contract against which the statute of limitations has run must plead the exceptions that take it out of the statute. Bliss on Code Pleading. § 205 and note 206; *Humbert* v. *Rector,* 7 Paige Ch. 195; *Sublette* v. *Tiney,* 9 Cal. 423. It is good pleading to allege that an act was done by the principal, without reference to the agent, even though in fact it was done by the agent. Maxwell Code Pl. 78; Bliss Code Pl. § 158; *Bennett* v. *Judson,* 21 N. Y. 238. The act of an agent is the act of the principal, and a payment made by an authorized person, or a payment made by an unauthorized person on account of another, which the latter afterwards assents to binds him so that it has the same legal effect as though made by himself. *Clarkin* v. *Brown,* 83 N. W. Rep. 351; *Bank* v. *Ballou,* 49 N. Y. 155. The note alleged in the pleading is a joint obligation. § § 3917, 3766, Rev. Codes; Bliss Code Pl. § 91; Pom. Rem. § 275; 1 Chit. Pl. 41. When an exception is necessary to constitute a cause of action it must be alleged by the plaintiff. Bliss Code Pl. § 202, note 194; *Baptist Church* v. *Ry. Co.,* 6 Barb. 313; *People* v. *Board,* 40 Barb. 626; *Toledo, Etc., Ry. Co.* v. *Pence,* 68 Ill. 524. Hence it was necessary for George A. Signor to plead that the contract was not what, on its face, it purported to be § 3917, Rev. Codes. The payment by one of two joint obligors does not suspend the running of the statute of limitations as to the other. Angell on Limitations, 608; Wood on Limitations, 608; *Cowhick* v. *Shingle,* 25 L. R. A. 608; *Bell* v. *Morrison,* 26 U. S. 351; *Van Keuren* v. *Parmelee,* N. Y. 523; 1 Waite's Pr. 65. The payment must be made by the debtor himself, or by his duly authorized agent, to prevent the running of the statute. *Shoemaker* v. *Benedict,* 11 N. Y. 177. Statutes of limitations passed through several stages of interpretation. Formerly they were considered as raising a presumption of payment. Later the statute was looked upon as one of repose. Now the statute has become one in bar. § 110 N. Y. Code Proc.; § 5154, Gen. St. of Minn.; § 5220, Rev. Codes; *Whittaker* v. *Rice,* 9 Minn. 14, 86 Am. Dec. 78; *Willoughby* v. *Irish,* 27 N. W. Rep. 379. In adopting the New York statute we adopted the New York interpretation of it. *Cathcart* v. *Robinson,* 5 Peters, 265; *McDonald* v. *Hovey,* 110 U. S. 619; *Pennock* v. *Doalogue,* 2 Peters, 1; *Cass Co.* v. *Security Imp. Co.,* 7 N. D. 528, 75 N. W. Rep. 775. It is held in New York that a payment by one of the joint obligors does not suspend the running of the statute as to the other. *Van Keuren* v. *Parmelee,* 2 N. Y. 523, 51 Am. Dec. 331; *Shoemaker* v. *Benedict,* 11 N. Y. 177, 65 Am. Dec. 95; *Murdock* v. *Waterman,* 145 N. Y. 55; *Willoughby* v. *Irish,* 35 Minn. 63, 27 N. W. Rep. 378. A partial payment upon an obligation by one of two joint obligors before the statute has run will not prevent the running of the statute as to the other. *Murdock* v. *Waterman,*

105 N. Y. 55; *Harper* v. *Fairley*, 53 N. Y. 442. And this is the general rule. *Wilson* v. *Torbet*, 21 Am. Dec. 635; *Lowther* v. *Chappell*, 42 Am. Dec. 643; *Burr* v. *Williams*, 20 Ark. 188; *Biscoe* v. *Jenkins*, 10 Ark. 116; *Cooper* v. *Wood*, 27 Pac. Rep. 886; *Tate* v. *Clements*, 26 Am. Rep. 709; *Meitzer* v. *Todd*, 39 N. E. Rep. 1046; *Kallenback* v. *Dickinson*, 100 Ill. 438, 39 Am. Rep. 53; *Davis* v. *Mann*, 43 Ill. 302; *Oleson* v. *Wilson*, 52 Pac. Rep. 373; *Maybery* v. *Willoughby*, 5 Neb. 370; *Kerper* v. *Wood*, 48 O. St. 621; *Hance* v. *Hair*, 25 O. St. 349; *Bush* v. *Stowell*, 10 Am. Rep. 694; *Muse* v. *Donelson*, 36 Am. Dec. 309; *Turner* v. *Thomp*, 17 S. E. Rep. 324. In an action upon a joint contract, plaintiff cannot sever the trial and take a separate judgment on the merits against one of the defendants and afterwards a separate judgment against the other joint defendant upon the same cause of action. § § 5261, 5481, 5633, Rev. Codes; Bliss Code Pl. § 92; 1 Freeman, Judgments, § 43; *Smith* v. *Black*, 9 Serg. & R. 142; *Mason* v. *Eldred*, 6 Wall. 231; *Johnson* v. *Lough*, 22 Minn. 203; *Niles* v. *Battershall*, 27 How. Pr. 381; *Black Hills Natl. Bank* v. *Kellogg*, 4 S. D. 313, 56 N. W. Rep. 1071. If this action had been against either of the defendants alone plaintiff could not recover, because the claim is upon a joint obligation, and all obligors were required to be joined. § 5232, Rev. Codes; Pom. Rem. § § 277, 278, 299. A failure to unite all the joint promisors could be taken advantage of by a plea in abatement or demurrer. Bliss Code Pl. § § 62, 92, 231; Maxwell Code Pl. 49, 372; *Hudson* v. *Archer*, 55 N. W. Rep. 1099; § 5268, Rev. Codes; *Niles* v. *Battershall*, 27 How. Pr. 381. A judgment against one of several joint debtors merges the cause of action in the judgment and bars an action against the other joint debtors. *Oakley* v. *Aspinwall*, 4 N. Y. 513; *Candee* v. *Smith*, 93 N. Y. 349; *Mason* v. *Eldred*, 6 Wall. 231; 6 Notes on U. S. Reports, 830; *Ferrald* v. *Bradford*, 50 Am. Dec. 293; *Benson* v. *Payne*, 17 How. 408.

WALLIN, C. J. This action originated in a justice's court, and is based upon a promissory note, which note is admitted to have been executed by the defendants, and delivered by them to the plaintiff. So far as material the note reads: "Casselton, Dakota, Nov. 9th. 1889. October 1st after date, with exchange, we promise to pay Wallace Grovenor one hundred sixty-four and 3-100 dollars." The complaint alleges that payments had been made on the note in the years 1892, 1894, and 1895, and judgment was demanded for the balance due, with interest, after deducting the total of such payments. The defendants appeared before the justice of the peace, and filed separate answers to the complaint. The answer of the defendant Elmer L. Signor raised certain issues of fact, which issues will not be further mentioned. The separate answer of George A. Signor embraced a copy of the note, and, after admitting the execution and delivery of the same said answer contained a denial that defendant (George A.) ever made the payments on the notes as stated in the complaint, and further alleged that he never made any payment or payments on the

note. Said answer further alleged that the cause of action set out in complaint did not accrue within six years before the commencement of the action. To this separate answer the plaintiff filed a demurrer upon the ground that the same did not state facts sufficient to constitute a cause of action. After the issues were so framed, the justice of the peace, against the objection of the defendant George A. Signor severed the trial of the action, and proceeded to separately try the issues of fact arising upon the answer of the defendant Elmer L. Signor, and in which trial George A. was not allowed to participate. At the conclusion of such separate trial a judgment was entered against Elmer L. Signor for the amount claimed in the complaint, with costs of suit. After said judgment was entered, the defendant George A. Signor filed a supplemental answer, which embraced an allegation to the effect that the plaintiff was barred from proceeding further against him in the action, for the reason that the plaintiff had already recovered a judgment in this action for the full amount claimed against his co-defendant and joint obligor, Elmer L. Signor, To the supplemental answer the plaintiff filed a demurrer on the ground that the facts stated therein did not constitute a defense to the cause of action stated in the complaint, whereupon the justice adjourned court, and later, and on the adjourned day, such proceedings were had that the justice entered an oredr sustaining said demurrers to the said answer and the said supplemental answer of George A. Signor. Said George A. Signor stood upon his said answer and supplemental answer whereupon the plaintiff offered said note in evidence, and rested his case, and the defendant George A. rested his case without offering evidence. Thereupon the justice entered judgment in the action in favor of the plaintiff and against the defendant George A. Signor for the amount claimed in the complaint, with costs. The defendant George A. Signor appealed from said last-mentioned judgment to the district court, and such appeal was taken on questions of law alone. In the notice of appeal the appellant specified the errors of law of which he complained substantially as follows: First, that the said magistrate erred in sustaining the plaintiff's demurrer to the separate answer of the appellant, and in not permitting the appellant to defend the action upon the facts alleged in the said separate answer of George A. Signor; second, that the magistrate erred in sustaining the demurrer to the supplemental answer of the appellant, and in not permitting the appellant to defend the action upon the facts set out in the supplemental answer. It further appears that the appellant's case was heard and determined in the district court upon questions of law alone, and that in disposing of the case that court's order for judgment directed, in substance, that the demurrers of the plaintiff to the appellant's separate answer and supplemental answer should be severally overruled, and the judgment entered by the justice against the appellant should in all things be reversed, and that the action as against the appellant should be dismissed, with costs to be taxed in favor of the appellant, George A. Signor. Judgment was

entered in the district court in conformity to such order, from which judgment the plaintiff has appealed to this court.

The errors assigned in this court by the plaintiff and appellant are as follows: (1) The district court erred in overruling the plaintiff's demurrer to the separate answer and supplemental answer of George A. Signor; (2) The district court erred in not affirming the judgment of the justice of the peace, and in dismissing the action as against George A. Signor; (3) the district court erred in not directing said action to be tried on its merits as to said George A. Signor. The facts narrated will suffice to raise the questions of law presented for determination.

In sustaining the demurrers to the answer and supplemental answer of George A. Signor the court of original jurisdiction necessarily decided that the facts set out in said answers were not sufficient to constitute a defense to the plaintiff's cause of action, and, when said defendant stood on such answers, and did not offer to amend the same, it was at least logical, from the standpoint of the justice, to enter judgment for the amount due on the note; and that is what was done by the justice. On appeal to the district court from such judgment, that court, under the notice of appeal, was required to consider and decide two questions of law, and no more, viz.: (1) Whether the justice erred in sustaining the plaintiff's demurrer to the separate answer of George A. Signor, and (2) whether the justice erred in sustaining the demurrer to the supplemental answer of George A. Signor Both of these questions, as appears by the order directing a judgment, were expressly ruled upon in the district court. That court overruled the justice, and entered an order overruling each and both of the demurrers to said separate answers. In this ruling the district court adjudged, necessarily, that the facts stated in said answers did constitute a defense to the cause of action stated in the complaint. But it is our opinion that the conclusion reached by the trial court, if sound and legal, did not warrant the order for a dismissal of the action against George A. Signor, which order was entered then and there without a hearing upon the facts and merits in the district court. As we see the case, the order overruling the demurrers to the two answers operated only as a judicial determination that the facts stated in the answers, if established by evidence, constituted a defense to the plaintiff's cause of action. But this holding certainly did not go further, and adjudicate that the allegations in said answers were not only sufficient in law, but were also severally true in fact. In our judgment, the effect of overruling the demurrers was to leave an issue of fact yet to be tried. From the nature and effect of the order overruling these demurrers we are clearly of the opinion that the case would fall within the letter and spirit of the following provision of the statute regulating appeals to the district court: "When the decision of the district court reopens the case for the trial of an issue of fact the decision shall direct that the action shall be retained and placed

on the calendar of the court for trial accordingly as in other cases; and thereupon the parties may be allowed to serve and file any pleadings that may be necessary or proper within such time as the court deems reasonable." See § 6771a, Rev. Codes 1899. Section 6779, Id., declares: "The action shall be tried anew in the district court in the same manner as actions originally commenced therein." In actions commenced in the district court, in which issues of law are framed, such issues are, as a rule, first determined; and when, in such cases, the decision of the legal issues leaves questions of fact undetermined, the court will in due course proceed to hear and determine the questions of fact. This familiar rule of practice is clearly voiced in the statute governing appeals from justice's court, from which we have quoted above.

From the briefs filed by counsel in this court we are led to believe that the district court held that the note in suit is strictly a joint obligation, and is not a joint and several obligation; and, further, that the note was barred, as against George A. Signor, because he, by answer, denied that he had personally made the payments set out in the complaint, and alleged that he had made no payments whatever on the note. But, as we have said, these vital allegations of fact were never established by any evidence offered in this action. It is true that the demurrers admitted the facts pleaded in the answer of George A. Signor, but such admission was made for the purposes of the demurrers only, and, when the demurrers were overruled and held for naught in the district court, the answers were intact, and the same raised issues of fact upon which the litigants were severally entitled to a trial upon the facts and merits. The separate answer of George A. Signor set out the statute of limitations in bar of the action, but to sustain this defense it was essential that his averment that he had made no payments on the note should be established by competent testimony, and any such testimony could, of course, be controverted by the plaintiff, and under the statute from which we have quoted the trial court, in the exercise of its discretion, could have allowed other issues to be framed in the district court after the demurrers were overruled. The case was in the district court for trial anew.

In our investigations of the case we have been greatly aided by the briefs of counsel, but, as this court has reached the conclusion that the case must be remanded to the district court for further proceedings, it is not deemed necessary or expedient to discuss all the questions which arise upon the record; and hence we shall consider but one further matter. We have reached the conclusion that the note in suit, upon all the facts appearing of record, is a joint note, and is not a joint and several obligation. The instrument, as written, embraces no terms from which this court can infer as a matter of law that the same is joint and several. Nor do the pleadings lend color to any such conclusion. Neither the complaint nor the separate answer of George A. Signor embraced a suggestion, much less an

averment, that each and both of the defendants received a benefit from the consideration for which the note was executed. The pleadings, therefore, as well as the note itself, show that the obligation was joint, and not joint and several. The note, by its terms, imposed an obligation to be performed by several persons; and hence, under the mandate of the statute, the courts are bound to presume that the note is a joint, and not a joint and several, obligation. Section 3766, Rev. Codes 1899. We have seen that no facts appear in the record whereby this note can be brought within the exception to this rule, as provided in § 3917, Id. Both parties, by their pleadings, have elected to stand upon the note as it was written; and this election, in our opinion, precludes the courts from holding otherwise. Section 3766, supra.

The remaining question is whether the facts set out in the separate answer of George A. Signor, if established, constitute a bar to the action as against him. The action was commenced more than six years after the maturity of the note, and hence the same is barred by the statute, unless the time has been extended in some manner. George A. Signor pleads the statute in bar of the action, and alleges that he never at any time made a payment on the note. We have assumed that the district court held that this defense was valid in law, and this court has reached the same conclusion. There is considerable conflict of authority upon this point, both in England and in this country; but the decided weight of modern authority will support our conclusion. *Oleson* v. *Wilson*, 20 Mont. 544, 52 Pac. Rep. 372, 63 Am. St. Rep. 639; *Hance* v. *Hair*, 25 Ohio St. 349; *Mayberry* v. *Willoughby*, 5 Neb. 368, 25 Am. Rep. 491; *Littlefield* v. *Dingwall*, 71 Mich. 223, 39 N. W. Rep. 38; *Kallenbach* v. *Dickinson*, 100 Ill. 427, 39 Am. Rep. 47; *Cooper* v. *Wood*, 1 Colo. App. 101, 27 Pac. Rep. 884; *Van Keuren* v. *Parmelee*, 2 N. Y. 523, 51 Am. Dec. 322; *Murdock* v. *Waterman*, 145 N. Y. 55, 39 N. E. Rep. 829, 27 L. R. A. 418; *Harper* v. *Fairley*, 53 N. Y. 443; *Shoemaker* v. *Benedict*, 11 N. Y. 177, 62 Am. Rep. 95; *Willoughby* v. *Irish*, 35 Minn. 63, 27 N. W. Rep. 379, 59 Am. Rep. 297; *Bell* v. *Morrison*, 1 Pet. 351, 7 L. Ed. 174. The cases cited from the states of New York and Minnesota are decisive authority here, inasmuch as they are decided under a statute identical in language with that in this state. See Rev. Codes N. D. 1899, § 5220. The courts in the cases cited, in construing this statute, hold that a payment upon a debt is equivalent to a new promise resting upon the original consideration. But when such payment is made by one joint debtor such payment does not operate as a promise binding any one except the debtor who makes or authorizes the payment, and this rule is based upon the theory that the relation of agency does does not arise upon the mere relation of joint or joint and several debtors.

Counsel have devoted a good deal of time and attention to the question of whether the supplemental answer contains a defense to plaintiff's cause of action, and this question, as presented upon this re-

cord, is one of some degree of nicety; but, inasmuch as the case must, in any event, be remanded to the district court for further proceedings, we do not deem it advisable or proper at this time to pass upon this question. The issues to be presented to the district court at the next hearing of the case cannot be anticipated with any degree of certainty for the reason that the trial court, on motion therefor, may deem it advisable to allow the pleadings to be amended and upon such amendment, if made, the fact may appear that the note in suit, while joint in form, is, in its legal effect, a joint and several obligation.

The judgment of the district court will be reversed, and the case remanded for further proceedings in that court. All the judges concurring.

(88 N. W. Rep. 278.)

A. B. MC DONALD *vs.* GEORGE W. BEATTY, *et al.*

Opinion filed Dec. 3, 1901.

Foreclosure—Redemption by Subsequent Mortgagee.

The plaintiff, in conformity with the statutes regulating redemptions of real estate sold at mortgage foreclosure sales, redeemed from certain foreclosures upon lands owned by the defendant. His right of redemption was based upon a subsequent mortgage on the premises, then in process of foreclosure, which mortgage the defendant claimed had prior thereto been rendered void by rescission. The holders of the sheriff's certificate received, and have since retained, the redemption money. No redemption having been made by defendant or by any other lienholder, sheriff's deeds were issued to plaintiff. It is *held*, in an action to recover possession of said premises, that the right to challenge plaintiff's right to redeem under the statute concerned the owners of the sheriff's certificates only, and that by receiving and retaining the redemption money they waived the right to object, and thereby validated plaintiff's redemption.

Rights of Redemption—Deed.

Held, further, that plaintiff by his redemption acquired all of the rights of the purchasers at the sale, which included the right to demand and receive sheriff's deeds.

Waiver—Estoppel by Silence and Conduct.

Prior to the foreclosure sales from which plaintiff redeemed, the purchasers contracted orally with the defendant that they would purchase at the sales, and would hold the certificates merely as security for the amount of their bids and interest, and that they would not rely upon their legal rights thereunder. The plaintiff made his redemption in good faith, and with the belief that his mortgage was a valid lien, and in entire ignorance of the oral contracts. Defendant knew of plaintiff's redemption shortly after they were made, but made no objection thereto; neither did he disclose to plaintiff the oral agreements, or tender or cause to be tendered to plaintiff the money he had paid to redeem. *Held*, that the defendant is estopped by his conduct and acquiescence in the redemption from asserting

any rights arising out of the oral contract, as against the plaintiff, who had no knowledge thereof.

Appeal from District Court, Towner County, *Cowan*, J.

Action by A. B. McDonald against George W. Beatty and wife to recover possession of land. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Cochrane & Corliss, for appellants.

Under the agreements between Beatty and Studness and Beatty and Jacobson acting for Morgan and Davis, the sheriff's certificates of sale constituted mere mortgages, and gave Studness and Morgan and Davis, the respective parties, only mortgage interests in the property. Instead of their furnishing the money to pay off these mortgages, and then taking from Beatty deeds as security, it was understood that the same result should be accomplished by allowing the foreclosure sale formally to go on. As between the parties the statutory period of redemption had not been set running by the form of the foreclosure sale, the real transaction being simply a security transaction. So long as such new mortgages were not foreclosed the transaction was not a judicial sale with the right of redemption in others, but a mere mortgage transaction. § § 4701, 4703, Rev. Codes; *Gaines* v. *Brockerhoff*, 19 Atl. Rep. 958; *Klock* v. *Walter*, 70 Ill. 413; *Cullen* v. *Carey*, 146 Mass. 50; *Sweet* v. *Mitchell*, 15 Wis. 641, 645; *Hoyles* v. *Bailey*, 17 N. W. Rep. 322; *Phelan* v. *Fitzpatrick*, 54 N. W. Rep. 614; *Hilton* v. *Pritchard*, 12 S. E. Rep. 242; 1 Pingree, Mortg. § 100; 1 Jones, Mortg. § 332; *Rhines* v. *Baird*, 41 Pa. St. 253; *Harrison* v. *Soles*, 6 Pa. St. 393; Sweitzer's App. 71 Pa. St. 264; Logue's App. 104 Pa. St. 136; *Baker* v. *Fireman's Fund Ins. Co.*, 21 Pac. Rep. 357; *Bank* v. *Bank*, 41 N. E. Rep. 919; *Trogdon* v. *Walston*, 45 N. E. Rep. 575; *Hiester* v. *Maderia*, 3 Watts. & Serg. 384; *Byers* v. *Johnston*, 56 N. E. Rep. 449; *Heaton* v. *Darling*, 68 N. W. Rep. 1087; *Bray* v. *Barbour*, 20 S. W. Rep. 899. If an agreement is entered into subsequently to the sale, the substance of which is that the purchaser or holder of the certificate of sale will treat it as a mere security, or will give a definite time in which to redeem, it will be enforced, even though parole. The court will not heed the plea that the contract cannot be received in evidence because within the statute of frauds. Freeman on Executors, § 316, p. 1079; *McMakin* v. *Schenk*, 98 Ind. 264; *Southard* v. *Pope*, 9 B Monroe, 261; *Butt* v. *Butt*, 91 Ind. 305; *Shade* v. *Creviston*, 93 Ind. 591; *Beatty* v. *Brummitt*, 94 Ind. 76. Under such an agreement the debtor, though the time granted him has expired, still retains the right to redeem, and the purchaser is regarded as merely holding the land as security. *Thelton* v. *Smith*, 84 Ind. 485; *Hughart* v. *Lenburg*, 45 Ind. 498; *Southard* v. *Pope*, 9 B. Monroe, 261; Freeman on Executors, § 316; *Klock* v. *Walter*, 70 Ill. 416; *Cullen* v. *Carey*, 146 Mass. 50; *Campbell* v. *Dearborne*, 109 Mass. 130; *Sweet* v. *Mitchell*, 15 Wis. 641, 665; *Hoyle* v. *Bailey*, 17 N. W. Rep. 322; *Phelan* v. *Fitzpatrick*, 54 N. W.

Rep. 614; *Kaufman* v. *Smallwood*, 36 Ill. 504; *McCormick* v. *Greenhow*, 2 Utah 263; *Ott* v. *Rape*, 24 Wis. 336; *Felton* v. *Smith*, 84 Ind. 485. By his redemption McDonald merely stepped into the shoes of Studness and Morgan and Davis. All the right he secured was their respective rights, subject to all equities in favor of Beatty. They could not take a deed and repudiate their agreements; neither could McDonald. Rorer on Judicial Sale, § 1195; 20 Am. & Eng. Enc. L. 639; *Dupee* v. *Salt Lake*, 53 Pac. Rep. 845. McDonald has never redeemed the property in question. His attempted redemption was by virtue of a mortgage that had been adjudged void for want of consideration before the attempted redemption thereunder. The rescission of a contract extinguishes it. § § 3931, 3932, Rev. Codes. To entitle a person to redeem, who is not the owner of the property, the person must be a creditor having a lien on the property by judgment or mortgage. Section 5540 Rev. Codes. McDonald obtained, by his attempted redemption, no greater right than was held by Studness and Morgan and Davis. His attempted redemption is not in law a redemption, notwithstanding Studness and Morgan and Davis received his money. *People* v. *Ransom*, 2 N. Y. 490; *Miller* v. *Lewis*, 4 N. Y. 554; *Pamperin* v. *Scanlon*, 28 Minn. 345; *Myer* v. *Mintoyne*, 106 Ill. 414; *People* v. *Ransom*, 4 Denio. 145. The statutory right of redemption must be exercised by the persons, and in the manner pointed out by the statute, otherwise there is no lawful redemption. *Pamperin* v. *Scanlon*, 28 Minn. 345; *Keller* v. *Coman*, 44 N. E. Rep. 434; *O'Brien* v. *Moffat*, 33 N. E. Rep. 616. The receipt by the purchaser at a judicial sale of the purchase price by one assuming to be a redemptioner does not make him a redemptioner as to third parties, where he is not a lawful redemptioner according to statute. *Jarrell* v. *Brubaker*, 49 N. E. Rep. 1050; *Scobey* v. *Kinningham*, 31 N. E. Rep. 355; *People* v. *Ransom*, 4 Denio. 145; *People* v. *Rathbun*, 15 N. Y. 528; *Griffin* v. *Chase*, 23 Barb. 278; *Thomas* v. *Bowman*, 30 Ill. 84; *Hare* v. *Hall*, 41 Ark. 372; *Wood* v. *Moorehouse*, 45 N. Y. 368; *Bagley* v. *Ward*, 37 Cal. 121; *Carver* v. *Howard*, 92 Ind. 173; *Hervey* v. *Krost*, 19 N. E. Rep. 125; *Hughes* v. *Helms*, 52 S. W. Rep. 460; *San Jose Bank* v. *Bank of Madera*, 54 Pac. Rep. 83. McDonald has never made any contract with Studness and Morgan and Davis; never received any assignment, and is at best a mere equitable assignee, who takes subject to all rights which Beatty has, as against Studness and Morgan and Davis, to insist that the sheriff's certificates are mere mortgages. The assignee of a sheriff's certificate stands in the shoes of the purchaser at such judicial sale. *Bruschke* v. *Wright*, 166 Ill. 183; *Roberts* v. *Clelland*, 82 Ill. 538; *People* v. *Ransom*, 4 Denio. 145; *Miller* v. *Lewis*, 4 N. Y. 554; *Ayers* v. *Campbell*, 9 Ia. 213; *McGoren* v. *Avery*, 37 Mich. 120; *O'Brien* v. *Moffat*, 33 N. E. Rep. 616; *Haselman* v. *Lowe*, 70 Ind. 414; *Chytraus* v. *Smith*, 30 N. E. Rep. 450; *Reynolds* v. *Harris*, 14

Cal. 667. McDonald is not a purchaser. A purchaser to be protected must make a contract with some one, either with the party selling at judicial sale, by making a bid for the premises, which is accepted, or by making a contract with the owner of the land or the holder of the certificate. *Priest* v. *Cummings,* 20 Wend. 356; 20 Am. & Eng. Enc. L. 575.

Morrill & Engerud and *Frank D. Davis,* for respondents.

Appellants assume that Jacobson was the authorized agent of Morgan and Davis in making the agreement to hold the sheriff's certificate as security only. Such is not the fact. Jacobson was apparently the agent of Morgan and Davis for the collection of the mortgage debt. The only evidence of this is the fact that he had possession of the papers. His testimony to the effect that he was their agent is incompetent and was objected to on that ground. His bald statement is merely a legal conclusion and cannot be considered over the objection made. *Larson* v. *Lombard Ins. Co.,* 53 N. W. Rep. 179; *Burkholder* v. *Farmer,* 51 N. W. Rep. 293; *Johnson* v. *Glover,* 10 N. E. Rep. 214; *Young* v. *Ins. Co., 22* Atl. Rep. 32; *Jackson* v. *Todd,* 56 Ind. 406; *Williams* v. *Sutler,* 7 Ia. 435. The evidence of the agency to convert the purchaser into a mere mortgagee must be in writing. § § 3887, 3960, Rev. Codes. The ostensible agency for collection prima facie established by the fact of possession of the paper would not establish an ostensible agency to make such a contract as is claimed in this case. 1 Am. & Eng. Enc. L. (2 Ed.) 1027 & Note 2; page 1028, Note 6. The letter from Morgan and Davis to Jacobson, written after this suit was commenced, is competent to show a ratification because written after McDonald had attached in ignorance of it and adversely to the agreement sought to be ratified. § 4318, Rev. Codes; 1 Am. & Eng. Enc. L. 1215. A redemptioner is a person who has an option to purchase premises previously sold at a judicial sale. § 5540, Rev. Codes. The only office which a subsequent valid lien has to perform in the machinery of redemption is to give the right to compel the execution purchaser to transfer his rights. The latter can waive his rights if he desires and part with his title for any price he chooses, the same as any owner of property can do. The purchaser in this case accepted the money tendered by McDonald and thereby parted with his rights by transfer of the same to McDonald. Freeman on Exc. § 27 and 321; *Emmest* v. *Bradstreet,* 20 Wend. 50; *Van Horn* v. *McLaren,* 8 Paige 285; *McLogan* v. *Brown,* 11 Ill. 519; *Carver* v. *Howard,* 92 Ind. 173; *Hare* v. *Hall,* 41 Ark. 372; *In Matter of Eleventh Ave.,* 81 N. Y. 438. A contingent liability secured by mortgage will support a redemption. *Crossen* v. *White,* 87 Am. Dec. 420. If the one who is not entitled to redeem either by reason of the invalidity of his lien or because of failure to take the statutory step for that purpose, pays the redemption money to the sheriff and receives the certificate of redemption, the original pur-

chaser ratifies the act of the officer and validates the redemption by accepting and retaining the money. Freeman on Exc. § 317; *Matter of Eleventh Ave.*, 81 N. Y. 438, 450; *Wood* v. *Moorehouse*, 45 N. Y. 368; *Harvey* v. *Krost*, 19 N. E. Rep. 125; 17 Am. & Eng. Enc. L. (2 Ed.) 1035; *Bagley* v. *Ward*, 37 Cal. 121; *Carver* v. *Howard*, 92 Ind. 173; *Hare* v. *Hall*, 41 Ark. 372; *Sexton* v. *Rhaines*, 13 Wis. 99. The redemption may assume the form of a deed from the purchaser to the redemptioner. Such deed will have the same effect as a regular redemption. *Leonard* v. *Flynn*, 26 Pac. Rep. 1097. Beatty stood silently by and allowed McDonald to put in his money when he could have prevented it. He allowed McDonald to obtain the sheriff's deed and pay the taxes on the land year after year, and now after more than three years, for the first time attempts to claim that McDonald has only a mortgage. Beatty is estopped by his conduct to question this redemption. *Power* v. *Larabee*, 3 N. D. 513; Pomeroy Eq. Jur. 805, 911, 817, 820; *Thompson* v. *Simpson*, 128 N. Y. 270; *Morgan* v. *Ry. Co.*, 96 U. S. 716. The sheriff in executing and delivering a certificate of sale or deed acts for the owner of the land by virtue of the powers vested in him by statute for that purpose; and the immediate parties to such instruments are concluded by their recitals the same as if they themselves had executed them, provided there was a valid judgment, execution and sale. *Blood* v. *Light*, 38 Cal. 649; *Hihn* v. *Peck*, 30 Cal. 288; *Shields* v. *Miller*, 9 Kan. 390; *Allison* v. *Snider*, 24 S. E. Rep. 911; Freeman on Exc. § 334; 22 Am. & Eng. Enc. L. 696. If this is true with respect to the sheriff's certificate of sale it is also true with respect to the sheriff's certificate of redemption. The instrument cannot be attacked collaterally if valid on its face and the jurisdictional facts exist. *Waller* v. *Harris*, 20 Wend. 555. Beatty should have acted promptly and disclosed his agreement to McDonald as soon as it was made. 1 Am.& Eng. Enc. L. 1203; *Power* v. *Larabee*, 3 N. D. 513. The purchaser at an execution sale gets the title of the debtor in the land sold subject to the debtor's right to redeem. It is therefore a conditional estate, and a conditional estate is within the protection of the recording law. § 3594, Rev. Codes.

YOUNG, J. This action was tried to the court without a jury. It involves the title and right of possession of two quarter sections of real estate situated in Towner county. The plaintiff prevailed in the district court, and the defendants appeal from the judgment, which adjudged that plaintiff was owner in fee simple of the real estate in question, and that the defendants have no interest therein. The case is presented for trial de novo under § 5630, Rev. Code, 1899.

The facts which we deem material to a determination of the question involved are not in dispute. On January 16, 1896, the title to the real estate in question was in the defendant George W. Beatty. It was then incumbered by two mortgages. One was

owned by Morgan & Davis, and covered one of the quarter sections. The other mortgage was on the other quarter section and was owned by the Vermont Loan & Trust Company. On January 16, 1896, the defendant George W. Beatty and his wife, Alice L. Beatty, joined in a third mortgage upon all of said real estate, to plaintiff, to secure certain promissory notes given by the defendant George W. Beatty to plaintiff, amounting to $5,500. This mortgage was given as a part of a certain contract between plaintiff, McDonald, and defendant Beatty, which provided for the sale by plaintiff to defendant of a certain mill property in Cando, in said county. On April 15, 1897, defendant Beatty demanded the delivery of a deed to said mill property pursuant to the terms of said contract, and, upon plaintiff's refusal to comply with the same, rescinded the contract, and notified the plaintiff of such rescission, and that the same was made upon the ground of a total failure upon the part of the plaintiff to perform his covenants with respect to the delivery of a deed of the mill property, and demanded the return of his papers including the notes secured by this mortgage. Later, and during the same month, plaintiff instituted an action in the district court of Towner county to foreclose this mortgage, which foreclosure was resisted by the defendant upon the ground that the contract of purchase of the mill property, which furnished the sole consideration for the note secured by the mortgage, had been rescinded by him. This defense was sustained by the trial court in a judgment entered on October 7, 1898, which judgment was thereafter affirmed by this court. See *McDonald* v. *Beatty*, 9 N. D. 293, 83 N. W. Rep. 224. Pending the controversy between plaintiff and defendant as to the rescission of the contract of April 15, 1896, for the purchase and sale of this property, the two mortgages first referred to, and to which plaintiff's mortgage was subordinate, were foreclosed. The sale under the Morgan & Davis' mortgage was made on March 13, 1897, and at such sale the premises covered thereby were sold to the mortgagees for the sum of $721.55; being the amount then due, with costs of foreclosure. The sale under the Vermont Loan & Trust Company mortgage was on December 12, 1896. At this sale Charles Studness was the purchaser for the sum of $725; that being the amount then due, including costs. In September, 1897, which was before the trial of the then pending foreclosure action on the $5,500 mortgage, plaintiff redeemed from both of said sales under the mortgage which he was then attempting to foreclose. It is conceded that both of the foreclosures from which plaintiff redeemed were strictly regular in form, and that a proper certificate was delivered to each of the purchasers at said sales, and, further, that plaintiff's redemptions were in compliance with the statutes as to all formal requisites, and that the amount paid by him to the sheriff on such redemptions, covered the amount due upon each certificate. It is also a conceded fact that the money so paid to the sheriff by the plaintiff was paid over to the holders of the sheriff's certificates as and for redemptions from said sales, and

that the money so paid has ever since been retained by them. No redemption from said sales was made or attempted by the defendant, or by any other redemptioner than plaintiff. After the statutory period for redemption had expired, sheriff's deeds were issued to plaintiff. All of the instruments herein referred to were recorded in the proper office at or about the date of their execution. The plaintiff rests his title to the real estate in controversy upon the sheriff's deeds. The defendants challenge plaintiff's title under these deeds for reasons which we will now consider.

It is urged by counsel for the defendants that plaintiff did not in fact redeem the property in question. This contention is not based upon any failure upon plaintiff's part to conform to the formal requirements of the statutes governing redemptions. No such claim is made. On the contrary, it rests upon plaintiff's alleged want of authority to redeem because of the prior rescission of the mortgage upon which his redemption was based. The acts of rescission occurred, as we have seen, on April 15, 1897. The judgment of the district court, which declared that the legal effects of the acts of rescission was to make plaintiff's mortgage null and void, was entered on October 7, 1898. Plaintiff's redemption under said mortgage occurred in September, 1897, which was more than a year before a judgment and at a time when plaintiff was attempting to enforce the mortgage in the foreclosure action. Section 5540, Rev. Code, names the classes of persons who may redeem property sold subject to redemption. These include creditors having a lien by judgment or mortgage on the property sold subsequent to that on which the property was sold. It is claimed by counsel for the defendants that the acts of rescission referred to had the immediate effect of rendering plaintiff's mortgage void, and that therefore when he redeemed he did not have a lien upon the premises, and accordingly was not entitled to redeem under the statute. It is clear that plaintiff's mortgage was not void when executed, and it is equally clear that it was not void after the judgment of the district court. But what its legal character was after the acts of rescission, and before the judgment, during which time redemption was made,—whether void or merely voidable,—is a debatable question. It is a question, however, which in this case we are not called upon to decide, and upon which we express no opinion. Concededly, the plaintiff paid to the holder and owner of the sheriff's certificates the amount required to make redemption, and such payments were made for that purpose. It might be conceded that the owners of the sheriff's certificates could have successfully challenged plaintiff's right to redeem on the ground now urged, but they did not see fit to do so. On the contrary, they accepted and retained the redemption money, and by so doing waived any question as to his right to redeem which may have existed, and thereby validated the redemption, and clothed plaintiff with their statutory right under the sheriff's certificate. That such effect follows the retention of redemption money is well settled, and in cases

where the persons redeeming did not possess the strict statutory right of redemption. See *Carver* v. *Howard,* 92 Ind. 173; *Hare* v. *Hall,* 41 Ark. 372; *In re Opening Eleventh Ave.,* 81 N. Y. 436. In 3 Freem. Ex'ns (3d Ed.) § 317, that author states that, "if a redemption made by a disqualified person is acquiesced in by the purchaser or other person from whom redemption is made, it will estop such person, after he has received such redemption money, from denying the validity of the redemption." It is also well settled that the holder of the sheriff's certificate and the person redeeming are the only persons concerned in the regularity of the redemption. The owner of the certificate may deal with it as he sees fit. He may sell and assign it, or he may retain it and insist that any one who wishes to secure his right thereunder by redemption shall do so only by strictly complying with the statute, or "he may waive his right to require exact and formal observance of the statutory mode, and his acceptance of the redemption money will be such a waiver." *Carver* v. *Howard,* supra. In this case it makes no difference to the defendant whether the rights evidenced by the sheriff's certificates were owned by the original purchasers or by the plaintiff, McDonald. He could redeem from the plaintiff as well as from the original purchasers, and it did not add anything to the amount required to free his premises from the lien; and by failing to redeem his rights in the realestate were lost. *Blair* v. *Chamblin,* 39 Ill. 521, 89 Am. Dec. 322; *Hervey* v. *Krost,* 116 Ind. 268, 19 N. E. Rep. 125; *Massey* v. *Westcott,* 40 Ill. 160; *McClure* v. *Englehart,* 17 Ill. 47. The most valuable right secured by the statute to a purchaser at a real estate mortgage foreclosure sale is the right to demand and receive a sheriff's deed to the premises purchased in case there is no redemption. This right, as we have seen, passed from the purchasers at the foreclosure sale to this plaintiff by his redemption, and when he received the sheriff's deeds upon which he now relies he acquired just what the sheriff's certificates authorized the original purchasers to obtain.

Defendants' chief attack, however, upon the title acquired by the plaintiff through the sheriff's deeds, is upon an entirely different ground. It is alleged in the answer and established by the evidence that prior to the foreclosure sales oral contracts were made between the defendant and the purchasers at such sales to the effect that the purchasers would bid in the property and hold the certificates as security for the amount for which the same was purchased, "and that, if such certificates were permitted to ripen into deeds, they would treat the same as security transaction only, and would not claim the right of a purchaser under the sheriff's deeds, but that by the payment at any time to them of the amount bid for said property at the sale with 12 per cent. interest, said property should be retransferred to the defendants." It is not disputed that such an agreement was made with Studness, who purchased at the Vermont Loan & Trust Company sale; and that a similar agreement was attempted

to be made as to the Morgan & Davis sale, through one J. G. Jacobson, is also conceded. But Jacobson's authority to bind the purchasers to the oral agreement is challenged by plaintiff. We shall, however, assume for the purposes of this decision that he had authority from his principal to make the oral agreement which he undertook to make, and that the oral contracts under which the purchasers at both sales were made were as hereinbefore set out. The question now presented is as to the effect of these oral agreements upon plaintiff's title. As between the immediate parties thereto, it is conceded by counsel that a court of equity would treat the certificates as mere mortgages in the hands of the purchasers, and would not permit them to acquire and retain title to the premises obtained thereunder in violation of their oral agreements. Assuming the correctness of this concession, merely for the purposes of this opinion there can be no doubt that if the purchasers had retained the rights acquired at the sales, instead of transferring them to plaintiff, and had they taken sheriff's deeds, the defendant could have successfully relied upon the oral agreements referred to for the purpose of defeating their title. But that is not this case. The plaintiff was not a party to the oral contracts, and was entirely ignorant of their existence. He made the redemption in good faith, believing that his mortgage was a valid and subsisting lien,, and had no knowledge or notice of the oral agreements until they were disclosed by the defendants' answer in this action, which was made more than 3½ years after they were made. What was the attitude of the defendant in the meantime? It is shown that he had actual knowledge of both redemptions soon after they were made, and that at no time prior to answering in this action did he make any objection to such redemptions. Neither did he pay or tender to plaintiff the moneys paid by him on such redemption. As we have seen, the foreclosure sales were made not only with defendant's actual knowledge, but at his solicitation. In making the foreclosure sales and in issuing the sheriff's deed on which plaintiff relies, the sheriff was defendant's agent, under the statute, clothed with authority to transfer title to the premises in question. No steps whatever were taken by defendant to cut off or restrain the exercise of this authority by the sheriff by notice, redemption, or otherwise. On the contrary, he remained silent until long after the issuance and delivery of the sheriff's deeds. Upon this state of facts, will the defendants be permitted to say that the sheriff's certificates and sheriff's deeds were not in fact what they purported to be, and that they are mere mortgages, as against the plaintiff, who was not a party to the oral contract, and had no knowledge whatever concerning the same? We are clear that they may not. It is not necessary to decide whether plaintiff is under the protection of the recording laws, as as against the secret oral contract. We base our conclusion on the ground that defendant by his conduct is estopped from asserting rights arising out of the secret oral agreements. He remained silent

when it was his duty to speak. Through his concealment of the oral agreement the plaintiff was induced to invest his money in the redemptions, believing that the foreclosures were valid, and that no defense existed thereto. As was said in *Gionnonatti* v. *Michelletti*, (S. D.) 87 N. W. Rep. 587, "There is no rule more equitable or necessary to enforce good faith than that which compels a person to abstain from asserting a claim of his own which he has induced others, to their detriment, to suppose did not exist. The rule is well stated in the case of *Dickerson* v. *Colgrove*, 100 U. S. 587, 25 L. Ed. 618, as follows: "The vital principle is that he who by his language or conduct leads another to do what he otherwise would not have done shall not subject such person to loss or injury by disappointing the expectations on which he acted. Such a change of position is firmly forbidden. It involves fraud and falsehood and the law abhors both. This remedy is always so applied as to promote the ends of justice. It is available only for protection, and cannot be used for a weapon of assault." See, also. *Morgan* v. *Railway Co.*, 96 U. S. 716, 24 L. Ed. 743; 2 Herm. Estop. § 958; 2 Pom. Eq. Jur. § § 804, 704, 818, 820. If the defendant's property has been sacrificed for less than its value, this result is directly attributable to his own neglect and conduct. He had an opportunity to redeem. As to the Vermont Loan and Trust Company mortgage he had three months and on the Morgan & Davis mortgage he had six months in which he could have freed his premises by paying to plaintiff the amount of his redemption, with interest. This remedy was open to him, and would seem to have been ample to fully protect his interests. See *Power* v. *Larabee*, 3 N. D. 502, 57 N. W. Rep. 789, 44 Am. St. Rep. 577. Not only did he choose to forego his statutory right of redemption, but he voluntarily elected to conceal the oral agreement which he had with the purchasers until after plaintiff's redemption had ripened into sheriff's deeds. Upon this state of facts, defendant has no standing in a court of equity to ask for relief from the position in which he has voluntarily placed himself. The trial court correctly sustained the validity of the sheriff's deeds.

The judgment of the district court is in all things affirmed. All concur.

((88 N. W. Rep. 281.)

HERMAN BERGMAN, *et al. vs.* EVAN M. JONES.

Opinion filed Nov. 26, 1901.

Fraudulent Conveyances — Chattel Mortgages — Partnership — Individual Debts—Delaying Creditors.

An insolvent copartnership engaged in a general merchandise business executed a chattel mortgage upon its entire stock of merchandise to secure the payment of certain pre-existing individual debts of the partners. Said mortgage provided that the mortgagors should re-

main in possession and continue the business practically without change, and gave them control of the proceeds of sales. The mortgagors reserved the right to sell the mortgaged goods for cash, and out of the proceeds of the sales thereof to pay all of the expenses of conducting the business, and to replenish the stock of goods, which stock was to be kept up to the same value as when the mortgage was given. They also agreed to account monthly, and promised to pay at such accounting to the mortgagees, upon the mortgage debt, the net profits of the business. The mortgage contained no provision covering new goods. It is *held*, in an action of conversion by the mortgagees against the sheriff who seized said goods under a warrant of attachment issued in an action against the partnership by partnership creditors, that said mortgage is fraudulent and void as to creditors, for the reasons: First, that the necessary effect of the conditions contained therein was to hinder and delay partnership creditors in the collection of their claims, and was primarily for the benefit of the mortgagors, and not for the benefit of the mortgagees; and for the further reason that it was an attempted appropriation by an insolvent partnership of its property to the payment of debts which the partnership was under no legal or moral obligation to pay, to the prejudice of partnership creditors.

Appeal from District Court, Richland County, *Glaspell*, J.

Action by Herman Bergman and another against Evan M. Jones, sheriff, for conversion of mortgaged property. From a judgment in favor of defendant, plaintiffs appeal. Modified.

W. E. Purcell and *C. L. Bradley*, for appellant.

The appellant is entitled to tax costs under § 5579, Rev. Codes. Our statute is a copy of § § 304 and 305, New York Code of Civil Procedure, and has been construed. *Griffin* v. *Brown*, 35 How. Pr. 372; *Ryan* v. *Doyle*, 40 How. Pr. 215. It is not necessary for mortgagees to declare the mortgage due before they demand possession of the mortgaged property from an attaching creditor of the mortgagor. The failure of the attaching creditor to comply with the demand subjects him to liability in trover. *McGraw* v. *Bishop*, 85 Mich. 72, 48 N. W. Rep. 167. Generally no notice of the mortgagee's election to consider the whole debt due is necessary. His proceeding to enforce the mortgage sufficiently shows his election. *Harper* v. *Ely*, 56 Ill. 170; *Heath* v. *Hall*, 60 Ill. 344; *Hoodless* v. *Reid*, 112 Ill. 105; *Johnson* v. *Van Velsor*, 43 Mich. 208; *Buchanan* v. *Ins. Co.*, 96 Ind. 510; *Lowenstein* v. *Phelan*, 17 Neb. 429; *Young* v. *McLean*, 63 N. C. 576; *Hunt* v. *Keach*, 3 Abb.'s Pr. 204. The warrant under which the marshal seized the property, under § 69 of the bankruptcy act, was void on its face, because the recitals of the conditions on which it was issued showed it to be without jurisdiction. *In re Kelley*, 91 Fed. Rep. 504. If there had been a proper showing and bond the marshal could not have been authorized to seize the property in controversy for the reason that it was not, at the time of the seizure in the hands of the bankrupts. *In re Rockwood*, 91 Fed. Rep. 363; *In re Ward*, 104 Fed. Rep. 985; *In re Hultz*, 12 Fed. Cas. 864; *In re Manahan*, 16 Fed. Cas. 569. The

evidence was conflicting; the credibility of witnesses was questioned, and the case was properly one for the jury. *Carver* v. *Plank Road Co.*, 61 Mich. 584; *Houck* v. *Gue*, 46 N. W. Rep. 280; *Russell* v. *Smith*, 23 S. E. Rep. 5; *Dirimple* v. *Bank*, 65 N. W. Rep. 501; *Chicago, Etc., Ry. Co.* v. *Olney*, 71 Fed. Rep. 95. If different minds may honestly draw different conclusions from the facts, whether disputed or not, the case should be left to the jury. *Stevens* v. *Pendleton*, 85 Mich. 157; *Knight* v. *Towles*, 62 N. W. Rep. 964; *Milne* v. *Walker*, 59 Ia. 186; *Smith* v. *Coe*, 55 N. Y. 678; *Overton* v. *Mining Co.*, 131 Ind. 135; *Suiter* v. *Park Natl. Bank*, 53 N. W. Rep. 205. The question of intent to secure a preference is one of fact for the jury. *Giddings* v. *Dodge*, 1 Dillon, 116; *In re Seeley*, 21 Fed. Cas. 1007. The bankruptcy court did not have the power to deprive the sheriff of possession summarily. *Smith* v. *Mason*, 14 Wall. 419; *In re Rockwood*, 91 Fed. Rep. 363; *In re Kelley*, 91 Fed. Rep. 504. Where property has been seized by a court officer, no other court not having a supervisory control, whose process has first taken the property, has a right to interfere with possession. *Buck* v. *Colbuth*, 3 Wall. 334; *Freeman* v. *Howle*, 24 How. 450; *Covell* v. *Heyman*, 111 U. S. 176; *Tua* v. *Carriere*, 117 U. S. 201.

McCumber, Bogart & Forbes and *Fred B. Dodge*, for respondent.

It was not error for the district court to deny costs to plaintiff. *Langhram* v. *Orser*, 15 How. Pr. 281; *Landsburger* v. *Magnetic Tel. Co.*, 8 Abb.'s Pr. 735; *Peet* v. *Warth*, 1 Bosw. 653; *Pyle* v. *Hand Co.*, 1 S. D. 385; *Laney* v. *Ingalls*, 5 S. D. 184; *Township* v. *Dow*, 4 S. D. 163. The amount claimed in the summons or complaint in the action in the circuit court is not material if the amount recovered is less than $50.00, and the justice court would have had jurisdiction of the action if the amount recovered had been claimed in an action in the justice court. *Kreuger* v. *Zirbel*, 2 Wis. 173; *Alexander* v. *Hard*, 42 How. Pr. 131; *Mechl* v. *Schwieckart*, 67 Barb. 599. The rule that the construction of a statute by one state shall be regarded as accompanying the adoption of the statute into another, is not an invariable rule of construction. *Ingraham* v. *Regan*, 23 Miss. 213; *Little* v. *Smith*, 5 Ill. 402; *Rigg* v. *Wilton*, 54 Am. Dec. 419. The mortgage was not valid because it contained no provision that the subsequently acquired property, or property purchased in replenishment, should be covered by the mortgage. *Brackett* v. *Harvey*, 91 N. Y. 214; *McKay* v. *Shotwell*, 6 Dak. 124. The debts secured by the mortgage were individual debts, and the property mortgaged was partnership property. The mortgage was therefore fraudulent and void. Bates on Partnership, § 586; *Heineman* v. *Hart*, 55 Mich. 64; *Keith* v. *Fink*, 47 Ill. 272; *Patterson* v. *Seaton*, 70 Ia. 689; *Cron* v. *Estate*, 56 Mich. 8; *Vernon* v. *Upson*, 60 Wis. 418; *Keith* v. *Armstrong*, 65 Wis. 225; *Meraugh* v. *Whitkell*, 52 N. Y. 146; *Wilson* v. *Robertson*, 25 N. Y. 187. The moment there is an adjudica-

tion in bankruptcy, and a trustee is appointed, the property of the bankrupt vests in the trustee. This included property subject to a valid mortgage. *In re Brooks,* 91 Fed. Rep. 508. Its effect upon a judgment is ipso facto to dissolve it. *In re Richards,* 96 Fed. Rep. 935; *In re Francis Valentine Co.,* 93 Fed. Rep. 953. And notwithstanding a stranger claiming title has made a claim for the property against the sheriff, the sheriff cannot surender to other than the court. *In re Francis Valentine Co.,* 94 Fed. Rep. 783. The court was justified in treating the mortgage as absolutely void in the face of the adjudication in bankruptcy, because it operated to charge partnership assets with individual liabilities. *In re Jones,* 100 Fed. Rep. 783. And because it was a preference given to secure a pre-existing debt. *In re Wolfe,* 98 Fed. Rep. 84; *In re Cobb,* 96 Fed. Rep. 821.

YOUNG, J. The plaintiffs seek in this action to recover damages from the defendant, as sheriff of Richland county, for the alleged conversion by him of a stock of general merchandise upon which the plaintiffs claim to have had a mortgage. Their damages are laid at the sum of $2,966.81, with interest thereon from the date of the alleged conversion. The facts and proceedings which are essential to a determination of the questions presented on this appeal may be stated as follows: The property in controversy, at and prior to its seizure by this defendant, was owned by a copartnership composed of August Bergman and Henry Maack, who were then engaged in the general mercantile business in the village of Lidgerwood, in said county, under the firm name of Bergman & Maack. The chattel mortgage upon which plaintiffs' rights in this action are based was executed by said copartnership on December 16, 1898, and filed in the office of the register of deeds of said county on December 19, 1898, and covered the property in question. On December 22, 1898, the defendant sheriff seized said property under a warrant of attachment in an action pending in the district court of Richland county, wherein Wyman, Partridge & Co. was plaintiff and said copartnership was defendant, upon a debt due from said copartnership amounting to $1,367.46, for goods sold and delivered to it by said attaching creditor. On December 29, 1898, the plaintiffs caused a demand to be made upon the defendant for the property covered by their mortgage, and the same was refused. On January 3, 1899, bankruptcy proceedings were instituted in the United States district court for the district of North Dakota against said copartnership, and on the 4th day of January, 1899, a warrant issued out of said court under which the marshal of said court took from the possession of the defendant all of the goods theretofore seized by him as above stated. On Janaury 23, 1899, said firm of Bergman & Maack was adjudged bankrupt, and on February 3, 1899, a trustee was appointed to administer the trust estate; and said trustee, as such, received from the United

States marshal the goods in question, for the purpose of administration under the authority of the bankruptcy court. The mortgage upon which plaintiffs base their right of recovery is as follows: "Know all men by these presents, that August Bergman and Henry M. Maack, copartners doing business under the firm name and style of Bergman & Maack at Lidgerwood, Richland county, North Dakota, parties of the first part, being justly indebted to Herman Bergman and Fred D. Maack, parties of the second part, in the sum of two thousand nine hundred and sixty-six and 81-100 dollars, which debt is hereby confessed and acknowledged, have, for the purpose of securing the payment of said debt, bargained, granted, sold, and mortgaged, and by these presents do bargain, sell, and mortgage, unto the said second parties, their heirs and assigns, all the personal property described as follows, to-wit: All that certain stock of merchandise, consisting of dry goods, boots, shoes, hats, caps, clothing, notions, glassware, crockery, woodenware, and all other articles of merchandise, now contained in the two-story store building owned by Ralph Maxwell and leased to the said first parties and situated upon lot number two (2) of block number 11 of the village of Lidgerwood, in said county of Richland and state of North Dakota, to the said second parties, their heirs and assigns, forever. Provided, however, that these premises are upon this express condition: That if the said first parties shall pay or cause to be paid unto the said second parties, or their heirs or assigns, the said sum of two thousand nine hundred and sixty-six and 81-100 dollars, according to the conditions of two certain promissory notes of even date herewith, as follows, to-wit: One note for the sum of one thousand one hudred and forty-eight and 59-100 dollars, due and payable on the 1st day of November, 1899, to the order of Fred D. Maack, one of the second parties, and one note for the sum of one thousand eight hundred and eighteen and 22-100 dollars, due and payable on the 1st day of November, 1899, to the order of Herman Bergman, one of the said second parties,—and interest thereon at the rate of eight per cent. per annum, then these presents to be null and void; otherwise to remain in full force and effect. And the said first parties hereby covenant and agree to and with the said second parties as follows, to-wit: (1) That they will take good and proper care of the said goods, wares, and merchandise above described, and will keep and maintain the said goods, and all thereof, at the said building wherein they are now situated, as above described, and that they will keep the said stock of goods, wares, and merchandise at its present value by replenishing all goods sold therefrom as hereinafter provided. (2) That they will sell the said goods, wares, and merchandise in the usual course of trade, for cash only, and will keep an accurate and correct account of all goods so sold, which said account shall be open to the inspection of the said second parties, their assigns or agents. (3)

That they will replenish all goods, wares, and merchandise so sold from said stock from time to time, and pay for same cash at time of purchasing same, and will not buy goods on credit to replenish said goods, wares, and merchandise so sold and delivered. (4) That they will pay the expense of selling said goods, wares, and merchandise out of the proceeds of said sales,—such expenses to consist only of freight on goods bought to replenish said stock, rent for said building, fuel and light for same, taxes and insurance upon said goods, and the further sum of thirty dollars per month for each of the said first parties for living expenses,— and will render an account of the same to the said first parties on the first day of each and every month during the time that these presents shall remain in force and effect. (5) That on the first day of every month during the time that these presents shall remain in force and effect they will render to the said second parties a full, true, and correct statement of the sales from said stock of goods, wares, and merchandise, and the receipts therefrom, together with the amounts expended in replenishing the goods, wares, and merchandise so sold, and the expenses of conducting the said business, and will pay to the said second parties each month the excess of the receipts over and above the amounts so paid for replenishing the said goods, wares, and merchandise and the expenses of conducting the said business; the same to be applied upon the said indebtedness until the whole thereof shall have been paid in full, together with the interest thereon." Then follows the usual power of sale for default in the condition of the mortgage. The above chattel mortgage and the notes therein described were signed by both members of the copartnership. The notes secured did not represent partnership debts, but represented individual debts of the partners to the payees in said notes, which debts were of at least a year's standing. The note to Herman Bergman represented an amount owed to him by his son August Bergman, and the note to Fred D. Maack covered an amount due him from his brother Henry M. Maack. Both of the mortgagees resided at Norwood, Minn. The mortgage in question was given under the following circumstances: Early in December, 1898, Henry Maack went to Norwood and conferred with his brother and Herman Bergman in reference to giving security for their private debts to plaintiffs upon this stock of merchandise. Henry Maack then "partly agreed to give the mortgage on their stock of goods at Lidgerwood," and on his return he was "to submit the matter of security to August Bergman." The entire matter as to the form and contents of the mortgage was left to the mortgagors, and it was expected that the mortgagors would run the business the same way as before, and that they would use such an amount of the proceeds of sales as they would need to support their families and to purchase new goods. Upon his return the two partners went to an attorney in Lidgerwood, and under their directions he drew the mortgage and notes

in question, and the mortgage was then executed and filed as before stated. The mortgagees were not aware that the mortgage had been executed until the attorney who drew it informed them of the attachment of the goods.

The case was tried to a jury. At the close of the testimony, counsel for defendant moved for a directed verdict for defendant upon the ground that it conclusively appeared from the evidence (1) that the mortgage under which plaintiffs claim a right or interest in the property attached was fraudulent and void as to the creditors of the mortgagors; (2) that both the lien of the attachment and plaintiffs' mortgage was destroyed by the bankruptcy proceedings, and that the title to the property in question had vested in the trustee in such bankruptcy proceedings. This motion was denied. But the court, upon its own motion, being of opinion that plaintiffs were entitled to recover, but that they had sustained only nominal damages, instructed the jury to return a verdict for plaintiffs for $1. Thereafter the court made an order for judgment on the verdict, and for costs and disbursements in favor of the plaintiffs. Later, upon motion of defendant, the judgment was modified by depriving plaintiffs of their costs, and awarding costs to defendant. Plaintiffs have appealed to this court, and, in a statement of case duly settled, specify for review a number of alleged errors.

The first and most important error assigned relates to the direction of the verdict. Appellants claim that "the court erred (1) in directing a verdict in this case for the plaintiffs for the sum of one dollar; and (2) in not directing a verdict for plaintiffs for the amount claimed in the complaint." We are of opinion that the trial court did not err in the particulars complained of to plaintiffs' prejudice. It is apparent that the foundation of plaintiffs' right to recover any sum whatever in this action is the chattel mortgage. If for any reason it appears that the instrument is invalid, their entire cause of action fails. The defendant's motion for a directed verdict assailed the mortgage as being fraudulent and void as to creditors of the mortgagors, and also upon the ground that the lien thereof had been stricken down by the bankruptcy proceedings. We shall have occasion to consider only the first ground of the motion, namely, the question as to whether the mortgage was fraudulent and void as to the creditors of the partnership. Counsel for appellants assert that the validity of the mortgage is sustained by the principles laid down by this court in *Bank* v. *Barnes*, 8 N. D. 432, 79 N. W. Rep. 880. We have reached an opposite conclusion. The views of this court as to the test to be applied to chattel mortgages of merchandise, like that now under consideration, were expressed in the following extract from the opinion formulated by Wallin, J., in the case referred to: "There is much conflict of judicial opinion as to the effect of permitting a debtor who has given a mortgage upon a stock of merchandise to remain

in possession and sell out the same. But we think it must be conceded that the better authorities do not hold that such an arrangement is necessarily fraudulent. Each case should be disposed of upon its own facts. We concede, however, that there is substantial agreement in the cases to the effect that such an arrangement may be assailed by creditors where it appears that the same was primarily intended as a means of hindering and delaying creditors, and at the same time of allowing the debtor to continue his business for his own advantage. In such cases the crucial test seems to be whether the arrangement is honestly entered into as a means of enabling the creditor to realize the largest amount possible out of the property mortgaged, or whether, on the contrary, the arrangement is made as a mere shift or device entered into chiefly for the debtor's advantage, and whereby he is enabled to carry on the business without interference from other creditors, and for his own advantage. We quote in this connection the language used by Mr. Justice Brewer in commenting upon certain decisions bearing upon this question, including *Robinson* v. *Elliott*, 22 Wall. 520, 22 L. Ed. 758. The distinguished jurist said: "In neither of those cases is it affirmed that a chattel mortgage on a stock of goods is necessarily invalidated by the fact that, either in the mortgage, or by parol agreement between the parties, the mortgagor is to retain possession, with the right to sell the goods at retail. On the contrary, it is clearly recognized in them that such an instrument is valid, notwithstanding these stipulations, if it appears that the sales were to be for the benefit of the mortgagee. What was meant was that such an instrument should not be used to enable the mortgagor to continue in business as theretofore, with full control of the property and business, appropriating to himself the benefits thereof, and all the while holding the instrument as a shield against the attacks of unsecured creditors.' We have quoted this language from the printed argument of counsel for the defendant, and we fully indorse the same as embodying a clear and satisfactory expression of the rule recognized by the better authorities as applicable to cases such as the case at bar." See cases cited in the opinion.

Turning now to the mortgage in question, we find that it conclusively appears from the provisions therein contained that its primary purpose an necessary effect was to hinder and delay the creditors of the mortgagors, and to serve as a shield and cover for the partnership property. Or, in other words, it operated not as security for the debt due the mortgagees, but as a protection to the mortgagors in the further prosecution of their business, and was thus primarily for the benefit of the mortgagors. By referring to its condition, it will be seen that no change whatever in the conduct of the business was contemplated. On the contrary, it was to continue just as it had been formerly conducted. The stock was to be kept up to the same actual value as when the mortgage was given, by additions thereto made from the proceeds of sales of the mort-

gaged goods. The reservation by the mortgagors of the power to sell the mortgaged goods, and to purchase new goods with the proceeds, when considered in connection with the provision that the stock was to be kept up to its original value, can be construed only as an express authorization by the mortgagees to the mortgagors to continue the business for an indefinite period. The selection of the additions to be made to the stock was not subject to the control of the mortgagees, but was controlled entirely by the mortgagors; and it was not contemplated that such additions were to be for the purpose of sorting up the mortgaged goods, thus facilitating their sale and aiding in paying the mortgage debt, but they were primarily for the purpose of aiding the mortgagors to keep such a stock of goods as would be profitable for them to have in the future conduct of their business. So, also, the provision for payment of the expenses of conducting the business out of the proceeds of sales of the mortgaged property, when considered in connection with certain other provisions of the mortgage, is equally fatal to its validity. Under the terms of the mortgage, the business was to continue just as it was before the mortgage was given. The only new obligation resting upon the mortgagors was their promises to pay on the mortgage debt the net profits of the business monthly; and this was in reality no more than an assurance, for the mortgagors, and not the mortgagees, controlled the proceeds of sales. In the meantime the mortgagors reserved the continuing right to pay all of the expenses of conducting the business, including rent, heat, light, taxes, insurance, freight on new goods, and $30 per month for each of the partners, out of the proceeds of sales of the mortgaged property. The right to withhold these expenses was limited only by the life of the mortgage. It will be observed by referring to the mortgage that it does not cover additions to the stock or after-acquired property. Consequently the new goods would not be subject to the mortgage lien. The necessary effect, then, of the provision authorizing the mortgagors to sell the mortgaged goods, and use the funds derived from such sales to purchase other goods, was to furnish a sure means to the partnership of acquiring an unincumbered stock of goods by aid of the property which was ostensibly hypothecated to secure the payment of the mortgage debt. Under such circumstances, it is apparent that the sales authorized to be made by the provision referred to were for the benefit of the mortgagors. Again, the fact that the mortgaging did not cover new goods rendered the provision for payment of expenses for conducting the business out of the proceeds of sales of the mortgaged goods fatal to the validity of the mortgage. As we have seen, should the business be conducted according to the terms of the mortgage, the items of stock would shift by sales and repurchases until no portion of the mortgaged goods would remain. Through the process of evolution provided for by the mortgage, the mortgaged stock might in time become an unincumb-

ered stock in the hands of the mortgagors, without the payment of a single dollar upon the mortgage debt. Not only does the mortgage afford authority to dispose of the mortgaged property without paying the proceeds upon the debt ostensibly secured, but it expressly authorizes the use of the proceeds of sales of the mortgaged goods to pay the entire expenses of running a business in which the mortgagees have but a partial interest. It might be conceded that on the day the mortgage was given the expenses provided for were legitimate charges, but as new goods were purchased, and the amount of unincumbered property increased, upon which the mortgagees had no lien, it is clear that the payment of all of the expenses of conducting this business was merely an application of the mortgaged property for the benefit of the mortgagors,—in other words, was the payment of all the expenses of a business in which the mrotgagees had but a partial and constantly diminishing interest. The mortgage involved in *Bank* v. *Barnes,* supra, was unlike the mortgage now under consideration, in all of its controlling features. The mortgage in that case covered after-acquired property. The mortgagor was left in possession as the agent of the mortgagee. The proceeds of sales were to be deposited daily. The new goods were purchased only in small quantities, and as a means of keeping an assortment, and to keep the stock in such condition as to make it profitable to handle, and with a view to the disposition of the entire stock of merchandise in the store. And the purchases in that case were determined by the mortgagee. In that case we reach the conclusion that the arrangement was an honest one, and calculated to afford at least as large a sum to apply upon the mortgage debt as could be realized from the goods at a forced sale. In the mortgage under consideration the restrictions found in the mortgage just referred to are entirely wanting. The necessary effect of this mortgage was to hinder and delay the creditors of the copartnership. No other conclusion is possible. We have not overlooked the fact that under § 5055, Rev. Codes 1899, the question of fraudulent intent is made a question of fact, and not of law. Here, however, the evidence of such intent is contained in a written instrument, and we cannot avoid the responsibility of declaring its legal effect. Our duty to do so is clear. On this subject we quote from Wait, Fraud. Conv. § 354: "Where the evidence is of such a conclusive nature that the fraudulent intent unmistakably fastens its fangs upon the transfer, so that a verdict or finding contrary to the evident evil design so established would be erroneous, the court pronounces the transaction covinous, and imputes the fraudunlent intent to the parties, in obedience to the principle of law that they must have contemplated the natural and necessary consequences of their acts. Where the facts are not controverted, and do not admit of a construction consistent with innocence, surely

the burden is cast upon the court to declare the result. There is no question of intention to be submitted to the jury. As the mortgage shows upon its face that it was not designed by the parties as an operative instrument between them, its only effect is to prejudice others. The court should 'pronounce it void, for the reason that the evidence conclusively shows it fraudulent.' *Russell* v. *Winne*, 37 N. Y. 595, 97 Am. Dec. 755. It is because such trusts are calculated to deceive and embarrass creditors, because they are not things to which honest debtors can have occasion to resort in sales of their property, and because they constitute the means which dishonest debtors commonly and ordinarily use to cheat their creditors, that the law does not permit a debtor to say that he used them for an honest purpose in any case. *Coolidge* v. *Melvin*, 42 N. H. 520; *Winkley* v. *Hill*, 9 N. H. 31. In *Blakeslee* v. *Rossman*, 43 Wis. 124, Chief Justice Ryan said: 'Intent does not enter into the question. Fraud in fact goes to avoid an instrument otherwise valid. But intent, bona fide or mala fide, is immaterial to an instrument per se fraudulent and void in law. The fraud which the law imputes to it is conclusive. Fraud in fact imputed to a contract (valid on its face) is a question of evidence.'" See, also, *Newell* v. *Wagness*, 1 N. D. 69, 44 N. W. Rep. 1014.

The mortgage in question is void as to creditors for another reason. When the mortgage was given the partnership was insolvent. The mortgage covered practically all, if not all, of the partnership property, and it undertook to secure the individual debts of the partners, which debts the partnership was under no legal or moral obligation to pay. In short, it was an attempted gift by an insolvent partnership of all of its property. This cannot be done. There is entire harmony in the authorities on this point. "A partnership paying the private debt of one of its members is paying what it is not liable for in law, equity, or morals, and is, in effect, giving away its property; and such conveyance, no bona fide rights intervening, is fraudulent and void as to existing creditors if they are prejudiced thereby, as well as to the separate creditor of the other partner, whose individual interest in the firm is thus given away." 1 Bates, Partn. § 566. See, also, *Ransom* v. *Van Deventer*, 41 Barb. 307; *Keith* v. *Fink*, 47 Ill. 272; *Heineman* v. *Hart*, 55 Mich. 64, 20 N. W. Rep. 792; *Cron* v. *Cron's Estate*, 56 Mich. 8, 22 N. W. Rep. 94; *Wilson* v. *Robertson*, 21 N. Y. 587; *Ferson* v. *Monroe*, 21 N. H. 562; *Patterson* v. *Seaton*, 70 Iowa 689, 28 N. W. Rep. 598; *Menagh* v. *Whitwell*, 52 N. Y. 147, 11 Am. Dec. 683; *Keith* v. *Armstrong*, 65 Wis. 225, 26 N. W. Rep. 445.

Having reached the conclusion that the mortgage was fraudulent and void as to creditors, it follows that plaintiffs had no cause of action. The court therefore properly refused to direct a verdict for plaintiffs for the full amount of their claim. Error was committed, however, in awarding to plaintiffs nominal damages, and the inclusion of the sum of $1 in the judgment appealed from was

erroneous. Otherwise the judgment, including the allowance of costs to defendant, meets our approval. The district court is directed to modify its judgment by eliminating the sum allowed to plaintiffs as nominal damages, and as so modified the judgment will be affirmed, with costs to respondent. The view we have taken as to the mortgage renders a consideration of other errors assigned unnecessary. All concur.

(88 N. W. Rep. 284.)

C. C. ROBERTS *vs.* CALLIE ROBERTS.

Opinion filed Nov. 27, 1901.

Mortgages—Wife's Homestead—Limitations—Payments.

A husband and wife executed a mortgage upon the homestead to secure the debt of the husband. The wife did not sign the note, but the mortgage contained a covenant to pay the debt as described in the note. The husband made payments on the note without the wife's knowledge or acquiescence during the life of the mortgage. This action was not commenced until about 11 years after the giving of the mortgage, and not until after the husband's death. The wife pleads that the statute of limitations has run against the mortgage so far as she is concerned, as said payments were made without her consent, and that she was her husband's surety in giving the mortgage. No personal liability is claimed upon the covenant to pay contained in the mortgage. *Held*:

1. That in waiving her homestead rights by signing the mortgage the relation of surety did not arise.
2. That the statute of limitations has not run against the mortgage.
3. That the mortgage was a waiver of the wife's homestead rights, simply, and continued in force by virtue of payments by the husband.

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

Action by C. C. Roberts against Callie Roberts executrix of the estate of Lorenzo D. Roberts, deceased, for the foreclosure of a mortgage. From a judgment denying foreclosure, plaintiff appeals. Reversed.

Pollock & Scott, for appellant.

S. B. Bartlett and *Benton, Lovell & Holt*, for respondent.

MORGAN, J. This is an action brought for the foreclosure of a mortgage upon real estate situated in Cass county. The mortgage was executed and delivered to the plaintiff on the 1st day of October, 1888, by Lorenzo D. Roberts and Callie Roberts, his wife. It was given to secure the payment of a certain promissory note for the sum of $3,118, and interest thereon at 8 per cent. per annum and payable on demand to C. C. Roberts, and was executed by L. D. Roberts individually on October 1, 1888. The said L. D. Roberts was the husband of Callie Roberts, and died on the 16th day of May, 1899, and before the commencement of this action.

The land involved in this suit and described in the mortgage was at the time of the execution of such mortgage, and continued to be up to the death of said L. D. Roberts, the homestead of said L. D. Roberts and Callie Roberts, and the same has ever since been occupied as a homestead by the said Callie Roberts and her adopted daughter. The consideration for the giving of the note and mortgage was money loaned by the plaintiff to his brother, the said L. D. Roberts. This money was used in the development and improvement of such homestead, and in buying stock and machinery for its cultivation. On January 1st, 1895, the sum of $1,766.83 was paid on said note, and on January 1, 1897, the further sum of $25 was paid thereon, and each of such payments was duly indorsed on said note. These payments were made by L. D. Roberts, without the knowledge or consent of Callie Roberts. She did not know of such payments until the fall of 1899, and after her husband's death. The defendant Callie Roberts never received, directly, any part of the money for which the mortgage was given as security. The mortgage contained an express covenant on the part of the mortgagors to "pay or cause to be paid the sum of money above specified at the time and in the manner above specified." The mortgage contained a full description of the indebtedness as expressed by the note. The money for which this note was given, and which was secured by the mortgage, was loaned to said L. D. Roberts without any security at first. But about eight months after such loan the note and mortgage were executed at the request of the mortgagor, L. D. Roberts. The action is brought against Callie Roberts as executrix of the estate of L. D. Roberts deceased. She answers in such capacity and individually, that she executed the said mortgage as a surety for her husband, and at his solicitation and request; that she received no consideration whatever for the giving of the same; that the plaintiff well knew that she executed such mortgage as surety for her husband only; that no payments were ever made on such note or mortgage with her knowledge, consent, or authority; that the cause of action based on such mortgage so far as the mortgage is concerned, did not accrue within ten years prior to the commencement of the action. The trial court found in her favor, and dismissed the action as to her personally, and ordered judgment against her as executrix for the full amount claimed, but refused to order a judgment for the foreclosure of the mortgage. Plaintiff appeals from such judgment, and requests a trial de novo in this court under the provisions of § 5630, Rev. Codes.

From the pleadings and the evidence the following facts may be considered entirely uncontradicted. That the indebtedness represented by the note and secured by the mortgage was the individual debt of the husband, and not the debt of the wife; that the wife executed the mortgage at the request of her husband; that the real estate secured by the mortgage was then occupied as the home-

stead of such parties; that such homestead was set apart to Callie Roberts as the widow of L. D. Roberts, deceased, by the county court of Cass county, and the same is now held and occupied by her and her daughter as such; that the wife received no consideration for the execution of the mortgage.

It is claimed by the defendant that in executing the mortgage the relation of principal and surety was created between her and her husband, and the case of *Bank* v. *Francis,* 8 N. D. 369, 79 N. W. Rep. 853, and other cases, are cited to support such contention. We are not called upon to determine that question in our decision of the case, for the reason that no personal judgment is sought to be obtained against her. Such liability is not claimed in the complaint, and is disclaimed in the brief. The real question to be determined by us is whether the lien of the mortgage existed as against the defendant when the action was commenced; whether payments made by the husband, without the knowledge or consent of the wife during the life of the mortgage, operated to continue the lien of the mortgage as against the homestead after the time it would have been released from such lien had no payments ever been made thereon. These payments made by the husband had the effect of continuing the debt in force so far as the husband was concerned, and it and the mortgage were both in force at the time this action was commenced, so far as his interests are concerned. If the mortgage is in force so far as the defendant is concerned, it is so by virtue of the fact that the payments made by the husband prevented the running of the statute, except as commencing at the date of such payments. No payments were ever made by the wife or on her behalf. To determine the effect of such payment by the husband, the following facts must be considered and borne in mind: The mortgage was given upon the property of the husband. The title was vested in him exclusively. The land was his land and his homestead, as the head of the family. He controlled it and its rents, profits, or products. Her right to the land during his life was the right to occupy and live upon it as his wife, and to make her home with her husband. She could also prevent her husband from selling or conveying the same, as no conveyance thereof would be valid unless she joined with her husband in executing the conveyance. She had no title in the homestead when she executed the mortgage. During his life she had the right to occupy it with him. At his death it continued to be the homestead of herself and family, and she then had the right to its use, rents, profits, or products, free from any of his debts that she had not consented to, as liens thereon by virtue of her conveyance or mortgage thereof. The rights of the wife in the homestead are well stated in *Kuhnert* v. *Conrad,* 6 N. D. 215 69 N. W. Rep. 185, as follows: 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." The same principle as to the rights of a wife to the homestead is laid down under statutes similar to our own in *Smith* v. *Scherck*, 60 Miss. 491, and in *Jenness* v. *Cutler*, 12 Kan. 500. It therefore follows that when she executed the mortgage in suit she conveyed no property of her own, and created a lien upon no property of her own, nor any property jointly owned by herself and husband. She merely waived her possessory right to the premises upon default in the conditions of the mortgage. At the request of her husband she relinquished her homestead right by joining with him in the execution of the mortgage,—a mortgage upon his property to secure his debt. The debt was not her debt, nor the property hers. The statute entitles her to occupy such property with her husband, or, in case he abandons her, to occupy it as her home, with her family, and to occupy it as a home after his death. But she waived such rights by executing the mortgage, subject to default in the conditions of the mortgage to secure his debt. By executing the mortgage to secure the debt of her husband she consented that her homestead right should become subject to payment of his debt, without any restrictions, unless the debt and mortgage became barred by the running of the statute of limitations. She waived her homestead right with knowledge that the husband had a right to pay the debt, and is bound by his acts, so long as her rights have not been unlawfully infringed upon. Part payment by the husband in a regular manner during the life of the mortgage is not such an act as discharges the morgage as to her, although it had the effect of continuing the lien of the mortgage longer than it would otherwise have continued. As said by the supreme court of Mississippi in *Smith* v. *Scherck*, supra.: "When, therefore, she joins in a mortgage of it to secure a debt, the property quoad the mortgage ceases to be a homestead, and is bound as any other property of the husband would be; and as long, therefore, as the the debt is kept alive by him who owes it, the mortgage remains in full force. Having consented that it might be bound for that debt, it must so continue until the debt be discharged by judgment, or by such lapse of time as constitutes a valid bar in behalf of the debtor." In this case the debt exists so far as the husband is concerned. So does the mortgage, also. Each by virtue of the payments made by the husband, and were effective in keeping the mortgage in force as to her.

None of the cases cited by respondent go to the extent of holding that a payment on a debt of the husband by him without the wife's knowledge or consent releases the mortgage given by husband and wife on his property, unless the mortgage be fully paid before the statute runs against the mortgage. The case of *Dunn* v. *Buckley*, 56 Wis. 190, 14 N. W. Rep. 67, is cited. In that case the wife signed a mortgage on the homestead to secure the husband's debt. The

homestead mortgage was additional and collateral security to a bill of sale which was in reality a chattel mortgage on the husband's property embraced in the bill of sale. The personal property embraced in the bill of sale was sold with the husband's consent, and the money received on such sale was not applied to pay the debt secured by the wife's mortgage. The court held that the money received on such sale should have been applied on the debt secured by the wife's mortgage, and held that the mortgage was discharged. In that case the action of the husband was prejudicial to the interests of the wife. In this case the action of the husband in making payments on the note was not prejudicial, but beneficial, to the interests of the wife. Hence the life of the mortgage was not extended by an act of the husband not contemplated by the wife when the mortgage was given. *Spencer* v. *Fredendall,* 15 Wis. 666, is cited also. In that case, also, the mortgage signed by the wife on the homestead was fully paid. The husband entered into an agreement with the creditor, without the wife's consent, that the original mortgage should stand as security for another debt. The court properly held that this could not be done as it operated as a new incumbrance of the homestead. In *Campbell* v. *Babcock, 27* Wis. 512, the court simply held that the wife was not estopped to plead usury in respect to a mortgage on the homestead, although the husband had estopped himself from so doing. In *Barber* v. *Babel,* 36 Cal. 11, the husband and wife executed a note and a mortgage upon land which afterwards became their homestead. Subsequently, and after the land became their homestead the husband gave a new note and mortgage to secure the same debt upon the same land, the wife refusing to sign the new mortgage; and the husband received a release of the old mortgage, which was recorded. There was an extension of the time of payment of the debt. The court held that the second mortgage was void, and that the statute of limitations had run as to the wife upon the first mortgage, and that the husband had no right to make a new contract affecting the homestead without the concurrence of the wife. Many of the cases cited by the respondent are based upon facts where the wife had mortgaged her own separate property as surety for her husband. Such is the case of *Bank* v. *Burns,* 46 N. Y. 170, where the wife's mortgage of her separate property was held released because the husband and the creditor extended the time of payment of the debt without her consent. In the case at bar no personal liability being claimed, and the wife not having mortgaged her own individual property, the case of *Bank* v. *Francis,* supra, is not applicable, and the wife is not a surety within that decision. In signing the mortgage the wife waived her homestead privileges and assumed no responsibility as surety under the pleadings and evidence in the case. So far as signing the mortgage is concerned, independent of the covenants to pay, the relation of surety did not arise. *Jenness* v. *Cutler,* 12 Kan. 500; *Tennison* v. *Tennison,* 114 Ind. 424, 16 N. E. Rep. 818.

Our conclusion is that the homestead was not released from the lien of the mortgage at the commencement of this action.

The judgment of the district court is reversed, and said court is directed to order a foreclosure of the mortgage, as prayed for in the complaint. All concur.

(88 N. W. Rep. 289.)

H. W. PHELPS *vs.* JOHN MCCOLLAM.

Opinion filed Dec. 2, 1901.

Process—Substituted Service—Justices of the Peace—Jurisdiction—Presumption—Judgment—Direct Attack—Transcript—Filing in Clerk's Office—Equitable Counterclaim.

Upon the evidence set out in the opinion it is *held*:

1. That service of a summons on the husband cannot be made by leaving a copy with his wife at the dwelling house of a neighbor, where she is temporarily staying, the husband having left the state, with the intention of remaining permanently.

2. Courts of justices of the peace are of limited jurisdiction, and no presumptions will be indulged in favor of their jurisdiction. Such jurisdiction must affirmatively appear.

3. The filing of a transcript or abstract of judgments rendered by justices of the peace pursuant to § § 5498, 6717, Rev. Codes, does not make the judgments those of district courts, to the extent that presumptions may be indulged in in favor of the jurisdiction of the justices rendering such judgments.

4. An action brought to cancel a judgment for lack of jurisdiction in the court to render it by reason of failure to serve the summons is a direct attack upon such judgment.

5. An answer pleading facts showing no service of the summons, and praying for a cancellation of a judgment rendered in the action, is pleading an equitable counterclaim, and is a direct attack upon the judgment.

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

Action by H. W. Phelps against John McCollam on a judgment. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Phelps & Phelps, for appellant.

Spencer & Sinkler, for respondent.

MORGAN, J. This is an action brought upon a judgment rendered in a justice's court of Walsh county on May 2, 1891. The complaint is in the usual form of such complaints, and alleges that the judgment was duly assigned to the plaintiff. The answer denies that the justice of the peace before whom it is claimed such judgment was recovered had jurisdiction to enter any judgment, for the reason that no personal or constructive service was ever procured upon the defendant, nor did the defendant ever appear in such action. The answer further alleges that the plaintiff is not the owner of the judgment sued upon. The answer asks for affirmative

relief in the form of a demand that the judgment sued on be canceled and declared null and void, for the reason that there was no service of the summons in that action. A determination by us that the judgment on which this action is founded was rendered without service of the summons on the defendant will render it unnecessary for us to decide whether the plaintiff is the owner of the judgment. We will assume that he is the owner thereof by virtue of an assignment of the judgment to him. The district court found in favor of the defendant upon both issues, and dismissed the action. The plaintiff appeals, and demands a trial anew here, under the provisions of § 5630, Rev. Codes. Upon the question of the jurisdiction of the justice of the peace, the following facts are material for a decision of the case: The defendant McCollam and his wife were living upon a farm rented to him in Walsh county during part of the year 1890, and up to about April 1, 1891. About April 1st they left this farm, with the intention of removing to the Northwest Territory to live permanently. The husband very soon thereafter went to said Northwest Territory, and filed upon a homestead there but did not ever reside on such homestead. The wife removed to the home of one Woods, at the invitation of the Woods family, and with the consent of her husband, to remain there until he secured a new home and sent for her. Some of the husband's goods were moved to the Woods place, but there is no showing that they were used there. The husband was at the Woods place a night or two, and took a few meals there, prior to the time of his leaving for the Northwest Territory. In the latter part of April it is claimed that a summons was served upon the wife at the Woods place. She says a paper was left with her. She does not know by whom, nor what the paper was, nor the precise date. There is no other evidence as to the contents of the paper. The only other evidence as to the service is that the summons was sent by mail to a deputy sheriff at Park River, for service, and that it was returned to the plaintiff's attorney in that suit as having been served on the defendant McCollam on April 25, 1891. This evidence as to mailing the sumomns to the deputy sheriff for service, and its return as having been served, was given by the plaintiff's attorney. The original files, and the docket of the justice of the peace, were not produced in court, nor was the fact that they could not be produced there shown by evidence of that diligent search which is necessary before secondary evidence of their contents could be properly received. Even had such showing been made, still there was no other evidence, except that given above in reference to the contents of the justice's docket, of the fact, manner, time, or place of service, or on whom, or by whom made. The plaintiff contends that the fact that an abstract of the judgment rendered by the justice of the peace was filed in the office of the clerk of the district court, pursuant to § § 5498, 6717, Rev. Codes, renders proof of the service of the summons unnecessary. Such abstract was offered in evi-

dence, and is a statement of the facts prescribed by, and has attached to it the certificate authorized by, said § 6717, and none others.

The first question to be determined is, what effect is to be given to the filing of such abstract in the office of the clerk of the district court, so far as the jurisdiction of the justice originally to render the judgment is concerned? The plaintifl contends that such filing of such transcript or abstract makes the judgment a judgment of the district court in all respects, and for all purposes, and gives to such judgment thereafter like presumptions of regularity and jurisdiction attaching to judgments of district courts. The language of § 5498 is that, after such docketing of such transcript in said clerk's office, "it becomes a judgment of such district court, and a lien upon real property." Such section enlarges the effect of such judgment after such filing. The effect is enlarged, so that it becomes a lien on real estate, and it is enlarged perhaps in other respects. From the language of such section, and from authoritative decisions on similar statutes, it is not our understanding that such filing renders such judgment thereafter a judgment of the district court, to the extent of clothing it with presumptions of regularity and jurisdiction, following the judgments of courts of general jurisdiction. In our opinion the effect of such filing is the following: The district court is thereafter to have full control of the enforcement and collection of such judgment. It becomes a lien on real estate, and the justice of the peace thereafter has no control over it, nor power to enforce it. The judgment nevertheless continues to be a judgment of a justice of the peace so far as relates to the principles to be applied in determining the jurisdiction of the justice to render it. *Agar* v. *Tibbetts*, 56 Hun. 272, 9 N. Y. Supp. 591; *Kerns* v. *Graves*, 26 Cal. 156.

The answer directly alleged that the judgment of the justice of the peace was void, for the reason that no personal service was ever procured upon the defendant, as provided by § 5252, Rev. Codes. If there was any personal service on him, it must have been by virtue of service upon his wife while at the Woods place, as it is undisputed that he was in the Northwest Territory after April 15th, and up to August of the same year. Was there service on the defendant under subdivision 7 of § 5252, Rev. Codes? It reads as follows: "In all other cases to the defendant personally; and if the defendant cannot conveniently be found, by leaving a copy thereof at his dwelling house in the presence of one or more of the members of his family over the age of 14 years, or if the defendant resides in the family of another, with one of the members of the family in which he resides over the age of 14 years." The question resolves itself into a determination of the fact whether the Woods house was the dwelling house of the defendant on April 25, 1891. The evidence is uncontradicted that the wife remained there for a temporary purpose only. She went there with no idea of remaining there permanently. The husband went there only casually, and remained only tem-

orarily. The fact that he did not remain permanently in the Northwest Territory, and that the wife did not follow him there, would not make any difference, and would not make the Woods house the dwelling house of the defendant. After his return from the Northwest Territory, the husband never made the Woods house his dwelling house. He went there occasionally until he established a home, but with no intention of remaining. The word "dwelling house" carries with its meaning the idea of an abode intended to be more than of temporary character. It must be the present, and intended to be the future, home of the occupants, before service on the husband can be made by leaving copies with the wife. 1 Bouv. Law Dict. p. 514; *Ames* v. *Winsor*, 19 Pick. 247; *Engine Co.* v. *Hubbard*, (S. D.) 77 N. W. Rep. 588. In the latter case the court in speaking of the word "dwelling house" as used in the section quoted said: "And when the statute makes service upon the wife constructive service upon the husband when made at his dwelling house, it must affirmatively appear that such dwelling house, where the service is so made, is in fact the dwelling house of the husband; that is, the permanent home of the family." We therefore conclude, under the facts shown, that there was no service on the husband, within the meaning of § 5252, supra. The service was not made at his dwelling house. The husband had no dwelling house in the state at the time such service is claimed to have been made, and there was no personal nor constructive service of the summons made on him in that case. It is claimed that want of service of the summons in that case cannot be shown in this case, as this action is a collateral attack upon the judgment on which it is based. The answer in this case pleads facts affirmatively showing absence of jurisdiction over the person of the defendant, without which no valid judgment could be entered, and asks affirmative relief. The defendant asks judgment that the pretended judgment be canceled and annulled. A judgment may be set aside in an action brought for that special purpose, upon a showing that such judgment was rendered without any service upon the defendant. Such an action can be sustained when the sole ground relied on is want of jurisdiction over the person by reason of the nonservice of the summons in the original action. Such an action is deemed a direct attack upon the judgment. *Magin* v. *Lamb*, (Minn.) 44 N. W. Rep. 675, 19 Am. St. Rep. 216; *Dady* v. *Brown*, 76 Iowa, 528, 41 N. W. Rep. 209; *Insurance Co.* v. *Waterhouse*, 78 Iowa, 674, 43 N. W. Rep 611; *Telegraph Co.* v. *Boylan*, 86 Iowa, 90, 52 N. W. Rep. 1122; *Johnson* v. *Coleman*, 23 Wis. 454, 99 Am. Dec. 193. A different rule is applicable in cases of actions brought to cancel judgments in which the court had jurisdiction by reason of the service of the summons upon the defendant in the original action. In such cases the action will not lie if there be an adequate remedy at law. *Kitzman* v. *Manufacturing Co.*, 10 N. D. 26, 84 N. W. Rep. 585. See, also, *Freeman* v. *Woods*, in fra.

This action is brought upon the judgment rendered by the justice of the peace. The object of the action is to recover the amount adjudged to be due on that judgment, and to continue such judgment in force. The answer, as we have seen, seeks affirmative relief in the form of having such judgment declared a nullity. Such a defense is in the nature of a counterclaim for equitable relief, and is permissible in a pleading under subdivision 2 of § 5274, Rev. Codes. In such a case the complaint is deemed to be based upon a contract, and the equitable counterclaim pleaded that the judgment on which the action is based was void is connected with the subject of this action. Assailing a judgment by pleading such a counterclaim is a direct, and not a collateral, attack upon the judgment pleaded, and is permissible under our system of Code pleading. *Vaule* v. *Miller,* (Minn.) 72 N. W. Rep. 452. The rule allowing a judgment to be attacked in direct proceedings, when void for want of jurisdiction, by reason of no service of the summons, applies to all judgments, whether foreign or domestic, and pertains to judgments of courts of general or of limited jurisdiction. In judgments of courts of general jurisdiction, jurisdiction is presumed until the contrary is shown. In judgments of a justice of the peace no presumptions in favor of jurisdiction follow the judgment. *Heffner* v. *Gunz,* 29 Minn. 108, 12 N. W. Rep. 342; 17 Am. & Eng. Enc. Law, p. 1082, and cases cited; *Dobbins* v. *McNamara,* 113 Ind. 54, 14 N. E. Rep. 887, 3 Am. St. Rep. 626. Before an action on such a judgment can be successfully maintained, it must appear, if denied, that the action in which the judgment was entered was one which the justice had jurisdiction to entertain, as having been based on service of the summons on the defendant, or a voluntary appearance in the action. *King* v. *Randlett,* 33 Cal. 319. Section 5285, Rev. Codes, prescribed as follows: "In pleading a judgment or other determination of a court or officer of special jurisdiction it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given, or made. If such allegation is controverted, the party pleading shall be bound to establish on the trial the facts conferring jurisdiction." Under this section the burden of showing service of the summons upon the defendant devolved upon the plaintiff, as such service was controverted in the answer. No such showing was made by legal or competent evidence, nor by any kind of evidence. The abstract or transcript filed in the office of the clerk of the district court contained no fact showing such service. It recited that judgment was rendered by the justice on May 2, 1891, for a certain amount, with specified costs. If it were conceded that the filing of such transcript in the clerk's office made the judgment a judgment of the district court, followed by presumptions of jurisdiction, such presumptions are affirmatively overcome by the evidence in the case showing absence of legal service. But, as before stated, the filing of such transcript had no such effect.

The district court found that there was no service of the summons on the defendant. On a careful review of the evidence, we find that this finding is sustained. Neither the record nor files of the justice of the peace were shown to establish such service, and, moreover, the evidence on behalf of the defendant shows that there was no such service actually.

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

(88 N. W. Rep. 292.)

NORTHERN PACIFIC RAILWAY CO. *vs.* FRANK LAKE, *et al.*

Opinion filed Dec. 7, 1901.

Statement of Case—Motion to Dismiss—Practice.

The structure and contents of a statement of case settled in a civil action tried to a jury is governed by § 5467, Rev. Codes 1899, which section, unlike section 5630, which governs statements in actions tried to the court without a jury, does not require that all the evidence shall be embodied in the statement, but, on the contrary, requires only the substance of the evidence. A motion to dismiss plaintiff's appeal in an action tried to a jury, upon the ground that the statement of case does not contain all the evidence offered at the trial, is denied, both upon the ground that the statement is sufficient in fact and the further ground that an objection that a statement of case is defective is not a proper ground for moving to dismiss an appeal.

Streets—Easements—Fee in Abutting Owner.

In this state the public has only an easement in streets and highways, the fee remaining in the original owner or his successor. Such owner may exercise such acts of ownership as are not inconsistent with the easement. The erection of buildings upon a public street is an invasion of the rights both of the public and fee owner, and the fee owner may maintain ejectment therefor. It is *held*, in an action of ejectment by plaintiff, who is the fee owner, against the defendants, whose sole defense is that their buildings are upon the street, that it was error to direct a verdict for defendants. *Held*, further, that it was error to deny plaintiff's motion for a directed verdict.

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

Action by the Northern Pacific Railway Company against Frank Lake and another. A verdict was directed for defendants, and plaintiff appeals from an order denying its motion for a new trial. Reversed.

Ball, Watson & Maclay, for appellant.

Plaintiff showed title to the fee of the strip of land in question and the burden thereupon devolved upon the defendants to show that plaintiff had lost such title or that it was subject to the easement of a public highway. If the public has gained an easement over it, such right has been acquired by user only, and not otherwise. In order to affect a common law dedication, there must co-exist the

intent on the part of the land owner to give his land for the public use, and the user or acceptance on the part of the public. Elliot Roads & Streets, 118, 119, 136; Am. & Eng. Enc. L. (2 Ed.) 36, 38, 43; *Bell* v. *City*, 27 N. W. Rep. 245; *County* v. *Miller*, 31 Mich. 447; *Bank* v. *Stockwell*, 48 N. W. Rep. 174; *Johnson v. City*, 63 N. W. Rep. 694; *Davis* v. *City*, 10 N. W. Rep. 768; *Marchand* v. *Town*, 51 N. W. Rep. 606; *Prescott* v. *Beyer*, 26 N. W. Rep. 732. In the case of the statutory dedication the acceptance by the public may be of a part only of the streets platted. The only use shown is confined within the limits of the present paved street with its sidewalks, and no easement could be acquired by user beyond these limits. *Baker* v. *Johnston*, 21 Mich. 319; *Field* v. *Manchester*, 32 Mich. 279; *Graham* v. *Hartnett*, 7 N. W. Rep. 280. This contest is between the land owner and a trespasser. No question of estoppel can arise as between the parties to this litigation. 9 Am. & Eng. Enc. L. (2 Ed.) 56; *City* v. *Hanover*, 67 N. W. Rep. 891; *Wilder* v. *City*, 12 Minn. 116. Even if the land is a highway the plaintiff is owner of the fee. 25 Am. Dig. 1607; 15 Am. Dig. 2948; *Thomas* v. *Hunt*, 35 S. W. Rep. 580. Even if the land is a part of Northern Pacific Avenue, the plaintiff is entitled to judgment. The owner of land subject to a public easement may maintain ejectment against an intruder who has seized and appropriated the land to his own use, or has used it for a purpose not authorized by the easement. 10 Am. & Eng. Enc. L. (2 Ed.) 473; *Gardner* v. *Tisdale*, 2 Wis. 153, 195; *Thomas* v. *Hunt*, 35 S. W. Rep. 581; *Smeberg* v. *Cunningham*, 96 Mich. 378. The act of the territorial legislature (Ch. 33, Laws 1871) declaring that section lines shall be public highways as far as practicable, and providing how the roads shall be laid out and established as re-enacted in § 1052, Rev. Codes, excepts incorporated cities. A section line road was never laid out. *Keen* v. *Board*, 67 N. W. Rep. 623; *Oyler* v. *Ross*, 66 N. W. Rep. 1099.

Taylor Crum, for respondent.

The property in question on the section line, by the statutes of the territory was set apart for public use, and the width of the street having been established by statute and acquiesced in by the Northern Pacific Railroad Company since 1880, and private rights acquired with reference to it, it would be a violation of good faith with the public to narrow the street at the bridge to the width of eighteen feet, or to allow plaintiff to revoke the dedication of its grantor. *Cincinnatti* v. *Lessee of White*, 31 U. S. 452. Territorial and county roads were established eighty feet in width. § 1, 2, Ch. 72, Laws 1862; § 27, Ch. 13, Laws 1867. Section lines are declared public highways. Ch. 33, Laws 1871. The right of way for the construction of highways over public lands was granted by congress. § 2477, Rev. St. U. S.; *Keen* v. *Board*, 67 N. W. Rep. 623. The land and highway in question is on a section line, was an existing high-

way in 1874 in a settled portion of the territory, and was not affected by the law of 1874, Chapter 14, reducing the width to sixty-six feet. Twenty years' use by public, under claim of right, evidenced by the use will give a right to road or street. *Town* v. *Skillman*, 11 L. R. A. 55; *Rathmann* v. *Nohrenberg*, 32 N. W. Rep. 305; Stat. Dak. 1877, § 37, Ch. 29; Elliott Roads & Streets, 123; *Burrows* v. *Guest*, 12 Pac. Rep. 850; *Moore* v. *Roberts*, 25 N. W. Rep. 565. The owner who makes a plat on which spaces are left indicating the direction of roads and streets, with reference to the plat, cannot recall his dedication. Elliott Roads & Streets, 89. Had Northern Pacific Avenue not been used as a street prior to 1880 when Northern Pacific Second Addition was platted, but was accepted, used and improved as such street subsequent to such time, its acceptance would be shown. *Burrows* v. *Guest*, 12 Pac. Rep. 850; *Meier* v. *Ry. Co.*, 19 Pac. Rep. 610; *State* v. *Croghan*, 19 Pac. Rep. 485; *State* v. *Eisele*, 33 N. W. Rep. 785; *Pillsbury* v. *Brown*, 9 L. R. A. 94. It is immaterial how the street became such, whether by formal action of the city in accepting its dedication, or by acceptance by user on the part of the public. *Kennedy* v. *Levan*, 33 Minn. 517; *Morse* v. *Zeize*, 24 N. W. Rep. 287. Neither the appellant nor its grantor had any title to the land in controversy. It was granted to the public by congress and accepted by the Territory of Dakota subsequent to the survey, and prior to the time the Northern Pacific Railroad Company acquired title to section 7. § 2477, Rev. St. U. S.; Ch. 72, Laws Dak. 1862; Ch. 13, § 27, Laws 1867; Ch. 33, Laws Dak. 1871; *Wells* v. *Pennington Co.*, 48 N. W. Rep. 307; *N. P. Ry. Co.* v. *Rockne*, 115 U. S. 600; *Tyler* v. *Cass Co.*, 1 N. D. 369.

YOUNG, J. The plaintiff brings this action to eject the defendants from a strip of land situated in the city of Fargo, said land lying and being in section 7, and immediately south of the section line between section 6 and 7, in township No. 139 north, of range 48 west, upon which section line the street known as Northern Pacific Avenue is located. The plaintiff alleges that it is the owner in fee, and entitled to the posesssion of said real estate, except so far as the city of Fargo has the right to use the same for street purposes; that the defendants unlawfully entered upon said premises and ejected the plaintiff therefrom, and have since withheld possession thereof from plaintiff. The defendants answered jointly, and denied each and every allegation of the complaint. The trial was to a jury. At the close of the testimony both parties moved for a directed verdict. Plaintiff's motion was denied. Defendant's motion was granted, and the jury was directed to render a verdict for the defendants. Plaintiff made a motion for a new trial, upon a settled statement of the case, which statement contained specifications of a number of alleged errors. The motion for new trial was denied by the trial court. Plaintiff appeals from the order denying said motion.

Counsel for respondents has presented a preliminary motion to

this court to dismiss plaintiff's appeal, and to affirm the judgment "upon the ground that the statement of the case does not contain all of the evidence offered upon the trial." The motion also contains a request that the abstract and briefs filed by appellant be stricken from the record herein, for the reason that the same do not comply with rule 18 of this court (6 N. D. XVIII), This motion is without merit, and will be denied. Rule 18, referred to in the motion, relates to the mechanical features of abstracts and briefs. In the brief filed by respondents' counsel in support of his motion, no particulars are pointed out wherein the briefs and abstracts violate said rule, and a reference to the same does not disclose any substantial departure from the requirements of the rule referred to. The failure of a statement of the case to contain all of the evidence is never a ground for dismissing an appeal which has been regularly taken. As already stated this case was tried to a jury and not to the court without a jury. The contents of statements in jury cases are governed by section 5467, Rev. Codes 1899, which does not require that all of the evidence offered shall be embodied in the statement, as is required in actions tried to the court without a jury, under section 5630, Rev. Codes 1899. Section 5467, which governs the contents of the statement in the case at bar, requires that only the substance of the evidence shall be stated; whereas section 5630, which governs statements of the case in actions tried to the court without a jury, requires that all of the evidence offered shall be embodied in the statement when a review of the entire case is demanded. It follows therefore that had defendants' motion been to strike out the statement, instead of for a dismissal of the appeal, it would have been denied.

The only error assigned by counsel for the appellant to which we shall have occasion to refer relates to the court's ruling upon the motion for a directed verdict. It is urged that the court erred in denying plaintiff's motion and in granting defendant's motion for a directed verdict. The plaintiff's motion was based upon the ground "that the undisputed evidence shows that the plaintiff was the owner of the tract of land described in the complaint and in question in this action, and that the defendants are in occupation of the same as trespassers, and without any right or title whatever." Defendants' counsel stated the grounds of his motion as follows: "Plaintiff has failed to prove the allegations of its complaint, and has failed to prove that it is the owner of or entitled to the posesssion of the premises in controversy." The questions involved in these motions were questions of law purely, and turn upon facts which are not in dispute. The plaintiff established its title to the real estate in controversy by a chain of conveyances commencing with a patent from the United States government. The section line between section 6 and 7 forms the north boundary line of the tract of land in controversy and conveyed to plaintiff as just stated. Northern Pacific Avenue is located on said section line. A dispute exists as to the width of the

avenue, but it is conceded that a portion of the same is upon plaintiff's land. It is shown that the defendants are in possession of a portion of said land immediately south of and within 40 feet of the section line, and have certain buildings thereon which they occupy. Defendants have no title to the land so occupied by them, and do not claim that they occupy it by any right or license derived from the plaintiff. Their sole contention and defense is that their buildings are entirely upon the street, and are not upon plaintiff's land, to which it has the exclusive right of possession. Counsel for defendants urge that under the law Northern Pacific Avenue is 80 feet wide,—that is 40 feet on each side of the section line. If this be true, then of course defendants' buildings are upon the street. This contention is based upon section 2477, Rev. St. U. S. which granted "the right of way for the construction of highways over public lands not reserved for public uses." and the territorial acceptance of said grant contained in chapter 33, Laws Dak. T. 1870-71, wherein all section lines were declared to be public highways as far as practicable (see *Walcott Tp.* v. *Skauge,* 6 N. D. 382, 71 N. W. Rep. 544), and upon chapter 13, Laws Dak. T. 1867-1868, which provided that "no road shall be less than 80 feet wide." Counsel for the plaintiff, on the other hand, for reasons we need not mention, denies that the street is 80 feet wide, as claimed by defendants, and allges that it is of much less width, and that defendants' buildings are, at least in part, upon plaintiff's land, of which it concededly has the exclusive right of possession. The question as to the width of the street is argued at great length by counsel for both parties in their briefs. It is a question, however, which we need not discuss or consider, inasmuch as we have reached the conclusion, without hesitation, that, in no event, can the rights of the parties to this action be affected by any conclusion which we might reach in reference thereto. It may be assumed that the defendants' buildings are upon the street, as they claim. Nevertheless they are upon land to which the plaintiff has the title. Plaintiff's land extends, as we have seen, to the section line, and includes that portion of the street upon which defendants' buildings are situated. In this state, as in a large majority of the states of the Union, the public has only an easement in streets and highways, the fee of the land remaining in the owner, subject to the easement, and he may exercise such acts of ownership and possession as do not interfere with the public use. It is patent that the maintenance of buildings upon public streets for private use is an infringement of the right of the land owner as well as of the public. The courts, both of this country and England have held with uniformity that the original owner, or those claiming under him, of land dedicated to public use may maintain ejectment against a permanent incumbrancer or occupier, inconsistent with or repugnant to the purpose of the dedication or grant *Gardiner* v. *Tisdale,* 2 Wis. 153, 60 Am. Dec. 407; *Thomas* v. *Hunt,*

(Mo.) 35 S. W. Rep. 581, 32 L. R. A. 857; *Taylor* v. *Armstrong*, 24 Ark. 102; *Coburn* v. *Ames*, 52 Cal. 385, 28 Am. Rep. 634; *Weyl* v. *Railroad Co.*, 69 Cal. 202, 10 Pac. Rep. 510; *Wright* v. *Carter*, 27 N. J. Law, 76; *Carpenter* v. *Railroad Co.*, 24 N. Y. 655; *Wager* v. *Railroad Co.*, 25 N. Y. 526; *Sherman* v. *McKeon*, 38 N. Y. 266; *Strong* v. *City of Brooklyn*, 68 N. Y. 1; *Smeberg* v. *Cunningham* 86 Mich. 378 56 N. W. Rep. 73. 35 Am. St. Rep. 613; Elliott, Roads & S. 519, 538; Jones, Easem. § § 547, 548; 10 Am. & Eng. Enc. Law (2d Ed.) 473, and cases cited at note 2. The legislature of the state adopted this doctrine of the courts in section 3360, Rev. Codes 1899, which reads as follows: "The owner in fee of a servient tenement may maintain an action for the possession of the land against any one unlawfully possessed thereof, though a servitude exists thereon in favor of the public." Conceding, therefore that defendants' buildings are upon the street, and that is all they claim, it follows, necessarily, that they are intruders and trespassers, both as against the plaintiff, the owner of the fee, and against the public represented by the city. Upon the undisputed evidence, the plaintiff is entitled to the relief prayed for in its complaint. The rulings of the trial court upon the motions for a directed verdict were erroneous. This conclusion requires a reversal of the order appealed from. Plaintiff's motion for a directed verdict should have been granted.

The order of the district court denying the motion for a new trial is reversed, and that court is directed to enter judgment in favor of plaintiff, and against the defendants, for the restitution of the premises described in plaintiff's complaint. All concur.

(88 N. W. Rep. 461.)

LENA HAGEN *vs.* CULBERT GILBERTSON, *et al.*

Opinion filed Dec. 9, 1901.

Appeal—New Trial in Supreme Court.

This action was tried to a jury, and after the evidence was put in, and the case had been rested on both sides, counsel on each side, respectively, requested a directed verdict. No ruling was made on either of said requests, but it appears that, immediately after said requests were made, counsel agreed in open court that the jury should be waived, that the case should be made a court case, and that each party should prepare findings and submit the same to the court. Thereupon the jury was discharged. Subsequently the trial court filed findings of fact and law, upon which judgment was entered for the plaintiff. Defendants appeal to this court, and in their statement have requested a trial anew of the entire case in this court. During the trial as had before the jury, the court sustained numerous objections made to questions propounded to witnesses, and in such cases the evidence thus offered was excluded, and was never brought upon the record. In other instances evidence which was offered at the trial was ruled out, and the same was not preserved in the record. *Held* that, upon this state of facts, this court, under § 5630, Rev. Codes 1899, is without authority to enter upon a trial of the issues anew.

Case Not Reviewed on Error.

This court, in cases tried to the court, where it is without authority to retry the issues anew, will not sit to review errors in the rulings made in the trial court.

New Trial.

For reasons given in the opinion, it is further *held* that the judgment must be reversed, and a new trial awarded.

Appeal from District Court, Richland County, *Winchester*, J.

Action by Lena Hagen against Culbert Gilbertson and William Rohan. From a judgment in favor of plaintiff, defendants appeal. Reversed.

McCumber, Forbes & Jones, for appellants.

A. T. Cole and *W. E. Purcell*, for respondent.

WALLIN, C. J. The complaint in this action charges, in substance, that the defendants acting together and conspiring to injure and defraud the plaintiff, obtained from the plaintiff at divers times in the years 1896 and 1897 certain sums of money and a certain promissory note, as follows: $113.85 so obtained was paid over by plaintiff to the defendant Rohan, and $100 so obtained was received by the defendant Gilbertson, and a certain note for $75, signed by the plaintiff with an indorser, and payable to said Gilbertson, was turned over by plaintiff to Gilbertson. It is further alleged that said money and said note were paid over and delivered to the defendants without any consideration whatever, and that the same were procured by deception, fraud, and undue influence practiced upon the plaintiff by the defendants, acting jointly and in pursuance of a conspiracy to defraud the plaintiff. Judgment is demanded against the defendants for the sum of $213.85, with interest, and also for the cancellation and surrender of the note. The district court entered judgment as follows: A several judgment for $100, with interest, was entered against defendant Gilbertson; and it was further adjudged that said defendant should surrender to plaintiff said note for $75, and further adjudged that said defendant should pay plaintiff the costs and disbursements of the action, taxed at $63.80. It was also adjudged that the plaintiff have and recover of the defendant Rohan a several judgment for the sum of $141.73, with costs and disbursements of the action. From such judgments the defendants have appealed to this court, and, in the statement of the case, defendants have demanded a trial of the entire action anew in this court.

We have reached the conclusion that upon this record a trial de novo cannot be had in this court, and this ruling is placed upon the ground that all the evidence offered in the trial court is not incorporated in the statement of the case. The case was tried before a jury, and after all the evidence was elicited, and both sides had rested the case, a motion was made in behalf of the plaintiff,

and also in behalf of the defendants,for a directed verdict. No ruling was made by the trial court in response to either of said motions for a directed verdict, but the record shows that, immediately after said motions were made, the respective parties agreed in open court as follows: "In open court the jury is now waived by both parties and it is made a court case; each party to prepare findings and submit them to the court within thirty days." Upon this stipulation of counsel the jury was discharged without returning a verdict, and thereafter the trial court made and filed its findings of fact and law upon which the judgment was entered. None of the findings of fact show or tend to show that the defendants conspired together or acted conjointly in procuring the several sums of money and the note from the plaintiff as charged in the complaint, but, on the contrary, the several facts as found show that each defendant acted independently, in so far as he acted at all, with respect to the subject-matter set out in the complaint. As a conclusion of law the trial court finds that the plaintiff was entitled to recover of each defendant a several judgment, and further found, in terms, "that the defendants are not jointly liable herein." The statement embraces a list of alleged errors of law based upon the rulings of the trial court in admitting and excluding the evidence, and also error in denying the defendants' motion for a directed verdict. Following the specifications of errors of law, we also find in the record a list of alleged errors leveled against the findings of fact, in which the appellants have attempted to specify wherein the evidence does not warrant or justify such findings of fact. The record discloses the further fact that the trial of the action was, at all times prior to the discharge of the jury, conducted as jury cases are required to be conducted. As the trial progressed, counsel from time to time objected to questions as propounded to the witnesses. Some of such objections were overruled, and others were sustained, by the trial court. In cases where the objections to questions were sustained, the evidence sought to be elicited from the witnesses by such questions was excluded from the jury, and the same was never brought upon the record in any manner. In several instances counsel offered to introduce evidence to show a particular state of facts, and upon objection being made to such evidence the trial court excluded the same from the consideration of the jury, and the same was not in any manner preserved or brought upon the record. The evidence thus excluded was not, therefore, considered by the trial court in deciding the case; nor is the same presented to this court for its consideration.

Upon this record in view of the reiterated rulings of this court upon the point it is needless to say that this court is not possessed of the right or authority, under the statute, to try the case anew upon the facts and merits. As we have often said, our right to enter upon a retrial of a case rests entirely upon the language of the statute embodied in section 5630, Rev. Codes 1899. To do so, it must af-

firmatively appear, first, that upon the trial of the action in the district court all the evidence offered was received; and it must further appear that such evidence is transmitted to this court after being incorporated in a statement of the case. In the case at bar the first condition is lacking. All the evidence offered at the trial was not received, and, of course, such excluded evidence is not before this court. By their voluntary agreement, made in open court, counsel consented to the discharge of the jury without a verdict, and after the evidence in the case was all offered, and a portion thereof had been excluded. In so doing counsel, under § 5630, supra, have waived or lost any possible right to retry the case in this court upon the evidence. Counsel are presumed to know that in this state, at least, no trial anew upon the evidence can be had in the supreme court unless all the evidence offered at the trial below was received, and thereafter sent to the supreme court. Nor does the fact that counsel have consented to try the case in the district court after that court had excluded from the record a part of the evidence offered at the trial change the rule. The statute requires, in cases tried to the court, that the evidence offered in the district court must be received, and when this is not done the case cannot be tried anew, under § 5630. This court cannot derive its authority to try cases anew from a stipulation made by counsel, and the fact that counsel have consented to try a case below in an irregular manner cannot operate to change the rule governing trials in this court, as the same is established by the legislature. See *Engine Works* v. *Kneer*, 7 N. D. 195, 73 N. W. Rep. 87; *First Nat. Bank of Devil's Lake* v. *Merchants' Nat. Bank*, 5 N. D. 161, 64 N. W. Rep. 941; *Peckham* v. *Van Bergen*, 8 N. D. 598, 80 N. W. Rep. 759; *Erickson* v. *Bank*, 9 N. D. 81, 81 N. W. Rep. 46, *In re Fleugel's Estate*, 10 N. D. 211, 86 N. W. Rep. 712. The case last cited is directly in point. In that case the court said: "The status of the case in this court with reference to procedure here is controlled by the statute and the steps taken by the appellants in taking the appeal, and this status, being once established, cannot be changed or affected by what counsel for the appellants may say with reference to the objects and purposes of the appeal."

In some cases where, under this statute, this court has been precluded from a retrial of the action, the court has simply affirmed the judgment entered below. In others we have deemed it to be in furtherance of justice to transmit the record, with a direction to try the case anew in the district court. Under the amended statute, and as it now stands, this discretion is given in express terms, and may be exercised, in furtherance of justice, in any case tried to the court. That this case was tried to the court, there can be no doubt. In waiving a jury is involved the necessary implication that the parties consented to a trial of all the issues before the court without a jury, and this makes the case a court case, under § 5630. Being a court case it can be tried in this court only upon the

terms set out in the statute. Nor does this court sit in a court case as a court of review, to correct errors in rulings upon the admission of evidence, unless this is done in connection with a retrial of the case upon the evidence and merits. See *Nichols & Shepard Co.* v. *Stangler*, 7 N. D. 102, 72 N. W. Rep. 1089, and *Erickson* v. *Bank*, supra. In the present case we are constrained by the facts in the record to grant a new trial. The case presents anomalies which make it in some respects a remarkable case, whether regarded from the standpoint of substantive law or from that of the law governing practice and procedure. The gist of the action is an alleged tort jointly committed by the defendants, whereby defendants, by fraud and duress, procured divers sums of money and a note from the plaintiff without consideration. The acts charged are therefore distinctly tortious acts, and, if established, are of such a character that the plaintiff could recover as damages not only the money and the interest thereon, and the value of the note, but, in addition thereto, might be entitled to smart money, by way of example and punishment. But no such relief is prayed for in terms. The plaintiff asks as relief only the money paid over, with interest, and, as equitable relief, that the note in the hands of one defendant be canceled and surrendered to plaintiff. The prayer for relief, so far as the money portion thereof is concerned, points to a waiver of the tort, and an action upon contract as for money had and received, and yet there is no statement to this effect found in the record; and hence the court below was necessarily at all times during the trial in the dark as to the legal theory of counsel for the plaintiff. It appears, however, that the trial court found from the evidence that the several acts complained of were not jointly committed, but were, on the contrary, independent acts of tort committed severally by the defendants. If this finding is supported by the evidence, then it is manifestly true that the action was improperly brought against the defendants jointly; and this would be true whether the tort was waived, or not, by the plaintiff. On the other hand, if the finding of fact on this feature is without support in the evidence, and the acts complained of were in fact jointly committed by the defendants, then the judgment was erroneously entered against each defendant, because in that event each would be equally liable in the same amount, and each would not be liable separately in different amounts, as was adjudged by the trial court. We have seen already that the record of the trial of the case presents an attempted amalgamation of the wholly different procedures which govern trials before the district court without a jury and those had with a jury; and it has been seen, also, that this compound of procdure so resulted, under the law, as to defeat a hearing in the supreme court, either to review errors, or upon the facts and merits of the case. To this should be added the curious and incongruous fact that as to one defendant the action was one brought for relief in a court of equity. In

this labyrinth of law and procedure, we are satisfied that it was impracticable to intelligently apply legal principles to the facts brought out at the trial. But, in discussing the elementary rules of law and procedure which should govern in the disposition of the case, we are not deciding or attempting to decide this case on its merits. This is precisely what this court finds itself unable to do under the law and upon the record transmitted to this court from the trial court. The authorities cited below will be found to be pertinent to the legal principles which, in our opinion, apply to the issues involved: 1 Enc. Pl. & Prac. 194, 195, 209; *Miller* v. *Bryden*, 34 Mo. App. 602; *Haskell Co. Bank* v. *Bank of Sante Fe*, 51 Kan. 39, 32 Pac. Rep. 624; *White* v. *Preston*, (Tex. App.) 15 S. W. Rep. 712; *Hill* v. *Davis*, 4 Mass. 137; *Thompson* v. *Albright*, (Tex. App.) 14 S. W. Rep. 1020.

Our conclusion is that the judgment entered below should be reversed, and that a new trial of the action will be in furtherance of justice, and this court will so direct. All the judges concurring.

(88 N. W. Rep. 455.)

FRANK J. PORTER, *et al. vs.* L. M. HARDY, *et al.*

Opinion filed Dec. 12, 1901.

Alteration of Instruments—Effect.

The material alteration of a written contract by a party entitled to a benefit thereunder, or with his consent, extinguishes all the executory obligations of the contract in his favor as against parties who do not consent to the alteration; and where the instrument so altered is converted, by such alteration, into a negotiable promissory note, such note is void, even in the hands of a bona fide holder.

Negligence Amounting to Estoppel.

An apparent exception to the foregoing rule exists in cases where parties sign skeleton notes, or notes not entirely filled out. In such cases the makers are sometimes held liable upon the completed instrument in the hands of good-faith purchasers, upon the ground that by signing the same in blank they impliedly authorized the holder to fill out the blanks in harmony with the general purpose of the instrument; and upon the further ground that the act of signing in blank was gross negligence, amounting to an estoppel as against a bona fide holder.

Skeleton Note—Signing—Detachment.

The defendants, who are farmers, with a view to forming an association to purchase a stallion from one E. Cooper, and at the request of the latter's agent, signed a contract wherein they agreed to associate themselves together for that purpose. This contract was contained in a bound book, and covered two pages. Portions of the contract were not filled out when signed. That portion on the lower page was in the form of a skeleton note, but was in fact an integral part of the contract. This portion was feloniously severed by Cooper's agent, and converted into a negotiable promissory note, and the same

was transferred to the plaintiff in due course. Defendants read the contract before signing it, and understood its general purpose. It is *held* that the note is void, and upon the facts of this case authority to fill out the blanks on the lower page and detach the same from the rest of the contract, thereby creating an entirely different instrument from that signed, cannot be implied.

Defendants Not Estopped to Repudiate.

Held, further, that the defendants were not negligent in signing said instrument upon the facts set forth in the opinion, and are not, therefore, estopped from asserting that the note in suit is not their contract.

Appeal from District Court, Wells County; *Glaspell*, J.

Action by Frank J. Porter and others, doing business under the firm name of Porter, Melick & Co., against L. M. Hardy and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

George A. Bangs and *Cochrane & Corliss*, for appellants.

F. Baldwin, for respondents.

YOUNG, J. Plaintiffs, for cause of action, allege that on May 5, 1893, the defendants executed and delivered their promissory note, dated on that day, wherein, for value received, they promised to pay one E. Cooper, or order, $700, on October 1, 1894, $700 on October 1, 1895, and $600 on October 1, 1896, with interest at the rate of 8 per cent. per annum until paid, payable annually; and that plaintiff is indorsee in due course of said note; and that the same has not been paid. The defendants, who are ten in number, answer jointly. Broadly stated, their defense is that they did not execute the note sued upon. The answer admits the genuineness of their signatures, but alleges a fraudulent and material alteration of the instrument to which such signatures were originally attached, and a total want of consideration. The trial was to the court without a jury, under § 5630, Rev. Codes, 1899. Judgment was ordered and entered for defendants. Plaintiff has appealed from the judgment, and in a statement of case settled under said section has specified for retrial by this court the eighteenth finding of fact made by the trial court, which finding is that "the defendants in signing said paper in the manner and form in which it was presented to them, were not guilty of negligence." All other findings of fact are conceded to be correct.

The following facts material to a determination of the questions presented by this appeal are established by the findings which are unchallenged: On or about May 5, 1893, one R. A. Whitehead had a number of imported stallions at Carrington, in Wells county. The stallions were owned by E. Cooper who was a breeder and importer of blooded stallions, residing near Adrian, Minn. Whitehead, who was Cooper's agent to sell said stallions solicited these defendants, who were farmers residing in the vicinity of Car-

rington, to organize a stock company with a capital stock of $2,000, for the purpose of purchasing one of these stallions. The contemplated purchase was conditioned upon the organization of the company and an examination of the stallion. The defendants agreed with Whitehead that they would meet and try to form a stock company if a sufficient number of farmers would meet with them, and the said Whitehead thereupon produced a book, which was so bound in the middle that upon being opened the two pages appeared to be one continuous statement or contract, and said statement or contract was so punctuated that it would show one continuous instrument; whereas in fact the leaves of the book were so perforated that they could be detached down in the binding, but in such a manner as not to be easily perceptible. Said Whitehead requested the defendants to sign said statement or contract, stating and representing to them, and each of them, that all he wanted was their names to show that they were willing to meet and form a stock company, and that when he got names enough he would notify them, and have them meet for that purpose. He also represented that the memorandum of agreement was to the effect that the signers thereof would meet, and form a stock company, and, if organized, they would buy a hores, and give three notes therefor to E. Cooper, if, on examination, they were satisfied with the horse; and it was agreed that they were not to execute and deliver their promissory note until said organization was duly effected, and a horse bought. Relying upon these representations, the defendants signed the printed document contained in the book referred to. In said book commencing upon the upper page, and ending at the botton of the lower page, were the following words and figures, when signed by these defendants, to-wit:

Stock Contract.

We, the undersigned stockholders, realizing the necessity of improving our horses, do hereby associate ourselves together to buy of E. Cooper the imported ..... stallion ..... No. ..... Said ..... is guarantied to be a breeder. Certificate of registry to accompany the horse. Capital Stock,

$2,000.00. May 5, 1893.

For value received we, or either of us, promise to pay to ....., or order, ...dollars on the first day of ....., 189.., and ..... dollars on the first day of ....., 189.., and ..... dollars on the first day of ..... 189.., Bank of ....., with interest at ..... per cent. per annum from date until paid, payable annually.

Here followed the signatures of the defendants.

That portion of the contract above set out down to the words "Capital Stock," and including the same, was upon the upper page, and the rest was upon the lower page. Between the pages, and close under the bound portion of the book, were perforations, by which the lower page could be detached. This book was presented

to the defendants for their signatures while they were at work in their fields. All of them were able to read and write, and they all read the paper hereinbefore set out before signing the same and they understood its general purpose. Whitehead, however, opened the book but partially, and because of the way in which it was bound it was almost impossible to notice the perforations. Thereafter Whitehead, without the knowledge or consent of these defendants, or any of them, tore off the lower page, containing the signatures of these defendants, and filled in the blanks so as to form the note sued upon, which note omitting the signatures, reads as follows:

$2,000.00. *New Rockford, N. Dak., May, 5, 1893.*

For value received, we, or either of us, promise to pay to *E. Cooper,* or order, *seven hundred* dollars on the first day of *October,* 1894, and *seven hundred* dollars on the first day of *October,* 1895, and *six hundred* dollars on the first day of *October,* 1896, at *New Rockford,* N. D., Bank of *New Rockford,* with interest at *eight* per cent. per annum from date until paid, payable annually.

The words and figures in italics were filled in by Whitehead. The stock company was not formed, and no horse was purchased by the defendants. Whitehead, however, after detaching the lower page, and filling out the blanks, sent the pretended note to E. Cooper, his principal. On or about June 1, 1893, Cooper indorsed the note in suit to plaintiff as collateral security to a debt which he then owed it, and received back from plaintiff other collateral security. The amount of Cooper's indebtedness to the plaintiff was then and is now in excess of the amount of the note here in suit.

It further appears from the findings that no part of the note in suit has been paid; that plaintiff parted with value for said note in the due and regular course of business, before maturity, and in good faith, without notice of any defects in the execution of said paper, or of the fact that a portion of it had been filled out after it had been executed by the defendants to said E. Cooper, or that any paper or writing had been attached to said paper, or was in the same book with it, or of any other matter or thing which would provoke inquiry as to the defense now set up by the defendants.

The question of the defendants' negligence in signing the document, which was afterwards converted into the note in suit,—and that is the only question relied upon by appellant,—is to be determined upon the facts hereinbefore set out. The trial court found, both as a matter of fact and as a conclusion of law, that the defendants were not guilty of negligence. It appears from the facts already stated that the note in suit is without consideraion, and that it has been materially altered, and is not the instrument originally signed by the defendants. It goes without saying that, as between the original parties, a recovery could not be had. The defense now interposed would necessarily be sustained. What is the position of the plaintiff, who concededly is a purchaser of the note in

due course? Can the plaintiff, merely because it is a good faith purchaser of the note in suit, recover on the same, notwithstanding the fact of the alteration of the instrument? There can be no doubt that under the general rule relating to the alteration of instruments a negative answer would be required to this question. The alteration in this case was material, and made by the agent of the payee, and without the consent of the defendants. It is well settled that, even as against an innocent indorsee, a negotiable instrument so altered is rendered void. The rule which is sustained by both reason and authority is well stated by Judge Dillon in his article on "Alteration of Instruments" in 2 Enc. Law & Proc., at page 177, as follows: "Any change in an instrument which causes it to speak a different language in legal effect from that which it originally spoke—which changes the legal identity or character of the instrument, either in its terms or the relation of the parties to it—is a material change, or technical alteration, and such a change will invalidate the instrument against all parties not consenting to the change. Not only will an alteration vitiate the instrument as between the immediate parties, but also as against a bona fide holder or indorsee without notice; and the latter can acquire no right or title other than that of the person under whom he claims." See cases cited by state under note 82; also, 2 Am. & Eng. Enc. Law (2d Ed.) p. 193, and cases cited; also, the opinion of this court in *Bank* v. *Laughlin*, 4 N. D. 391, 61 N. W. Rep. 473, and § 3937, Rev. Codes 1899, which is declaratory of the rule as above stated. As was said in *Bank* v. *Laughlin*, supra, "After such alteration, the paper is no longer the same paper as that sent out by those who executed and delivered the original instrument." Counsel for plaintiff frankly admits that under the rule as above stated the plaintiff cannot recover in this action. Their sole contention is that upon the facts of this case the defendants are estopped from denying the execution of the note in the form in which it was purchased by the plaintiff. It is claimed that the defendants were guilty of gross negligence, both in fact and in law, in signing the instrument which was afterwards converted into the note sued upon. While it is a well-settled rule that a material and unauthorized alteration of a negotiable note renders it void even as against an indorsee in due course, it is equally well-settled that there are exceptions to this rule, under which the maker may be prevented from relying upon the alteration for the purpose of defeating a recovery. The most familiar exception as applied to negotiable notes, covers all of these cases where parties have either signed skeleton notes, or notes only partially filled out, and the same have thereafter been filled out, and transferred to an innocent holder. The cases are exceedingly numerous where notes so altered have been enforced at the suit of innocent indorsees notwithstanding the fact that they were materially different from the instrument signed by the maker. The doctrine upon which a majority of these cases rests

is that the maker of the note, by signing it while it contains blanks, and knowing that it may be given currency as commercial paper impliedly, assents that the blanks may be filled out; that is, the law implies his consent to the alteration from the fact of his signing it with blanks therein. In that view the person filling the blanks is held to be the agent of the maker. The alteration, in this view, is made with the consent of the maker of the note, and the contract therefore is his contract. Other cases place the liability of the makers upon the ground of estoppel by negligence. The limitations upon this implied power to fill blanks is well stated by Judge Dillon in the article before refrred to, on pages 159 and 161, as follows: "It may be laid down generally that if one signs an instrument containing blanks he must be understood to intrust it to the person to whom it is so delivered to be filled up properly, according to the agreement between the parties; and when so filled the instrument is as good as if originally executed in complete form; and, if one signs or indorses a bill containing blanks to be filled, the delivery of such an instrument is an authority to fill up the blanks in conformity with the original instrument. * * * The implied authority to fill blanks is confined to such insertions as are necessary to make the instrument perfect according to its nature, frame, and intended use. There is no inference of authority to make any additions to the terms of the instrument, or to make a new instrument by erasing what is written or printed, or by filling blanks with stipulations repugnant to the plainly expressed intention of the paper as shown by its written or printed terms; and such an addition or alteration will avoid the instrument, even in the hands of an innocent holder, unless the person authorized to fill the blanks may be considered as a stranger with reference to any other changes which he may make." See cases cited under notes 74, 75, 82, and 83.

We may now inquire whether, upon the facts in this case, the defendants are liable upon the note in suit under the doctrine of implied authority or estoppel by negligence. We are agreed that they are not liable. It certainly cannot be claimed that the plaintiff has any right of recovery upon the note sued upon which depends upon the doctrine of implied authority. The instrument sued upon is a negotiable promissory note. The instrument signed by the defendants was not a negotiable note in form, with unfilled blanks, but, on the contrary, was a stock contract, in which the signers agreed to associate themselves together to buy a horse. Applying the doctrine of implied authority to the instrument signed by the defendants, it is apparent that it would extend only to filling the blanks in the instrument according to the purport and effect of the contract as contained within its four corners. Had all of the blanks been filled, it would still be a contract, nonnegotiable and conditional, and the promises to pay therein contained would be unenforceable save upon the condition of an actual association being formed and an actual purchase of a stallion. The instrument

was not so filled out, but, on the contrary, the contract was cut in two, and an entirely different instrument was created. As we have seen, the doctrine of implied authority does not extend to the creation of different instruments. We find no basis of fact in this case to conclude that there was any implied authoriy in Cooper or his agent to convert the contract signed by the defendants into the note here sued upon. Neither are we able to find that the defendants were negligent in signing the contract as they did. The cases are numerous where parties who have unwittingly signed negotiable notes have been held liable to good-faith purchasers because of their negligence and carelessness in not ascertaining the nature of the instrument signed by them. That, however, is not this case. In this case the parties signed the instrument knowingly. But they did not sign a skeleton note, or a note containing blanks, but an entirely different instrument. They were able to read the contract and they read it before signing it, and understood its general nature. We are not able to see wherein they were negligent in signing it. The most that can be said is that they were negligent in not having the blanks filled out; but, as we have seen, they were not bound to assume that the instrument would or could be filled out in any other way than according to its general terms and purport. We do not think the contract signed by the defendants presented such an appearance as to make the mere fact of their signing the paper an act of carelessness. The loss resulting from the forgery must fall upon the purchaser of the forged paper, and not upon the innocent makers of the stock contract. The defendants had as good a right to rest upon the presumption that the contract which they signed would not be converted by forgery into a negotiable promissory note as the plaintiff had to presume that the note which he purchased was not forged. Parties taking such paper must be considered as taking it at their own risk, so far as the question of forgery is concerned, and as trusting to the character and credit of those from whom they receive it and of the intermediate holders. *Holmes* v. *Trumper*, 22 Mich. 427, 7 Am. Rep. 661; *Bank*, v. *Clark*, (Iowa) 1 N. W. Rep. 491, 33 Am. Rep. 129; *Bank* v. *Stowell*, 123 Mass. 196, 25 Am. Rep. 67; *Gerrish* v. *Glines*, 56 N. H. 9; *Kellogg* v. *Steiner*, 29 Wis. 626; *Scofield* v. *Ford*, 56 Ia. 370, 9 N. W. Rep. 309; *Benedict* v. *Cowden*, 49 N. Y. 396, 10 Am. Rep. 382; *Searles* v. *Seipp*, 6 S. D. 472, 61 N. W. Rep. 804. It follows from what we have said that the trial court correctly held that the plaintiff is not entitled to recover inthis action.

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

(88 N. W. Rep. 458.)

FRANK J. PORTER *vs.* WILLIAM P. ANDRUS.

Opinion filed Dec. 17, 1901.

Action on Note—Defenses—Unauthorized Delivery—Indorsement.

Certain persons signed a note, negotiable in form, and left it with an agent of the payee therein named for the purpose of procuring other persons to sign it, after certain conditions as to sale of shares of stock had been performed. The note was not to be delivered to the payee under any circumstances until such conditions had been performed and such other persons had signed the note. The note was delivered by such agent to the payee before such conditions had been performed, and before such other persons had signed. *Held*, that these facts would constitute a defense to the note as against the payee, but not as against an indorsee of such note in due course, as defined in § 4884, Rev. Codes.

Indorsement as Collateral to Antecedent Debt.

The payee transferred such note to the plaintiffs by a written guaranty of payment indorsed thereon before maturity, as collateral security for a pre-existing debt due from the payee to palintiffs. No new consideration passed between them at the time of the transfer nor any extension of time, nor was any new obligation or duty incurred at the time by plaintiffs as a matter of fact nor as a matter of law. *Held*, that plaintiffs were not indorsers in due course, under § 4884, Rev. Codes.

Ruling Proper.

Evidence considered, and it is *held* that there was no error in the refusal of the trial court to direct a verdict for the plaintiffs.

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

Action by Frank J. Porter and others against William P. Andrus and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

George A. Bangs, for appellants.

Pollock & Scott, for respondents.

MORGAN, J. This is an action upon a promissory note executed and claimed to have been delivered by the defendants to the Leeds Importing Company. As amended, the complaint states a cause of action upon a promissory note in the ordinary form with the following allegation appertaining to the tranfer of such note to the plaintiffs, viz.: "That on the 24th day of June, 1893, the Leeds Importing Company being indebted to these plaintiffs in a sum largely in excess of the amount due on the promissory note above described, indorsed said note as follows: "The Leeds Importing Company, by E. Cooper, Secretary;" and transferred the same to these plaintiffs as collateral security to said indebtedness due these plaintiffs from said Leeds Importing Company, upon the consideration that the date of the maturity of said indebtedness be extended by these plaintiffs for the period of four

months." The defendants answered the complaint and the amended complaint and alleged, in substance, that on or about May 2, 1892, the defendants were negotiating with the Leeds Importing Company for the purchase of a horse, and agreed with said company that with the said company's co-operation and assistance these defendants, with certain other persons whom said company promised and agreed to procure and induce to take stock in said company, would organize a joint-stock company for the purchase of said horse; that the performance of said agreement was entered upon, and only partially consummated; that the defendants, at the request of said Leeds Importing Company and for the purpose of facilitating the transaction of the business, signed their names to a paper of the character and description of that mentioned and described in the complaint, but upon the express promise and conditions that said note should not be delivered to the said Leeds Importing Company or to any other person until all of the stock of the said company should have been placed, and all of the stockholders should have signed the said note; that said Leeds Importing Company procured possession of said note by fraud and stealth, and departed from the state cladestinely, long before said agreement was consummated, and before said stock of said proposed joint-stock company had been all sold, and before all of the holders of said stock had signed said note, and that in consequence of such action of said company in taking said note out of the state the note was never signed by such other persons. The answer further alleges that such note was transferred to plaintiffs as collateral security for the payment of a pre-existing indebtedness due from said Leeds Importing Company to plaintiffs and not otherwise. The case was tried to a jury. The only question submitted to the jury was whether there was an extension of the time of the payment of the indebtedness from the Leeds Importing Company by plaintiffs at the time the note in suit was indorsed to the plaintiffs by the Leeds Importing Company. The jury found for the defendants, thus finding that there had been no extension of time of the payment of the indebtedness between those parties at that time. The plaintiffs regularly moved for a new trial upon a statement of the case, duly settled, which motion was denied. The plaintiffs appeal to this court from the order denying such motion for a new trial.

The errors specified and assigned are that the court erred in not granting plaintiffs' motion for a directed verdict, and that there was error on the part of the court in not granting plaintiffs' motion for a new trial. Upon a careful consideration of the evidence, we are satisfied that there was no error in submitting to the jury the question whether there was an extension of the time of payment of the indebtedness from plaintiffs to the bank at the time that the note in suit was transferred to them. One witness testified that it was his "recollection and belief" that June 24, 1893, was the time when the plaintiffs received the note, and the time

of payment was then and there extended for a period of four months. But other facts were testified to by this and other witnesses, which, if believed by the jury, would be good grounds for not believing the witness testifying as to the precise time of the transfer and of the extension of the time of payment. This witness was the secretary of the Leeds Importing Company, and the officer that transferred the note to the bank by the written guaranty. He testified by giving two depositions. In the first the precise date of the guaranty was not given, nor did he mention the extension of the time of payment in consideration of the transfer of the note to the bank. He testified that the bank gave him a receipt for this note at the time of the transfer to the bank, but this receipt was not produced. His testimony that he had no notice that defenses were claimed to the note when he transferred it seems to be contradicted by a letter written by him to one of the makers in answer to one to him from this maker, in which this maker complains that the note was delivered to the payee contrary to agreement. These letters were written before the note was turned over to the bank.

Members of the plaintiffs' firm testified that the note was transferred to them as collateral security for the indebtedness due from the Leeds Importing Company to their bank, without any mention of the extension of the time, and without furnishing any data as to the precise time of such transfer. From all of these considerations, we do not think that the secretary's testimony was of that character that entitled it to such absolute weight that a verdict should have been directed upon it. The weight of it under the circumstances, was properly submitted to the jury in connection with the other testimony, and the court did not err in refusing to direct a verdict for the plaintiff.

The next question to be determined on this appeal is, was there such a delivery of the note in suit to the payee as to bind the makers thereof when in the hands of the plaintiffs, under the circumstances under which the plaintiffs received it? The facts pertaining to the delivery of the note to the payee were stipulated by the attorneys at the trial and are as follows: "It is now stipulated that the note was signed by the several parties who did sign the same upon the understanding and promise of the payee that same should be deposited with T. R. Peart, and not delivered to the payee or any other person until $800 more of the stock should be subscribed for, and the subscribers of such additional stock should have signed said note; that said note was never signed by any other subscribers, and never delivered according to the terms of the agreement, but was clandestinely taken by the agent of the payee out of the state; and that no delivery of said note was ever made by any of the parties who signed the same." From this stipulation it appears that delivery to the payee was unauthorizd at the time made. This note was therefore delivered and put into circulation in fraud of the rights of the makers, and recovery thereon could not be had in an action by

the payee named therein. This is conceded by the plaintiffs. However, the note was upon its face regular and negotiable in form, and duly signed when delivered to the agent by defendants. It was transferred to the plaintiffs by a written guaranty of payment, absolute in its terms. Such an unauthorized delivery to the payee and its subsequent transfer to the plaintiffs, the present holders, does not make the note subject to defenses by the makers, providing the plaintiffs are holders of the note in due course, without notice, for value. It simply compels the plaintiffs to show that they are such holders. The possession of the note alone, duly indorsed to them, is not sufficient to protect them as against the showing of an unauthorized and fraudulent delivery and putting into circulation. Such a showing shifts the burden upon them to show that they are bona fide holders. If they succeed in showing that they are such bona fide holders, they are protected as against any defenses in favor of the makers. The makers having permitted the note regularly signed by them to remain in the agent's hands, and trusted him with its possession for the purpose of procuring the other signatures, cannot complain of his breach of trust, and they should be the sufferers, rather than those who innocently purchased the note without any notice of the manner in which it was put into circulation. The rule in cases of notes delivered without authority, when held by bona fide holders, is the same as in cases of notes thus held that were fraudulent in their inception. The good-faith holder is protected against existing equities or defenses in favor of the makers upon his showing that he holds as an innocent purchaser, after having parted with a valuable consideration therefor without notice and before maturity. *Vickery* v. *Burton*, 6 N. D. 245, 69 N. W. Rep. 193; *Knowlton* v. *Schultz*, 6 N. D. 417, 71 N. W. Rep. 550; *Mooney* v. *Williams*, 9 N. D. 329, 83 N. W. Rep. 237; *Landauer* v. *Improvement Co.*, (S. D.) 72 N. W. Rep. 467; *Dunn* v. *Bank*, (S. D.) 77 N. W. Rep. 111; *Bank* v. *Barber*, (Iowa) 9 N. W. Rep. 890; *Bank* v. *Dakin*, (Kan. Sup.) 39 Pac. Rep. 180, 45 Am. St. Rep. 299; *Bank* v. *Flath*, 10 N. D. 291, 86 N. W. Rep. 867; *Smith* v. *Livingston*, 111 Mass. 342.

It now remains to be considered whether the plaintiffs are holders of the note in suit in due course of business for value, without notice of any defenses claimed thereto. Under the verdict of the jury, there was no extension of the time of payment of the the indebtedness from the payee of the note to the plaintiffs. No money or property was paid or delivered to the payee at the time of the transfer. There was no new contract entered into in express terms between the payee and plaintiffs at the time. The indebtedness from the payee to the plaintiffs was a pre-existing one, and there was no change in the status of such indebtedness by virtue of such transfer. The plaintiffs parted with nothing nor did the payee

receive anything at the time by virtue of such transfer of the note. Under these facts, concerning which no contradiction arises, are the plaintiffs innocent holders of the note for value, without notice, and in the usual and ordinary course of business? That the note was not due at the time of its receipt by the plaintiffs is conceded. It is conceded by the plaintiffs' attorney that, if they are not such bona fide holders, no recovery can be had by them in this action. The defendants claim that no recovery can be had against them for the reason that the plaintiffs parted with nothing of value, and did not incur any new obligation, at the time the note was received by them. The plaintiffs claim a recovery by reason of the fact that by the indorsement of the note to them by a guaranty absolute in form they became a party to the note, and such guaranty necessarily incurred upon them the duties, responsibilities, and obligations of a holder of negotiable paper, and that by assuming such duties an obligation was assumed by them which brings them within the definition of the words "valuable consideration," laid down in the statute. Such definition is as follows: "A valuable consideration is a thing of value parted with or a new obligation assumed at the time of obtaining a thing, which is a substantial compensation for that which is obtained thereby. It is also called simply value." Section 5130, Rev. Codes. "An indorsee in due course is one who in good faith, in the ordinary course of business and for value before its apparent maturity or presumptive dishonor and without knowledge of its actual dishonor, acquires a negotiable instrument duly indorsed to him or indorsed generally, or payable to the bearer, or one other than the payee who acquires such an instrument of such indorsee thereof." Section 4884, Rev. Codes.

The question is therefore presented whether the plaintiffs are indorsees in due course, they having taken the note simply as collateral to a pre-existing debt, without entering into any new contract whatever, save such as devolved upon them, if any, by operation of law, by virtue of becoming holders thereof under the guaranty of payment indorsed thereon and duly signed by the payee. The fact that this note was transferred under a guaranty of payment, and not by indorsement in blank or to another's order, is immaterial, as the holders, by virtue of the transfer by a guaranty of payment, are indorsees in due course in either case, if they bring themselves within the provisions of the statute defining indorsees in due course. *Dunham* v. *Peterson*, 5 N. D. 414, 67 N. W. Rep. 293, 36 L. R. A. 232, 57 Am. St. Rep. 556.

Upon the question of the rights of holders of negotiable paper taken in due course before maturity as collateral security for a pre-existing debt, there is a radical conflict of authority. The courts sustaining the right of the holders to recover in such cases as against equities or defenses in favor of the holders, do so, generally, upon the ground that, by becomng holders of such negotiable paper through indorsement, they become parties to it, and as such assume

obligations in reference to the enforcement of the same. *Brooklyn City & N. R. Co.* v. *National Bank of the Republic,* 102 U. S. 14. 26 L. Ed. 61. Those courts denying the rights of such holders to recover as against defenses in favor of the makers do so upon the ground that the holders parted with nothing in the nature of a new consideration when they acquired such note or other negotiable paper; that merely accepting the note as collateral security for a pre-existing debt, without any agreement for extension of time or forbearance of some kind, and without making any new promise, so far as the original debt is concerned, or any new obligation, is not receiving the collateral for anything of "value," within the meaning of that term as laid down in the statute or the law merchant. *Coddington* v. *Bay,* 20 Johns, 637, 11 Am. Dec. 342. In this case the guaranty of payment was unconditional. If the note was not paid at maturity, the guarantors became absolutely liable thereon. In such event the plaintiffs were not compelled to proceed against the makers of the note. Failure to do so, or delay in doing so, would not exonerate the guarantors. Section 4646, Rev. Codes. Upon the maturity of the note the plaintiffs could proceed against the guarantors upon the guaranty, or against the Leeds Importing Company upon its original obligation to the plaintiffs. There were no prior indorsers to be held by protest in case of nonpayment. Under the verdict of the jury and the evidence in the case, no new obligation was undertaken by the plaintiffs as a matter of fact, and none developed upon them as a matter of law. They were, therefore, not indorsees in due course of business, and did not acquire the note as such, within the meaning of § § 5130 and 4884, quoted herein, and did not incur any new duty in becoming guarantees of the note. It is said that such holders of commercial paper acquired as collateral security for payment of pre-existing ogligations should be protected in order to maintain the absolute integrity and stability of negotiable paper so negotiated before maturity. Holders of negotiable notes or paper by indorsement before maturity are never protected against defenses against such notes in favor of the makers, unless the same were acquired for value or upon some benefit conferred or obligation incurred. No reason is apparent why the rule should be enlarged in cases where such notes are acquired as collateral security. The language of the statute will not sustain such a construction. Our decision in this case is based upon the sections of the statute quoted, construed in reference to the particular facts in this case, to the effect that there was no value given or duty incurred when the note was taken by the plaintiffs.

A different question, not necessary to be decided in this case, would be presented had plaintiffs acquired this note by guaranty or indorsement, where prior indorsements had been made of the note. In such case the duty would devolve on the plaintiffs to see that such prior indorsers were duly charged by demand notice,

and the note protested in case of nonpayment. In this case the guaranty was unconditional; protest, demand, and notice of nonpayment having been waived by the terms of the guaranty, although without such waiver no duty in reference thereto devolved on the guarantees. In the leading case, holding that the holders of commercial paper duly indorsed to them are protected against defenses in favor of the makers, when such paper is held as security for a pre-existing debt, the supreme court of the United States says: "It [plaintiff] received the note under an obligation imposed by the commercial law to present it for payment and give notice of nonpayment in the mode prescribed by the settled rules of that law. We are of the opinion that the undertaking of the bank to fix the liability of prior parties by due presentation for payment, and due notice in case of nonpayment,—an undertaking necessarily implied by becoming a party to the instrument,—was a sufficient consideration to protect it against equities between the other parties of which it had no notice." *Brooklyn City & N. R. Co.* v. *National Bank of the Republic,* 102 U. S. 14, 26 L. Ed. 61. Such is the reason given by many courts for holding that a pre-existing debt is a good consideration to sustain the rights of holders of paper indorsed as security for such pre-existing indebtedness. But we are not considering or deciding a case based on such facts. In this case the plaintiffs assumed no new responsibility, duty, or obligation when they took this note, and therefore parted with no value for it, and are not holders in due course, within the meaning of the statute quoted above. The note in suit did not mature until nearly 2½ years after its transfer to the plaintiffs. It was given for $800, but the indebtedness of the Leeds Importing Company to plaintiffs was upwards of $15,000 at that time. Hence it does not appear that the plaintiffs could have accepted any immediate obligation as holders thereof towards its collection. Our decision is based upon the fact that the plaintiffs did not acquire this note for value, as defined in the provisions of the Code cited, and incurred no obligations by acquiring it. The plaintiffs have failed to show that they are indorsees of the note in due course, as defined in such statute.

The order of the district court is affirmed. All concur.

(88 N. W. Rep. 567.)

JAMES THOMPSON *vs.* GEORGE THOMPSON.

Opinion filed Dec. 20, 1901.

Claim and Delivery—Arrest and Bail.

In an action in claim and delivery brought for the purpose of securing possession of mortgaged personal property, in which it is claimed that defendant has concealed such property with intent to deprive the plaintiff of the benefit of his security, *held*, that an order of arrest and bail may be issued under subdivision 3 of § 5304, Rev. Codes.

Vacation of Order for Arrest.

On an application to vacate an order of arrest in such a case, the evidence is considered as recited in the opinion, and *held* to warrant a vacation of the order of arrest and defendant's discharge from custody.

Fraudulent Concealment of Mortgaged Chattels.

A concealment, within the meaning of such section, signifies to hide or to secrete with intent to deprive the mortgagee of his security.

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

Action by James Thompson against George Thompson. From an order vacating an order of arrest, plaintiff appeals. Affirmed.

S. E. Ellsworth, for appellant.

Jerome Parks, for respondent.

MORGAN, J. This is an appeal from an order made by the district court of Stutsman county vacating an order of arrest in a civil action theretofore made by that court. Such order of arrest was made in an action in claim and delivery after an attempt had been made to procure the possession of the personal property described in the claim and delivery papers, and such attempt had failed. The claim and delivery action was brought to recover possession of two bay mares, 8 years old, weight 1,200 pounds, on which plaintiff held a chattel mortgage to secure payment of two notes, one then due, and the other not due until November, 1901. The order of arrest was issued upon an affidavit, and upon the complaint, and all other papers in the claim and delivery action, which were expressly made a part of the affidavit. This affidavit, after stating facts making out a cause of action for the possession of the property described, contained the following allegations pertaining to the grounds for praying for the order of arrest, to-wit: "Said undertaking, affidavit, and notice in claim and delivery were, on the 16th day of January, 1901, placed in the hands of the sheriff of Stutsman county, who, under and by virtue thereof, on the 17th day of January, 1901, attempted to seize the property described for the purpose of holding and delivering the same as required by law. Thereupon the said defendant, George Thompson, concealed and removed, and disposed of so that it could not be found, and cannot be found and taken by said sheriff, and with the intent that it should not be found and taken, and with the intent to deprive the plaintiff of the benefit thereof, part of the propery described in such affidavit." After reciting that the sheriff made diligent search and inquiry around defendant's premises and in the neighborhood of his residence for the mares described in the affidavit, the affidavit alleges: "The said defendant, George Thompson, in answer to plaintiff's demand for possession of said mares, declared that they had been taken to the woods (meaning thereby the forest region of the state of Minnesota), and that, if plaintiff found them,

he would have to travel a long way." Upon this affidavit and the papers made a part thereof, an order of arrest was issued, and the defendant arrested thereunder, the plaintiff having given a bond in the sum of $1000 as provided by § 5307, Rev. Codes, and the sheriff ordered to release said defendant from such arrest upon his furnishing a bail bond in the sum of $400. The defendant did not furnish such bond, and was kept in custody until released by the order appealed from on March 9, 1901. On said March 9th, the defendant was brought before the court on a motion for his discharge from such arrest, specifying in his notice that such motion "will be made on all papers filed in said action and on the affidavits of George Thompson, William Armstrong, Andrew Thompson, and P. W. Eddy." On such hearing the affidavits of said persons were read, their substance being as follows: A positive denial of having concealed or disposed of the mares on which plaintiff holds a mortgage; a denial by defendant and Andrew Thompson that defendant used the language contained in plaintiff's affidavit, that the mares were in the woods, and that he would have to travel a long way to get them. Three witnesses testified that the mares were, at the time of the plaintiff's and the sheriff's visits to defendant's premises, at or around such premises, and had been there during all the time since the mortgage was executed. That such mares were not correctly described in such mortgage, and that in consequence of such incorrect description the sheriff did not recognize or find them. The defendant did nothing whatever to hinder the sheriff from taking them at that time. That at that time defendant offered to pay the note then due, with costs, but plaintiff refused such offer unless defendant would secure the note not due by further security. That, after the sheriff had failed to find and levy on such mares, defendant was arrested at the instance of the plaintiff for removing mortgaged property, and waived examination on such charge, and was placed under bonds to appear for trial at the district court. That after such arrest plaintiff brought another action against defendant on a money demand on the note due, being the same note described in the mortgage, and recovered judgment thereon. That defendant thereupon paid such judgment in full, with costs. That there exists great animosity on the part of the plaintiff against defendant for the reason that defendant placed an attachment upon a stallion belonging to the plaintiff, and refuses to release such attachment, and that his refusal to release such attachment is the cause of plaintiff's bringing such proceedings against the defendant. The plaintiff offered in evidence and read affidavits to rebut the showing made by the defendant by the affidavits, the contents of which have just been recited. The affidavits on plaintiff's behalf showed with great particularity the diligence used by himself and the sheriff to find the property described in his mortgage. To show a concealment of such property, his affidavit contained the following facts which are given as recited in the affidavit, viz.: "I

followed him [defendant] into the stable, and told him I wished to see the two mares described in his mortgage. He answered: 'If you see them you will go a long ways.' I then inquired, 'Where are they?' He said: 'gone to the woods.' I asked who took them there, and he replied, 'Claflin.' I inquired, 'What right had you to send them out of the state?' Then Andrew Thompson, his father, who had been standing near and within hearing during the foregoing conversation, answered: 'We have a right to do it. We had a written agreement from Tom Creath.'" Creath was the person to whom the mortgage was originally given, and from whom the plaintiff purchased it. What transpired at this interview, together with the fact that the defendant said that he did not know where the mares were at that time, and that the sheriff failed to find them after a thorough and sufficient effort to do so, is relied on by the plaintiff as a sufficient showing that the defendant concealed the property within the meaning of subdivision 3 of section 5304, Rev. Codes, providing in what cases a defendant may be arrested in civil action, which reads as follows: "In an action to recover the possession of personal property unjustly detained, when the property or any portion thereof has been concealed, removed or disposed of, so that it cannot be found or taken by the sheriff and with the intent that it should not be found or taken or with the intent to deprive the plaintiff of the benefit thereof." Before considering whether such a showing in view of defendant's evidence, would be sufficient to warrant a denial of the motion to vacate the order of arrest, we will consider other questions arising in the case in reference to the provisional remedy of arrest and bail. That such remedy may be resorted to in a claim and delivery action upon a proper showing under the section quoted is not denied. The remedy may be resorted to when there was fraud at the inception of the contract in reference to personal property, or in cases where there was no fraud when the contract was entered into, but there is fraudulent concealment of the property when the contract is attempted to be enforced. *In re Short*, 54 N. Y. Supp. 1075; *Tracy* v. *Griffin*, 50 Barb. 70; *Barnett* v. *Selling*, 70 N. Y. 492. In this case the cause of action set forth in the complaint and the cause of arrest set forth in the affidavit are not identical. The cause of action alleged in the complaint is simply one in claim and delivery, and judgment may be rendered therein without a determination of any of the facts alleged as grounds for the order of arrest. It was therefore proper for the trial court to enter upon an investigation of the question raised by the motion of the defendant as to the legality as a matter of fact upon the merits of the arrest and imprisonment of the defendant, and to decide such questions upon affidavits. Section 5330, Rev. Codes; *Johnson* v. *Florence*, 32 How. Prac. 230. After considering the affidavits presented on the motion to vacate the order of arrest, we are in entire accord with the conclusion reached by the trial court. The defendant clearly showed that he had been

guilty of no act of concealment. Conceding that everything contained in the plaintiff's showing to be true, still we find nothing to sustain the conclusion that the defendant did anything with intent to deprive the plaintiff of his security as defined in § 5304, supra. This statute is penal in its nature, and those invoking its aid must bring themselves strictly within its terms. Admitting that he sent the mares to the woods under the written consent of the mortgagee (Creath), that would not be ground for defendant's arrest. That would not necessarily be a concealment of the property with intent to deprive the plaintiff of the benefit of his security. That might be sufficient ground for the mortgagee to deem himself insecure, and justify him in commencing foreclosure proceedings by attempting to take possession of the property before the debt was all due, as he did in this case, but would not be sufficient as a ground for the imprisonment of the defendant under a statute requiring a showing of an intent to deprive plaintiff of his security before that can be justified. Even had the defendant sent the mares to the woods for a temporary purpose without the consent of the mortgagee, without any intention to defraud the mortgagee of his security, that would not alone justify the holding of the defendant in custody, nor be grounds for compelling him to give bail to keep himself from such imprisonment. Before that would be a concealment within the statute, the defendant must have done so with intent to deprive the plaintiff of his security. As against such a showing as made by the plaintiff in this case, if any evidence at all be required to overcome it, a denial of any concealment of the property by an affirmative showing by defendant and his witnesses, coupled with a showing of the absence of any intent to deprive the plaintiff of the benefit of his security, with the further affirmative showing of an offer to satisfy the debt due, overcomes such showing affirmatively. The question for decision upon a motion to vacate an order of arrest upon the merits in cases where the cause of action and the cause of arrest are not identical is, shall the order of arrest be continued in force after a consideration of all the affidavits presented on both sides? *Chapin* v. *Seeley*, 13 How. Prac. 490.

This much has been said upon the theory that "two bay mares, 8 years old, weight 1,200," were actually mortgaged by the defendant to Creath. This is plaintiff's theory of the evidence. But upon the theory that the mares that were intended to be mortgaged were incorrectly described,—which is the defendant's contention,—and that the ones intended to be mortgaged were older, and of less value, still the same conclusion would be reached. It does not appear, nor is it claimed, that the defendant was responsible for such misdescription, nor that it was done fraudulently. These old mares are clearly shown to have been on or around the premises at the time the sheriff was searching for the property described in the mortgage. If these were the ones mort-

gaged, there was no concealment of them. A concealment implies a hiding or secreting with intent to prevent the seizure of the property. Construing what was there said by the defendant with strictness against him, it cannot be held that there was a concealment of the mortgaged property without regard to which span of mares was intended to be mortgaged.

Upon a consideration of the whole evidence, we hold that the weight of it was in favor of vacating the order of arrest. We discover nothing in the record disclosing any intention on the defendant's part to deprive the plaintiff of his claim or of his security. True, there is a bitter animosity existing between these parties growing out of their business dealings, and each has done nothing towards accommodating the other. Both have stood under their strict legal rights as understood by them. If doubts existed in our minds as to where the weight of the evidence lies, we would probably not disturb the decision of the trial court. In cases of continuing or vacating orders of arrest the trial court is held to have discretionary powers, which will not be disturbed on appeal except in cases of manifest abuse thereof. *Clarks* v. *Lourie*, 82 N. Y. 580; *Liddell* v. *Paton*, 67 N. Y. 393; *Wright* v. *Brown*, Id. 1; *Towle* v. *Richardson*, 63 Vt. 96, 20 Atl. Rep. 925.

The order is affirmed. All concur.

(88 N. W. Rep. 565.)

WILLIAM C. CLOPTON *vs.* JOSEPHINE CLOPTON.

Opinion field Jan. 3, 1902.

Divorce—Jurisdiction—Answer—Decree—Vacation of Decree—Motion to Set Aside.

This action was brought to obtain a divorce from the bonds of matrimony. An answer to the complaint was filed by James E. Campbell, an attorney at law, which admitted the marriage and the plaintiff's residence in this state, but denied the cruel and inhuman treatment alleged as grounds of divorce. At the trial plaintiff offered evidence in support of his complaint, but defendant offered no evidence. A decree was entered divorcing the parties on the 2d day of February, 1899. Later, and on July 23, 1900, the defendant obtained an order to show cause why the judgment of divorce should not be vacated upon the ground of absence of jurisdiction, in this: that said James H. Campbell was without authority to appear for defendant or to file an answer in her behalf. Upon a hearing had upon the order to show cause, the trial court, after considering the evidence and hearing counsel, adjudged and ordered that the judgment should be vacated upon the ground above stated, and in the same order directed that the defendant should file an answer to the complaint, which answer was accordingly filed. This order was made on November 30, 1900. On January 22, 1901, the plaintiff obtained an order requiring defendant to show cause why the vacating order above mentioned should not be set aside, and this upon the ground that the same was obtained by fraud and deceit practiced upon the trial

court. The hearing upon the last-named order was had upon the same evidence adduced at the first hearing and upon additional evidence. *Held*, that the hearing upon the first order to show cause was not a bar to the second hearing, and this despite the fact that the same ultimate question was presented for decision at each and both of the hearings in the court below.

Second Hearing—Discretionary.

Held, further, that a second hearing of a motion upon the same state of facts is a matter resting in the discretion of the court, and in such cases leave must be obtained.

Leave Granted.

Held, further, that the hearing itself is tantamount to granting leave.

Alternative Remedies.

Held, further, that the remedy by appeal from an order, and by motion to vacate the order, are alternative remedies.

Second Hearing Sparingly Granted.

Held, further, that the right to apply for an order a second time upon the same grounds is not a strict legal right, and leave to do so should be sparingly granted to prevent abuse and vexatious litigation.

Evidence examined, and *held* that the trial court did not err in granting the second order, which order is affirmed.

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

Action by William C. Clopton against Josephine Clopton for divorce. From an order setting aside the vacation of a judgment for divorce entered in favor of plaintiff, defendant appeals. Affirmed.

E. C. Rice and *Cochrane & Corliss*, for appellant.

Newman, Spalding & Stambaugh, for respondent.

WALLIN, *C.* J. The facts presented by the record in this case are as follows: On the 18th day January, 1899, a complaint was filed by the plaintiff in the district court of Morton county, alleging a cause of action against the defendant for a divorce from the bonds of matrimony upon the ground of cruel and inhuman treatment. Later, and on the 26th day of the same month, one James E. Campbell, a practicing attorney residing in said county of Morton, filed in said action a paper purporting to be the answer of the defendant to the plaintiff's complaint, which answer admitted that the plaintiff was a resident of this state, and denied the allegations of cruel and inhuman treatment, as alleged in the complaint. On the 2d day of February, 1899, the said James E. Campbell and the plaintiff's attorney appeared in open court, and stipulated that the court should appoint a certain person named by them as referee to take the testimony in the action, and report the same to the court; whereupon the district court by its order appointed the referee agreed upon, and upon the same day said referee filed his report, which included the testimony of the

plaintiff, and whereby it appeared that the defendant offered no testimony before said referee. Later, and upon the same day, findings were filed by the court, and a judgment was entered in the action in favor of the plaintiff, whereby the parties were divorced from the bonds of matrimony. It further appears that the defendant on the 23d day of July, 1900, appeared by one of her present attorneys, E. C. Rice, Esq., and applied for and obtained an order from said district court requiring the plaintiff to show cause on the 25th day of August, 1900, why said judgment of divorce should not be vacated and set aside, upon the ground that said James E. Campbell, who prepared and served the answer to the complaint did so without authority from the defendant. The final hearing upon the order to show cause occurred on the 30th day of November, 1900, at which hearing the parties were represented, respectively, by their attorneys, and affidavits and counter affidavits were submitted upon the issue of fact raised by the order to show cause, viz. whether the said James E. Campbell was or was not authorized to appear and file an answer in the action in behalf of the defendant. After hearing counsel, and considering the evidence submitted upon the motion, the district court entered an order dated November 30, 1900, which embraced the following language: "The court finds that the defendant never, directly or indirectly, authorized the employment of James E. Campbell to enter an appearance in this action on her behalf. The court also expresses it as its belief, from the evidence and from the statements of counsel, that Mr. Campbell acted in good faith, believing that he had authority to appear; whereupon the decree and judgment entered in the above-entitled action is set aside, and the defendant is given thirty days in which to file an answer, and the case to stand for final disposition the same as if no judgment or decree had heretofore been entered." It further appears that the plaintiff, on the 22d day of January, 1901, applied for and obtained from said district court an order requiring the defendant to show cause before that court on the 25th day of January, 1901, why the above-quoted order vacating the decree of divorce should not be set aside and annulled on the ground that the same was procured by deceit and fraud practiced upon the court. The last-mentioned order to show cause came on to be heard in the district court on the 30th day of January, 1901, and at said hearing both parties were represented by counsel, and affidavits were submitted on both sides upon the issues presented by the order to show cause; whereupon said court, after hearing counsel and considering the proofs submitted at such hearing, entered an order in the action, which, so far as material, declares that the order of November 30, 1900, "was procured by and through the fraud and deceit practiced by the defendant upon the court, and that said order was improvidently made." Said order further recited that said James E. Campbell was defendant's attorney in the action, and did, when the answer was filed, have authority to file

an answer in defendant's behalf. Said order further directed that the vacating order of November 30, 1900, be set aside and annulled, and that the judgment of divorce entered on the 2d day of February, 1899, "remain and be in full force and effect as if said order of November 30, 1900, had not been made." From the order dated January 30, 1901, setting aside the former order and reinstating the judgment, the defendant has appealed to this court.

In this court it is contended by counsel for the appellant that the order appealed from must be reversed, for the reason that the district court, under established principles of law and practice, was devoid of lawful authority to make the order, and this for the reason, as counsel argue, that the questions involved and decided by the order appealed from had been previously fully adjudicated by the district court upon the order to show cause obtained by the defendant, and which culminated in the order of November 30th vacating the judgment. In support of this proposition, the appellant's counsel argue that the ultimate question presented to the district court for solution by the two orders to show cause was identical, viz. one of jurisdiction in the district court over the person of the defendant, and that the pivotal fact to be determined upon both applications to the court below was whether the attorney who assumed to represent the defendant in the action, and who filed an answer to the complaint in her behalf had or had not authority to do so; and, upon the assumption that these premises are made manifest by the record, counsel proceed to the conclusion that the question of jurisdiction is res judicata, and therefore cannot be relitigated upon the last order to show cause (that obtained by the plaintiff), for the reason that it was fully adjudicated upon the order previously obtained by the defendant. But we think this postulate of counsel is fairly debatable. From our standpoint the record develops many dissimilar features in the two applications for relief to the district court. Upon the first order to show cause the defendant attacked a final judgment entered in the district court, and did so solely upon jurisdictional grounds. Upon the second order (that obtained by the plaintiff), an interlocutory application was made to the district court to set aside an order in the action, which order plaintiff claimed was obtained by means of false testimony and a deceit practiced upon the court by the defendant. We are far from being convinced that these dissimilar features do not distinguish the two applications in such a way as to wholly differentiate them from each other; but for the purposes of the case it will not, from our point of view, become necessary to determine this question.

In deciding the case we shall accept the premise of the appellant's counsel, and concede that the ultimate question presented by the last order to show cause was the same as that presented by the first, viz. a question of jurisdiction. But in disposing of the case it must be further premised that additional evidence of a convincing char-

acter was presented upon the hearing of the last order, which evidence was discovered by the plaintiff after the first order had been made and the judgment had been vacated. We are therefore confronted with a case where a second motion is made in the district court upon the same grounds and state of facts, and to obtain the same ultimate relief, sought by a prior motion, which had been decided; the only difference in the two motions being that the one last made was supported by additional evidence. The law question presented is whether this practice can be permitted. It is contended that, inasmuch as the order which vacated the judgment was an appealable order, the plaintiff was limited to that mode of reviewing the action of the district court. Upon this question there is some conflict of judicial opinion, but it seems that the weight of authority is arrayed in support of the proposition that the remedy of appeal and that by motion to vacate an order are alternative remedies. See *Belmont* v. *Railroad Co.*, 52 Barb. 637; *Aiken* v. *Peck*, 72 Ga. 434; 15 Enc. Pl. & Prac. 356; also 14 Enc. Pl. & Prac. 87.

It is further contended that the question decided upon the first order to show cause, i. e. that of juridiction, is res judicata, and hence the same question could not lawfully be relitigated in the trial court upon the hearing of the second order to show cause. Here again there is presented a conflict in the adjudications, but it seems that the weight of authority, as well as the better opinion, is that a court of superior jurisdiction, unless restricted by statute, has such control of its own orders that it may vacate or modify the same in furtherance of justice, and also determine the conditions upon which they shall be operative. Nor is the doctrine of res judicata applied to orders with the same strictness as to judgments. See 15 Enc. Pl. & Prac. 349; *Johnston* v. *Brown*, 115 Cal. 694, 47 Pac. Rep. 686; *Bowers* v. *Cherokee Bob*, 46 Cal. 280, 281; *Jensen* v. *Barbour*, 12 Mont. 566, 31 Pac. Rep. 592; 14 Enc. Pl. & Prac. 176; *Page* v. *Page*, 77 Cal. 83, 19 Pac. Rep. 183.

It has been said that what may be done by motion may be undone by motion. See *Belmont* v. *Railroad Co.*, 52 Barb. 637; *White* v. *Munroe*, 33 Barb. 651. The rule in New York, which we think is the better rule, is well settled that a new motion for the same relief is a matter of right, and may be made without leave of court, when the motion is made upon a new state of facts; but, on the other hand, where a new motion is made upon the same state of facts as those presented on a previous motion, that the hearing of such new motion is discretionary with the court, and leave must be obtained to hear the same. The rule that leave must be first obtained before or at the second hearing is the established rule in Minnesota. See *Carlson* v. *Carlson*, 49 Minn. 555, 52 N. W. Rep. 214.

In the case at bar no objection appears to have been made by the defendant to the second hearing in the district court, nor do we think that such objection, if made, would properly have been sus-

tained. Before the second application was heard upon its merits the district court, upon proper application therefor, had by its order to show cause directed that the application should be heard before the court at a time and place specified in its order. We think this order was tantamount to an express leave of court to present the matter a second time to the court. But, independently of this view, it appears to be the better opinion that the fact of hearing the same matter a second time furnishes irrefragable proof that the court either before or at the hearing, had given leave to present the matter anew. *Harris* v. *Brown,* 93 N. Y. 390. See *Jensen* v. *Barbour,* 12 Mont. 566, 31 Pac. Rep. 592; also 14 Enc. Pl. & Prac. 186. The rule requiring previous leave is one of mere practice, and may be relaxed. Id. But it should be kept in mind that the rule allowing a second hearing of a motion upon the same state of facts which was presented at a former hearing rests in the discretion of the court, and is not a strict legal right. This rule of practice requiring leave to be granted is most salutary, and one intended to prevent the abuse which would likely ensue if litigious persons were permitted, uncurbed, to make repeated motions to the same court, based upon the same state of facts. Our conclusion is that no rule of law or practice was violated by the district court in permitting the plaintiff to move in that court to vacate the previous order obtained by the defendant, and this brings us to the merits of the order appealed from.

We are required to examine the evidence submitted at the hearing of plaintiff's order to show cause, and to determine therefrom whether the order appealed from is sustained by the evidence. This feature of the record presents no difficulties. This court, after a careful consideration of all the evidence in the record, is unanimously of the opinion that the order appealed from is sustained by an overwhelming weight of evidence. But as the evidence is voluminous, we are convinced that an attempt to analyze the same, and present it in logical order, would serve no useful purpose, and hence we shall refrain from any attempt to do so. Nor shall we, upon this appeal from an order, consider whether or not the plaintiff was, when the decree was entered, a bona fide resident of this state within the meaning of the divorce law. That question was not litigated upon the hearing had below, which culminated in the order appealed from. Moreover, the defendant, by her first answer (which we hold was filed by her authority and in accordance with her then existing desires, and pursuant to a definite arrangement made with her husband), affirmatively admitted the plaintiff's residence in this state. It is true, and this court has so ruled, that in a divorce case an admission of residence made by answer does not preclude the trial court from intervening in behalf of the state to investigate and determine the matter of the residence of the plaintiff, notwithstanding the admission in the answer. See *Smith* v. *Smith,* 8 N. D. 219, 86 N. W. Rep. 721. But in the case under

consideration the record does not show that the trial court intervened for this purpose. Upon this state of facts it must follow that the question of the plaintiff's residence, as against the defendant at least, is foreclosed by defendant's express admission of plaintiff's residence in her original answer to the complaint.

We find no error in the order appealed from, and hence the same will be affirmed. All the judges concurring.

(88 N. W. Rep. 652.)

JAMES CALDWELL *vs.* THE BROOKS ELEVATOR COMPANY.

Opinion filed Dec. 6, 1901.

Arbitration—Oath of Arbitrators.

From the evidence recited in the opinion, *held*: That arbitrators appointed in writing to adjust disputes between plaintiff and defendant were duly sworn before entering upon the discharge of their duties, and the fact that a subsequent oath taken by them and reduced to writing was defective is of no consequence.

Action on Award—Impeachment.

In an action on an award the defendant may interpose defenses of an equitable nature tending to impeach the award, but the correctness of the award upon the merits, when made in good faith, cannot be inquired into in such action.

Improper Action of Arbitrators.

If the arbitrators refused to consider evidence offered, such action, if pleaded and proven, would vitiate the award.

Intendments Favor the Findings.

Every reasonable intendment will be presumed in favor of an award.

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

Action by James Caldwell against the Brooks Elevator Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Bosard & Bosard, for appellant.

The arbitrators were not sworn according to § 5983, Rev. Codes, and therefore the award sued upon in this action is void and no judgment should have been entered upon it. *Wilkins* v. *Van Winkle*, 3 S. E. Rep. 761. The statute is mandatory and failure of the arbitrators to take the oath prescribed by this section is jurisdictional and the award rendered void and incapable of supporting a valid judgment. *Combs* v. *Little*, 3 Green, (N. J.) 310, 40 Am. Dec. 207; *Inslee* v. *Flagg*, 2 Dutch. (N. J.) 368, 69 Am. Dec. 580; *Overton* v. *Alpha*, 13 La. Ann. 558; *Frizzell* v. *Fickes*, 27 Mo. 557; *Toler* v. *Hayden*, 18 Mo. 399; *Fassett* v. *Smith*, 41 Mo. 516.

John P. Galbraith, for respondent.

Appellant appeared, participated in the arbitration, produced evi-

dence before the arbitrators after it had heard the oath administered to them. The appellant is estopped from denying that the arbitrators were properly sworn. *Kelsey* v. *Darrow*, 22 Hun. 125; *Greer* v. *Canfield*, 56 N. W. Rep. 883. This is not a motion to affirm the award of the arbitrators, but an action on an award made by them. The award was good as a common law award, and even though the arbitrators were not sworn at all appellant would not be entitled to a reversal in this case. *Burnside* v. *Whitney*, 21 N. Y. 148; *Browning* v. *Wheeler*, 35 Am. Dec. 617; *Howard* v. *Sexton*, 4 N. Y. 157; *Greer* v. *Canfield*, 56 N. W. Rep. 883.

MORGAN, J. This is an action upon an award found by arbitrators duly appointed by the parties in writing. The complaint alleges, in substance, as follows: that the plaintiff and defendant, on February 28, 1898, entered into an agreement in writing, which said agreement was set out in the complaint at length, being the submission of the differences of the parties to arbitration. Such agreement or submission recited that differences and disputes had arisen between the plaintiff and the defendant as to business matters pending between them; that the plaintiff claimed that the defendant was indebted to him on account of services performed by him for the defendant, and the defendant claimed that the plaintiff was indebted to it on account of a breach of a certain contract entered into between them, wherein the plaintiff guarantied weights and grades of all wheat purchased by him as agent of said defendant; that such parties therein agreed to submit all such differences and disputes to three arbitrators, to be chosen as prescribed in such agreement; that such arbitrators should meet, and, after being sworn, should hear the allegations and evidence of the parties, and make an award thereon, which award should be filed in the office of the clerk of the district court of Grand Forks county, and judgment entered thereon. The complaint further alleges that such agreement or submission was duly acknowledged by said parties, and that three arbitrators were duly appointed by them as therein prescribed; that the arbitrators were duly sworn, and entered upon the discharge of their duties; that plaintiff and defendant appeared before such arbitrators, and presented their differences and disputes to them; that, after hearing such evidence, and considering the same, the arbitrators duly decided and awarded that the plaintiff should have and recover from the defendant the sum of $262; that such award was duly filed in the office of the clerk of the district court of Grand Forks county, and the parties notified of such award and filing. Judgment is demanded against the defendant for such sum of $262, with costs and disbursements. The answer denies that the arbitrators were duly sworn. It further alleges that there existed between said parties a contract, wherein the plaintiff guarantied the weights and grades of all the wheat bought by plaintiff as agent of the defendant at its elevator; that such contract was offered in evidence at the hearing before such arbitrators; that they refused

to consider the same, or did not give to it its correct legal effect and interpretation. The trial court made findings of fact and conclusions of law favorable to plaintiff, and ordered judgment in his favor for the sum of $262. Defendant appeals from such judgment, and demands a trial de novo, and a review of all the evidence in this court.

The award was made on the 17th day of March, 1898, and filed in the office of the clerk of the district court of Grand Forks county immediately thereafter. From the time of the filing of the award in said clerk's office no action or proceeding in reference thereto was taken by either of the parties until this action was commenced in March, 1900. The plaintiff did not move, as he might have done, to have the award affirmed under section 5986, Rev. Codes, 1899; nor did the defendant move to vacate or modify the same as it might have done under sections 5987 or 5988, Id. The year during which such proceedings might have been taken was allowed to pass without anything being done by either party towards affirming or vacating the award. The defendant makes no claim against the validity of the award except as alleged in the answer, nor is any question raised as to the bringing or maintenance of the action in the present form. The defendant confines its attacks on the award to the contention that the arbitrators were not sworn, and that they did not give due effect to nor consider the contract of employment between the plaintiff and the defendant company. The facts in regard to the swearing of the arbitrators are that the arbitrators met for conference, and before proceeding with their duties the matter of being sworn was considered. A notary public was sent for, who appeared before the arbitrators, and then and there administered an oath to them by reading the same from the statute. Afterwards, and before the award was signed, the arbitrators concluded that the oath should have been reduced to writing. It was thereupon decided that the notary should write out an oath, which he did. This oath was then signed by the arbitrators, and attached to and made a part of the award as filed in the clerk's office. The written oath did not conform to the terms of the statute. The statute provides that the arbitrators must be sworn to make a "just award according to their understanding." Section 5983. As written out by the notary, the oath did not contain a statement that they would make a just award. The word "just" was omitted therefrom.

In this case we need not determine whether such an oath was fatally defective or not, or whether the defect in its terms was waived; as, under the view we have have taken of the evidence, the arbitrators were duly sworn by the notary before they commenced their deliberations. The facts in regard to swearing the arbitrators before they entered upon a performance of their duties are as follows, so far as material: The plaintiff testified: "I was

present when the arbitrators were sworn. * * * Mr. Murphy went out after a law book, to see what was to be done,—how to do it. The arbitrators were sworn at that time, and went ahead and considered the matter." Mr. Murphy, one of the arbitrators, testified: "At the time the arbitrators met for conference they were sworn by Mr. Dennis. Question. You may state whether or not Mr. Dennis, who administered the oath, had in his hand the statute of the state of North Dakota. Answer. He did. I don't know to what part of the statute it was opened, but he turned to that part with reference to the oath, and read it from the statute. Exhibit A is the oath I signed. I think this was made up afterwards, and we signed it. It was made up after we had made up the award. I remember that they sent out for Mr. Dennis, and I remember him coming in there with the Code and reading the oath to us; but whether that is exactly like the Code or not I don't know." Mr. Bendeke, an arbitrator, testified: "When the arbitrators met, we talked up the question of being sworn, and called Mr. Dennis in. He swore us. The first thing he had to do was to look up the Code. We looked up the Code for the legal form to be used in a court of arbitration. The oath was administered by Mr. Dennis. He read it to us, and afterwards wrote it down. I don't remember whether it was written down before we looked through the different papers or afterwards. He read it from the Code or a law book. I don't remember about the form of it. Defendant's Exhibit A is the oath we signed. Afterwards or before, I can't say. Whether before taking the testimony or looking through the evidence, I am not sure. I remember we were sworn by what Mr. Dennis read to us, and we afterwards signed what he wrote out." Mr. Dennis, the notary public, testified: "I examined the Code at that time to see what was required of the arbitrators. At the time I administered the oath, I read it, I think, from the Code. We were at a loss to know what the procedure was in the matter, and I administered the oath in accordance with the instructions in the Code. Question. When was it that defendant's Exhibit A was made up and signed by the arbitrators? Answer. As I remember, it was after they considered the evidence in the case. That form was made up because we understood it was required by the statute." On cross-examination he testifies that the oath administered to them was the same oath that was written down by him, so far as contents are concerned. Upon this testimony we have no hesitation in holding that there is no showing made that the oath was not administered in conformity with the requirements of the statute as to the contents of the oath. The oath was not required to be reduced to writing, and, if orally administered to the arbitrators, substantially in compliance with the terms of the statute, the award by the arbitrators can be sustained so far as the oath is concerned. The testimony greatly preponderates to the effect that the proper oath was read by the notary from the statute when administered. The evidence

of the notary is so conflicting that his final conclusions that both oaths were the same in terms does not convince us that such was the fact. Correctness and regularity in official acts are presumed. To hold that the oath was not correctly read would virtually be assuming irregularities in place of presuming regularities. None of the witnesses recollect the precise terms of the oath administered, which is not surprising in view of the lapse of nearly two years since it was administered. That the notary concludes at last that the written oath was the same as the oral one is not based upon any fact refreshing his memory, but seems to be a mere conclusion. The fact that the oath afterwards drawn up and signed was different of no consequence. The trial court found expressly that the arbitrators were duly sworn, and from the record we sustain such finding. The rule to be followed in considering the validity of awards is that all reasonable presumptions will be indulged to uphold their validity and give them effect. Morse, Arb. 411; *Wood* v. *Treleven*, 74 Wis. 580, 43 N. W. Rep. 488.

The remaining question to be considered relates to the allegation of the answer that the arbitrators did not consider the contract of employment between plaintiff and defendant while making up their award or at any other time. This is tantamount to alleging that they refused to consider evidence offered for consideration to them. In the answer defendant demands affirmative relief to the effect that the award be declared a nullity, for the reason that such evidence was not considered. Under statutes similar to ours, such answers have been upheld as stating defenses to actions brought upon awards. Such answers are not construed as allowing a review of the award upon the merits, but as tending to impeach it upon equitable considerations. The answer therefore states a defense. *Canfield* v. *Insurance Co.*, 55 Wis. 419, 13 N. W. Rep. 252; *Van Cortlandt* v. *Underhill*, 17 Johns. 405; *Day* v. *Hamomnd*, 57 N. Y. 479, 15 Am. Rep. 522. Upon a consideration of the evidence, however, we find no foundation, as a matter of fact, for such allegations of the answer. The evidence is distinct and pointed to the effect that the contract was before the arbitrators, and was considered by them. The award was found in favor of the plaintiff, after disallowing some of the plaintiff's claims. The award found in favor of the plaintiff was a balance found due and struck in his favor. Mr. Murphy testifies: Mr. McKinney was a witness for them [defendant], and, while he said there was a shortage in grades he couldn't furnish any tangible proof of it. * * * We had no way of knowing that the company had been any loser by the grades, so we didn't allow him [plaintiff] anything for overweights, and did not allow them any thing for under grades. We offset one against the other." Nothing can be clearer than this testimony to show that the contract was considered by the arbitrators in making the award. We are not determining whether they decided correctly or not. On the merits, their decision is final, so far as this

case is concerned. 2 Am. & Eng. Enc. Law (2d Ed.) p. 778; *Goddard* v. *King*, 40 Minn. 164, 41 N. W. Rep. 659. Submission of controversies to arbitrators for decision are favored as a speedy and inexpensive mode of adjusting differences, and every reasonable intendment will be made in favor of awards. 2 Am. & Eng. Enc. Law (2d Ed.) p. 766; *Wood Working Co.* v. *Schneider*, 119 N. Y. 475, 24 N. E. Rep. 4. As said in *Call* v. *Ballard*, 65 Wis. 188, 26 N. W. Rep. 548: "True, this is giving to the award a liberal construction; but such is the construction we are required to give." The award signed and filed by the arbitrators recites: "Whereas, the said Brooks Elevator Company and the said James Caldwell came before the said arbitrators, and submitted evidence in support of their respective claims, and said arbitrators having duly considered all of said evidence and allegations: Now, therefore, we * * * do find * * * that said Brooks Elevator Company is justly indebted to said James Caldwell on the matter of difference between said parties as set forth in the agreement for submission to arbitration," etc. There is total failure to show by the defendant that the arbitrators did not consider all the evidence before them respecting the matters in difference as submitted to them.

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

(88 N. W. Rep. 700.)

POWERS DRY GOODS CO. *vs.* NELS NELSON.

Opinion filed Nov. 9, 1901.

Attachment—Lien—Discharge in Bankruptcy.

The lien of an attachment on personal property of a bankrupt is not destroyed by a mere discharge of the debt secured by the lien, through a discharge under the present national bankruptcy act; and, unless such lien is one which is itself declared void by said act, it may be enforced, through a modified form of judgment, as against the property on which the lien exists.

Exempt Property in Bankrupt.

Under § 70 of the national bankruptcy act, the title of the bankrupt's property passes to the trustee in bankruptcy, except as to property which is exempt under state laws. As to such exempt property the jurisdiction of the bankruptcy court is limited to determining whether or not it is exempt, and the title thereto remains in the bankrupt, and, when set apart as exempt by the bankruptcy court, is subject to the jurisdiction of the state, and not the federal, courts.

Rights of Trustee in Bankruptcy.

Section 67 f of said act, which provides that certain liens upon the property of a bankrupt shall be null and void when he is adjudged a bankrupt, and that the property covered thereby shall pass to the trustee as a part of the estate of the bankrupt, does not apply to an attachment lien upon property which is exempt, and over which the bankruptcy court has disclaimed jurisdiction by setting it aside to the debtor as exempt.

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

Action by the Powers Dry Goods Company against Nels Nelson. Judgment for plaintiff. Defendant appeals. Affirmed.

George H. Gjertsen and *L. B. Everdell,* for appellant.

Purcell & Bradley, for respondent.

YOUNG, J. The complaint states a cause of action for goods sold and delivered by plaintiff to defendant between February 1 and May 6, 1900. A warrant of attachment was issued at the commencement of the action under subdivision 8, § 5352, Rev. Codes 1899, which subdivision provides that an attachment may be issued and levied upon personal property sold, in actions to recover the purchase price therefor. Under such warrant of attachment the sheriff of Richland county, wherein the action was pending, levied upon the goods sold, and also other personal property, and took the same into his possession. The defendant, in an amended answer, pleads as his sole defense a discharge in bankruptcy by the district court of the United States for the district of North Dakota, which discharge is claimed to have had the effect of canceling both the debt sued upon and the lien of the attachment as well. The case was tried to the court without a jury, upon a written stipulation of facts. The trial court found, as a conclusion of law from the facts found, "that the plaintiff is entitled to judgment against the defendant for the amount claimed in the complaint, with interest and costs; such judgment, however, to be enforced solely against the property attached herein and held by the sheriff of Richland county * * * under the warrants of attachment herein." In pursuance thereof, a qualified form of judgment was entered, providing that it should be enforced only against the property held by the sheriff under the warrant of attachment, and further providing that upon a sale of personal property, and a return of execution showing such sale and the amount realized from said property, "said judgment should thereby be satisfied in full." The defendant has appealed from the judgment, and in a settled statement of the case, containing all the evidence offered, demands a review of the entire case by this court.

The case turns upon facts which are not in dispute. So far as they are material to a determination of the questions involved, they may be stated chronologically as follows: On June 23, 1900, the defendant filed a petition to be adjudged a voluntary bankrupt, together with a schedule of all his assets and liabilities, with the clerk of the district court of the United States for the district of North Dakota, in conformity with the acts of congress relative to bankruptcy. The plaintiff was listed as a creditor, and his claim was listed in the schedule of liabilities. The present action was commenced in the district court of Richland county on June 27, 1900; and on the following day the sheriff levied upon the goods sold by plaintiff, and took them into his custody. On

June 30th, 1900, the district court of Richland county, upon defendant's application setting forth the pendency of the bankruptcy proceedings, stayed all further proceedings in the action until further order. On July 2, 1900, defendant was duly adjudged bankrupt by the United States court. On August 6, 1900, the United States court made an order requiring the trustee in the bankruptcy proceedings, Charles G. Bade, to set aside, under the acts of congress and the laws of the state, as exempt, to the defendant, and as his own property, certain personal property, including all of the chattels taken by attachment in this action. On August 9th thereafter said trustee set aside all of said property as exempt, as required by said order. On August 22, 1900, the plaintiff caused a second warrant of attachment to be issued, and on the following day the same was levied by the sheriff upon the same property seized under the first attachment, which property had continued in his actual custody at all times after its seizure in the first instance. On September 22, 1900, the United States district court made an order in the bankruptcy proceeding discharging the defendant from all debts and claims which existed on June 23, 1900, the day the petition was filed, which were provable by the bankruptcy act against his estate, excepting therefrom such debts as are by law exempt from the operation of a discharge in bankruptcy. It is stipulated that the facts alleged in plaintiffs complaint are true, and, further, that the property seized by the sheriff under the attachment was in part property sold to defendant by plaintiff. It is also stipulated that during the pendency of the bankruptcy proceedings the defendant made a petition in said bankruptcy court for an order directing the trustee to set out as exempt all of the personal property by him listed in his schedule, and that such order was made on August 6, 1900, as hereinbefore stated. It is also agreed that the question of the right of the defendant to claim the property attached as exempt as against the claim of the plaintiff has never been litigated or determined, unless the same was, as matter of law, determined or litigated in the bankruptcy proceedings in which the plaintiff took no part. The judgment here appealed from was rendered and entered on March 26, 1901.

Defendant contends that his discharge in bankruptcy by the United States court on September 22, 1900, was a complete bar to the recovery of any judgment whatever by plaintiff. This claim proceeds necessarily upon the theory that both the debt and the lien of the attachment were wiped out of existence by the discharge of the bankruptcy court. As to the debt sued upon, it is conceded that it was provable at the time defendant filed his petition, and that it was not of such a nature as to be exempt from a discharge. So far, then, as the debt stands alone, unaided by the lien of the attachment, it clearly was not enforceable as against the defense of a discharge. But the discharge of the lien is an entirely different matter. Counsel for defendant urge that, if payment

of the debt cannot be enforced directly, it cannot be enforced through the aid of an attachment lien. It is claimed that, inasmuch as an attachment is generally defeated by anything that defeats the recovery of a valid money judgment, the attachment lien in this case must fall with the failure of the right to a money judgment. This rule clearly does not apply to liens securing debts which have been discharged by proceedings under the national bankruptcy act. A discharge under that act cancels some debts, and preserves others, according as they come within its provisions. It also provides that certain liens are rendered void and of no effect by the bankruptcy proceedings. Other liens are not disturbed. The act deals with both debts and liens, and it is now too well settled to require extended discussion that a mere discharge of the debt does not of itself discharge the lien securing it. The lien, to fail, must be one that is stricken down by the terms of the act. It is held that, where bankruptcy acts recognize the lien of an attachment as valid, "a discharge in bankruptcy does not prevent the attaching creditors from taking judgment against the debtor in such limited form as may enable them to reap the benefit of their attachment. When the attachment remains in force, the creditors, notwithstanding the discharge, may have judgment against the bankrupt, to be levied only upon the property attached." *Hill* v. *Harding*, 130 U. S. 699, 9 Sup. Ct. 725, 32 L. Ed. 1083, and cases cited. *Bank* v. *Elliot*, (Wis.) 85 N. W. Rep. 417, is directly in point. The question in that case was as to the right of a creditor to enforce the equitable lien of a garnishment when the debt sued upon had been discharged by a discharge under the present national bankruptcy act. The court, after careful consideration, reached the conclusion that he had such right. We quote at length, with approval, the following from the opinion of Judge Marshall in that case: "Whether the court errred in refusing to give appellant judgment in form against Elliott obviously depends upon whether, after the discharge in bankruptcy, and the entry of the plea by Elliott in bar of further prosecution of the main suit as to him, appellant had a cause of action, in any sense, upon which a judgment could be rendered. It is conceded that if a defendant is discharged in bankruptcy from a debt, pending proceedings to enforce it, he is entitled to plead such circumstance in bar of further proceedings for a personal judgment, if the plaintiff does not voluntarily discontinue the action, and to recover on such plea. But it is said that if an action is wholly in rem, or partly in rem and partly in personam, its status as an action to reach the res is not disturbed by a discharge of the defendant in bankruptcy, if the plaintiff's interest therein be preserved by the bankrupt act. The authorities seem to be uniform to that effect. *Roberts* v. *Wood*, 38 Wis. 60; *Bates* v. *Tappan*, 99 Mass. 376; *Bowman* v. *Harding*, 56 Me. 559; *Leighton* v. *Kelsey*, 57 Me. 85; *Ingraham* v. *Phillips*, 1 Day 117; *Jones* v. *Lellyett*, 39 Ga. 64; *Pierce* v. *Wilcox*, 40 Ind. 70; *Stoddard* v.

Locke, 43 Vt. 574; 5 Am. Rep. 308; *May* v. *Courtnay*, 47 Ala. 185; *Kittredge* v. *Warren*, 14 N. H. 509; *Munson* v. *Railroad Co.*, 120 Mass. 81, 21 Am. Rep. 498. In *Bowman* v. *Harding* it was insisted on behalf of the discharged party that he was, by the express terms of the bankrupt act, released from all his debts, and that no such discharged debt could by implication be consiered to have sufficient life to form the basis of a judgment, even in form, against him. The court thought otherwise, reasoning that the language of the bankrupt act, preserving a lien incident to a debt, by implication preserved the debt, notwithstanding its discharge, so far as necessary to make the lien effective. Speaking of the same subject, in *Leighton* v. *Kelsey*, supra, the court said, in substance, the provisions of the bankrupt act are not to be construed so as to preclude the rendition of such a judgment as is necessary to enable a lien claimant, whose interest in property is preserved to him by the act, to perfect and realize upon it. In *Bates* v. *Tappan* this language was used: 'The provisions for a full discharge * * * must be construed, as they well may be, so as not to prevent the enforcement of a lien, which the statute itself permits, by any requisite proceedings therefor which do not involve a judgment in personam. A lien by attachment can be enforced in no other way than by the qualified judgment which was rendered by the superior court, and it must therefore be affirmed.' The present bankrupt act has the same features as the act of 1867, which were the foundation of the adjudications cited. It provides that 'all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt,' etc. Section 67f. The language as clearly, by implication, preserves all liens claimed in legal proceedings, of sufficient age to be outside the four-month limit, as it expressly annuls those within such limit. The preservation of certain liens necessarily left the lien claimants free to pursue the necessary legal or equitable remedies to render them effective." See, also, *In re Blumberg*, (D. C.) 94 Fed. Rep. 476.

Having reached the conclusion that the lien of the attachment in this case was not discharged by the mere discharge of the debt, the question next presented is whether the discharge in bankruptcy did not in itself operate as a discharge of the lien. Counsel for defendant urged that it was discharged under the provisions of section 67f of the bankruptcy act, which provides that "all * * * attachments * * * obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged bankrupt and the property affected by the levy * * * shall be deemed wholly discharged and released from the same, and shall pass to the trustee

as a part of the estate of the bankrupt," etc. This section, in our opinion, has no reference whatever to the particular lien now under consideration. It is true that, when plaintiff secured its attachment lien, defendant was insolvent. But the lien was created not before the petition was filed, but afterwards; and, as will hereafter appear, the vital element of jurisdiction over the property and this particular lien was lacking in the bankruptcy court at that time, and as a consequence it was in no way affected by the bankruptcy proceedings. When the attachment was issued and levied,—and we refer now to the second attachment, which was levied August 23, 1900, and have no occasion to consider the earlier attachment,—the defendant's debt was not yet discharged, but was a valid and enforceable obligation. The levy was upon property owned by the defendant, which was not then, and never was, in the possession of the trustee,—property which neither at the time of the levy nor prior thereto constituted any part of the bankrupt's estate, subject to be administered upon by the bankruptcy court. It was exempt property, over which the bankruptcy court had no further jurisdiction than to ascertain whether it was exempt, or was property to be administered upon for the benefit of general creditors. It is true, by section 70 of the bankruptcy act the trustee is, by operation of law, vested with the title of the bankrupt, but this section expressly excepts title to property which is exempt. The title to defendant's exempt property remained in him. As was said in *Re Durham*, (D. C.) 104 Fed. Rep. 231: "Where the property is claimed as exempt, no title passes to the trustee, and he is only entitled to the possession thereof for the purpose of ascertaining by proper appraisement whether the value of the property does not exceed that allowed as exempt under the laws of the state. As soon as that is ascertained, it is the duty of the trustee to deliver it to the bankrupt." Again, in *Jeffries* v. *Bartlett*, (C. C.) 20 Fed Rep. 496, it was said that: "It would seem that the jurisdiction of the bankruptcy court begins and ends, in regard to excepted or exempted property, in reviewing or controlling the assignee in designating and setting apart such property, and that property designated and set apart does not pass to the assignee, nor is it subject to be administered by the court as a part of the bankrupt's estate. * * * If such exempted property can be said to be brought into the bankrupt court at all, then, when it has been designated and set apart by the assignee, it has been administered and has passed out of the possession and control of the court. After property has been administered upon by the bankruptcy court and disposed of, and neither the assignee nor creditors have any further interest therein, the bankruptcy court ought not to stand as a warrantor, and by injunctions protect the property from assaults in other courts at the suit of persons who may claim liens thereon or title thereto." To the same effect is *Adams* v. *Crittenden*, (C. C.) 17 Fed. Rep. 42. Our conclusion that

the title to property which is exempt remains in the bankrupt, and that jurisdiction as to liens thereon is in the state, and not the federal, courts, is also sustained by the following authorities: *Robinson* v. *Wilson,* 15 Kan. 595, *22* Am. Rep. *272*; *Thole* v. *Watson,* 6 Mo. App. 591. In *Robinson* v. *Wilson* an attachment was levied on land claimed as a homestead within four months prior to the adjudication in bankruptcy. It was held that the homestead did not pass to the assignee in bankruptcy, and that the bankruptcy proceedings did not dissolve the attachment. In the course of its opinion the court said that, "as the bankrupt court gets no jurisdiction of the exempt property, it would seem that it should take none over any specific liens upon such property." In *Thole* v. *Watson* it was held "that where houshold furniture attached is claimed as exempt by the bankrupt, and set apart to him as exempt by the assignee, it does not pass to the assignee, and is subject to the process of the state courts." See, also, *In re Kaeppler,* 7 N. D. 435, 75 N. W. Rep. 789. Aside from the convincing reasoning of the cases referred to, we find ample ground in the language of the statute relied upon for holding that the liens which are declared void by it do not include liens upon exempt property, over which, as we have seen, the state, and not the federal, courts have jurisdiction. Section 67f, after declaring that all attachments levied within four months prior to the filing of the petition shall be null and void, and discharged and released, declares that the effect of such a discharge shall be to pass the property covered by the lien "to the trustee as a part of the estate of the bankrupt." It is entirely plain that this section does not refer to liens upon property upon which the court does not undertake to administer, and over which it has no jurisdiction. Exempt property constitutes no part of the estate which passes to the trustee for the benefit of creditors. As before stated, under the plain policy of the bankruptcy act, as well as by its specific provisions, exempt property is not disturbed, but is left to the debtor, to be held by him subject to the laws of the state, entirely freed from federal interference. If defendant's contention that the discharge in bankruptcy destroyed the lien created by the attachment upon his exempt property is true, then such exempt property would, under the section above referred to, pass to the trustee as a part of the estate of the bankrupt for the benefit of his creditors; thus entirely destroying the debtor's right to save the exemptions allowed by the laws of the state from the reach of general creditors. No such absurd construction can be sustained. In this case the bankruptcy court had by an express order set apart the property levied upon before the attachment was levied. By that order it disclaimed further jurisdiction, even for the purpose of inventory and appraisement. Upon this state of facts, it seems clear the discharge in bankruptcy was without effect upon the lien theretofore created under the laws of this state upon property which was then subject exclusively to the jurisdiction of the

state courts. As sustaining our views, see the very recent case of *In re Little*, (D. C.) 110 Fed. Rep. 621.

It is urged that the second attachment was void because it was made after the trial court had made an order staying all proceedings in the action. Whether that order was intended to go further than to postpone the trial and proceedings then had under the first attachment is a matter of some doubt, but, even if it is conceded that the stay was broad enough to forbid the second attachment, we are of opinion that the granting and issuance of the same was of itself a sufficient revocation of the order staying proceedings.

This disposes of all objections to the judgment appealed from. For the reasons already stated, the judgment must be affirmed, and it is so ordered. All concur.

(88 N. W. Rep. 703.)

MARY NESS *vs.* EVAN M. JONES.

Opinion filed Nov. 8, 1901.

Exemptions.

Sections 5516, 3605, and 3625 of the Revised Codes of 1899, and § 208 of the state constitution, relating to exemptions, considered and construed.

Head of Family.

Held, that the husband, and not the wife, is primarily the head of the family, and that, as a result merely of the conjugal relation, a wife, who is a debtor, does not occupy the relation of head of the family for the purpose of claiming exemptions of personal property from seizure and sale by legal process.

Exemption Claim When Made by Wife.

Held, further, that under certain conditions, when shown to exist from necessity, the wife may be compelled to accept the burden of maintaining the family, and in such exceptional conditions the law concedes to her the family headship for the purpose of claiming exemptions.

Insolvency of Husband—Head of Family.

In the case at bar the family of the plaintiff consisted of herself, her husband, and eight children. The family resided upon land owned by the plaintiff, which was operated as a farm, and consisted of one quarter section of land. In 1895 the husband engaged in the machinery business in connection with certain farming operations upon lands owned by him separately. The husband failed in business, lost all of his property, and became a bankrupt. During all the time in which the husband was prosecuting said outside business the wife carried on the home farm and supplied the necessaries for the support of the family, and did this with only slight assistance from her husband in the way of advice and the performance of some little work about the home. The property in question consists of grain raised by the wife on the home farm, which the plaintiff, the wife, claims as exempt from seizure to satisfy a judgment against her and her husband. At all

times the husband and wife have lived together as such on the home premises, and the evidence shows that the husband is not disabled, mentally or physically; nor is there any suggestion in the evidence that the husband is, or ever was, unwilling to labor for the support of his family. *Held*, under such conditions, that the husband was the head of the family, within the meaning of the exemption law as to personal property, and that the wife, under the conditions shown by the evidence, was not the head of the family for such purposes.

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

Action by Mary Ness against Evan M. Jones. Judgment for defendant, and plaintiff appeals. Affirmed.

W. E. Purcell and *C. L. Bradley*, for appellant.

H. C. Preston and *McCumber, Bogart & Forbes*, for respondent.

WALLIN, C. J. This action was brought to recover the possession of personal property of the admitted value of $850, which the defendant, as sheriff, seized on an execution issued upon a judgment against the plaintiff and her husband as joint debtors. The plaintiff, before instituting suit, demanded the property from the sheriff as exempt property. At the close of the trial the court directed a verdict for the defendant, and upon the return of such verdict judgment was entered in favor of the defendant. A statement of the case was settle in the court below, but no motion to vacate the verdict or for a new trial was made in the trial court.

Counsel for appellant have assigned numerous errors upon the record, the last and most important of which is as follows: "The court erred in granting the motion to direct a verdict for the defendant." At the threshold of the case we are met by an objection urged by counsel for the respondent to any consideration of this assignment of error. As a basis for the objection counsel assume that the assignment requires the consideration of questions of fact, and upon this assumption counsel claim that this court cannot lawfully proceed to review the so-called questions of fact, for the reason that the appellant has ommitted to move for a new trial in the district court. In support of this objection counsel for repondent have cited numerous cases from other states, none of which, in our judgment are in point. The objection is untenable in this jurisdiction. The trouble with it lies in the assumption that the assignment of error involves a review of questions of fact. The assignment has reference to a ruling of the trial court made during the trial of the action, and, if such ruling was erroneous, it was an "error of law occurring at the trial," and would fall under subdivision 7 of § 5472, relating to new trials. Such rulings were classed as "errors of law" in the supreme court of the territory of Dakota, in which the rule in California was followed, and such has been the unvarying practice in this state. See *De Lendrecie* v. *Peck*, 1 N. D. 422, 424, 48 N. W. Rep. 342; *Slattery* v. *Donnelly*, 1 N. D. 266, 47 N. W. Rep. 375; *Henry* v. *Maher*, 6 N. D. 413, 414, 71 N. W. Rep. 127; Hayne, New Trial & App. § § 112, 114.

But this rule of practice, which was a mooted one in the courts, was conclusively settled by the enactment of a statute now embraced in § 5627, Rev. Codes 1899. That section after providing that, in actions tried to the court, questions of fact may be reviewed in this court, whether a motion for a new trial was or was not made in the action, proceeds in the last part of the section to prohibit a trial of questions of fact in this court in jury cases, unless a motion for a new trial is first made in the district court. This section, construed with others relating to new trials, leaves it optional with the moving party in jury cases to move or not move for a new trial in the district court; but, if the motion is not made below, no review of questions of fact can be had in the supreme court. The precise question presented by this objection of counsel was passed upon and ruled adversely to the views of the respondent's counsel in *Sanford* v. *Elevator Co.*, 2 N. D. 6, 10, 48 N. W. Rep. 434, 435. It follows upon these authorities that this court cannot review questions of fact in this case, because the plaintiff has not seen proper to move for a new trial. But respondent's counsel insist that the assignment of error based upon the order directing a verdict necessarily involves questions of fact. In this counsel is in error. The motion for a directed verdict called only for a decision upon a question of law. In deciding such motion, the court was not required to reach a definite conclusion as to any ultimate fact at issue. It was called upon merely to determine whether there was competent evidence in the case reasonably tending to establish the material facts in issue. In this case the court held that there was a failure of proof on plaintiff's part as to material facts, and, so holding, ruled as a matter of law that there were no facts to be submitted to the jury. This ruling was a ruling upon a question of law, and none the less so for the reason that it was necessary for the court to consider and examine the evidence in reaching a conclusion upon such question. See authorities above cited.

This brings us to a consideration of the merits of the assignment of error based upon the order directing a verdict for the defendant. This order of the trial court was granted upon a motion therefor made by the defendant's counsel, and in their brief filed in this court defendant's counsel concede that for the purposes of such motion it must be assumed that the evidence in the case was sufficient to establish all the material facts alleged in the complaint, excepting only the facts necessary to be established in order to place the plaintiff in a position to claim the benefits of the statute regulating exemptions of personal property; but as to this feature the contention of respondent's counsel is that the testimony wholly failed. The trial court was of the opinion that the plaintiff had failed upon this feature of the case, and the presiding judge stated in effect, in directing a verdict, that § 3625 limited the exemption to the head of a family, and that the statute provides that the husband is the head of the family, and that in this case

the evidence failed to show that the headship of the Ness family had from necessity ceased to be in the husband and had become vested in the wife. Is this view of the matter sound? The order of the district court directing a verdict presupposes that a married woman is not primarily, and as a necessary result of her marital relation, the "head of a family," and as such entitled unconditionally to the benefits of the exemption law as to personal property. The trial court, it seems, assumed that under certain exceptional conditions, which may be shown to exist, a married woman, may become entitled to such benefits, and, finally, the court below assumed that in the case at bar the plaintiff has wholly failed to show by testimony that her husband is not, and that she is, the head of the Ness family.

The legal problem presented for solution is one of no little difficulty, and we have reached our conclusions with some degree of doubt. Our chief difficulty arises upon the construction placed upon the language of said section 3625, supra, and this is occasioned by the very brief and meager language employed by the legislature in subdivision 1 of that section. This section is an innovation, in so far as it declares that the wife, when a claimant, is included within the meaning of the phrase "head of a family," and the last part of the subdivision, which declares that "in no case are husband and wife entitled each to a homestead," is obscure, in this: that such limitation upon the rights of married persons is by its terms confined to the family homestead, and means, of course, that in no case shall one family have more than one homestead which is exempt from seizure and sale on legal process. But no terms used in said subdivision warrant the conclusion that the legislature intended to limit the right of married persons to one, and only one, statutory exemption of personal property. If that was the legislative purpose, it must follow as a result of a construction of all the law bearing upon the subject-matter of exemptions. Nor is the uncertainty in any degree removed by anything found in section 5516, which goes no further than to declare that personal property to an amount specified shall be exempt "to the head of a family as defined by chapter 39," which chapter relates to homesteads, in which is found section 3625, wherein, as has been said, a wife is included within the meaning of the phrase "head of a family." It must be conceded that the language of the section last cited, when considered by itself, gives no preference to either the husband or the wife, and that it declares that the wife, as well as the husband, is included in the phrase "head of a family."

But the practical difficulties of giving the language of subdivision 1 of section 3625 a literal construction are obvious. The statute is entirely silent upon the question of whether, in a case such as this, where both husband and wife are debtors, and claimants, one or both are entitled to an exemption and, if both, whether the total exemption is limited to the maximum of property or

value specified in the statute, and, if so limited, whether each may claim just one-half of the maximum, or whether the right of exemption, as to each claimant, may be otherwise adjusted as between husband and wife. No attempt was made by the legislature to make provision for the adjustment of any of the differences which would be precipitated in the event of a claim of exemption being made by both husband and wife in the same case. Such practical difficulties as those mentioned, with others which might be suggested, when considered in connection with the general scope and policy of the exemption laws of this state, as the same are revealed alike in the exemption statutes and in the mandate contained in section 208 of the state constitution, have forced this court to the conclusion that section 3625 must be interpreted in connection with all cognate law upon the subject of exemptions, and that, when so interpreted, it means that a wife may claim exemptions only in those exceptional circumstances in which the husband has been constructively deposed from his primary headship of the family and the wife has been invested therewith. The head of a family is, and must remain, a unit. The term "head" implies a singular number, and never, in any connection found in these statutes does it imply the plural number. Our conclusion is that a wife cannot, under section 3625, base a claim for exemptions upon the mere fact of her marital relation. She may, however, for the benefit of the family, claim exemptions when certain conditions are shown to exist which operate to cast upon her the rights and the responsibilities which appertain to the headship of a family. The distinctive purpose of our exemption laws, whether pertaining to the homestead or to personal property, is to afford to debtors (who are heads of families, and to none others) certain immunities which are intended to secure to the families of debtors the necessaries and comforts of life. To the mere debtor, not the head of a family, has not been accorded any of the immunities found in these humane provisions of the laws of the state. The exemption is made for the benefit of families, but nowhere in the law can be found a suggestion that any family is entitled under the exemption laws to claim or receive double immunity, and yet such would be the result in a case like this, if both husband and wife have a full legal right, each in his own behalf, to claim the maximum exemption.

In the case at bar the husband, a joint debtor, has asserted a claim for exemptions, and the sheriff has acquiesced in such claim and turned over to the husband the property claimed by him as exempt from execution, and the whole thereof. With reference to this fact counsel for the plaintiff calls our attention to the fact that the aggregate amount, as claimed, respectively, by the husband and his wife,—the plaintiff,—is less than the maximum amount of personal property allowed by the statute for the benefit of a family, and as to this counsel say that it is inharmony with the legislative

purpose, and that the plaintiff, therefore, is not seeking to get a double allowance of property for her family. But this contention, from our point of view, clearly overlooks two considerations. It ignores the fact that the statute gives exemptions only to one person, viz., the head of the family, and also ignores the fact that nowhere in the statue is there found a restriction which will prevent a party who is entitled to the statutory exemption from receiving the full maximum of personal property allowed by the statute. The statute itself not containing any such restrictions upon this valuable right, the court would hardly venture to read into the statute a limitation upon the right, and, if it attempted to do so, we know of no rule which would measure the respective rights of husband and wife, as between themselves, where each sought the full benefit of the exemption right in the same case.

Our conclusion that the husband is primarily the head of the family rests not alone upon the laws of nature, nor upon the sanctions of the common law. It is in this state further reinforced by express statutory enactments. Section 2764 of the revision of 1899 reads: "The husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto." Section 2765 declares: "The husband must support himself and his wife out of his property or by his labor. The wife must support the husband, when he has not deserted her, out of her separate property, when he has no separate property and he is unable from any infirmity to support himself."

The remaining questions for determination presented by the assignment of error under discussion relate to the evidence and are relatively of little difficulty. It is quite clear from this record that plaintiff's counsel deemed it necessary to show by testimony at the trial that the plaintiff, by reason of certain facts and conditions, had, from necessity, been placed in the relation of headship to her family; and a mass of evidence was put in by plaintiff for this express purpose, and the same is practically undisputed. Our duty is to consider this evidence, but to do so only so far as is necessary to decide whether there is any competent evidence in the record reasonable tending to sustain all the material facts necessary to sustain the cause of action alleged in the complaint. As already seen, the only fact which is not conceded to have been established is whether the plaintiff, at the time she demanded the property in dispute, was the head of her family. The trial court held that this vital fact had not been shown, and this court has reached the same conclusion. In doing so, we have put the most favorable construction upon the evidence offered upon this branch of the case. The facts shown by the evidence may be briefly stated as follows: Plaintiff and her husband have a family of eight children, all minors, save one. The family have resided many years upon a farm owned by the plaintiff, and the property in question consists of grain raised on the plaintiff's homestead. In

the year 1895 the plaintiff's husband embarked in the machinery business at a place about four miles distant from the home farm, and for some time carried on that business in connection with his farming business, which latter was carried on by the husband upon lands owned by him in the vicinity of the home farm. At all times since their marraige the plaintiff and her husband have lived together as husband and wife, and there is no suggestion in the record that the conjugal relation has not at all times been entirely harmonious. The husband is a hard-working and able-bodied man, and nothing in the record indicates a want of ability in the husband, either physical or mental, to care for and maintain his family, or to provide them with the ordinary and necessary comforts of life. So far as the husband's health and strength are concerned, the evidence indicates ability on his part to discharge the duties incident to the headship of a family; nor does the evidence warrant the conclusion that the husband is not entirely willing to discharge such duties to the extent of his ability. But the evidence shows, further, that while the husband was carrying on his said machinery and farming business he left the matter of caring for the home and the children largely to his wife. She supervised the home farm, and attended to the wants of the children, purchased their clothing, and looked after their schooling. She did this, too, from resources drawn from the home farm, and with little substantial aid from the husband, except in the way of advice and some slight assistance about the home. The business of the husband resulted disastrously, and he was driven into bankruptcy, losing all his property.

Just here counsel contend that the husband, because of his financial straits, lost his original position of head of the Ness family, and for the same reason the plaintiff emerged from the background and appeared as the head of the family. We think this position is untenable. It would seem that, if a debtor ever needs the benefit of exemption laws, it is when he is in the greatest financial distress. If he has nothng save his hands with which to support his family, he should at least be permitted to hope that his first small acquisitions of property (acquired by manual labor) would not be seized to satisfy the demands of his creditors. Such property would be subject to seizure unless the husband claimed them as exempt; and he could not maintain his claim if he had ceased to be the head of a family, by reason of financial reverses or for any other reason. The law as we construe it will tolerate but one head and one exemption for one family. If a policy more liberal than this is desirable, it can be inaugurated only by the legislative branch of the government. It is not the province of the courts to create exemptions in cases where the lawmaker has withheld them. Nevertheless it is a fact of common experience, and one which is only too familiar, that conditions sometimes exist in which the wife from dire necessity is compelled to assume the burdens and responsibilities which

belong to the headship of a family; and, where such conditions arise, from necessity the courts, to aid the family of the debtor, have intervened and conferred upon the wife, in lieu of the hsband, the immunities afforded by the exemption laws. The authorities cited below afford illustrations of this doctrine of the courts. See *Linander* v. *Longstaff*, 7 S. D. 157, 63 N. W. Rep. 775; *Scholler* v. *Kurtz*, (Neb.) 41 N. W. Rep. 642; *State* v. *Houck*, (Neb.) 49 N. W. Rep. 462; *Ecker* v. *Lidskog*, (S. D.) 81 N. W. Rep. 905, 48 L. R. A. 155; *Van Doran* v. *Marden*, 48 Iowa, 186. In the last case cited the court say: "When, however, marriage relation does exist, the headship of the family cannot depend upon circumstances of property held by the parties. If this were so, the question involving the headship of the family would be one of fact and never of law. That it is a question of law, when the husband is resting under no disability, we think cannot be doubted." In none of the cases cited does the fact that the husband is a bankrupt and possesses no property figure as a factor in deciding the question whether he or his wife, who is residing with him, is the head of the family to which both belong. In the case at bar there is no evidence tending to show that the husband has deserted his family, or that he is either unable or unwilling to provide necessaries for his family, sufficient for their support, by the labor of his own hands. Nor does the fact that for a time the wife, out of the homestead and its products, aided only by her husband's advice, supplied the wants of the family, at all tend to show that the wife is entitled to the benefits of the exemption law.

We find no error in the judgment, and hence the same will be affirmed. All the judges concurring.

(88 N. W. Rep. 706.)

GEORGE C. WILES *vs.* MCINTOSH COUNTY.

Opinion filed Dec. 31, 1901.

County School Superintendents—Compensation.

Section 652, Rev. Codes, which prescribes the salaries of county superintendents of schools, construed, and *held*, that said section requires that salaries shall be computed upon the basis of the number of schools or separate departments of graded schools presided over by superintendents, which have been taught at least three months in the preceding year, and shall not be computed upon the number of schools which have been taught less than three months. This construction of said section is not of that doubtful character which would warrant the courts in following a contrary interpretation placed thereon by the department of public instruction.

Voluntary Payments Do Not Estop County.

The plaintiff brought this action to recover a balance alleged to be due him for salary as county superintendent. The county interposed a counterclaim for an alleged overpayment of salary, which payment was induced by plaintiff's overstatement to the board of county

commissioners of the number of schools in the county. It is *held* that, inasmuch as such overpayments were made under a mistake of fact, and were induced by plaintiff's false statements, they were not voluntary payments, and can therefore be recovered back by the county. It is *held*, further, that the doctrine of voluntary payment does not apply to payment made from public funds by agents of municipal corporations whose duties and powers in reference thereto are limited and defined by law. It was error, therefore, for the trial court to direct a verdict against the defendant upon its counterclaim upon the ground that the overpayments were voluntary.

Motion to Strike Statement Denied.

A motion by respondent's counsel to strike appellant's abstract and the statement of the case from the record, and to affirm the judgment upon the ground that the statement was settled in violation of the statute in this: that the statutory time for proposing amendments was not given, is denied for the reason that the record does not sustain the ground upon which the motion is based.

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

Action by George C Wiles against the county of McIntosh. Judgment for plaintiff. Defendant appeals. Reversed.

A. W. Clyde, State's Atty., and *Morrill & Engerud*, for appellant.

Herried & Williamson, for respondent.

YOUNG, J. Plaintiff commenced this action to recover from the county of McIntosh the sum of $200, which he alleged was due to him from said county as a balance of salary as county superintendent of schools. The defendant, in its answer, denied that any balance was due to plaintiff, and pleaded the statute of limitations against plaintiff's cause of action. The answer also set up a counterclaim in defendant's favor and against plaintiff for an alleged overpayment of salary, amounting to $700, and prayed for an affirmative judgment for that sum. The case was tried to a jury. At the close of the testimony, upon motion of defendant's counsel, a verdict was directed against plaintiff on his cause of action, and upon motion of plaintiff's counsel a verdict was directed against the defendant on its counter claim. Separate judgments were entered upon the verdicts so directed. The defendant has appealed from the judgment dismissing its counterclaim, and in a statement of case duly settled has specified for review a number of alleged errors.

The only error assigned which we shall have occasion to consider relates to the verdict directed against the defendant's counterclaim. The ground for such directed verdict, as stated by plaintiff's counsel in his motion therefor, was "that the plaintiff is not liable upon the counterclaim * * * for the reason that the evidence shows that the plaintiff, in drawing his salary, acted upon the opinion of the superintendent of public instruction, * * * and for the further reason that the money was regularly paid by the regular auditing board of the county under the law, and is therefore a

voluntary payment." No other reasons than those just stated were urged, or were relied upon, apparently, by the trial court in granting the motion. It seems to have been conceded at the trial that the plaintiff had been overpaid; at least it was not seriously controverted. The plaintiff's entire contention in the trial court—and that is his chief contention in this court—was that the payments were voluntary, and that they cannot, therefore, be recovered back by the county. This contention we cannot sustain. The answer alleges that during the years 1896, 1897, 1898, 1899, and 1900 the plaintiff presented quarterly accounts for salary to the board of county commissioners, in which he claimed salary in excess of the amount limited and prescribed by law; that for the purpose of procuring the allowance of such accounts he misrepresented and overstated to said board the number of schools which were in the county, which determined the amount of his salary, and by so doing induced said board to allow each of said accounts, which covered not only the sum lawfully due him, but amounts greatly in excess of the sum due; that the sums so allowed above his lawful salary and paid by the defendant, amounted to $700. Counsel for plaintiff urge in this court two propositions in support of the verdict: (1) That there is no competent evidence of overpayment; (2) that, conceding that the plaintiff was overpaid, the payments were voluntary and cannot be recovered back. The evidence offered by the defendant in support of its counterclaim was exceedingly unsatisfactory. But we cannot agree with counsel that there is no competent evidence of overpayment. During the entire period here in question the plaintiff's salary was fixed by law. Section 652, Rev. Codes 1895, provided that the salary of county superintendents of schools shall be as follows: "In each county having * * * forty-one schools and not over fifty, $900; and for each additional ten schools, or major fraction thereof, $100 additional: provided, that in computing the salary of such superintendent no school shall be included unless the same shall have been taught at least three months during the preceding year. * * * The amount of his salary shall be determined each year by the actual number of schools or separate departments in graded schools over which such superintendent had official supervision during the preceding year, and the same shall be paid out of the county general fund monthly upon the warrant of the county auditor." By the amendment embodied in chapter 75, Laws 1897 (§ 652, Rev. Codes, 1899), county superintendents were allowed $10 for each additional school, instead of the $100 allowance for 10 schools or a major fraction thereof, as under the previous statute. The statute is not ambigious. It furnishes an absolute means of measuring the salaries of county superintendents. In the determination of such salaries it requires merely a mathematical computation upon existing facts. The controlling fact is the number of schools or separate departments of graded schools presided over by the

county superintendent, which schools or departments have been taught at least three months in the year preceding that for which the salary is claimed. Neither counties nor county officials have authority either to increase or diminish the compensation so fixed by the legislature. No special method was provided for determining the number of schools which serves as a basis for the computation of salaries. Evidently the lawmaking body considered that question might, at least primarily, be left to the integrity of superintendents. When, however a dispute arises as to the number of schools, the question is one of fact, to be determined like any other question of fact. The effect of a dispute as to the number of schools is merely to delay a computation of the amount of salary until the number can be ascertained by the county auditor, or judicially, when such course is necessary. We find from an examination of the record before us that there was before the trial court when it directed the verdict against the defendant on its counterclaim substantial evidence fairly tending to show that the plaintiff during his incumbency of the office of county superintendent of schools presented quarterly accounts for salary to the county commissioners greatly in excess of the amount due; that such accounts were verified by his oath, wherein he stated that the charges were just, and were such as were allowed by law, and that no part of the same had been paid; that the defendant relying upon such verified accounts, paid the sums so claimed by the plaintiff as and for salary. There is evidence to the effect that plaintiff overstated the number of schools in the county. Counsel for plaintiff strenuously urge that there is no evidence tending to show that the number of schools in McIntosh county, during the years in question, was less than the number necessary to authorize the payment of the salary which the plaintiff claimed and was paid; in other words, they claim that there is no evidence of overpayment. This contention is not sustained by the record. The evidence on this point is contained in a certain public document, prepared by the superintendent of public instruction, which purports to contain reports of the county superintendent of schools for McIntosh county for the years in question, in which is set forth the number of schools in which no school was taught, the number of schools taught one month and less than three months, and the number of schools taught three months and upwards. In addition to the foregoing, the defendant offered in evidence the sworn statement of the plaintiff, showing the number of schools for one of the years in question, which statement had previously been filed by him with the county commissioners. The evidence afforded by the public document referred to was admitted without objection as to its competency, and no objection was made that the same was hearsay; on the contrary, the plaintiff seems to have, at least tacitly, admitted the accuracy of the statements contained in said report; at least he did not challenge the facts therein stated, or offer any evidence to contradict the same. His only ob-

jection to its introduction was that in computing and drawing his salary for the period in question he acted upon the advice of the department of public instruction. Whether the document was admissible as against a proper and timely objection we need not determine. It is sufficient to say that it was admitted without objection, and under circumstances which, in our opinion, preclude the plaintiff from claiming that it did not constitute legal evidence as to the facts which it purported to establish. On the basis of the number of schools shown by these reports it appears that the plaintiff claimed and drew salary from the defendant in amount in excess of that to which he was entitled under the statute. That he had been so overpaid was, in effect, conceded at the trial in the lower court. His entire contention in the trial court was that the amounts in question were paid to him by the county voluntarily, and that having been so paid they could not be legally recovered back; and that constitutes his chief contention in this court.

We are unanimously of the opinion that the facts of this case do not bring the plaintiff within the protection of the rule which he invokes. The rule, as stated and recognized by this court in *Wessel* v. *Mortgage Co.*, 3 N. D. 160, 54 N. W. Rep. 922, 44 Am. St. Rep. 529, is that "where a party, with full knowledge of the facts, pays a demand that is unjustly made against him, and to which he has a valid defense, and where no special damage or irreparable loss would be incurred by making such defense, and where there is no claim of fraud upon the part of the party making such claim, and the payment is not necessary to obtain possession of the property wrongfully withheld, or the release of his person, such payment is voluntary, and cannot be recovered." As stated by Winslow, J., in *Fredericks* v. *Douglas Co.*, (Wis.) 71 N. W. Rep. 798, the rule is "that, as between man and man, money paid voluntarily, with knowledge of all the facts, and without fraud or duress, cannot be recovered merely on account of ignorance or mistake of law. * * * It is founded upon the general principle that a man may do what he will with his own. He may give it away, or buy his peace; and if he does so with knowledge of the facts, he is generally remediless." Does the evidence in this case show a voluntary payment by the county to the plaintiff under the above rule? Clearly not. On the other hand, it appears conclusively that the overpayments of salary were not voluntary under the rule as stated, and for two reasons. In the first place, the overpayments were made under a mistake of fact as to the amount due; and, in the second place, the overpayments were secured by the plaintiff through fraudulent representations and inducements consisting of his sworn accounts. It is clear that upon such facts, if the controversy were between individuals, the plaintiff could not successfully contend that the overpayments received by him were voluntary. But if it were conceded that the county officers had full knowledge of the facts before making payment, and that no

fraud or misrepresentation was practiced by the plaintiff, and that such payment was therefore voluntary so far as the auditing and disbursing officers are concerned, nevertheless the result would be the same. In this case it is not a controversy between individuals, but between an individual and a municipal corporation. The county officers who were charged with the disbursement of the county's funds were mere agents of the county, and their authority and duty in reference to county funds and the disbursement thereof was limited and defined by law. Such authority only extended to paying the plaintiff his lawful salary as authorized by the legislature, and of this limitation the plaintiff was bound to take notice. The doctrine of voluntary payment, therefore, has has no application, for the reason that no overpayments were made by the sanction or approval of the county, but were made in defiance of the statute governing the matter of payment. Public officials dealing with trust funds do not stand on the same footing as individuals dealing with their own property. As was said in *Fredericks* v. *Douglas Co.*, supra: "They are not dealing with their own. They are trustees for the taxpayers, and in dealing with public funds they are dealing with trust funds. All who deal with them know also that the public officials are acting in this trust capacity. To hold that when public officers pay out money in pursuance of an illegal and unwarranted contract, such moneys cannot be recovered in a proper action brought in behalf of the public merely because the payment had been voluntarily made for services actually rendered, would be to introduce a vicious principle into municipal law, and a principle which would necessarily sweep away many of the safeguards now surrounding the administration of public affairs. Were this, in fact, the law, it can readily be seen that public officials could at all times, with a little ingenuity, subvert and nullify that wholesome principle of the law which prohibits their spending the public funds for illegal purposes. All that would be necessary to be done would be to make the contract, and have the labor performed, pay out the money, and the public would be remediless." The doctrine announced by the Wisconsin supreme court in the language just quoted appeals to us as sound in principle, and is well sustained by authority. See *Demarest* v. *Inhabitants of New Barbadoes Tp.*, 40 N. J. Law, 604; *Russell* v. *Tate*, 52 Ark. 541, 13 S. W. Rep. 130, 7 L. R. A. 180, 20 Am. St. Rep. 193; *Weeks* v. *Town of Texarkana*, 50 Ark. 81, 6 S. W. Rep. 504; *City of Tacoma* v. *Lillis*, 4 Wash. St. 797, 31 Pac. Rep. 321, 18 L. R. A. 372; *Williard* v. *Comstock*, 58 Wis. 565, 17 N. W. Rep. 401, 46 Am. Rep. 657; 7 Am. & Eng. Enc. Law (2d Ed.) 961, and cases cited at note 1. See, also, § 1981, Rev. Codes, where this doctrine is recognized.

The plaintiff, for the purpose of sustaining the amount paid to him as and for salary, produced in evidence a letter dated May 11, 1897, signed by Will M. Cochran, deputy superintendent of public

instruction, wherein he was advised that, in the opinion of the department of public instruction, the plaintiff, in computing his salary, was to take into consideration any and all schools, without reference to the length of the term of the same. It is urged by counsel for the plaintiff that this construction of the statue is binding upon the courts, and should be followed. It is true that in cases of doubt the contemporaneous construction of the statute by officers charged with its execution is entitled to great weight. But that rule has no application here. As before stated, the statute fixing salaries (§ 652, Rev. Codes 1899) is unambiguous in its language. It is not even doubtful. It plainly provides that the salaries of superintendents shall be computed upon the basis of the number of schools or departments of graded schools presided over by them, which have been taught at least three months during the preceding year. It is not possible to spell out of said section a construction that the salaries are to be computed upon the basis of the number of schools, "without reference to the length of term of same," as stated in the letter of advice of the deputy superintendent of public instruction. This advice might go to the plaintiff's good faith in making the overcharges in question, but it would not have the effect of making such overcharges lawful, or affect the lawful amount of his salary in any way whatever.

Counsel for plaintiff made a preliminary motion to strike from the files of this court the appellant's abstract and the statement of case, alleging as grounds therefor that the statement of case was settled in disregard of the statute and rules of this court in this: That it was served upon the attorneys for the plaintiff August 22, A. D. 1901, with a notice that the same would be settled on August 27, 1901, and that in pursuance of said notice the statement of case was settled and allowed on said last-named date, without the consent of the plaintiff, and that he was thereby deprived of the statutory period in which to propose amendments to the statement. This motion is not meritorious, and will be denied. The record does not sustain the grounds upon which the motion is based. On the contray, the record discloses that a proposed statement of case and amendments proposed thereto by respondent were submitted to the trial judge on the 13th day of August, A. D. 1901, pursuant to a written stipulation, signed by counsel for both parties, which stipulation is contained in the record. It further appears that upon said last-mentioned date G. N. Williamson, one of the counsel for plaintiff, appeared on his behalf, and proposed amendments, which defendant refused to consent or agree to; that the court thereupon ordered that the transcript of the evidence and proceedings at the trial prepared by the official stenographer of the court, with copies of the exhibits, should be taken as the statement of case. Pursuant to such order, the transcript was incorporated in the statement, and on August 27, 1901, the trial judge appended his official cerificate thereto. After the order of the trial

judge directing that the transcript be taken as the statement, defendant's counsel served or furnishel plaintiff's counsel with a copy thereof on the date stated in their motion. This was entirely unnecessary, and was ex gratia. The trial judge had settled by order what should be contained in the statement on August 13th, pursuant to the written stipulation of counsel. It is not claimed that the statement was not settled in accordance with the facts.

For the reasons heretofore given, the judgment dismissing the defendant's counterclaim will be reversed, and the case remanded to the district court for further proceedings, and it is so ordered. All concur.

(88 N. W. Rep. 710.)

L. E. MAPES *vs.* R. L. METCALF, *et al.*

Opinion filed Dec. 24, 1901.

Appeal—Trial De Novo Refused.

This action was tried to the court without a jury under § 5630, Rev. Codes 1899. Pursuant to a stipulation of counsel and an order of the trial court only a part of the issues of fact were tried, and the remaining issues were expressly reserved for future trial and determination, and no evidence was offered thereon. Judgment was entered upon the evidence so submitted. Both parties have appealed from such judgment. Plaintiff appeals upon the judgment roll proper, and assigns errors upon the court's conclusions of law. Defendants have taken a cross appeal, with a view to securing a retrial upon the evidence, and to that end have settled a statement of case, containing all of the evidence offered at the trial, with a proper demand for a retrial and review of the entire case in this court. It is *held*, as to defendants' appeal, that this court is without authority to accord to them a retrial upon the evidence, for the reason that § 5630, supra, which is the entire source of our jurisdiction and authority to retry cases, only covers cases which have been fully submitted for final determination, and does not authorize a retrial of portions of a case.

Sale of Good Will—Restraint of Trade.

The purpose and legal effect of § 3927, Rev. Codes 1899, which authorizes "one who sells the good will of a business to agree with the buyer to refrain from carrying on a similar business within the specified county," etc., is to except contracts in restraint of trade which are made in accordance with said section from the condemnation of illegality otherwise resting on such contracts. It is necessary, however, to the validity of an agreement to refrain, such as is authorized by said section, that it shall be collateral and auxiliary to a sale of the good will of such business. Said section does not make valid a bare agreement to refrain, which is unaccompanied by a sale of the good will of a business.

Contract Not in Restraint of Trade.

One Mapes, who was the proprietor of a newspaper and job-printing business, entered into a written contract with the defendants, who were the proprietors of a rival newspaper and job-printing business in the same village, to discontinue his newspaper and job-printing business, and not to resume the same within the county for a period

of five years, in consideration of which defendants covenanted to pay him a certain share of the proceeds realized from the publication of legal notices during such period. Mapes discontinued his paper as agreed, and in all things complied with his covenant, and as a part of the transaction, but not particularly mentioned in the written agreement, transferred to the defendants his subscription list and the good will of his business. It is *held*, upon plaintiff's appeal, that the trial court erred in holding that the contract sued upon is void as being in restraint of trade, and in holding that no action can be maintained thereon.

Waiver of Right to Arbitration.

It is *held*, further, that the defendants, by denying all liability under the contract, have waived any right which they may have had to require an arbitration, under the stipulations of the contract, as a condition precedent to the maintenance of the present action.

Appeal from District Court, Nelson County, *Fisk*, J.

Action by L. E. Mapes against R. L. Metcalf and others. Judgments for defendants, and plaintiff appeals. Reversed.

Templeton & Rex, for appellant.

A contract in restraint of trade is valid if it be limited either as to place or time, such limitation being reasonable. *Tode* v. *Gross*, 127 N. Y. 480; *Diamond Watch Co.* v. *Roeber*, 106 N. Y. 473; *Althen* v. *Vreeland*, 36 Atl. Rep. 479; *Fowle* v. *Parke*, 133 U. S. 88, 33 L. Ed. 67; *Anchor Electric Co.* v. *Hawkes*, 171 Mass. 101; *Oregon Steam Nav. Co.* v. *Windsor*, 87 U. S. 84, 22 L. Ed. 315; *Morse & Co.* v. *Morse*, 103 Mass. 73. The contract in suit is not void as tending to create a monopoly. *Diamond Watch Co.* v. *Roeber*, 106 N. Y. 473, 483; *Leslie* v. *Lorillard*, 110 N. Y. 519, 18 N. E. Rep. 366, 1 L. R. A. 456; *National Ben. Co.* v. *Union Hospital Co.*, 45 Minn. 272, 47 N. W. Rep. 806; *Perkins* v. *Lyman*, 8 Mass. 522; *Oakes* v. *Cattaraugus Water Co.*, 143 N. Y. 430; *Matthews* v. *Associated Press*, 136 N. Y. 333; *Wood* v. *Whitehead Bros.*, 165 N. Y. 545. The case at bar in this aspect is similar to cases where physicians or other professional men have sold out their practice with a covenant not to re-engage in the same profession; such agreements have been uniformly held good. *Smalley* v. *Greene*, 52 Ia. 241, 35 Am. Rep. 267, 3 N. W. Rep. 78; *Haldzman* v. *Simonton*, 55 Ia. 144, 7 N. W. Rep. 493; *Cook* v. *Johnson*, 47 Conn. 175, 36 Am. Rep. 64; *Bunn* v. *Guy*, 4 East, 190; *Holbrook* v. *Waters*, 9 How. Prac. 335; *Stafford* v. *Shortreed*, 17 N. W. Rep. 756; *Dwight* v. *Hamilton*, 113 Mass. 175; *Martin* v. *Murphy*, 129 Ind. 464. The case at bar must be distinguished from cases of combinations, trusts, and pools, to limit production and enhance prices. The distinction between cases of this class and of the class of the case at bar is indicated in *Cummings* v. *Union Blue Stone Co.*, 164 N. Y. 404; *Dolph* v. *Troy Laundry Machine Co.*, 28 Fed. Rep. 553. It was contended in the lower court that Mapes sold nothing tangible, therefore the contract was void. Such contention is untenable. *Leslie* v. *Lorillard*, 110 N. Y. 519; *National Ben.*

Co. v. *Union Hospital Co.*, 45 Minn. 272; *Franz* v. *Bieler*, 58 Pac. Rep. 466, 56 Pac. Rep. 249, 126 Cal. 176; *Wood* v. *Whitehead Bros.*, 165 N. Y. 545. The statutes of this state, § § 3926, 3927 and 3486, Rev. Codes, are not against appellant's position. Respondent's contention, that there was no breach of the obligations of the contract to warrant the bringing of suit until defendants had refused to arbitrate is not well founded. § 3925, Rev. Codes. By denying the validity of, and all liability under, the contract the defendants waived any right to arbitration. 2 Enc. L. 581, note 2; *Bailey* v. *Aetna Ins. Co.*, 77 Wis. 336, 46 N. W. Rep. 440; *Kahn* v. *Ins. Co.*, 34 Pac. Rep. 1059; *Menz* v. *Ins Co.*, 79 Pa. St. 478, 21 Am. Rep. 80. The question is analogous to that arising in cases of replevin and conversion, where it is held that a failure to make demand before suit is cured by defendant's assertion of ownership and right to possession in his answer. *Guthrie* v. *Olsen*, 44 Minn. 404; *Kellogg* v. *Olson*, 34 Minn. 103; *Daggett* v. *Gray*, 42 Pac. Rep. 568. Section 3983, Rev. Codes, authorizes the sale of the good will of a business. Mapes bound himself not to draw off any of the customers, and a sale of the good will is necessarily implied thereby. *Lane* v. *Smythe*, 19 Atl. Rep. 199; *Boon* v. *Moss*, 70 N. Y. 465; *Mantzfield* v. *Ry. Co.*, 102 N. Y. 205.

Bosard & Bosard and *H. D. Fruit*, for defendants and respondents.

By the contract of the parties any disagreement regarding the interpretation thereof should have been settled by arbitration. Plaintiff did not offer to arbitrate or select an arbitrator as required by the contract and until defendants refused to arbitrate there was no breach of the contract sufficient to warrant the bringing of suit. *Westhaven* v. *Ins. Co.*, 84 N. W. Rep. 717; *Hembean* v. *Great Camp of Knights*, 49 L. R. A. 592. The contract sued on by plaintiff is in restraint of trade, and in the nature of a contract creating a monopoly, and is void. § § 3926, 3927, 3928, Rev. Codes; *Clark* v. *Needham*, 83 N. W. Rep. 1027; *U. S.* v. *E. C. Knight Co.*, 163 U. S. 16; *Wright* v. *Ryder*, 36 Cal. 342; *McMullen* v. *Hoffman*, 174 U. S. 639; *Western Wooden Ware Ass'n* v. *Starkey*, 74 N. W. Rep. 604; *Wintonburg* v. *Molyneaux*, 83 N. W. Rep 842; *U. S.* v. *Addyston Pipe & Steel Co.*, 29 C. C. A. 141, 46 L. R. A. 122; *Richardson* v. *Buhl*, 6 L. R. A. 457; *Peo.* v. *Milk Exchange*, 29 L. R. A. 437; *Morris Run Coal Co.* v. *Barclay*, 8 Am. Rep. 159; *Chapman* v. *Brown*, 48 N. W. Rep. 1074; *Carroll* v. *Giles*, 4 L. R. A. 154; *State* v. *Nebraska Distilling Co.*, 43 N. W. Rep. 155; *McCutcheon* v. *Merz Co.*, 31 L. R. A. 415; *Standard Oil Co.*, v. *Adouse*, 15 L. R. A. 598. The covenants of the defendant depend on the covenants of the plaintiff, and in order for the plaintiff to recover he must show a full compliance with the contract on his part. *Belt* v. *Stetson*, 26 Minn. 481. It will not suffice that the thing the plaintiff has done is as good as he agreed, it must be the particular thing. *Bixbee* v. *Wilkinson*, 25 Minn. 481; *Dauchey* v.

Drake, 85 N. Y. 407. A party contracting to do several things for a certain consideration, when the value of each different thing is not stated, is bound to perform, or tender performance, of all the covenants which enter into the contract before suing to recover, and any material deviation from his contract will defeat a recovery. *McMillan* v. *Vanderlip,* 12 Johns. 165; *Jennings* v. *Camp,* 13 Johns. 95; *Husted* v. *Craig,* 36 N. Y. 221; *Brown* v. *Webber,* 38 N. Y. 187; *Catlin* v. *Tobias,* 26 N. Y. 218; *Borrowman* v. *Drayton,* 19 Moake's Eng. Rep. 341. Plaintiff violated substantial provisions of his contract, thereby depriving defendant of the benefits thereof. Defendant was then justified in abandoning further performance. *Brussie* v. *Peck Bros. & Co.,* 54 Fed. Rep. 820; *Lake Shore Ry. Co.* v. *Richards,* 38 N. E. Rep. 773; *Bond* v. *Carpenter,* 8 Atl. Rep. 539.

YOUNG, J. The plaintiff brings this action upon a covenant contained in a written contract executed by the defendants R. L. Metcalf and Meldonetta Metcalf in favor of one E. Mapes, and duly assigned by said Mapes to the plaintiff prior to the commencement of this action. Plaintiff demands a money judgment, and an accounting by the defendants for moneys alleged to have been received by them under said contract. Thomas J. Baird and Mary A. Rayburn are sureties on an undertaking given to secure said contract, and are made defendants herein. The defendants answered jointly, admitting the execution of the contract and bond in suit, but denying all liability thereunder, and denying that Mapes had complied with his covenants in said contract. The trial was to the court without a jury. The issues of fact as to the amount of plaintiff's damages were not tried, and no accounting was had. Prior to the trial of the case in the district court, upon stipulation of counsel for the respective parties an order was entered of record by the presiding judge to the effect that the "issue as to damages plaintiff may be entitled to recover herein be, and the same hereby is, reserved for trial and determination at such future time as may be fixed by the court, in the event that, after the trial and determination of the other issues in this case it shall be necessary to try such issue." Evidence was offered upon all other issues than that reserved, and, from the facts established by the evidence so offered, the court found, as a conclusion of law, that the plaintiff was not entitled to recover upon said contract. Judgment was ordered and entered dismissing the action, and awarding costs to the defendants. Both parties have appealed from the judgment. Plaintiff's appeal was perfected on July 25, 1901, and is taken upon the judgment roll proper. Upon this appeal error is predicated solely upon the decision of the trial court. The particular assignment relied upon is the conclusion of the trial court that the contract in suit is void and that no action can be maintained thereon.

After the plaintiff's appeal was perfected the defendants took a cross appeal from the judgment, with a view to securing the review of the entire case in this court upon the evidence. To this

end, they caused to be settled and brought into the record a statement of the case, embracing all the evidence offered and proceedings had at the trial, including therein a specification "that they desire a retrial and review of the entire case in the supreme court." The structure and contents of the statement are in strict conformity to the requirements of § 5630, Rev. Codes 1899, under which the case was tried, which section also prescribes the conditions upon which a retrial may be had in this court. No defect in the form or contents of the statement is shown or claimed to exist. Nevertheless, we are agreed, for reasons which will hereafter be stated, that this court is without lawful authority to accord to defendants the review and retrial which they seek. The only authority possessed by this court to retry cases is conferred by § 5630, Rev. Codes 1899, and the provisions of said section operate as a limitation upon our authority to do so. That section, in unmistakable language, as repeatedly construed by this court, authorizes and requires a final disposition of cases appealed thereunder at our hands. That the express purpose of this statute is to secure a speedy and final determination by this court of actions appealed thereunder, does not admit of doubt. The original act (chapter 82, Laws of 1893) required the supreme court to "render final judgment according to the justice of the case." The same requirement as to rendering final judgment was embodied in the amended act (section 5630, Rev. Codes 1895). The statute now in force, while differing in some respects from the former act, nevertheless retains those features which require a review of cases appealed thereunder on their merits, and a final dispostion of the same by this court. Under former acts we were even without authority to order a new trial. The hardship necessarily incident to this lack of authority was relieved by the present law, which permits this court to order a new trial when necessary, and in furtherance of justice. It is clear that § 5630, Rev. Codes 1899, only authorizes appeals to this court for the purposes of a retrial thereunder in cases where the entire case is presented to this court for review and final determination. A retrial of a part of the issues or of a fragment of a case by this court would not only be contrary to the spirit of the statute, but in violation of its express language. Have we authority, then, to accord to the defendants a retrial? We are unanimous in the opinion that we have not. It appears upon the face of the record before us that a portion of the issues made by the pleadings has not been tried; further, that by stipulation of counsel and upon the order of the trial judge, the issues of fact as to the amount of plaintiff's recovery were reserved for future determination, and no evidence was offered upon such issues in the trial court. If it were conceded that this stipulation was proper for the conduct of the trial in the district court, the fact remains that a retrial in this court is an entirely different matter, and cannot be governed by stipulation of counsel. The right to a retrial, and our authority to retry, depend entirely upon the stat-

ute. The statute, as we have seen, only authorizes a retrial where the entire case is presented for review and final determination. It follows, therefore, that the parties to this litigation by reserving some of the issues involved for future determination, voluntarily deprived themselves of the right to secure a review and final determination of the case at the hands of this court under § 5630, under which defendants' appeal is taken. The record shows upon its face that only a portion of the case is presented to this court for retrial. No such retrial is authorized by the statute. The defendants' attempt therefor, to secure a review of the evidence, is entirely unavailing for any purpose. Counsel for plaintiff made a preliminary motion to strike out certain portions of the abstract prepared by defendants on their appeal. Our conclusion that the defendants are not entitled to a review of the evidence under the statute renders a consideration of this motion unnecessary.

We now turn to plaintiff's appeal. The only question for determination is whether the contract sued upon is void. It appears from the findings of fact contained in the record that on and prior to January 2, 1894, E. Mapes was the owner and publisher of a newspaper known as the "Nelson County News," published at Lakota, in Nelson county, and operated a job-printing plant in connection therewith. The defendants R. L. Metcalf and Meldonetta Metcalf were the owners and publishers of a newspaper known as the "Observer," published at the same place, and they also operated a job-printing plant. On January 2, 1894, the parties entered into a written contract, which, as far as material, is as follows: " * * * For and in consideration of the discontinuance of the Nelson County News, now published as aforesaid, on or before February 9th, 1894, and of the covenants and agreements of the said E. Mapes to do no job work or printing of any kind or nature whatsoever for parties resident of Lakota, and agreeing to neither re-establish the Nelson County News as a newspaper at Lakota, or to directly or indirectly countenance or assist in the establishment of another newspaper at Lakota, or at any other point in Nelson county, for the term of ~~five~~ years from the date of this agreement, the said R. L. Metcalf and Meldonetta Metcalf, for themselves, their heirs, executors, and assigns, agree to and with the said E. Mapes, his heirs, executors, and assigns, to pay to the said E. Mapes one-half of all moneys received by them for the publication of legal notices for a term of five years from date * * * That these payments shall be made on the first day of each month for such publications as shall be completed at any time during the preceding month. * * * That they shall be allowed the sum of twenty cents per thousand ems for composition on all legal notices as above described. * * * It, however, is especially understood and agreed that, if at any time the said R. L. Metcalf and Meldonetta Metcalf shall make a bona fide sale of the plant referred to, they shall be allowed to com-

mute the balance remaining due on this agreement at the rate of $150 per annum for such time as shall be unexpired. * * *" It further appears that said E. Mapes has fully complied with all his covenants and agreements contained in said contract; that since January 2, 1894, the defendants have continued the publication of the Observer, and during this time have published legal notices therein of the kind covered by the agreement; that said defendants paid to E. Mapes under said contract the sum of $707.16,—the last payment having been made in November, 1895; that since that date they have refused to make any further payment; that said E. Mapes assigned his cause of action on the contract to compel an accounting to the plaintiff, L. E. Mapes, prior to the commencement of this action. The trial court not only found that E. Mapes discontinued the publication of his paper, but that he also turned over the subscription list and good will of said paper and printing business to defendants. The facts thus far narrated present all that is necessary for a determination of the questions presented by plaintiff's appeal.

The trial court found, as a conclusion of law, that the contract in question is in restraint of trade, and is void as against public policy, and that no action, therefore, can be maintained thereon. The appellant assigns error upon this conclusion, and the correctness of this conclusion is the only question presented for determination. We are not able to agree with the trial judge that the contract in question is void. The principles upon which contracts in restraint of trade have been held void by the courts of England and this country proceed upon the theory that the public welfare demands that private citizens shall not be allowed, even by their own voluntary contract, to restrain themselves unreasonably from the prosecution of trade, callings, or professions, or from embarking in business enterprises in the promotion and encouragement of which the public has an interest. Just what amounts to a reasonable restriction becomes a question of much delicacy, to be determined upon the facts peculiar to each case. In this case, however, we are freed from the embarrassment of judicially determining whether the restraints imposed by this contract are reasonable or unreasonable, by an express statute upon the subject. Section 3926, Rev. Codes 1899, provides that "every contract by which any one is restrained from exercising a lawful profession, trade or business of any kind otherwise than as provided by the next two sections is to that extent void." Section 3927, Rev. Codes 1899, provides that "one who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city or a part thereof so long as the buyer or any person deriving title to the good will from him carries on a like business therein." "The good will of a business is the expectation of continued public patronage, but it does not include the right to use the name of any person under whom it was acquired." Section 3486, Rev. Codes 1899. "The good will of a business is property,

transferable like any other property." Rev. Codes 1899, § 3487. See, also, § 3267, Rev. Codes 1899. And "one who sells the good will of a business thereby warrants that he will not endeavor to draw of any of the customers." Section 3983, Rev. Codes 1899. The good will of one's business, although intangible, is deemed by the law to be a thing of value, and is adequate as a consideration for the promise of a purchaser, and may form the subject-matter of a contract of sale, in whole or in part. *Cruess* v. *Fessler*, 39 Cal. 336; *Herfort* v. *Cramer*, 7 Colo. 483, 4 Pac. Rep. 896; *Brett* v. *Ebel*, 29 App. Div. 256, 51 N. Y. Supp. 573; *Bank* v. *Warren*, 94 Wis. 151, 68 N. W. Rep. 549; *Smock* v. *Pierson*, 68 Ind. 405, 34 Am. Rep. 269; *Leslie* v. *Lorillard*, 110 N. Y. 519, 18 N. E. Rep. 363, 1 L. R. A. 456; *National Benefit Co.* v. *Union Hospital Co.*, 45 Minn. 272, 47 N. W. Rep. 806, 11 L. R. A. 437; *Franz* v. *Bieler*, 126 Cal. 176, 56 Pac. Rep. 249, 58 Pac. Rep. 466; *Wood* v. *Whitehead Bros. Co.*, 165 N. Y. 545, 59 N. E. Rep. 357; Bish. Cont. § 65, and cases cited. It has always been held lawful for the vendor of the good will of a business to bind himself to refrain from conducting a like business within a limited territory and for a limited period, provided, only, that his agreement to refrain shall be no more extensive than is necessary to secure to the vendee the fruits of his purchase. Such covenants are ordinary incidents to the sale of the good will of a business. Hence the question in these cases is whether the agreement to refrain was necessary to secure to the purchaser the fruits of his purchase. In the case at bar this question is settled in favor of the validity of the contract involved in this particular by section 3927, Rev. Codes 1899, above quoted. The restraint imposed by the contract is within the territorial limits authorized by said section. It is contended, however, that the agreement to refrain from carrying on a business must be auxilliary and collateral to a sale of the good will of the business; that is, the transaction must involve more than a bare agreement to refrain. We think this construction is entirely sound, and that it follows necessarily not only from the language of the section, but from its purpose, which is to permit a purchaser to secure the property which he buys, namely, the good will of a business. The question which is entirely decisive of this case, then, is this: Did Mapes sell to the defendants the good will of his business? It is contended by counsel for defendants that the transaction was purely and simply an agreement on the part of Mapes, for the consideration named in the contract, to refrain from doing business, and that there was no sale of the good will whatever. This evidently was the view taken by the trial court. We reach an opposite conclusion, and are of opinion that the facts found by the trial court fairly establish that Mapes sold the good will of his business to defendants, that such sale furnished the consideration for defendants' promise to pay contained in the contract, and that Mapes' agreement to refrain from publishing a newspaper and doing job printing within the time and ter-

ritory limited by the contract was collateral to such sale, and was for the purpose of securing to the defendants the good will so purchased. It is true, the contract does not use the words "good will," but that fact is not controlling. The contract shows upon its face that, at and prior to the making of the contract, Mapes was conducting a newspaper and job-printing business in Lakota, at which point the defendants also conducted a newspaper and job-printing business. The good will of his business, as we have seen, was property of a greater or less value. In consideration of the defendants' promise to make the payments named in the contract, Mapes agreed (1) to discontinue his business; (2) to refrain from following it for the time and within the territory named in the contract. This agreement, as we have already seen, he has fully performed. These provisions, in our judgment, evidenced a sale of the good will by Mapes to the defendants. No other deduction seems possible. Mapes, it is conceded, did not sell and transfer to the defendants any portion of his printing plant or, in fact, any tangible property. He did, however, surrender his business, and did so in pursuance of the contract in question. It is evident that the covenants of the defendants in the contract were to compensate Mapes for the benefits which they expected to derive from his surrender of his business. We conclude that the necessary legal effect of the contract was a sale by Mapes, for the consideration therein named, to the defendants, of the good will of his business. Such was the construction placed by Mitchell, J., upon a contract somewhat similar in *National Benefit Co.* v. *Union Hospital Co.,* (Minn.) 47 N. W. Rep. 806, 11 L. R. A. 437. In this view, the contract shows upon its face that the defendants' promise to pay, upon which this suit is brought, is based upon a lawful consideration. In this case, however, we are not confined to the uncertain language of the contract in determining what the transaction was, for the fact is expressly found that Mapes not only discontinued the publication of his newspaper as agreed, but that he also, as a part of the transaction, turned over his subscription list and the good will of his paper and printing business to the defendants. It is true, the fact of the turning over of the good will and subscription list is not mentioned in the written contract, and is a fact which is entirely outside of the contract, but that is entirely immaterial. The inquiry here is whether the defendants' promise is based upon a sufficient and lawful consideration? The consideration expressed in the written instrument is not conclusive; it may be explained or contradicted; and, under the modern rule, it may be shown that the instrument does not state the whole consideration, but that there were other considerations between the parties in addition to that expressed. *Levering* v. *Shockley,* 100 Ind. 558, *Nichols, Shepard & Co.* v. *Burch,* 128 Ind. 324, 27 N. E. Rep. 737; *Coles* v. *Soulsby,* 21 Cal. 47; *Bank* v. *Aull's Adm'r,* 80 Mo. 199; 6 Am. & Eng. Enc.

Law (2d Ed.) 772. The contention of the defendants' counsel that the omission of the written contract to recite the tranfer of the good will and the subscription list by Mapes to the defendants renders such transfer entirely immaterial and voluntary cannot be sustained. As we have seen, it is competent to prove the true consideration. We are of opinion that the transaction in the case at bar involved a sale by Mapes of the good will of his business, and his agreement to refrain from conducting a similar business was merely collateral to such sale, from which it follows, of course, that the contract in suit was one authorized to be made by section 3927, Rev. Codes 1899, before quoted, and that defendants are liable on the covenant sued upon in this action. A large array of authorities are cited by counsel for both parties relating to contracts in restraint of trade. We believe that, without exception, they are cases wherein the aid of the courts was invoked either to force covenants in restraint of trade, or to recover damages for breaches of such covenants. The question in the case at bar is entirely different. Here the contract to refrain has been fully performed, and the present action is to recover on defendants' promise to pay for the benefits which they have concededly received. Whether they could defeat a recovery if the contract were in fact illegal, as in restraint of trade, after having received all of the benefits thereunder, we do not determine. The statute above referred to is, of course controlling on the question of the legality of this contract.

One further question remains: The contract contains a stipulation that, in case of any disagreement as regards its interpretation, the same shall be settled by arbitration. Counsel for defendants urge that the present action cannot be maintained, because it does not appear that the defendants have refused to arbitrate. This contention cannot be sustained. It is not necessary to consider whether the arbitration provided for was intended to be a condition precedent to an action on the contract, or whether the agreement to arbitrate covers any of the questions involved in this action, for the reason that the defendants, by denying all liability under the contract, have waived any right which they may have had to submit any question here involved to arbitration. 2 Am. & Eng. Enc. Law, p. 581, and cases cited in note 2.

For the reason stated, the judgment will be reversed, and the case remanded to the district court for further proceedings, and it is so ordered. All concur.

(88 N. W. Rep. 713.)

STATE, *ex rel.* P. J. MCCLORY *v's.* E. I. DONOVAN.

Opinion filed Dec. 17, 1901.

Liquor Nuisance—Abatement of Action.

Construing § 7605, Rev. Codes 1899 This action was brought under said section to abate a liquor nuisance, and the trial court dismissed

the action. From the judgment of dismissal the plaintiff appealed to this court, and after a trial anew this court reversed said judgment and directed the trial court to reverse the same, and enter judgment for the plaintiff as demanded in the complaint. This was not done. On the contrary, the trial court, after the defendant had filed a bond, and paid the accrued costs of the action, entered judgment abating the action; and such judgment was entered upon the theory that the action could properly be abated under the provisions of said statute relating to the abating of actions. The action was brought against the owner of the premises in which the nuisance was maintained, and such premises were not leasehold premises. *Held*, that under such conditions the defendant was not in a position, under said section, to ask for an abatement of the action, and that the action was improperly abated.

District Court Acts Ministerially in Entering Judgment on Mandate.

Held, further, in cases tried anew in this court, that in entering judgment pursuant to the direction of this court the district court acts ministerially, and hence is without authority to further adjudicate upon questions in the case, except in cases where this court directs a new trial of all the issues, or of certain questions which are specified.

Authority of Counsel—Notice of Appeal—Waiver of Right to Object—Laches.

The plaintiff appealed to this court from the judgment of abatement. The notice of appeal was signed, and the appeal was taken by special counsel, said counsel being the same counsel who tried the case originally in the district court, and who signed the notice of appeal to this court from the first judgment; said counsel being the same counsel who, on the first appeal, filed briefs and argued the case in this court in behalf of the state. The summons was signed by P. J. McClory, as assistant attorney general, but he did not try the case, nor did he sign either of the notices of appeal, nor did he appear in this court at the argument of either appeal. Respondent's counsel moved in this court to dismiss the appeal taken from the judgment abating the action, claiming as grounds of the motion that the attorneys who signed the notice of appeal were without authority to do so. *Held*, that the motion is denied for the reason that the respondent's counsel have, by repeated recognitions of the attorneys who signed the notice, waived their right, if any they had, to raise the question of authority to sign such notice. The notice on its face purported to be signed by the plaintiff's attorneys, and there was no proof submitted in support of the motion that they were not. This also furnishes a proper ground for denying the motion to dismiss.

Statute Operates Prospectively.

The action was commenced long prior to the passage of the statute embraced in chapter 178 of the Laws of 1901. *Held*, that said statute is prospective only, in its operation, and that it has no application to actions commenced prior to its passage.

Appeal from District Court, Cavalier County; *Fisk*, J.

Action by the state, on the relation of P. J. McClory, as assistant attorney general, against E. I. Donovan. Judgment for defendant, and plaintiff appeals. Reversed.

Bosard & Bosard, for appellant.

Templeton & Rex, for respondent.

WALLIN, C. J. This is an action in equity, and the relief sought by the plaintiff is the abatement of a liquor nuisance, as defined by § 7605, Rev. Codes, 1899. The trial court found the material facts to be true as stated in the complaint, but as a conclusion of law adjudged that the action should be dismissed and a judgment of dismissal was accordingly entered in the trial court. This judgment was entered upon the theory that the nuisance which was found by the court to exist as a fact was in a drug store, and was maintained by the defendant under the shield of a druggist's permit, and, being so maintained, that the nuisance could not be abated by a court of equity. From such judgment the state appealed to this court, and the entire case was tried anew in this court under § 5630, Id., upon all the evidence offered and proceedings had in the trial court. The litigation in this court resulted in a reversal of the judgment, and the district court was directed by this court to "reverse its judgment, and enter a judgment in favor of the plaintiff for the relief demanded in the complaint." See *State* v. *Donovan*, 10 N. D. 203. The remittitur embracing the record and including said directions to the district court was sent to the court below, whereupon the following proceedings were had in the district court: The defendant, after notice to plaintiff's counsel, presented a petition to the district court, which embodied a request, in substance, that he (the defendant), upon payment of the costs of the action, be permitted to file a bond conditioned as required by § 7605, Rev. Codes 1899, and that upon his doing so a judgment should be entered abating the action. The record further shows that, after a hearing upon such petition was had in the district court, an order was made as follows: "It is ordered that within one week from this date said defendant pay to the attorneys for plaintiff the sum $285.85, the costs of this action as taxed and allowed, including an attorney's fee of $250, hereby fixed by the court, and that he file in the office of the clerk of this court his bond, with sureties to be approved by the clerk of this court, in the penal sum of $7,000, conditioned as provided by § 7605, Rev. Codes 1899; and that on so doing, judgment be forthwith entered herein abating this action without further order; and on default of said defendant so to pay such costs and file such bond, then that judgment be entered as prayed in the complaint." To this order an exception was preserved, and the making of such order is the only error assigned in this court. Pursuant to the order, judgment was entered abating the action, and from such judgment the plaintiff has again appealed to this court.

In this court a preliminary motion has been filed in behalf of the respondent to dismiss the present appeal. The motion is based upon the contention that Messrs. Bosard & Bosard (the attorneys who have signed and served the notice of appeal) are mere volunteers in the action, and are devoid of authority to take an appeal or sign a notice of appeal in this action. In order to understand

the basis of this motion, it becomes necessary to make a brief statement of facts. The action was instituted in the year 1898 by P. J. McClory, as assistant attorney general for Cavalier county, and the summons in the action was signed by McClory in said official capacity; but it is conceded that after the commencement of the action Messrs. Bosard & Bosard were retained by private parties to assist in the prosecution. It appears further that said special counsel had the exclusive charge of the case in the district court during its trial, and that after judgment was entered in the district court the first time said counsel took an appeal to this court, and in doing so signed and served the notice of appeal; and it is also true that said special counsel prepared and served the briefs and abstracts and made the oral argument in this court on said first appeal. It is further true that when the record was remanded said counsel represented the state, and were recognized as attorneys for the state by the defendant's attorneys in all that was done in and about the application made by the defendant's counsel for the abatement of the action. It is further true that counsel for the defendant have never at any time, prior to making this motion, raised an objection as against the right of said assistant counsel to represent the state in this action. We are clear that upon this state of facts the defendant is estopped from raising the question of the jurisdiction of this court to hear the second appeal. As supporting this conclusion, we cite the case of *Woods* v. *Walsh*, 7 N. D. 376, 75 N. W. Rep. 767.

But there is another ground upon which the motion should be denied. The notice of appeal is signed by Bosard & Bosard, who are resident attorneys, as the attorneys for the plaintiff. Upon its face the notice shows and announces to all concerned that the attorneys who assumed to represent the plaintiff in taking the appeal are the attorneys for the plaintiff in fact. This prima facie showing has not been overcome or disputed by any evidence submitted on the motion to dismiss the appeal. Of course the mere fact that the attorney who signed the summons did not take the appeal is of no consequence, and does not show or tend to show that Messrs. Bosard & Bosard have not been employed to take this appeal. Upon the record standing alone, we should be compelled to hold that the attorneys who have assumed to take the appeal have been employed to do so. But counsel, in support of the motion, place great stress upon the provisions of chapter 178 of the Laws of 1901, and argue upon this statute that the state's attorney, or the attorney general, or some official representative of the state, and such officers only, have authority to prosecute the present appeal to this court, inasmuch as such appeal was not attempted to be taken until said statute took effect. After a careful reading of the enactment of 1901, we fail to find in the same any support whatever to the contention of counsel. There is not a line or suggestion in the statute looking towards the matter of prosecuting or appealing any action which had been commenced prior to the passage of the act. The object of the enactment

is to define the duties of state's attorneys and the attorney general, and to give said officials exclusive control of certain classes of actions. But the statute, by its terms, is clearly prospective in its operation, and is not retrospective and hence it can have no bearing in any case such as this, which was brought and tried on its merits before the statute went into effect. The motion to dismiss must be denied.

We turn now to a consideration of the merits. It is the contention of the respondent that the order of the district court directing the abatement of the action was properly entered under the provisions of § 7605, supra, which directs that actions in equity brought under said section shall be abated upon certain conditions The clause of the section relied upon by the respondent reads as follows: "And if the proceeding is an action in equity and bond is given and costs therein paid before judgment and order of abatement, the action shall be thereby abated; provided, however, that the release of the property under the provisions of this section shall not release it from any judgment, lien or penalty or liability to which it may be subject under any other statute or law." It will be conceded that this provision of the statute authorizes, and in fact directs, the abatement of actions in equity brought under § 7605. But it is equally clear that the abatement of any such action can be had only upon the conditions named in the statute which regulates such abatement. The statute in fact names the conditions of any such abatement in its requirement that the costs of the action must be paid and a bond given as prerequisites. But this feature of the statute conveys no information whatever either as to the amount of any such bond or as to the conditions to be embodied in the bond; hence, in order to give effect to this part of the statute. it becomes necessary to consider the context, and ascertain whether the character and amount of any such bond can be gathered by a reference to other portions of the statute A careful reading of the entire section discloses the fact that but one bond is described in the section, and that a bond which may be given by the owner of the realestate in a case of a leasehold, and where, after a trial, the leasehold premises have been adjudged to be a nuisance. In such cases the owner of the premises, if he so elects, is accorded certain privileges: First, he may, after such judgment, terminate the lease by a three-days' notice in writing to the tenant; second, he may, upon the conditions named in the statute, have the premises which have been seized released and turned over to him by an order of court. The conditions are, after satisfying the court of his good faith, that the owner shall appear in the action, pay the costs thereof, and give a bond to the amount of the full value of the property involved, conditioned that the nuisance shall be immediately abated, and that he will prevent the same from being established on the premises for the period of one year. When these conditions are fully met, the court, under the terms of the statute, will order the premises which have been taken and

closed to be delivered to the owner. Under a preceding clause of the section, the court, after judgment, is required to abate the nuisance, and in doing so the officer is directed to shut up the premises "as against the use or occupation of the same for saloon purposes, and keep the same securely closed for the period of one year unless sooner released as hereinafter provided.)" A careful reading of the statute will show that the only provisions made in it for releasing such property from any such seizure are those to which we have referred, and whereby the owner of leased premises may obtain an order of release upon the terms already mentioned, viz., upon giving a certain bond and paying costs. Manifestly, it is to such bond and to such conditions, and to none other, that reference is made in the provisions of the statute regulating the abatement of equity actions. Under such conditions the statute permits an action in equity to be abated, and permits the court to release property seized, and to turn the same over to the owner in cases of seizure; and possibly the statute contemplates that such an action may be abated, under the conditions named, in a case where no seizure has been made in fact. The language of the statute leaves little room for doubt that the legislature intended that, after a judgment has established the existence of the nuisance, the premises in which it is maintained shall, for saloon purposes, be closed for one full year in all cases, unless the nuisance is maintained on leasehold premises. In cases of leaseholds the owner, on the conditions named, may obtain an order of release, and in none other. It would, in our opinion, be a striking departure from this obvious policy of the law to so construe the statute as to permit an owner who has not leased his premises, and who is personally charged with the offense of maintaining a nuisance, to obtain full control of his property at any time, even before judgment, by the simple process of paying the accrued costs and giving a bond. We are certainly not at liberty to read any such language into § 7605 of the Revised Codes of 1899. Counsel for the respondent cite the following Iowa cases in support of their contention: *Morris* v. *Lowry*, 85 N. W. Rep. 788; *Same* v. *Connolly*, Id. 789. These cases are not in point. Under the Iowa Code the right of an owner who has appeared in an action brought to abate a liquor nuisance to have the action abated on giving the required bond and paying the costs of suit is unrestricted. It is a right accorded to all owners of property who appear in the action, and who act in good faith. In this state the legislative assembly has seen fit to limit the right to cases in which the nuisance is maintained upon leasehold premises. The defendant in this case is not, therefore, entitled to the benefits of the statute governing the abatement of this class of actions, and this for the reason that the nuisance sought to be abated is maintained on premises owned and occupied by the defendant as a drug store. The conclusion we have reached will necessitate a reversal of the judgment appealed from, but we should unhesitat-

ingly reach the same conclusion upon another and wholly independent ground. As has been seen, this action is now before this court upon a second appeal. Upon the former appeal the case was tried anew in this court upon the merits, and upon all the evidence offered and proceedings had in the district court. The trial in this court was a trial de novo under § 5630, Rev. Codes 1899, and such trials are clearly designed to terminate litigation by a final adjudication upon all the issues involved, except in cases where for special reasons a new trial of some or all of the issues is directed to be had in the district court by an order sent down with the record. No such order was made in the case at bar. Nevertheless, the learned trial court has thought proper to permit the defendant to intervene in that court for the purpose of renewing the litigation; and, acting upon such permission, the defendant was allowed to interject into the case questions and considerations of both law and fact which were not brought to the attention of this court in any manner, and upon which this court has never, until the present appeal, had an opportunity to pass, or to make an adjudication. Upon such new matter so interjected the learned trial court has—we think, erroneously—assumed the right to enter a judgment in disregard of the order sent down. We are unable to concur in this assumption of authority on the part of the trial court. It is true that the defendant claimed to do what was done under color of a statute permitting a bond to be filed at any time before judgment. Nevertheless, we are clear that this right, when proper, must be exercised with reference to the mode of reviewing cases established by § 5630. The state would have the right to litigate the questions as to the amount of the bond, the amount of the costs to be paid, and above all the good faith of the owner who seeks to abate the action; and this case forcibly illustrates the further right of the state to question the right of a defendant under the statute to have the action abated. If the state has such right, then it must follow that the state or any appellant would have an undoubted right to have this court pass upon all such questions, whether of law or fact. But to do so the bond to abate an action must be filed in the court below, and before an appeal is taken. It is true that the defendant might argue in this case that, inasmuch as he was successful in the court below, there was no occassion to tender a bond and ask for an abatement of the action before the first appeal was taken. But, if this would furnish an excuse, it certainly does not excuse the omission of counsel to apply to this court for leave to present an application to the court below to abate the action. No such request was made in this court, and, if it had been, it could not have been granted, for the reasons above given in disposing of the case on its merits. It is well settled that in cases such as this the district court, in entering judgment pursuant to an order transmitted to it in the record, acts ministerially, unless this court in express terms directs further proceedings to be had in the district court. Our conclusions on this feature of the

case find ample support in the adjudications. See Elliott, App. Proc. § 564, and cases cited in note 1.

The order directing the judgment, which is assigned as error, and the judgment appealed from, are severally reversed, and the district court is directed to enter judgment, pursuant to the order of this court in favor of the plaintiff, and for the relief demanded in the complaint with costs. All the judges concurring.

(88 N. W. Rep. 717.)

INDEX.

ABATEMENT OF ACTION. See INTOXICATING LIQUORS.

1. As against the owner of the premises the Supreme Court ordered the place closed and abated as a nuisance. The district court notwithstanding this order, permitted defendant on payment of costs and filing of bond to obtain an order abating the action. *Held* error. State v. Donovan, 610.

2. An action against the owner of a building in which intoxicating liquors are sold to abate the same as a nuisance, the premises not being leasehold premises, the defendant was not within the terms of § 7605, Rev. Codes, and could not abate the action by giving bond and paying costs. State v. Donovan, 610.

3. Chapter. 178, Laws 1901, relating to attorneys in actions to abate liquor nuisances, being prospective in its terms, does not render appeal by counsel other than the state's attorney or attorney general abortive. State v. Donovan, 610.

ABSTRACTS ON APPEAL. See APPEAL AND ERROR, 610.

ABUSE OF DISCRETION.

1. The statute vests in the court a sound discretion as to opening up judgments entered against a party through his excusable neglect, and where the facts set out in the motion papers for such relief may be met and opposed by counter-affidavits, but no affidavits have been produced it is an abuse of discretion for the trial court to refuse to vacate the default. Minnesota Thresher Mfg. Co. v. Holz, 16.

2. *Held*, under the facts in this case, that defendant showed a sufficient excuse for his default, and that a refusal of the court to vacate the judgment was an abuse of discretion. Minnesota Thresher Mfg. Co. v. Holz, 16.

ACCEPTANCE OF BENEFITS. See APPEAL AND ERROR, 72.

ACKNOWLEDGMENTS.

1. An instrument not acknowledged as prescribed by the statute is not entitled to record, and when recorded in fact the same does not operate as notice to the public. American Mortg. Co. v. Mouse River Live Stock Co., 290.

2. A written assignment of a real estate mortgage, the execution of which is acknowledged before a notary public of another state, is entitled to be read in evidence in this state under the provisions of § 5696, Rev. Codes, without further proof when the certificate of acknowledgment attached thereto is authenticated by the signature and official seal of such notary. It is not necessary to have attached thereto the certificate of an officer of a higher rank to the official character and signature of such notary. Grandin v. Emmons, 223.

ACKNOWLEDGMENTS—Continued.

3. A certificate of acknowledgment of a mortgage by a husband and wife of their homestead recited that they (naming them) personally appeared before the notary and were known by him to be the "person" who "are" described in the foregoing instrument, and who executed the same, and acknowledged that "he" executed the same. *Held*, that the certificate showed an acknowledgment of the mortgage by both; that the use of the words "he" and "person" was clearly a clerical error when considered in connection with the entire certificate. McCardia v. Billings, 373.

4. The deputy sheriff making a foreclosure sale correctly executed the certificate of sale in the name of the sheriff, by himself as deputy. The acknowledgment was erroneous in that the deputy did not acknowledge it for himself personally and in behalf of the sheriff. The defect, however, was cured by § 3585, Rev. Codes, enacted in 1887. McCardia v. Billings, 373.

5. A written assignment of a real estate mortgage, the execution of which is acknowledged before a notary public of another state, is entitled to be read in evidence under § 5696, Rev. Codes, without further proof, when the certificate of acknowledgment attached thereto is authenticated by the signature and official seal of such notary. Grandin v. Emmons, 223.

6. A certificate of acknowledgment of a mortgage by husband and wife of their homestead, reciting that they (naming them) personally appeared before the notary and were known by him to be the "person" who "are" described in the foregoing instrument and who executed the same and acknowledged that "he" executed the same, shows an acknowledgment of the mortgage by both. McCardia v. Billings, 373.

ACTION TO QUIET TITLE. See Quieting Title, 223.

ADVERSE POSSESSION.

1. Under Ch. 158, Laws 1899, any person who claims title to real estate in this state may perfect his title thereto by taking and retaining adverse, open, exclusive and undisputed possession of such real estate for a period of ten years, and by paying all taxes assessed against the land for said period. Power v. Kitching, 254.

2. Under Ch. 158, Laws 1899, a claim of title by adverse possession is sufficient if the occupant claims ownership in good faith under an instrument constituting color of title. Power v. Kitching, 254.

3. A tax deed in the form prescribed by § 1639, Comp. Laws, is sufficient color of title to support adverse possession. Power v. Kitching, 254.

4. A tax deed will constitute color of title though the tax was void by reason of irregularities in the proceedings which appear on the face of the deed sufficient to render it void on its face. Power v. Kitching, 254.

5. Where the occupant claims title to land by adverse possession under Ch. 158, Laws 1899, the limitation of actions fixed by § 1640, Comp. Laws, does not apply to the suit. Power v. Kitching, 254.

ADVERTISEMENTS. See Mortgages 223

ADVICE OF COUNSEL. See Malicious Prosecution 48.

AFFIDAVIT OF MERITS.

1. Upon a motion to set aside a default judgment under the statute, defendant must include in his moving papers an affidavit of merits, a verified answer setting forth his defense, and affidavits showing his excuse for not appearing and answering in time. Minnesota Thresher Mfg. Co. v. Holz, 16.

AGENCY. See PRINCIPAL AND AGENT 59, 90, 5.

ALTERATION OF INSTRUMENTS. See NEGOTIABLE INSTRUMENTS, 551.

1. The rule that a material alteration of a note renders it void does not apply to skeleton notes delivered by the makers and subsequently filed, on the ground that by signing in blank they impliedly authorized the holder to fill out the blanks in harmony with the general purpose of the instrument. Porter v. Hardy, 551.

2. The material alteration of a written contract by a party entitled to a benefit thereunder, or with his consent, extinguishes all the executory obligations of the contract in his favor as against parties who do not consent to the alteration. Porter v. Hardy, 551.

3. Where a part of a contract is in the form of a skeleton note, the detachment of such part and subsequently filling the blanks, so as to make a negotiable note, is a material alteration, rendering the same void. Porter v. Hardy, 551.

4. Where a part of a contract is in the form of a skeleton note, and the latter is detached and made a negotiable note by filling of the blanks, the signers of such contract are not guilty of negligence, so as to estop them from asserting that the note subsequently detached, was void and not the contract signed. Porter v. Hardy, 551.

AMENDMENTS. See PLEADINGS, 424.

APPEAL AND ERROR. See CONTEMPT, 154.

1. Where the statement of a case tried without a jury fails to embrace all the evidence offered at the trial, and the conclusions of law and the judgment are justified by the findings of fact, the judgment will be affirmed, but without prejudice to further proceedings by the parties which may be instituted. Littel v. Phinney, 351.

2. In a case tried to the court without a jury the Supreme Court is without authority to try the case anew unless the statement of the case embraces all the evidence. The certificate of the trial court to the effect that the statement embodies all the evidence is sufficient prima facie, but is not conclusive of the fact where the record shows on its face that the statement does not contain all the evidence. Littel v. Phinney, 351.

3. Appeals in contempt cases are governed by § 5954, Rev. Codes, and not by § 5630. To review the sufficiency of the evidence, the statement of the case must embrace specifications of particulars showing wherein the evidence is insufficient. Noble Tp. v. Aasen, 264.

4. In the absence of an express waiver of interrogatories, an order of conviction for contempt, under § 5942, will be vacated where no interrogatories have been filed. Noble Tp. v. Aasen, 264.

5. Appellants demanded a trial anew in the Supreme Court under the provisions of § 5630, Rev. Codes. A large portion of the evidence was omitted from the statement of the case. This being made to appear, the judgment of the district court was affirmed. Geils v. Fleugel, 211.

APPEAL AND ERROR—Continued.

6. Where no findings of law or fact are in the record, and no error is assigned as to the findings, the judgment appealed from will be affirmed. Douglas v. Richards, 366.

7. An assignment of error that the court erred in overruling the objection of plaintiff's counsel to the introduction of certain evidence on behalf of the defendant, setting out a literal copy of the objection made to such evidence during the trial, and as set forth in the statement of the case as settled, is sufficient though it does not contain any reference to the folio or page of the abstract where the objection was made, and the assignment therefore overruled. Vidger v. Nolin, 353.

8. Under § 5469, Rev. Codes, providing that if the judge in any case refuses to allow an exception in accordance with the facts, the party desiring the statement settled may apply to the Supreme Court. The latter court has authority to settle a statement of the case when it appears the trial court has refused a request to do so in accordance with the facts. Taylor v. Miller, 361.

9. Where it appears by a preponderance of the evidence submitted to the Supreme Court that the trial court has not refused to settle a statement of the case in accordance with the facts in certain respects, such court will not settle a statement of the case. Taylor v. Miller, 361.

10. Under § 5469, Rev. Codes, providing that, if the judge in any case refuses to allow an exception in accordance with the facts, the party desiring the statement settled may apply to the Supreme Court. Until it is shown the trial court has refused to do so, the Supreme Court is without authority to settle a statement of the case. Taylor v. Miller, 361.

11. Under § 5630, Rev. Codes, in actions tried without a jury, the party desiring to appeal may cause a statement of the case to be settled, and is required to specify the questions of fact he desires the Supreme Court to review. On appeal, involving the validity of certain taxes, questions such as: "Were the town taxes of the town of Raymond legally levied?" and "Were the taxes of school District No. 23 of the town of Raymond legally levied?" call for a determination of matters of law and are not in compliance with such section; and the court will not enter upon the retrial of any issue of fact, nor consider or determine any question of law, either depending on the facts or arising on the evidence, embodied in the statement. Douglas v. Richards, 366.

12. On appeal from a judgment in foreclosure an undertaking, under Revised Codes 1899, § 5610, whereby the obligors undertake to pay the judgment as entered in the district court, in so far as the same shall be affirmed in the Supreme Court, operates to stay proceedings in the district court. National Bank of Wahpeton v. Hanberg, 383.

13. Where an undertaking is voluntarily filed to pay a judgment in foreclosure, the omission to obtain an order respecting the undertaking, as prescribed by § § 5611, 5616, Rev. Codes, is at most an irregularity and not prejudicial to the respondent. National Bank of Wahpeton v. Hanberg, 383.

14. Where, in an action for conversion of wheat, its value at the time of its delivery at an elevator was agreed on by stipulation, and no evidence of value at any other time was offered, defendant cannot

APPEAL AND ERROR—Continued.

urge after trial and upon appeal that there was no evidence of the value of the wheat at the time of its conversion. Willard v. Monarch Elev. Co., 400.

15. Under § 5630, Rev. Codes, to secure a trial de novo on appeal in actions tried to the court without a jury, the statement of the case settled must contain all the evidence offered, and the failure to incorporate in the statement exhibits offered in evidence, or to have them officially identified as constituting a part of the statement precludes the court from trying the case anew. Eakin v. Campbell, 416; Teinen v. Lally, 153.

16. Criminal contempt proceedings considered and *held*, that the procedure in contempt trials, as laid down in § 5942, Rev. Codes, does not govern in cases arising under the statute relating to intoxicating liquors. The latter trials are governed by the special proceedings prescribed in Sec. 7605, Rev. Codes. State v. Massey, 154.

17. Any final order in a contempt case, which adjudges that the defendant is guilty, is appealable to the Supreme Court under § 5954, Rev. Codes, 1899. State v. Massey, 154.

18. On appeal to the Supreme Court from a final order adjudging defendant guilty of contempt, where a review of the evidence is sought, a statement of the case must be settled as in jury cases. The Supreme Court, in such matters, sit as a court of review for the correction of errors. State v. Massey, 154.

19. Contempt cases are not governed by § 5630, Rev. Codes, and the Supreme Court can not sit in such cases to try them anew. State v. Massey, 154.

20. On appeal from a judgment in an action tried to the court below without a jury, where review was demanded in the Supreme Court and where the statement of the case affirmatively disclosed that evidence offered below was omitted from the statement of the case, the contents of the statement of the case *held* to prevail over the prima facie evidence contained in the certificate of the trial court to the effect that all the evidence offered was therein contained. Kipp v. Angell, 199.

21. On appeal from a judgment in foreclosure an undertaking, under § 5610, Rev. Codes, *held* to stay proceedings in the district court. National Bank of Wahpeton v. Hanberg, 383.

22. In an action in equity to foreclose a chattel mortgage, plaintiff recovered judgment against defendants as follows: It was adjudged that plaintiff recover $460.62; that the sheriff should take possession of the chattels described in the mortgage and sell the same as in execution sales and apply the proceeds in discharge of the money feature of the judgment. Defendants appealed from the judgment, and to perfect the appeal caused the usual undertaking for costs to be filed, and, in addition thereto, an undertaking framed under § 5610, Rev. Codes, whereby the obligors undertook, in effect, to pay the judgment as entered in the district court in so far as the same should be affirmed in the Supreme Court. The undertaking was not given pursuant to any order of the court or judge thereof, as required by § 5611, Rev. Codes, or § 5616, Rev. Codes. *Held*, nevertheless, that said undertaking operated to stay proceedings in the district court. Nat. Bank of Wahpeton v. Hanberg, 383.

23. The courts will not determine the constitutionality of a statute at the instance of parties not affected by its provisions. State v. Donovan, 203.

APPEAL AND ERROR—Continued.

24. A motion in the Supreme Court to affirm a judgment in a case in which a trial de novo of all the issues is demanded on the ground that the documents, offered in evidence in the district court by plaintiffs, were not incorporated in the statement, will be granted where it is conceded that such documents were offered at the trial and were omitted from the statement. Geils v. Fluegel, 211; Kipp v. Angell, 199.

25. The statute, § 5606, Rev. Codes, permits an appeal from a judgment either in whole or in part, but in a case tried to the court below without a jury, where the notice of appeal declared in terms that the appeal was from the whole judgment, and the statement of the case stated in terms that the appellant desired a trial anew in the Supreme Court, but the statement of the case did not contain all the evidence offered upon the trial as required by § 5630, Rev. Codes, the entire case will not be reviewed, notwithstanding counsel agreed to such review. Geils v. Fluegel, 211.

26. Where an objection to evidence is sustained no advantage can be taken of the ruling on the ground that the objection was not sufficiently specific. American Mortg. Co. v. Mouse River Live-Stock Co., 290.

27. An appeal will lie to the Supreme Court, under § 5954, Rev. Codes, from a final order adjudging the accused guilty of contempt. On such appeal the Supreme Court may review all the proceedings had, all of the affidavits and proofs introduced, and, for the purpose of reviewing questions as to the sufficiency of the evidence, a statement of the case may be prepared under Ch. 10, Art. 3, Rev. Codes. In order, therefore, to review the sufficiency of the evidence, the statement of the case must embrace specifications of particulars showing wherein the evidence is insufficient. Township of Noble v. Aasen, 264.

28. A motion was made to dismiss an appeal for duplicity. The notice of appeal stated in substance that appellants appealed from the judgment and from all orders made by the district court prior to said judgment. The record disclosed that numerous orders were made prior to the entry of final judgment, including an order denying a motion to quash the alternative writ of mandamus, and also an order overruling demurrer to the complaint. The motion would be well taken if the orders were appealable and the time for appeal from the same had not expired. State v. Gang, 331.

29. An assignment of error in appellant's brief in the following language: "The court erred in overruling the objection of plaintiff's counsel to the introduction of certain evidence on behalf of the defendant, to-wit: At this time the plaintiff objects to any and all evidence offered on the part of the defendant under the several counterclaims pleaded and set up in their answer and supplemental answer, excepting that certain counterclaim pleaded which the plaintiffs by their reply deny, they pleading settlement in payment thereof, for the reason and upon the ground that such several counterclaims, and all of them, are not proper matters to be pleaded in defense to, or as a counterclaim in this action," *held* sufficient compliance with rule 12 of the amended rules of court. Vidger v. Nolin, 353.

30. In reviewing an order of a trial court overruling or granting a motion for a new trial, where the motion is based entirely upon the sufficiency of the evidence to sustain the verdict, the Supreme Court will only inquire whether there is evidence of a substantial character supporting the verdict. Flath v. Casselman, 419.

APPEAL AND ERROR—Continued.

31. Where a decree consists of two distinct parts, receipt of benefits under one will not bar an appeal from the other portion. Wishek v. Hammond, 72.

32. A complaint in an action for malicious prosecution contained no allegation of loss of time, nor was any evidence of such loss introduced at the trial. *Held*, that the instruction permitting plaintiff to recover for loss of time, though erroneous, was harmless where it appeared that the jury were not misled thereby. Merchant v. Pielke, 48.

33. The certificate appended to a statement of the case by the trial judge, to the effect that the same embodies all the evidence, is sufficient to establish the fact prima facie, but the same is not conclusive. United States Sav. & Loan Co. v. McLeod, 111.

34. Under § 5630, Rev. Codes, on appeal on trial by the court, all the evidence must be embodied in the statement of the case without reducing the same to narrative form or striking out irrelevant evidence. United States Sav. & Loan Co. v. McLeod, 111.

35. Where all evidence offered on a trial before the court without a jury was not embodied in a statement of the case, as required by § 5630, Rev. Codes, a trial anew in the supreme court cannot be had. United States Sav. & Loan Co. v. McLeod, 111.

36. Where it is difficult to ascertain the theory of procedure on which a judgment appealed from was rendered, and the record also shows incongruities of practice and procedure, the judgment will be reversed and a new trial granted. Hagen v. Gilbertson, 546.

37. A statement of a case settled in a civil action tried before a jury is governed by § 5467, Rev. Codes, and not by § 5630. The latter section relates to cases tried before the court, while under the former only the substance of the evidence need be stated. Northern Pacific Ry. Co. v. Lake, 541.

38. An objection that a statement of case on appeal is defective, is not proper ground for dismissing the appeal. Northern Pacific Ry. Co. v. Lake, 541.

39. In an action tried in the district court before a jury, where evidence was excluded, on objection, during the trial, but at its conclusion the jury were discharged, by consent of counsel, and the case submitted to the court on the evidence adduced, *held*, that on appeal a retrial could not be had under § 5630, Rev. Codes, because all testimony offered did not, and of necessity could not, appear in the stated case. Hagen v. Gilbertson, 546.

40. In cases appealed for a re-trial, under § 5630, but where a re-trial cannot be had in the appellate court, because all evidence offered below does not appear in the stated case, the Supreme Court will not review errors in the rulings made in the trial court. Hagen v. Gilbertson, 546.

41. Objection that a statement of the case on appeal is defective is not proper ground for dismissal of the appeal. Northern Pacific Ry. Co. v. Lake, 541.

42. Motion to dismiss an appeal in a liquor case because the attorney taking it was not the state's attorney nor authorized to appear for

APPEAL AND ERROR—Continued.

the people unless by appointment of court or employment of county commissioners, denied because counsel for respondent by constant recognition of the attorneys taking the appeal, had waived his right to object in the Supreme Court. State v. Donovan, 610.

43. In cases tried anew on appeal, in entering judgment pursuant to direction, the district court acts ministerially and is without jurisdiction to further adjudicate the case. State v. Donovan, 610.

44. Motion to strike appellant's abstract and statement of the case from the record and affirm the judgment denied. Wiles v. McIntosh County, 594.

45. Supreme Court is without authority to retry, where part of issues only was determined by court below in case tried without a jury under § 5630, Rev. Codes. Mapes v. Metcalf, 601.

APPROPRIATIONS. See MUNICIPAL CORPORATIONS, 230.

ARBITRATION AND AWARD.

1. From the evidence recited in the opinion, *held*: That arbitrators appointed in writing to adjust differences between plaintiff and defendant were duly sworn before entering upon the discharge of their duties, and the fact that a subsequent oath taken by them and reduced to writing was defective is of no consequence. Caldwell v. Brooks Elev. Co., 575.

2. In an action on an award the defendant may interpose defenses of an equitable nature tending to impeach the award, but the correctness of the award upon the merits, when made in good faith, cannot be inquired into in such action. Caldwell v. Brooks Elev. Co., 575.

3. If the arbitrators refused to consider evidence offered, such action, if pleaded and proven, would vitiate the award. Caldwell v. Brooks Elev. Co., 575.

4. Every reasonable intendment will be presumed in favor of an award. Caldwell v. Brooks Elev. Co. 575.

5. By denying all liability under a contract, defendants waived any right which they may have had to require an arbitration under the stipulations of the contract as a condition precedent to the maintenance of the action. Mapes v. Metcalf, 601.

ARREST AND BAIL.

1. In an action in claim and delivery brought for the purpose of securing possession of mortgaged personal property, in which it is claimed that defendant had concealed such property with intent to deprive the plaintiff of the benefit of his security, *held*, that an order of arrest and bail may be issued under subdivision 3 of § 5304, Rev. Codes, Thompson v. Thompson, 564.

2. On an application to vacate an order of arrest in such a case, the evidence is considered as recited in the opinion, and *held* to warrant a vacation of the order of arrest and defendant's discharge from custody. Thompson v. Thompson, 564.

3. A concealment, within the meaning of § 5394, Rev. Codes, signifies to hide or to secrete with intent to deprive the mortgagee of his security. Thompson v. Thompson, 564.

ASSESSMENT AND TAXATION. See MUNICIPAL CORPORATIONS, 230.

1. The tax receipts and redemption certificates given to the holder of a

ASSESSMENT AND TAXATION—Continued.

void tax deed, held not liens on the land as they were not made at the time when the holder of the tax deed had any title or interest in the land. Sheets v. Paine, 103.

2. Description of lands for taxation in the assessment book as S. E. 4 S. W. 4, W. 2 S. W. 4 opposite the owner's name, and opposite the figures 18 in the section column, with no town or range stated opposite these letters and figures in the assessment book, and without any attempt to indicate, either by figures or ditto marks, in what town or range said section was situated, *held*, fatally defective so as to render the assessment and tax deed based on a sale of the land absolutely void. Sheets v. Paine, 103.

3. Where the description of lands in the assessment book is void, a tax deed based thereon is also void, and cannot be made good by parole evidence showing the correct description of the land intended to be effected. Sheets v. Paine, 103.

4. Mandamus will issue to compel the levying of a tax against a municipal corporation for the payment of a judgment duly entered against it. Coler v. Coppin, 86.

5. Section 1180, subdivision 6, Rev. Codes, exempts from taxation all buildings belonging to institutions of purely public charity, including public hospitals together with the land actually occupied by such institutions not leased or otherwise used with a view to profit. *Held* not to exempt a hospital owned and operated by a private individual, though exclusively for purposes of public charity, since such property cannot be said to belong to an institution. Engstad v. Grand Forks County, 54.

6. Tax deed, set out in the answers of defendants as their source of title, issued in pursuance of attempted tax sale for the tax of 1888, although regular on its face, is voidable because of the failure of the assessor to annex any affidavit to his assessment roll in the year 1888. Eaton v. Bennett, 346.

7. Where tax deeds, regular on their face but voidable because of an illegal assessment, were recorded more than three years prior to the commencement of the action, the recording of said deeds did not operate to start running the special statute of limitations found in § 1640, Comp. Laws, and hence the actions were not barred. Eaton v. Bennett, 346.

8. The pretended taxes for 1888 in Emmons county were wholly illegal and void because of the omission by the assessor to annex an affidavit to his return or assessment roll. Such taxes being void, a suitor was not compelled, by § 1640, Comp. Laws, to pay, as a condition of relief, the taxes on said land before a tax deed could be avoided. Eaton v. Bennett, 346.

9. Section 1551, Comp. Laws, 1887, requiring assessors to attach to their return or assessment roll an affidavit of authentication in the form therein prescribed, is mandatory, and a compliance with this requirement was vital to the taxes based on the assessment. Eaton v. Bennett, 346.

10. The omission of an assessor to annex any affidavit to his return, as required by § 1551, Comp. Laws, 1887, was fatal to the jurisdiction of the taxing officers, and the tax extended against property so attempted to be assessed was void. Eaton v. Bennett, 346.

11. A tax deed in the form prescribed by § 1639, Comp. Laws, will constitute color of title even if the tax upon which it was issued

ASSESSMENT AND TAXATION—Continued.

by reason of irregularities in the tax proceedings, and irregularities appearing on the face of the deed, sufficient to render the deed void on its face, will not operate to defeat the instrument as a color of title. Power v. Kitching, 254.

12. The statute of limitations embraced in § 1640, Comp. Laws, does not control where the occupant of land claims title by adverse possession under Ch. 158, Laws 1899. Power v. Kitching, 254.

13. A tax deed in the form prescribed by § 1639, Comp. Laws, issued by the county treasurer, and purporting to be based upon a tax sale of the land, and describing the same, is sufficient, under the statute, to constitute color of title. Power v. Kitching, 254.

14. An action in equity will lie to enjoin an officer from selling personal property belonging to plaintiff which defendant had seized to satisfy an alleged personal tax charged against plaintiff, where the property was seized in another county from that for which defendant was elected or in which he had jurisdiction to act. Shaffner v. Young, 245.

15. Where the notice of a tax sale is substantially insufficient for any reason, it matters not that the statute declares that the tax deed shall be conclusive and shall convey title. Such statutes are unconstitutional and if upheld would operate to transfer title to real estate without due process of law. Dever v. Cornwell, 123.

16. In an action to quiet title to land, defendant answered denying plaintiff's ownership and alleging title in himself. To sustain his claim of ownership, plaintiff put in evidence a tax deed, describing the land, issued upon a tax sale, made by the treasurer of the county in 1896 for the taxes of 1895. The deed was regular upon its face and in the form prescribed by § 1268, Rev. Codes, except that the deed was not executed by the county treasurer but was executed and issued by the county auditor. After introducing the deed plaintiff rested his case. The evidence disclosed that the county tax for 1895 was not levied in specific amounts and that the commissioners attempted to levy said tax by percentages. The tax of 1895 was extended on the tax list and based on said attempted levy by percentages. *Held*, that, under § 48, Ch. 100, Laws 1891, said attempted tax levy was without authority of law, and the county tax based thereon was illegal and void; that the county treasurer was without jurisdiction to sell the land for said taxes, and the tax deed based on such sale was void from the beginning. Dever v. Cornwell, 123.

17. Under § 48, Ch. 100, Laws 1891, the county tax was required to be levied in specific amounts, and the county commissioners had no jurisdiction to levy such tax by percentages. Therefore a tax extended on the list based upon a levy by percentages was void, and a tax deed based thereon illegal. Dever v. Cornwell, 123.

18. By § 1255, Rev. Codes 1895, the notice of tax sale was required to be published "once a week for three consecutive weeks preceding the sale." This language means that the publication must continue for and during three full weeks of seven days each—a total period of twenty-one days, preceding the sale, therefore the notice of tax sale for the taxes of 1895 published first on September 17th, 1896, again on September 24th, 1896, the last publication on October 3rd, 1896. The sale took place on October 5th, 1896. Excluding the date of the first publication, the notice was published only eighteen days before the sale, and was insufficient. Dever v. Cornwell, 123.

ASSESSMENT AND TAXATION—Continued.

19. Where the county tax for the year 1895 was levied by percentages and not in specific amounts, the legislature, subsequent to such pretended levy and a sale based thereon, attempted to validate said attempted levy of county taxes by Ch. 99, Laws 1897. *Held*, that said act of validation can operate only upon uncollected taxes based on said levy. It does not purport to do more than validate the levy. It does not undertake to validate any sale or to give effect to a void tax deed. If it did so the act would be unconstitutional, it being beyond legislative power to transfer title to land by declaring that void deeds shall be valid conveyances of title. Dever v. Cornwell, 123.

20. Where the statute required the tax deed to be issued by the county treasurer, and it was in fact issued by the county auditor, whether such deed issued by the county auditor is void on its face is not decided. Dever v. Cornwell, 123.

21. Under § 2264, Rev. Codes, a city is required to make an appropriation or tax levy before contracting for an expenditure of money, and the entering into a contract before complying with this statute is an ultra vires act, and will be enjoined at the suit of a tax-payer. Roberts v. City of Fargo, 230.

22. A complaint in a suit in equity to enjoin a sheriff from seizing property on a tax warrant in a county other than that where the warrant was issued, must contain averments showing that the sheriff's trespass if not restrained will cause irreparable injury. Shaffner v. Young, 245.

23. A sheriff seizing property under pretended authority contained in a tax warrant of distraint issued from another county, is a trespasser, and may be enjoined from such seizure by a suit in equity. Schaffner v. Young, 245.

24. Equity will not restrain an illegal and void tax assessment where it is sought to be enforced against personal property only, unless irreparable injury would follow a denial of this relief. Schaffner v. Young, 245.

25. A verification in an affidavit of an assessor's return is defective where it fails to show that the town clerk administered the oath in the town in which he held his office. Lee v. Crawford, 482.

26. Where an assessor's return shows that it was verified long before the assessment could be lawfully commenced, the assessment is void. Lee v. Crawford, 482.

27. A defect in the affidavit of an assessor to his return in failing to show that the town clerk administered the oath in the town in which he held his office is not necessarily fatal, as the court will presume, in support of the affidavit, that the officer acted within his territorial jurisdiction in administering the oath. Lee v. Crawford, 482.

28. In the absence of evidence to the contrary, the Supreme Court will presume that the published notice of a tax sale contained a description of the land as found in the tax list, since the treasurer, in selling, is governed by the list. Lee v. Crawford, 482.

29. A description of land in a notice of tax sale, as S. W. 4 of S. E. 4, of section 32, township 141, range 50, is insufficient to identify the land. Lee v. Crawford, 482.

30. Where land is sold for taxes for a sum in excess of all taxes due, with interest and penalty added, together with all costs and charges

ASSESSMENT AND TAXATION—Continued.

legally due and collectible against the land at the date of sale, the sale for the excessive amount renders the entire sale illegal and void. Lee v. Crawford, 482.

31. The statute making tax deeds prima facie evidence of title does not operate as conclusive evidence of title or of the regularity of the tax proceeding antecedent to the deed, in favor of the tax title claimant, or against the fee owner. Lee v. Crawford, 482.

32. Sections 1638 and 1640, Comp. Laws, relating to the execution of tax deeds and making them prima facie evidence, does not operate to cure insufficient descriptions in the notice and tax list. Lee v. Crawford, 482.

33. Realty sought to be recovered was, at and prior to the commencement of the action, in defendant's possession. Plaintiff claimed title in fee and held on a tax deed issued on sale of the land for taxes assessed in defendant's name in 1888. The action was commenced more than three years after the tax deed was recorded. Section 1640, Comp. Laws, did not bar the suit. Lee v. Crawford, 482.

ASSESSORS. See ASSESSMENT AND TAXATION, 346.

ASSIGNMENTS OF ERROR.

1. Assignments of error in the brief of counsel examined and found sufficiently specific without referring to the abstract or statement of the case. Vidger v. Nolin, 353.

ASSIGNMENT OF MORTGAGES. See MORTGAGES, 223.

ATTACHMENT.

1. The lien of an attachment on personal property of a bankrupt is not destroyed by a mere discharge of the debt secured by the lien, through a discharge under the present national bankruptcy act; and, unless such lien is one which is itself declared void by said act, it may be enforced, through a modified form of judgment, as against the property on which the lien exists. Powers Dry Goods Co. v. Nelson, 580.

ATTORNEYS.

1. Motion to dismiss appeal, because the summons is signed by an attorney who did not try the case or sign notice of appeal, denied where respondent's attorney had recognized the attorney who signed the notice of appeal as having authority to do so. State v. Donovan, 610.

ATTORNEY GENERAL. See ATTORNEYS, 610.

BAIL. See MURDER, 464; ARREST AND BAIL, 564.

1. Under Const., § 6, and Rev. Codes 1899, § 8446, providing that all persons may be bailable by sufficient sureties, unless for capital offenses, when the proof is evident or the presumption great, in capital case the accused is entitled to bail before trial as a matter of absolute right, unless the proof of guilt is evident or the presumption thereof is great. State v. Collins, 464.

2. Under Const., § 6, and Rev. Codes 1899, § 8446, providing that all persons may be bailable, unless for capital offenses when the proof is evident or the presumption great, the admission to bail in such cases may be granted of withheld as matter of judicial discretion. State v. Collins, 464.

ASSESSMENT AND TAXATION—Continued.

3. On an application for bail by one accused of homicide, facts *held* to authorize its denial, both as a strict legal right and as a matter of discretion. State v. Collins, 464.

BANKRUPTCY.

1. Under § 70 of the national bankruptcy act, the title of the bankrupt's property passes to the trustee in bankruptcy, except as to property which is exempt under state laws. As to such exempt property the jurisdiction of the bankruptcy court is limited to determining whether or not it is exempt, and the title thereto remains in the bankrupt, and when set apart as exempt by the bankruptcy court, is subject to the jurisdiction of the state, and not the federal courts. Powers Dry Goods Co. v. Nelson, 580.

2. Section 67f of said act, which provides that certain liens upon the property of a bankrupt shall be null and void when he is adjudged a bankrupt, and that the property covered thereby shall pass to the trustee as a part of the estate of the bankrupt, does not apply to an attachment lien upon property which is exempt, and over which the bankruptcy court has disclaimed jurisdiction by setting it aside to the debtor as exempt. Powers Dry Goods Co. v. Nelson, 580.

BANKS AND BANKING. See Sales, 95.

1. It is ultra vires the power of a national bank to loan money on real estate mortgage security, but it iswell settled that no one but the United States, in the person of the comptroller, can object. The transaction in such case is perfectly good and enforceable between the parties. First Natl. Bank v. Flath, 281.

2. The report of officers of a national bank to the comptroller of the currency does not purport to give the actual or estimated value of the bank's property, and is incompetent alone as a basis from which to deduce the actual value of the bank's stock. Patterson v. Plummer, 95.

3. Under section 5012, Rev. Codes, certificates of stock in a national bank are of the presumptive value named on the face of the stock as to its amount. Patterson v. Plummer, 95.

BIAS. See District Judges, 389, 431; Judges, 389, 431, 264; Contempt, 264.

1. A district judge cannot exercise a judicial function in a case after an affidavit of prejudice and bond have been filed against him. Orcutt v. Conrad, 431; Gunn v. Lauder, 389; White v. Lauder, 400.

BILLS AND NOTES. See Negotiable Instruments, 1, 114, 227, 551; Payment, 114; Alteration of Instruments, 551.

BILL OF EXCEPTIONS. See Statement of the Case, 211.

BONA FIDE PURCHASER. See Negotiable Instruments, 290, 551.

1. Under the evidence in the case, *held*, that defendant has not sustained the allegation in his answer that he was a bona fide purchaser of the land for value and in good faith, without notice, actual or constructive, of the existence of plaintiff's mortgage. American Mortg. Co. v. Live Stock Co., 290.

BOND ON APPEAL. See Appeal and Error.

1. Where appellant voluntarily filed an undertaking, such as is required by § § 5611, 5616, Rev. Codes, the omission to obtain an order respecting the the undertaking was a mere irregularity resulting in no prejudice to the respondent, hence the necessity of such an order not determined. National Bank of Wahpeton v. Hanberg, 383.

BOUNDARIES.

1. The boundaries of the counties of Billings, Stark and Mercer were in no wise changed or affected by the act embraced in chapter 25 of the Laws of 1895, and the attempt to relocate the boundaries of said counties by the act embraced in chapter 57 of the Laws of 1899, was aboritive. Shaffner v. Young, 245.

BURDEN OF PROOF. See Evidence, 160, 95, 120, 311; Negotiable Instruments, 275.

1. A person claiming to destroy the solemn recitals in a deed, or to prove that a deed absolute in form was intended as a mortgage, or was not intended to pass the estate shown upon its face, has the burden of establishing the fact by clear, specific and satisfactory evidence so as to leave in the mind of the court no hesitation or substantial doubt. McGuin v. Lee, 161.

2. The burden of showing a waiver of a factor's lien is upon the party asserting it. Rosenbaum v. Hayes, 311.

3. When fraud in the inception of a note is alleged, the holder, who claims to be a good faith purchaser, has the burden of showing it. First Natl. Bank v. Flath, 281.

4. Where, in an action on a negotiable note by an indorsee, the burden to prove a good faith purchase has shifted to the plaintiff by the introduction of evidence showing fraud between the original parties thereto, such burden is sustained prima facie by showing a purchase for full value, and before maturity. First Natl. Bank v. Flath, 281.

CANVASSING BOARDS. See Elections, 132.

CARRIERS. See Pleading, 215.

1. Plaintiff commenced an action against the defendant for negligently killing his horse during shipment, alleging that it was shipped from Grand Rapids, Minn., to Moorehead, Minn. The proof showed that the contract at Grand Rapids was in writing, and with another company; there was no allegation in the pleading or evidence upon the trial of any joint relation between the defendant and such company. *Held*, that plaintiff could not recover under the pleadings. Ausk v. Great Northern Ry. Co., 215.

2. In suing the last of several connecting carriers for a loss, it is necessary to allege that the carriers were joint contractors, or that the property was delivered and received by the defendant. Ausk v. Great Northern Ry. Co., 215.

CASES AFFIRMED, DISTINGUISHED OR OVERRULED.

1. The assessor's return showing a verification at a date prior to the time when the assessment could lawfully be commenced, under § 1546, Comp. Laws 1887, held void, following Eaton v. Bennett, 10 N. D. 346. Lee v. Crawford, 482.

2. Emmons County v. The Lands of First National Bank, 9 N. D. 589, followed, and affirmed in so far as it declares the word "forthwith," used in the statute, to be directory, and not mandatory, as to time. Pickton v. City of Fargo, 478.

3. The failure to demur to a counterclaim when such counterclaim is prohibited by law is not a waiver of all objections to such counterclaim. Parties cannot consent to litigate matters strictly prohibited by express statute. Noble Tp. v. Aasen, 8 N. D. 77, is not in conflict because, in that case, there was no express enactment against entertaining the counterclaim. Vidger v. Nolin, 359.

CERTIORARI.

1. Under section 6099, Rev. Codes, relating to applications for writs of certiorari and providing that the application must be made on affidavit by the party beneficially interested, an application for a writ to review an order of a district judge directing the destruction of certain gambling devices alleged to have been made without jurisdiction, which application shows that he transferred his entire interest in such gambling devices to another and has no interest therein at the time of making the application, is not made by the party beneficially interested within such section. Sanderson v. Winchester, 85.

CHANGE OF JUDGE. See PREJUDICE AND BIAS, 264, 431.

CHATTEL MORTGAGES. See FORECLOSURE, 383; CONVERSION 400; APPEAL AND ERROR, 383.

1. In an action between a mortgagee and mortgagor, it is not necessary to show that the execution of a chattel mortgage was witnessed. J. I. Case Threshing Machine Co. v. Olson, 170.

2. The formality of witnessing the execution of a mortgage is not contemplated by the statute except as a prerequisite to filing in order that it may become constructive notice to incumbrancers or purchasers of the property mortgaged. J. I. Case Threshing Machine Co. v. Olson, 170.

3. Where, in a written lease of farm lands, it was stipulated that the second party should hold 500 bushels of the first party's one-half of wheat until the plowing was done, and should have a lien on the same for that amount, the tickets for the 500 bushels to be deposited with a third party, the provision *held* to create a chattel mortgage and not a pledge or agreement for a pledge of the wheat. Willard v. Monarch Elev. Co., 400.

4. Plaintiff leased a cultivated farm to one Jepson for the farming season of 1896, and by the written lease stipulated that the second party was to hold 500 bushels of the first party's one-half of wheat until the plowing was done and should have a lien on the same for that amount, the tickets for 500 bushels to be deposited with a third party named. At the time of the delivery of the 500 bushels at the elevator, and before the elevator company had issued tickets for such wheat, plaintiff notified the company of her claim and asked it to hold the tickets until Jepson did the plowing. The agent agreed to hold the tickets for her, but there-

after turned them over to Jepson and refused to deliver them to plaintiff. The turning over of the tickets without authority after notice was a conversion of the wheat and no demand therefor was necessary before the commencement of an action. Willard v. Monarch Elev. Co., 400.

5. Defendant executed to plaintiffs a chattel mortgage on his prospective one-half interest in certain crops to be grown on the premises of which he was lessee. Intervenor was the owner of the property and in her lease to defendant, after specifying various conditions imposed on the defendant was the following provision. "It is hereby distinctly understood and agreed that the ownership and title to all of said grain shall be and remain in the party of the first part (intervenor) until all the conditions agreed to be performed by the party of the second part are performed." Defendant failed to perform the conditions. *Held*, that defendant's breach of the conditions prevented his ever acquiring any title to the crops in question, and hence his mortgage to plaintiff was void. Hawk v. Konouzki, 37.

6. A chattel mortgage upon the future earnings of a threshing rig, which describes the engine and separator by naming the manufacturer thereof and giving other suitable description of power and size, and names the owner and operator of such rig and the period when and county where such future earnings are to accrue, is not void because it omits to state the number of such engine and separator and the names of the persons against whom such future earnings are to accrue. Reynolds v. Strong, 81.

7. Concealment of mortgaged chattels within the meaning of § 5304. Subd. 3, Rev. Codes, signifies hiding with intent to deprive the mortgagee of his security. Thompson v. Thompson, 564.

8. In a contract for the lease of a farm was the following stipulation: "The second party to hold five hundred bushels of first party's one-half of wheat until the plowing is done, and shall be a lien on same for that amount; the tickets for the above five hundred bushels to be deposited with R. P. Sherman." Such provision was a chattel mortgage, and not a pledge, nor an agreement, for a pledge, so far as the wheat is concerned. Willard v. Monarch Elev. Co., 400.

9. In an action in equity to foreclose a chattel mortgage, plaintiff recovered judgment for $460.62, wherein it was directed that the sheriff take possession of the chattels described in the mortgage and sell the same as in execution sales and apply the proceeds of the sale in discharge of the money feature of the judgment. At the inception of the case, plaintiff caused a warrant of attachment to issue under § 5896, Rev. Codes. The sheriff took the property described in the mortgage into his possession. Immediately upon such possession being taken defendants rebonded under § § 5902 and 5371, Rev. Codes. Defendants' bond was conditioned to the effect that the parties signing the undertaking would, on demand, pay to plaintiff the amount of any judgment which might be recovered in the action against the defendants. Whether or not the giving of the delivery bond operated to discharge and wipe out the lien of the chattel mortgage, not decided. Nat. Bank of Wahpeton v. Handberg, 383.

CLAIM AND DELIVERY.

1. A judgment in claim and delivery, awarding the return of a certain threshing engine to the defendants, contained this condition: "If the same cannot be delivered to the defendants in as good condition as the same was at the time of the taking thereof, that the defendants recover of the plaintiff the sum of $600,"—and also gave $50 for the taking and detention. Such judgment was not void. A tender of the engine to defendants two years after the same was taken from them, in a condition materially worse in substantial particulars than when taken, did not have the effect of satisfying the judgment. Nichols & Sheperd Co. v. Paulson, 440.

2. Under § § 5477 and 5484, Rev. Codes, allowing judgment in claim and delivery for a return of the property, or its value in case a return cannot be had, and damages for the taking and detention by plaintiff, the fact that defendants claimed and were awarded damages for the taking and detention of the property does not impair their right to recover the property or its value. Nichols & Shepard Co. v. Paulson, 440.

3. In an action in claim and delivery, brought for the purpose of securing possession of mortgaged personal property, in which it is claimed that defendant has concealed such property with intent to deprive the plaintiff of the benefit of his security, an order in arrest and bail may properly issue. Thompson v. Thompson, 564.

4. Under the statutes of this state a defendant from whom property has been taken in a claim and delivery action, when he prevails, may recover judgment for a return of the property, or its value in case a return cannot be had and damages, if any are shown, for the taking and detention by plaintiff. The right to have his property or its value, and the right to recover damages for the wrongful taking and detention are separate rights. The fact, therefore, that the defendants claimed, and were awarded, damages for the taking and detention of the engine in the judgment mentioned does not impair their right to recover the property or its value also given by the judgment. Nichols & Shepard Co. v. Paulson, 440.

COLOR OF TITLE.

1. A tax deed, purporting to be based upon a tax sale of land described in the deed, is sufficient to constitute color of title. Power v. Kitching, 254.

2. A tax deed in the form prescribed by statute, issued by the county treasurer and purporting to be based upon a tax sale of the land, describing the same, is a sufficient color of title to sustain an adverse possession, even though executed by the treasurer when the statute required it to be executed by the auditor. Power v. Kitching, 254.

3. A tax deed, void upon its face, may create color of title. Power v. Kitching, 254.

4. Under chapter 158, Laws 1899, any person who claims title to real estate may perfect his title thereto by taking adverse, open, exclusive and undisputed possession of such real estate for a period of ten years, and by paying all taxes assessed against the land for said period. The claim of title will suffice, under the statute,

CLAIM AND DELIVERY.—Continued.

if the occupant claims title and ownership in good faith under an instrument which constitutes color of title within the meaning of the law. Power v. Kitching, 254.

COLLATERAL ATTACK.

1. Judgments which are merely erroneous and not void are binding upon the parties thereto until reversed or modified, and cannot be impeached collaterally. Nichols & Shepard Co. v. Paulson, 440.

COLLATERAL SECURITY. See NEGOTIABLE INSTRUMENTS, 558; PLEDGES, 558.

CONSIDERATION. See UNDUE INFLUENCE, 43; NEGOTIABLE INSTRUMENTS, 43.

1. A promissory note without consideration is void. Andrews v. Schmidt, 1.

CONSTITUTIONAL LAW.

1. Chapter 87, of the Laws of 1897, does not violate § 61 of the State Const., which requires that no bill shall embrace more than one subject which shall be expressed in its title. The act assailed embraces but one subject, viz: The securing of homes for children of the class named, and such subject is expressed in the title of the act. State v. North Dakota Children's Home Society, 493.

2. Chapter 87, Laws 1897, does not conflict with § 111 of the State Const., which confers upon county courts, exclusive original jurisdiction in probate matters, the appointment of guardians and settlement of their accounts. The duties placed upon county courts by said act are not in violation of, but in aid of their constitutional jurisdiction over guardians. State v. North Dakota Children's Home Society, 493.

3. Section 176, Constitution, provides that the legislature shall by a general law exempt from taxation property used exclusively for school, religious, cemetery or charitable purposes. Engstad v. Grand Forks County, 54.

4. Section 1180, Subd. 6, Rev. Codes, exempts from taxation all buildings belonging to institutions of purely public charity, including public hospitals together with the land actually occupied by such institutions not leased or otherwise used with a view to profit. *Held*, that the fact that the legislative enactment does not execute the constitutional mandate to the full measure intended does not render such act unconstitutional. Engstad v. Grand Forks county, 54.

5. Section 176, Constitution, providing that the legislative assembly shall by a general law exempt from taxation property used exclusively for school, religious, cemetery or charitable purposes, is not self-executing but requires affirmative legislative action to put it in operation. Engstad v. Grand Forks County, 54.

6. Chapter 25, Laws 1895, entitled: "An act to increase the revenues of the state by changing and increasing the boundaries of the counties of Billings, Stark and Mercer," is unconstitutional and void. Shaffner v. Young, 245.

7. Chapter 57, Laws 1899, entitled: "An act to settle disputes as to

CONSTITUTIONAL LAW.—Continued.

county boundaries and to confirm the acts of officials in counties that have exercised jurisdiction over territory not clearly within county boundaries," in so far as it attempted to change the boundaries of organized counties, is violative of § 168, Constitution, as it omits any provision for submitting the law to the voters for approval. Shaffner v. Young, 245.

8. An act relating to titles to real property, chapter 158, Laws 1899, is not unconstitutional under section 61 of the state constitution. The title is faulty because too general, but the subject of the act is expressed in the title. It leads and does not mislead. Power v. Kitching, 254.

9. Courts will not inquire into and determine the constitutionality of statutory provisions at the instance of parties who are not interested or affected by such provisions. State v. Donovan, 203.

10. The provision of section 13 of the State Constitution, that no person shall be compelled in any criminal case to be a witness against himself, will shield a witness against the production of private books and papers, but that protection does not extend to public records such as those required to be kept by section 7596, Rev. Codes. State v. Donovan, 203.

11. The legislature, subsequent to a pretended tax sale, attempted to validate an illegal levy of county taxes for the year 1895, by the passage of Ch. 99, Laws 1897. Section 1 of said act provides that the levy of taxes, as made in the various counties, for the year 1895, are legalized and made valid for all intents and purposes the same as if made in conformity to the law then in force. Said act of validation operated only upon uncollected taxes based on said levy. It did not undertake to validate any tax sale or to give effect to any void tax deed. If it did so the act would be unconstitutional. It is beyond legislative power to transfer title to land by declaring that void tax deeds shall be valid conveyances of title. Dever v. Cornwell, 123.

12. Where the notice of tax sale is substantially insufficient for any reason, it matters not that the statute declares that the tax deed shall be conclusive and shall convey title. Such statutes are unconstitutional and if upheld would operate to tranfer title to real estate without due process of law. Dever v. Cornwell, 123.

13. A purchaser at a tax sale has no vested right in the statute of limitations in force at the date of sale. The statute may be changed and shortened by subsequent legislation. Power v. Kitching, 254.

CONTEMPT.

1. In cases of civil contempt, where an actual loss has been produced by the commission of the offense, and where the injured party has incurred costs and expense, the court may order the offender to pay over to the injured party a sufficient sum to indemnify him. The amount so ordered to be paid must be ascertained from the evidence, and canont be fixed arbitrarily at the discretion of the trial court. Noble Tp. v. Aasen, 264.

2. In an action for a civil contempt the court cannot arbitrarily fix the injured party's loss without ascertaining it from the evidence in the case. Noble Tp. v. Aasen, 264.

CONTEMPT.—Continued.

3. In cases of contempt of a civil nature, under sections 5943 and 5944, Rev. Codes, where the accused is found guilty of the offense charged, and the offense consists of acts or conduct calculated to defeat, impair, impede or prejudice the rights or remedies of a party to an action or proceeding, but no actual loss or injury is proved the court must impose a fine nevertheless not exceeding $250 in addition to the costs and expenses of the proceeding, the fine to be paid into the public treasury, and no part of the same can be paid to the moving party. Noble Tp. v. Aasen, 264.

4. In contempt proceedings under chapter 34 of the code of civil procedure, the accused is not, on showing of prejudice of the presiding judge, entitled to have another judge called in to determine the case. Noble Tp. v. Aasen, 264.

5. Contempt proceedings, under chapter 34 of the code of civil procedure, are neither civil nor criminal actions within the meaning of sections 5454 and 8120, Rev. Codes. Noble Tp. v. Aasen, 264.

6. Appeals in contempt cases are not governed by section 5630, Rev. Codes. The same are governed by section 5945, Rev. Codes, and by the provisions of article 8, chapter 10, Code of Civil Procedure, and in order to review the sufficiency of the evidence, the statement of the case must embrace specifications of particulars showing wherein the evidence is insufficient. Noble Tp. v. Aasen, 264.

7. Criminal contempt proceedings, under section 5942, Rev. Codes, do not govern the procedure in cases arising under the statute relating to intoxicating liquors. The latter trials are governed by the special proceedings prescribed in section 7605, Rev. Codes. State v. Massey, 154.

8. Any final order in a contempt case, which adjudges that the defendant is guilty, is appealable to the supreme court under section 5954, Rev. Codes. State v. Massey, 154.

9. On appeal from a final order in a contempt case, where a review of the evidence is sought a statement of the case must be settled as in jury cases, as the supreme court, in such matters, sits as a court of review for the correction of errors. State v. Massey, 154.

10. Section 5630 of the Revised Codes of 1895 has no application to any contempt case, and the supreme court cannot sit in such cases to try the case anew. State v. Massey, 154.

11. Evidence examined and found legally competent to sustain the conviction. State v. Massey, 154.

CONTESTING ELECTIONS. See Elections, 132.

CONTRACTS. See Specific Performance, 461; Damages, 95; Mortgages, 160; Sales, 120, 408; Municipal Corporations, 230.

1. A parol contract for the sale of land, treated upon the theory that the same can be specifically enforced if the complaint contains sufficient averments to justify aquitable interference. Kulberg v. Georgia, 461.

CONTRACTS.—Continued.

2. A contract for the sale of good will *held* not invalid as in illegal restraint of trade. Mapes v. Metcalf, 601.

3. It is necessary to the validity of an agreement to refrain from carrying on trade in a given locality, that it shall be collateral and auxiliary to a sale of the good will of the business sold. Mapes v. Metcalf, 601.

4. An agreement to refrain from a given trade in a certain specified community unaccompanied by a sale of the good will of a business is illegal and unenforceable. Mapes v. Metcalf, 601.

5. By denying all liability under a contract providing for the arbitration of any differences growing out of its performance, is a waiver of the right to insist upon arbitration thereunder. Mapes v. Metcalf, 601.

6. A contract for the allowance of a claim in probate made with the administrator after the ten days limited for his action thereon, being beyond the jurisdiction of the administrator to enter into, is without consideration and will not support an action. Farwell v. Richardson, 34.

7. All persons entering into contractual relations with municipal corporations or their officers are chargeable with notice of their powers and the limitations upon their powers. Roberts v. City of Fargo, 230.

8. No contract of a municipal corporation requiring a disbursement of corporate funds can be made by the city council, and no expense can be incurred by any city officer unless a previous appropriation has been made covering the expense involved. Roberts v. City of Fargo, 230.

9. An unlawful and ultra vires contract by a municipal corporation may be enjoined at the suit of a tax payer. Roberts v. City of Fargo, 230.

10. In an action against a carrier for the negligent killing of a horse in shipment, the contract with the carrier, as set up in the complaint, must be proven with strictness as pleaded. Ausk v. Gt. Nor. Ry. Co., 215.

11. A provision in a partnership contract by which the parties agree to permit the appointment of one partner to a public office, and that the fees arising from such office shall inure to the benefit of the firm is prohibited by sections 6911 and 6912, Rev. Codes, making it unlawful for any person to give, or either to give or ask, or receive any reward or gratuity in consideration that he himself, or any other person shall be appointed to any public office. Wishek v. Hammond, 72.

CONVERSION. See Trover and Conversion, 400.

1. In an action for conversion of wheat covered by chattel mortgage, the value of the wheat at the time of delivery was agreed on by stipulation of counsel, no evidence of value at any other time was offered, the trial court, without objection and pursuant to the stipulation, adopted the price of the wheat when delivered as the measure of damages, and it was *held* that appellant could not urge after the trial that there was no evidence of the value of the wheat at the time of the conversion. Willard v. Monarch Elev. Co., 400.

CONVERSION—Continued.

2. Where the evidence disclosed a conversion of wheat covered by chattel mortgage by an elevator company, no demand for the same by plaintiff and refusal to deliver was necessary as a condition precedent to commencing suit. Willard v. Monarch Elev. Co., 400.

3. Where a landlord personally notified an elevator company of her claim on certain wheat deposited by a tenant, and the elevator agent agreed to hold the tickets for her and afterwards delivered the tickets to the tenant, and on demand refused to deliver them to the landlord, such delivery of the tickets without authority was a conversion and no demand was necessary before suit. Willard v. Monarch Elev. Co., 400.

CORPORATIONS. See MUNICIPAL CORPORATIONS, 230.

COSTS. See CONTEMPT, 264.

COUNTIES. See PLEADING, 424.

1. The boundaries of the counties of Billings, Stark and Mercer were in no wise changed or affected by the act embraced in chapter 25 of the Laws of 1895, and the attempt to relocate the boundaries of said counties by chapter 57 of the Laws of 1899, was also abortive. Schaffner v. Young, 245.

2. Construing chapter 25, Laws 1895, and chapter 57, Laws 1899, *held*, that chapter 57, Laws 1899, in so far as it attempted to change the boundaries of counties, is unconstitutional and void because the same omitted any provision for submitting the law to the voters for approval. Schaffner v. Young, 245.

COUNTY COMMISSIONERS. See TOWNSHIP ORGANIZATION, 331; MANDAMUS, 331.

COUNTY JUDGE. See REMOVAL FROM OFFICE, 63.

COUNTY SUPERINTENDENT OF SCHOOLS. See SUPERINTENDENT OF SCHOOLS, ——

COUNTING ON STATUTE. See PENALTIES AND FORFEITURES, 43; UNDUE INFLUENCE, 43.

1. In an action to recover the statutory penalty against a mortgagee for failure to satisfy a mortgage of record after the debt secured had been paid, a request to satisfy the same must be alleged and the statute prescribing the penalty strictly counted upon. Peckham v. Van Bergen, 43.

COURT RULES.

1. Strict compliance with the rules of court will not always be exacted. The requirements of the rule may be relaxed in cases where there is substantial compliance with the terms of the rules. Vidger v. Nolin, 353.

COURTS. See JUDGES.

COUNTER CLAIM. See Pleading, 353, 120, 536.

1. In an action for the possession of real estate under the forcible detainer act, as enacted in § 6677, Rev. Codes, no counterclaim can be pleaded in justice court except as a set-off for rent or damages in cases where judgment for rent or damages is claimed. Vidger v. Nolin, 353.

2. In a case where the counterclaim is interposed by defendant in an action for possession of real estate, under § 6677, Rev. Codes, no damages nor rent being claimed, the right to object to any evidence in support of such counterclaim is not waived by replying in place of demurring to such counterclaim. Vidger v. Nolin, 353.

CREDITORS.

1. A creditor within the meaning of section 5052, Rev. Codes, includes all parties who have demands, accounts, interests or causes of action for which they might recover any debt, demand, penalty or forfeiture. Soly v. Aasen, 108.

CREDITOR'S BILL. See Fradulent Conveyances, 108, 287.

CRIMINAL CONVERSATION. See Fraudulent Conveyances, 108.

CRIMINAL LAW. See Contempt, 264; Habeas Corpus, 464; Homicide, 464.

1. The record of sales which druggists holding permits are required to keep is competent evidence against them upon a criminal prosecution. State v. Donovan, 203.

2. It is not lawful for a druggist holding a permit to sell intoxicating liquors to persons who are in the habit of becoming intoxicated. It is not material whether he knows of such habit or not. The druggist sells at the peril of the fact. State v. Donovan, 203.

3. It is not lawful for druggists holding permits to sell intoxicating liquors to persons after relatives have served notice as provided in section 7616, Rev. Codes, and a sale after notice is punishable whether the person is in the habit of becoming intoxicated or not. State v. Donovan, 203.

4. A place kept by a druggist who has a permit to sell intoxicating liquors, becomes a common nuisance when such druggist sells intoxicating liquors therein unlawfully and without the protection afforded by his permit. State v. Donovan, 203.

5. A druggist is liable to prosecution for the unlawful sale of intoxicating liquor even though made under a permit not specifying the particular place for which issued, the permit to sell under the law being required to be limited to a particular place. State v. Hilliard, 436.

6. One accused of selling intoxicating liquors may be compelled to produce in evidence, upon his trial, the public records required to be kept by a druggist under § 7596, Rev. Codes, and the accused cannot protect himself against such production under § 13 of the constitution, providing that no person shall be compelled in any criminal case to be a witness against himself. State v. Donovan, 203.

CRIMINAL LAW—Continued.

7. Appeals in contempt cases are not governed by § 5630, Rev. Codes, but are governed by § 5954, and by the provisions of Art. 8 of Ch. 10 of the Code of Civil Procedure. In order to review the sufficiency of the evidence the statement of the case must embrace specifications of particulars showing wherein the evidence is insufficient. Tp. of Noble v. Aasen, 264.

8. The accused in a contempt proceeding, whether brought into court by order to show cause or under a warrant of attachment, unless he admits the offense charged, is entitled, under § 5942, Rev. Codes, to have interrogatories filed specifying the facts and circumstances of the offense charged against him. Twp. of Noble v. Aasen, 264.

9. In a contempt proceeding where no interrogatories were filed specifying the facts and circumstances of the offense charged against the accused, and where there was no express waiver of interrogatories, the conviction was vacated as erroneous. Twp. of Noble v. Aasen, 264.

10. In cases of contempts of a civil nature, where the accused is convicted of acts or conduct calculated to destroy, impair, impede or prejudice the rights or remedies of a party to an action or proceeding, but no actual loss or injury is proved, the court may impose a fine not exceeding $250 in addition to the costs and expenses of the proceeding. Such fine must be paid into the public treasury and can not be paid to the moving party. Twp. of Noble v. Aasen, 264.

CROPS. See CHATTEL MORTGAGES; LANDLORD AND TENANT, 37.

1. The intervenor, Mathwig, being the owner of certain lands, by his written lease dated March 17th, 1898, leased them to defendant, August Konouzki, for one year. It was provided in the lease that Konouzki, described as the second party, agreed to pay as rent for the premises one-half of all grain raised thereon. He further agreed to sow wheat, oats and flax upon certain designated portions of the premises, and did summer-fallow a designated portion, and did plow back in the fall of the year all the cultivated parts of the premises; to furnish necessary utensils; perform all labor; to draw out and spread the manure, and to deliver one-half the grain to the elevator or the cars free of expense to the party of the first part. The ownership and title to all of the grain was reserved in the first party until the conditions agreed to be performed by the second party were fulfilled. The lease was not recorded or filed as a chattel mortgage. *Held*, that if he had raised the stipulated crop and threshed the same the title to on-half of such crop would pass from the lessor to the tenant, only upon the conditions named in the lease. Until these were performed the title would be and remain in the land owner. Hawk v. Konouzki, 37.

CURATIVE LEGISLATION. See CONSTITUTIONAL LAW, 123; TAXATION, 123.

1. Chapter 57, Laws 1899, entitled: "An act to settle the disputes as to county boundaries and to confirm the acts of officials in counties that have exercised jurisdiction over territory not clearly within county boundaries," is in violation of § 168 of the Constitution in that it omits any provision for submitting the law to

CURATIVE LEGISLATION.—Continued.

the voters for approval. Schaffner v. Young, 245.

2. It is beyond legislative power to transfer title to land by declaring that void deeds shall be valid conveyances of title. Dever v. Cornwell, 123.

3. The legislature may, by appropriate legislation, validate an illegal tax levy in so far as it applies to uncollected taxes based on such levy. Dever v. Cornwell, 123.

4. It is not competent for the legislature to validate a tax sale or to give effect to a void tax deed by curative legislation. Dever v. Cornwell, 123.

5. It is competent for the legislature to cure irregularities and confirm proceedings which, without the confirmation, would be void because unauthorized, provided such confirmation does not interfere with intervening rights. Dever v. Cornwell, 129.

6. Section 3585, Rev. Codes, enacted in 1887, held to cure a defect in the form of an acknowledment by a deputy sheriff to a certificate of mortgage foreclosure sale. McCardia v. Billings, 373.

7. There is nothing in § § 1638, 1639 or 1640, Comp. Laws 1887, which operates to cure irregularities in precedent assessments. Lee v. Crawford, 482.

8. The curative provisions of § 17, Ch. 41, Laws 1897, have no application to and do not affect or cure the attempt of municipal officers to assess and levy a special tax for local improvements under the incorporation act. Pickton v. City of Fargo, 469.

DAMAGES. See Sales, 408; Claim and Delivery, 440; Forcible Entry and Detainer, 352.

1. In an action for damages for the refusal to comply with the contract for the purchase of a machine and attachments, the measure of damages was the difference between the contract price agreed upon and the market value of the property at the time and place of the refusal to accept the property pursuant to the terms of the contract. Minneapolis Threshing Mach. Co. v. McDonald, 408.

2. Where defendant had contracted to receive, purchase and pay for a separator and attachments upon delivery, at a fixed price named in the contract of purchase, and upon the tender of the machine refused to accept the same at the contract price, but offered to purchase the same at a reduced price, such offer was not properly admissible in evidence for the defendant in an action brought against him for breach of his contract of purchase, as the law applicable under such circumstances does not make it the duty of the person claiming damages to minimize such damages to the lowest possible sum. Minneapolis Threshing Mach. Co. v. McDonald, 408.

3. In claim and delivery the defendant, from whom property has been taken in an action, upon recovering damages, is entitled to a return and delivery of the property, or its value in case a return cannot be had, and damages, if any are shown, for the taking and detention by plaintiff. The right to have his property, or its value, and the right to recover damages for the wrongful taking and detention are separate rights. The fact that defendants were

DAMAGES.—Continued.

awarded damages for the taking and detention of an engine in the judgment, does not impair their right to recover the property, or its value, also given by the judgment. Nichols & Shepard Co. v. Paulson, 440.

4. In an action for damages for refusal of defendant to accept a separator and attachments which he had ordered from plaintiff, the freight charges paid to the place of delivery were properly recoverable as damages. Minneapolis Threshing Machine Co. v. McDonald, 408.

5. Instruction concerning exemplary damages examined and held erroneous as invading the province of the jury. Lindblom v. Sonstelie, 140.

6. The injured party in a contempt proceeding may have his damages assessed under § § 5943, 5944, Rev. Codes. Such damages are limited to the costs and expenses incurred by the party because of the act of the accused. Twp. of Noble v. Aasen, 264.

7. A verdict for $800.00 damages for malicious prosecution in a case where actual malice was shown, held to be not excessive. Merchant v. Pielke, 48.

8. In an action for malicious prosecution defendant may show that he acted upon the advice of counsel in mitigation of damages. Merchant v. Pielke, 48.

9. In an action for breach of contract in failure to deliver certain bank stock, where no damages were proved, *held*, that a verdict was properly directed for the defendant. Patterson v. Plummer, 95.

10. The measure of damages recoverable for a breach of an agreement to deliver personal property, where the contract price has not been paid, is fixed by section 4985, Rev. Codes, at the excess, if any, of the value of the property to the buyer over the amount due on the purchase price. Patterson v. Plummer, 95.

11. In an action for the possession of real estate, under § 6677, Rev. Codes, no counterclaim can be pleaded in justice court, except as a set-off for rent or damages in cases where rent or damages are claimed. Vidger v. Nolin, 353.

12. Where a counterclaim is interposed by the defendant in an action for possession of real estate, under § 6677, Rev. Codes, and no damages are claimed, or rent, the right to object to the counterclaim is not waived by failure to demur. Vidger v. Nolin, 353.

DEBTOR AND CREDITOR. See Novation, 170.

DEEDS. See Mortgages, 160; Taxation, 103, 346, 482; Quieting Title, 340.

1. Under § 3520, Rev. Codes, providing that, though a grant is not actually delivered to the grantee, it is to be deemed delivered when, by agreement, it is understood to be delivered, and when it is delivered to a stranger for the benefit of the grantee. Where a grantor executed a deed without consideration to an infant daughter in 1892, retaining it in his possession until 1899, when he placed it on record without any agreement that it was to be considered as delivered, no title passed thereunder as there was no delivery. McManus v. Commow, 340.

DEEDS.—Continued.

2. The common law rule of evidence requiring proof of the execution of written instruments to be made by the testimony of subscribing witnesses is no longer in force in North Dakota. Such rule was abrogated by § 3888a, Rev. Codes, Ch. 59, Laws 1897, McManus v. Commow, 340.

3. McGuin and wife executed and delivered to Lee a warranty deed of land partly owned by the wife and partly by McGuin. in consideration of the release and taking up of certain secured and unsecured debts of McGuin, and the leasing to McGuin of such lands for farming purposes. McGuin received a written lease of such lands from Lee at the same time the deed was conveyed, McGuin and wife retaining possession. Such lease contained a special provision that Lee would reconvey such lands on payment of a fixed sum at a fixed time, such sum being the sum total of said debts. This stipulation to reconvey on conditions did not constitute the deed presumptively a mortgage. McGuin v. Lee, 160.

4. McGuin's wife held the title to certain lands in her name. She delivered a deed to such lands to L. unconditionally, L. not having notice of any intention on her part to convey such lands contrary to that expressed in the deed. *Held*, that she cannot claim such deed to be a mortgage as against L., who relied upon it as an absolute deed. McGuin v. Lee, 160.

5. In an action to have a deed declared to be a mortgage plaintiffs must show the deed to be a mortgage by evidence clear, specific, satisfactory and convincing. McGuin v. Lee, 160.

6. The tax deeds set out in the answers as defendant's source of title, issued in pursuance of attempted tax sales for the tax of 1888, regular on their face, were, in fact void because the assessor did not annex any affidavit to his assessment roll in the year 1888, and because of this ommission no valid tax could be extended against the lands based on such pretended assessment. Eaton v. Bennett, 346.

7. In an action to quiet title to real property plaintiff claimed title under a deed from A., who claimed under an alleged lost deed from C. The proof of the execution and delivery of such lost deed and the contents thereof were required to be established by clear and satisfactory evidence. McManus v. Commow, 340.

8. Evidence examined and *held* sufficient to sustain the finding of the trial court that a lost deed was in fact executed and delivered. McManus v. Commow, 340

9. Commow, in 1892, executed a deed of certain land to his infant daughter four years of age, retaining the same in his possession until August, 1899, when he placed the same on record. There was no consideration for this conveyance, and no agreement that the same was to be considered as delivered. Under the evidence there was neither an actual or constructive delivery of the deed within the meaning of § 3520, Rev. Codes, and hence no title passed thereunder. McManus v. Commow, 340.

10. Under § 1639, Comp. Laws, a tax deed is prima facie evidence of the regularity of the tax proceedings upon which it was issued, but the evidence in the record destroys the prima facie effect of the deed. Such deed does not operate as conclusive evidence of title, or of the regularity of the tax proceedings, antecedent to the deed. Lee v. Crawford, 482.

DEEDS.—Continued.

11. By § 1640, Comp. Laws, no action shall be commenced to recover possession of lands which have been sold for non-payment of taxes, unless it is begun within three years after the recording of the tax deed. The recording of a deed, voidable because of failure to comply with the statute regulating the levy of the taxes for which the land was sold, does not operate to start the operation of such three year limitation. Eaton v. Bennett, 346.

12. Under § 1551, Comp. Laws, requiring an assessor to attach to his return, or assessment roll, an affidavit of authentication in the form therein prescribed, where the assessor fails to annex any affidavit to the return, tax deeds issued in pursuance of attempted sales for such taxes are void, although regular upon their face. Eaton v. Bennett, 346.

DEFAULT. See Judgments, 16, 26; Principal and Agent, 59.

1. An action in equity will not lie to enjoin the collection of a judgment taken against defendant by default through his mistake, inadvertance, surprise or excusable neglect, the statute furnishing adequate relief by motion. Kitzman v. Minnesota Thresher Mfg. Co., 26.

2. On an aplication to vacate a judgment taken against him by default, defendant must produce an affidavit of merits, verified answer setting forth his defense, and a sufficient excuse for not appearing and answering in time. Minnesota Thresher Mfg. Co. v. Holz, 16.

DELIVERY. See Deeds, 340; Negotiable Instruments, 558; Alteration of Instruments, 558.

DEMAND. See Conversion, 400; Evidence, 400.

DEPOSITIONS. See Evidence, 5.

DIRECTORY STATUTES. See Municipal Corporations, 469.

DISTRICT JUDGES. See Bias, 389, 431.

1. Under § 5454a, Rev. Codes, requiring the district judge to arrange for and procure the judge of some other district to preside at the trial in cases in which he is disqualified by prejudice. Where it appears that a district judge was disqualified at the January term and failed to call in another judge by the July term, and at such latter term adjourned the court after he was informed that another judge would attend and preside in such cases, the supreme court, by mandamus, directed the performance of the duty imposed on him of calling in another district judge. Gunn v. Lauder, 389; White v. Lauder, 400.

2. In a civil action where affidavits and an expense bond have been seasonably filed, under § 5454a, Rev. Codes, the resident judge of the district court within which the action is pending is thereafter disqualified to exercise further judicial functions in the action. When disqualified the resident judge has certain ministerial duties to perform connected with the calling in of an outside judge, but is inhibited by the statute from exercising any judicial functions in the action. Orcutt v. Conrad, 431.

3. A district judge disqualified by the filing of an affidavit of prejudice against him, under § 5454a, Rev. Codes, and the filing of bond, was without jurisdiction to appoint a receiver in the action, and such appointment was void. Orcutt v. Conrad, 431.

DISTRICT JUDGES.—Continued.

4. Upon an appeal from justice court, under § 6779, Rev. Codes, the action is triable anew in the district court in the same manner as actions originally commenced therein, but the district court acquires no jurisdiction upon such appeal to try the action anew or to litigate a counterclaim in cases where the justice had no jurisdiction to determine the issues raised by the pleadings. Vidger v. Nolin, 353.

DIVORCE.

1. In an action for divorce, an admission in defendant's answer that plaintiff's residence within the state was bona fide when the action was commenced *held* not to conclude the court from examining the plaintiff as to his residence. Smith v. Smith, 219.

2. In a divorce case the state is always present as a party, not technically, but actually and potentially, a party. The state, represented by the court, is there to see to it that no transient inhabitant, whose domicile is elsewhere, shall call upon the courts of this state to adjudicate upon the marital relations of citizens of other states or nations. Smith v. Smith, 219.

3. An appeal from an order setting aside a decree of divorce, and a motion to vacate the order before the trial court, are alternative remedies. Clopton v. Clopton, 569.

4. Where an order setting aside a divorce granted on a second hearing of a motion to show cause why the vacating order should not be set aside, and on the ground that it was obtained by fraud and deceit practiced on the trial court, the evidence *held* the warranting an order granting the motion. Clopton v. Clopton, 569.

5. "Residence," in contemplation of the divorce laws, is synonymous with "domicile," and must be adopted as permanent. Smith v. Smith, 219.

6. Plaintiff came to Fargo, North Dakota, in June, 1898, remained there two weeks; went to Bismarck and remained 'till September, then to Grand Forks and surrounding towns until December. After December 21st, and after the service of the summons in his divorce case, he went to Chicago, remaining there a week, then to Buffalo, New York, where he remained until the fall of 1899, came back to Fargo for a week, then returned to Buffalo, remained there until July, 1900, came to Fargo, North Dakota, remained another week, returned to Buffalo, remaining there until September 30th, 1900. He then returned to Fargo, North Dakota, and applied for a divorce. *Held*, that he did not acquire a residence in this state to entitle him to sue for divorce. Smith v. Smith, 219.

7. A divorce granted in this state to one not a resident of the state would be without binding force in other jurisdictions. Smith v. Smith, 219.

8. Residence in the state for the prescribed time before commencing an action is jurisdictional. Smith v. Smith, 219.

9. In every divorce suit the state, for the enforcement of its policy concerning the marital relation, constitutes the third party, and no admission can be made by the other parties which will affect the public interests. Smith v. Smith, 219.

DOMICILE.

1. The statute requiring residence, which means domicile, for a period of ninety days as a preliminary to starting an action for divorce, is jurisdictional to the subject-matter of divorce. Smith v. Smith, 219.

DRUGGISTS. See Intoxicating Liquors, 203, 436, 608.

1. Section 13 of the Constitution, providing that no person shall be compelled in any criminal case to be a witness against himself will not protect a witness against the production of public records, such as those required by § 7596, Rev. Codes, to be kept by a druggist having a permit to sell intoxicating liquors. State v. Donovan, 203.

2. The authority conferred upon county courts to issue permits to registered pharmacists to sell intoxicating liquors for medicinal, mechanical, and scientific purposes, by chapter 63 of the Penal Code, is limited to granting permits to sell at the particular place petitioned for. It is accordingly *held* that sales made at a place other than that for which the petition was granted are unlawful sales, and the person making such sales is not exempt from the consequences imposed by said chapter for unlawful sales, even though the seller's permit does not specify the particular place for which issued. State v. Hilliard, 436.

3. A place kept by a druggist who has a permit to sell intoxicating liquors becomes a common nuisance, under the provisions of section 7605, Rev. Codes, when such druggist sells intoxicating liquors therein unlawfully, and without the protection afforded by his permit. State v. Donovan, 203.

4. A druggist holding a permit to sell intoxicating liquors is prohibited, by section 7597, from selling to persons who are in the habit of becoming intoxicated. It is not material whether he knows of such habit. He sells at the peril of the fact, whatever it may be. State v. Donovan, 203.

5. Section 7616, Rev. Codes, which prohibits sales by druggists to persons whose relatives have served the notice therein provided, describes a separate and distinct offense, and the same is consummated by a sale after notice, whether such person is in the habit of becoming intoxicated or not. State v. Donovan, 203.

DUE PROCESS OF LAW. See Constitutional Law, 123; Taxation, 122.

DUPLICITY.

1. A motion to dismiss an appeal for duplicity is properly made where the appeal is from the judgment and also from orders made prior to judgment, if the orders were appealable and the time for appeal from the same has not expired. State v. Gang, 331.

DURESS. See Undue Influence, 43.

EJECTMENT. See Roads and Streets, 541; Quieting Title, 254.

ELECTIONS.

1. In an election contest the trial court found that the plaintiff and contestant had a majority of the votes cast upon the official precinct return; also that she had a majority upon a count of the ballots of the only precinct in dispute. These findings supported the judgment appealed from. Eakin v. Campbell, 416.

ELECTIONS.—Continued.

2. Tally lists constitute no part of the precinct returns. It is the duty of county canvassing boards to canvass the votes as certified by the precinct officers, and the returns must stand until such facts are proven as show that they are not true. Eakin v. Campbell, 416.

3. The evidential effect of the certificate of election issued to the defendant was overthrown by the fact that the precinct returns upon which it was based showed that plaintiff and not defendant had a majority of all votes cast for the office in question. Eakin v. Campbell, 416.

4. While the official returns are binding upon canvassing boards, that is not true as to courts in election contests where the purpose is to ascertain the true vote. The courts may go back of the prima facie case made by the certificate of the election, and the determination of the state board or county board may be corrected by the ballots themselves when the ballots are still in existence and have been kept as required by law. Eakin v. Campbell, 416.

5. In this state the duties of canvassing boards are ministerial and not judicial. State v. McKenzie, 132.

6. The object and purpose of the canvass made by the county canvassing board is to determine the result of the election as shown by the official returns of such election, and not to determine judicially who received the most votes in fact. In case the official returns do not fairly recite the votes as cast, the remedy provided for those who are aggrieved is by contesting the election. State v. McKenzie, 132.

7. In canvassing the result of an election the county canvassing board is limited to a consideration of the official returns, which are required by law to be sent in by the officers of the election precincts. These include the precinct poll-books and the certified statements of the election made by the precinct officers, but do not include tally lists. State v. McKenzie, 132.

8. It is proper for the county canvassing board to refuse to consider the tally sheets or lists found in the poll-books for the purpose of verifying the votes as shown by the official statements of the election for the precinct. State v. McKenzie, 132.

EQUITY. See INJUNCTIONS, 245.

1. Equity will enjoin the sale of personal property, seized unlawfully under a distress warrant, for the satisfaction of a personal property tax against the plaintiff, if the complaint contained facts showing that the trespass of defendant is one which will cause irreparable damage to the plaintiff. Shaffner v. Young, 245.

2. He who seeks equity must do equity. Easton v. Lockhart, 181.

3. Courts not merely observe the rules of the contract, but also have respect to the obligations of the golden rule, and unless plaintiff has done as he would be done by it is useless for him to come into equity, where good conscience reigns supreme over the letters of the law. Easton v. Lockhart, 181.

4. Where the vendee under a contract for the purchase of land, with no knowledge of clouds upon the title thereof, entered into possession and, before receiving notice of defects in title, did a few days work in the way of breaking the land, he was not entitled, upon discovering the defects, to remain in possession and to refuse

EQUITY.—Continued.

to perform his contract, but was entitled to compensation for the work done. Easton v. Lockhart, 181.

5. Equity will not relieve from a judgment entered against defendant through his mistake, inadvertance, surprise or excusable neglect. He has adequate remedy under the statute by motion. Kitzman v. Minnesota Thresher Mfg. Co., 26.

ESTOPPEL.

1. Where parties signed skeleton notes not entirely filled out, they were not guilty of such negligence in so doing as would estop them from defending an action for the collection of the same on the ground of material alteration. Porter v. Hardy, 551.

2. Where the signers of a certain contract, a part of which was in the form of a skeleton note, signed the same with certain blanks not filled in, they were not thereby guilty of such negligence as would estop them from asserting that the note susequently detached was void, as not the contract signed. Porter v. Hardy, 551.

3. While it is the general rule that a party cannot appeal from a judgment if he has to that extent accepted the benefits thereof, yet, where a decree consists of two distinct parts, the receipt of benefits under one portion will not bar an appeal from the other portion where such appeal cannot in any manner affect that portion under which the benefits were received. Wishek v. Hammond, 72.

4. Where a judgment in an action recites that the case was dismissed without prejudice it will not operate as a bar to another suit on the same subject-matter. Prondzinski v. Garbut, 300.

5. Where a debtor and his wife united in a deed of lands partly owned by the wife and partly owned by the debtor, such deed being acknowledged and delivered through a notary, properly acknowledged and accepted by the grantee as an absolute transfer, it is *held*, that the parties would be estopped as against the grantee from claiming that the deed was intended only as a mortgage. McGuin v. Lee, 160.

6. A defendant brought into court by order to show cause, or under a warrant for contempt under § 5942, Rev. Codes, is entitled to have interrogatories filed specifying the facts and circumstances of the offense charged against him. His mere omission to object to the proceedings upon the ground that none have been filed will not waive his statutory right. Twp. of Noble v. Aasen, 264.

7. In a case where a counterclaim is interposed by the defendant in an action for possession of real estate, under § 6677, Rev. Codes, no damages nor rent being claimed, the right to object to the introduction of any evidence in support of such counterclaim is not waived by replying in place of demurring to such counterclaim. Vidger v. Nolin, 353.

8. In an action against an elevator company for the conversion of wheat covered by a chattel mortgage, where counsel upon the trial stipulated to the value of the wheat in question at the time of the delivery of the wheat at the elevator, but there was no evidence as to the value of the wheat at the time of the conversion, the court's attention not having been called to the fact that the value of the wheat was not to be measured according to the facts stipulated, the defendant was held to have consented that the damages be measured as of the time of delivery and was estopped to suggest

ESTOPPEL.—Continued.

a different rule on appeal or motion for a new trial. Willard v. Monarch Elev. Co., 400

9. Prior to the foreclosure sales from which plaintiff redeemed, the purchasers contracted orally with the defendant that they would purchase at the sales, and would hold the certificates merely as security for the amount of their bids and interest, and that they would not rely on their legal rights thereunder. The plaintiff made his redemption in good faith, and with the belief that his mortgage was a valid lien and in entire ignorance of the oral contracts. Defendant knew of plaintiff's redemptions shortly after they were made, but made no objection thereto, neither did he disclose to plaintiff the oral agreements, or tender, or cause to be tendered to plaintiff the money he had paid to redeem. Defendant was estopped thereby from asserting any rights arising out of the oral contracts as against the plaintiff, who had no knowledge thereof. McDonald v. Beatty, 511.

10. In a contract for the sale of the good will of a business, was stipulation that in case of disagreement as regards its interpretation, the same should be settled by arbitration, but defendants, by denying all liability under the contract, waived any right which they may have had to submit any question involved to arbitration. Mapes v. Metcalf, 600.

ESTATES OF DECEASED PERSONS. See EXECUTORS AND ADMINISTRATORS, 34; LIMITATION OF ACTIONS, 34.

EVIDENCE.

1. When the pleadings disclose that the contents of a document in the posession of the adverse party will necessarily have to be proven in order to establish a link in the proof of the other party's cause of action or defense, a notice to produce such document at the trial is not necessary. Nichols & Shepard Co. v. Charlebois, 446.

2. Parole evidence is not admissible to correct or explain the description in an assessment roll upon which a tax deed has issued regular on its face, but voidbecause of the incomplete description in the assessment roll upon which it was issued. Sheets v. Paine, 103.

3. The written report of the officers of a national bank to the comptroller of the currency, made pursuant to section 5211, Rev. Statutes, U. S., does not purport to give the actual or estimated value of the bank's property, and is incompetent alone as a basis from which to deduce the actual value of the banks stock. Patterson v. Plummer, 95.

4. In an action for malicious prosecution, evidence showing the relation of the parties, defendant's acts, conduct, declarations, and feelings of hostility and ill-will toward plaintiff is admissible for the purpose of showing malice in the institution of the prosecution. Merchant v. Pielke, 48.

5. Plaintiff, in an action for malicious prosecution, must prove that he has been prosecuted by the defendant either civilly or criminally; that the prosecution terminated in his favor; that it was malicious, without probable cause and resulted in his damage. Merchant v. Pielke, 48.

EVIDENCE.—Continued.

6. In an action to quiet title to real estate, where plaintiff claimed through a lost deed, the proof of the execution and delivery of such lost deed and the contents thereof were required to be established by clear and satisfactory proof. McManus v. Commow, 340.

7. Evidence examined and found sufficient to sustain the finding of the trial court that an alleged lost deed was in fact executed and delivered. McManus v. Commow, 340.

8. The common law of evidence, requiring proof of the execution of written instruments to be made by the testimony of subscribing witnesses, is no longer in force in this state. McManus v. Commow, 340.

9. Before secondary evidence of the contents of a lost instrument is permitted, such diligence should be required to be shown in attempting to produce the original as will leave no reasonable supposition that the original is in existence, or can be produced. McManus v. Commow, 340.

10. Evidence examined and found insufficient to establish the delivery of a deed to a minor child. McManus v. Commow, 340.

11. Evidence of a wife denying that she ever executed a certain mortgage considered, and *held*, that her testimony does not overcome the probative weight of the notary's certificate by that clear and convincing proof adopted as the rule to determine such cases. McCardia v. Billings, 373.

12. In an action for conversion evidence of demand is unnecessary where the other proof of an actual conversion of the property by the defendant is sufficient without it. Willard v. Monarch Elev. Co., 400

13. Where the value of the wheat at the time of the delivery at the elevator was agreed on by counsel at the trial, and no evidence of value at any other time was offered, and the trial court, without objection, pursuant to the stipulation, adopted the price of the wheat when delivered as the measure of damages. Appellant was estopped after the trial to urge that there was no evidence of the value of the wheat at the time of the conversion. Willard v. Monarch Elevator Co., 400.

14. In an action to recover for breach of contract for refusal to accept certain farm machinery according to the terms of the contract of sale, defendant was held not entitled to testify to the circumstances under which he signed the contract, the answer having alleged no affirmative defense. Neither was defendant competent to testify to the value of the property purchased by him, no foundation having been laid. Minneapolis Threshing Machine Co. v. McDonald, 408.

15. Defendant, having broken his contract to purchase a separator and attachments, was not entitled, in defending an action for breach of the contract, to offer proof of his willingness to purchase the property at a less sum than the contract price. Minneapolis Threshing Mach. Co. v. McDonald, 408.

16. Evidence held to sustain in the finding of the trial court that the plaintiff and contestant had a majority of the votes cast upon the official returns and upon a count of the ballots in the precinct in dispute. Eakin v. Campbell, 416.

EVIDENCE.—Continued.

17. In reviewing an order of a trial court overruling or granting a motion for a new trial, where the motion is based entirely upon the insufficiency of the evidence to sustain the verdict, the appellate court will inquire only whether there is evidence of a substantial character supporting the verdict. Flath v. Casselman, 419.

18. Evidence examined and held to sustain the verdict. Flath v. Casselman, 419.

19. Evidence of the decisions of the land department of the Federal government in matters of final proof, in support of the homestead entries, is not reviewable by the state courts in collateral proceedings. The decisions of such department, when it has jurisdiction, are conclusive as to questions of fact, and cannot be assailed except in direct proceedings where fraud or mistake or imposition is alleged. Brokken v. Baumann, 453.

20. Parol evidence is inadmissible to supply omissions in journal entries to show the passage of a municipal ordinance. Pickton v. City of Fargo, 469.

21. The fact that certain members of the city council, who are named in the journal entries, were present when the council meeting assembled, and answered to their names on roll call, will not warrant the presumption that such members remained until a given ordinance was put upon its passage and voted thereon. Pickton v. City of Fargo, 469.

22. Where the journal entries of the proceedings of a city council show that upon the passage of an ordinance the ayes and nays were called and a certain number of votes, a majority of the council, were cast, but omits to show the names of the members voting, or how each voted, such entries are insufficient to establish the fact that the ordinance was adopted by the city council. Pickton v. City of Fargo, 469.

23. Under § 1639, Comp. Laws, a tax deed is prima facie evidence of regularity of the tax proceedings upon which it was issued. But where the evidence in the record destroy the prima facie effect of the deed, such deed does not operate as conclusive evidence of title, or of the regularity of the tax proceedings, antecedent to the deed. Lee v. Crawford, 482.

24. A letter found in the files of a case by the trial judge, but which had not been offered in evidence, could not be considered as having any bearing upon the case on trial. Corey v. Hunter, 5.

25. In an action against a carrier for killing a horse during shipment, evidence offered *held* inadmissible under the pleadings. Ausk v. Great Nor. Ry. Co., 215.

26. The proof that will destroy the recitals in a solemn instrument in writing must be clear, satisfactory and specific, and of such a character as to leave in the mind of the chancellor no hesitation or substantial doubt. McGuin v. Lee, 160.

27. The provisions of § 13 of the State Constitution, that no person shall be compelled in any criminal case to be a witness against himself, will shield a witness against the production of private books and papers, but the protection does not extend to public records such as those required to be kept by § 7596, Rev. Codes. State v. Donovan, 203.

EVIDENCE.—Continued.

28. The record of sales which druggists holding permits are required to keep by § 7596, Rev. Codes, is competent evidence to show the names of persons to whom sales were made, the kind and quantity of liquor sold, the date of sale and the purpose for which sold. Such records are public records. It was, therefore, not error to permit the introduction of such records in evidence over defendant's objection that the contents thereof might tend to criminate him. State v. Donovan, 203.

29. An enrolled bill, properly authenticated by the officials of the senate and house of representatives, approved by the governor and filed with the secretary of state, cannot be impeached by entries in the journals. Power v. Kitching, 254.

30. A written assignment of a real estate mortgage executed under seal before a notary public in another state is admissible in evidence under § 5696, Rev. Codes without any further proof. Grandin v. Emmons, 223.

31. Courts will take judicial notice of the seal of a notary public, and it proves itself prima facie by its appearance upon a certificate of acknowledgment. Grandin v. Emmons, 223.

32. In an action between a mortgagee and mortgagor it is not necessary for plaintiff to prove that a chattel mortgage was properly executed, or that it was duly witnessed, as a condition to its being received in evidence. J. I. Case Threshing Mach. Co. v. Olson, 170.

33. In an action for divorce, an admission in defendant's answer that plaintiff's residence within the state was bona fide when the action was commenced will not conclude the court from examining the plaintiff as to his residence. Smith v. Smith, 219.

34. Neither a record nor a copy of a record of a deed is admissible in evidence until proof is made that the original is not in possession of or under the control of the party producing such record or copy. American Mortg. Co. v. Mouse River Live-Stock Co., 290.

35. Payment to the sheriff after levy, on account of a fraudulent assignment of the account, discharged the debt. Faber v. Wagner, 287.

36. The recital in a judgment that an action was dismissed without prejudice is competent evidence to the effect that such judgment will not bar another suit on the same subject-matter. Prondzinski v. Garbut, 300.

37. A certificate of acknowledgment to a mortgage by a notary will ordinarily be held valid as against the unsupported evidence of the person certified to have executed it. McCardia v. Billings, 373.

38. A prior or contemporaneous agreement, made by a mortgagee or his agent, that upon payment of two notes the mortgage would be released, is not admissible in evidence when the mortgage provided absolutely that it should be security for four notes. First Natl. Bank. of Langdon v. Prior, 146.

39. The legal presumption is, that a promissory note unendorsed is owned by the payee named therein. Shepard v. Hanson, 194.

40. Where personal property was sold by sample, in an action to recover the purchase price, where defendant claims that the goods were not equal in quality to the samples by which they were sold,

EVIDENCE.—Continued.

the burden is on defendant to establish the fact. James v. Bekkedahl, 120.

41. The taking of security raises a presumption of waiver of a lien It is a rebuttable presumption, however. Rosenbaum v. Hayes, 311.

42. The burden of showing a waiver of a factors lien is upon the party asserting it. Rosenbaum v. Hayes, 311.

43. A party may make a purchase of lands in satisfaction of a precedent debt or for a consideration then paid, and may at the same time contract to recover the lands upon the payment of a certain sum without the intention that the transaction should be in effect a mortgage. The covenant to reconvey may be one fact taken in connection with other facts going to show that the parties really intended the deed to operate as a mortgage, but standing alone it is not sufficient to work that result. McGuin v. Lee, 160.

44. Where it is proven that the consideration for a deed was grossly inadequate to the value of the land, this circumstance may be considered in determining whether in fact the deed was intended as security only, but it would not be sufficient alone to constitute it a security transaction. McGuin v. Lee, 160.

45. Defendant appealed from a judgment in an action tried in the district court without a jury, and in the statement of the case demanded a trial de novo of all the issues in the case. The documentary evidence offered at the trial was omitted from the statement of the case. The judgment was affirmed on motion of respondent. Kipp v. Angell, 199.

46. The action of land officers in accepting proof under homestead entry, and issuing a certificate, is not conclusive as to the homestead character of property after the acceptance of the proofs. Brokken v. Baumann, 453.

EXECUTIONS.

1. Defendant, being the owner of a threshers lien, transferred the same to plaintiff by an assignment in writing, which was duly delivered. After the transfer, creditors of the assignor obtained judgments against him, and executions thereon were delivered to the sheriff for service. The sheriff levied upon the debt due from the defendant on account of such threshing. After the levies were made, but before receiving notice of the transfer of the lien to plaintiff, defendant paid over to the sheriff the entire amount of the debt due from defendant on account of said threshing, taking a receipt therefor from the sheriff. The amount paid was applied on the execution. *Held*, that the transfer of the account, being fraudulent and void as to creditors, did not operate to defeat the levy made upon the debt; that the payment to the sheriff, together with the sheriff's receipt operated as full payment of the debt, and discharged the same under the provisions of section 5514, Rev. Codes. Faber v. Wagner, 287.

EXECUTORS AND ADMINISTRATORS.

1. Under section 6405, Rev. Codes, claims not acted on by an administrator within ten days after their presentation are deemed rejected. Plaintiff presented claims against decedents estate on April 23d, 1898, but no action was taken thereon until November 14th, 1898, when an agreement for their allowance was entered

EXECUTORS AND ADMINISTRATORS.—Continued.

into between plaintiff and the administrator and heirs-at-law of the deceased, and they were indorsed by the administrator as allowed. Such action was futile, however, since the claims became rejected at the expiration of ten days from their presentation, and were beyond the jurisdiction of the administrator at the time of the alleged agreement. Farwell v. Richardson, 34.

2. On April 23rd, 1898, plaintiff filed with defendant, as administrator, certain claims against his decedent. No action was taken thereon until July 8th, 1898, when an agreement was entered into between plaintiff and the administrator and heirs-at-law of decedent that a certain amount of such claims should be allowed on November, 1898, such amount was allowed and the allowance endorsed on such claim by the administrator. On December 9th, 1898, the claim was presented to the county court for allowance and was then rejected. *Held*, that a complaint setting forth these facts was insufficient since, under Rev. Codes, section 6405, providing that a claim not acted on within ten days after presentation shall be deemed rejected, plaintiff's claims were rejected before the date of the alleged agreement, and hence the administrator's authority to allow them had terminated and the agreement on which plaintiff's action was based was void. Farwell v. Richardson, 34.

3. An executor or administrator has no jurisdiction to allow a claim against the estate of decedent after the ten days limited for action have run. Farwell v. Richardson, 34.

EXCEPTIONS. See PRACTICE, 140.

EXEMPTIONS.

1. Section 5516, 3605, and 3625, of the Revised Codes of 1899, and § 208 of the State Constitution, relating to exemptions, considered and construed. Ness v. Jones, 587.

2. The husband, and not the wife, is primarily the head of the family, and as a result merely of the conjugal relation, a wife, who is a debtor, does not occupy the relation of head of the family for the purpose of claiming exemptions of personal property from seizure and sale by legal process. Ness v. Jones, 587.

3. Under certain conditions, when shown to exist from necessity, the wife may be compelled to accept the burden of maintaining the family, and in such exceptional conditions the law concedes to her the family headship for the purpose of claiming exemptions. Ness v. Jones, 587.

4. In the case at bar the family of the plaintiff consisted of herself, her husband, and eight children. The family resided upon land owned by the plaintiff, which was operated as a farm, and consisted of one quarter section of land. In 1895 the husband engaged in the machinery business in connection with certain farming operations upon lands owned by him separately. The husband failed in business, lost all of his property and became a bankrupt. During all the time in which the husband was prosecuting said outside business the wife carried on the home farm and supplied the necessaries for the support of the family, and did this with only slight assistance from her husband in the way of advice and the performance of some little work about the home. The property in question consists of grain raised by the wife on the home farm, which the plaintiff, the wife, claims as exempt from seizure

EXEMPTIONS.—Continued.

to satisfy a judgment against her and her husband. At all times the husband and wife have lived together as such on the home premises, and the evidence shows that the husband is not disabled, mentally or physically; nor is there any suggestion in the evidence that the husband is, or ever was, unwilling to labor for the support of his family. *Held*, under such conditions, that the husband was the head of the family, within the meaning of the exemption law as to personal property, and that the wife, under the conditions shown by the evidence, was not the head of the family for such purposes. Ness v. Jones, 587.

5. Under section 70 of the national bankruptcy act, the title of the bankrupt's property passes to the trustee in bankrutcy, except as to property which is exempt under state laws. As to such exempt property the jurisdiction of the bankruptcy court is limited to determining whether or not it is exempt, and the title thereto remains in the bankrupt, and when set apart as exempt by the bankruptcy court, is subject to the jurisdiction of the state, and not the federal courts. Powers Dry Goods Co. v. Nelson, 580.

6. Section 67f of said act, which provides that certain liens upon the property of a bankrupt shall be null and void when he is adjudged a bankrupt, and that the property covered thereby shall pass to the trustee as a part of the estate of the bankrupt, does not apply to an attachment lien upon property which is exempt, and over which the bankruptcy court has disclaimed jurisdiction by setting it aside to the debtor as exempt. Powers Dry Goods Co. v. Nelson, 580.

FARM CONTRACTS. SEE CHATTEL MORTGAGES, 37, 400; CROPS, 37.

FACTOR'S LIEN.

1. A factor's lien, provided for in section 4836, Rev. Codes, is dependent upon the possession of the property upon which the lien is claimed. The possession required to sustain such lien is sufficient if it appears that the property is so appropriated to the factor that it is assuredly under his control. Rosenbaum v. Hayes, 311.

2. Evidence shows possession and control of sheep in controversy under factor's lien when seized under an attachment against the owner of the sheep. Rosenbaum v. Hayes, 311

3. The fact that the factor acquired possession of sheep, on which he held a factor's lien, on Sunday will not defeat his possession or lien. Rosenbaum v. Hayes, 311.

4. Evidence examined and *held* not to show waiver of the factor's lien by taking other security, or by reliance upon the personal responsibility of the debtor. Rosenbaum v. Hayes, 311.

5. Where a factor takes possession of sheep in controversy in replevin and two days later defendant rebonded them and thereafter sold the sheep, an assignment of the factor's lien thereon did not affect the rights of the parties. Rosenbaum v. Hayes, 311.

FINDINGS OF FACT.

1. The findings of fact in this case examined and found to support the judgment entered. Eakin v. Campbell, 416.

2. In an election contest the trial court found that the plaintiff and contestant had a majority of the votes cast upon the official precinct return; also that she had a majority upon a count of the ballots of the only precinct in dispute. These findings support the judgment appealed from which declares the plaintiff to have been elected and awards her the office in dispute. Eakin v. Campbell, 416.

FORCIBLE ENTRY AND DETAINER.

1. In forcible detainer actions, under § 6677, Rev. Codes, no counterclaim can be interposed except as a set-off to a demand made for damages or rents and profits in an action for the possession of realty. No counterclaim can be pleaded in the justice court except as a set-off for rents or damages in cases where judgment for rents or damages are claimed. Vidger v. Nolin, 353.

2. In an action for forcible detainer for the possession of realty the right to the possession of the realty is the only fact that can be rightfully litigated unless damages or rent is claimed. Vidger v. Nolin, 353.

FORECLOSURE. See MORTGAGES, 373, 511; CHATTEL MORTGAGES, 383; PLEADING, 424.

1. The advertisement of notice of sale upon foreclosure of mortgage under a power is sufficient, if made six times, once in each week for six successive weeks, before the sale. Grandin v. Emmons, 223.

2. In an action to foreclose a mortgage upon real estate, defendant answered alleging ownership, and that he purchased for value, in good faith, without notice of the mortgage. To prove title at the trial he offered certain pages of a deed record kept in the office of the register of deeds, showing a chain of title. The evidence was objected to on the ground that no foundation had been laid for the proof, and the objection properly sustained. American Mortg. Co. v. Mouse River Live Stock Co., 290.

3. The death of the mortgagor does not revoke or suspend the power of sale in a mortgage, but the same may be exercised; and unless the heirs redeem within a year after the sale their rights are cut off. Grandin v. Emmons, 223.

4. The rights of a mortgagor, mortgagee and purchaser under foreclosure sale under a power of sale, as well as the rights of all subsequent incumbrances, are to be determined by the provisions of law in force at the time the mortgages were given. Nichols v. Tingstad, 172.

5. Neither the second mortgagee nor his assignee can redeem from the sale under foreclosure of the first mortgage as a matter of right, unless such redemption is made within a year from such sale. Nichols v. Tingstad, 172.

6. An action to redeem from a foreclosure sale cannot be maintained as a matter of right as no equitable grounds exist in favor of such right to redeem. Nichols v. Tingstad, 172.

FORECLOSURES.—Continued.

7. Upon a foreclosure under a power of sale a junior mortgagee is entitled to the surplus in the hands of the person making the sale, after satisfying the mortgage foreclosed on under section 5424, Comp. Laws, providing that such surplus shall be paid to the mortgagor, his legal representatives or assigns. A junior mortgagee being included in the word "assigns." Nichols v. Tingstad, 172.

8. Where defendant promised to extend the time of redemption for plaintiff to redeem from a mortgage foreclosure, and then, in violation of such promise, upon which plaintiff relied, he took a sheriff's deed to the land, the defendant becomes thereby an involuntary trustee of the land in question for plaintiff's benefit. Prondzinski v. Garbut, 300.

9. The mortgagors and subesquent mortgagees or incumbrancers of the property mortgaged are deemed in law parties to a foreclosure proceeding by advertisement under a power of sale, and are bound by such foreclosure, the same as though they were made parties, and served with process, in an action for foreclosure. Nichols v. Tingstad, 172.

10. In the foreclosure of a mortgage by advertisement, under power of sale, substantial compliance with the requirements of the statute as to notice is sufficient, unless prejudice is shown. Therefore an incorrect date of the mortgage being stated in the notice does not vitiate the foreclosure. McCardia v. Billings, 373.

11. In foreclosures by action none are affected by the decree except such persons as are made parties and are served with process. Nichols v. Tingstad, 172.

FRAUDULENT CONVEYANCES. See CHATTEL MORTGAGES, 520.

1. A chattel mortgage executed to secure pre-existing individual debts of partners which allows the mortgagors to continue the business, reserves the right to sell the mortgaged goods for cash, and out of the proceeds replenish the stock and pay the expenses of the business, and which provides for the payment of the net proceeds of the business to the mortgagees, is void, as its effect is to delay partnership creditors, and it is primarily for the benefit of the mortgagors. Bergman v. Jones, 520.

2. The transfer of threshing account and statutory lien, while good between parties, *held* void as to execution creditors of the assignor because made without consideration, and with intent to defraud the creditors of the assignor, in which intent the transferee participated. Faber v. Wagner, 287.

3. Where an account for threshing, with lien, was fraudulently assigned, but the sheriff on execution levied on the debt and the debtor paid the same, the transfer did not defeat the levy. Faber v. Wagner, 287.

4. Where an action was commenced to set aside a conveyance of certain lands alleged to have been made with intent to defraud plaintiff and prevent him from collecting out of such lands a judgment recovered against one of the defendants, but which judgment had not been renderd when the conveyance was made, although

FRAUDULENT CONVEYANCES—Continued.

suit was pending upon which judgment was obtained after the conveyance, the plaintiff was a creditor within the meaning of § 5052, Rev. Codes. Soly v. Aasen, 108.

5. The term creditor as applied in § 5052, Rev. Codes, is not used in its strict technical sense, but has been construed liberally and includes all parties who have demands, accounts, interests or causes of action for which they might recover any debt, demand, penalty or forfeiture. Soly v. Aasen, 108.

6. Knud G. Aasen bought the lands in suit, giving his note and mortgage for the purchase price. Upon paying the note and mortgage the deed was taken in the name of Gudbjorn Aasen, a son fourteen years of age. Since the taking of the deed father and son have lived together, working the land, the father taking the proceeds and paying the taxes. An action was brought against Gudbjorn Aasen for damages for alleged criminal conversation with plaintiff's wife. Subsequent to the commencement of this action, and before judgment, Gudbjorn Aasen transferred the land in suit to his father. *Held*, that the conveyance was fraudulent as to plaintiff. Soly v. Aasen, 108.

FRIVOLOUS MATTER. See PLEADING, 424.

GAMBLING DEVICES. See CERTIORARI, 85.

GOODWILL.

1. One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within the county. Mapes v. Metcalf, 601.

2. It is necessary to the validity of a contract to refrain from the carrying on of a business, that it be callateral and auxiliary to a sale of the goodwill of the business. Mapes v. Metcalf, 601.

GUARDIAN AND WARD. See INFANTS, 493.

1. Chapter 87, Laws 1897, relating to societies organized for the purpose of securing homes for orphans and authorizing county judges to investigate the facts in reference to children alleged to have been abandoned, and in proper cases to direct that they be turned over to one of such societies, does not conflict with § 111 of the constitution, conferring on county courts jurisdiction in probate matters and to appoint guardians and settle their accounts. State v. North Dakota Children's Home Society, 493.

2. Chapter 87, Laws 1897, relating to societies organized for the purpose of securing homes for orphans and requiring such society, after incorporation, to procure and file with the secretary of state a certificate, signed by the governor and three or more members of the supreme court, of their confidence of the trustworthiness of the corporation, does not conflict with § 96 of the constitution as imposing non-judicial duties on the supreme court. State v. North Dakota Childrens' Home Society, 493.

3. A petition for habeas corpus, to recover possession of minor children in the custody of a society organized under Ch. 87, Laws 1897, will be denied where the county court, after a judicial investigation on notice, has determined that the petitioner was leading a lewd and immoral life, and by reason thereof was an

GUARDIAN AND WARD—Continued.

unfit person to continue as the natural guardian of such children. State v. North Dakota Children's Home Society, 493.

4. Chapter 87, Laws 1897, relating to societies organized to secure homes for orphans, is not invalid as providing for an involuntary servitude, which is not a punishment for a crime. State v. North Dakota Children's Home Society, 493.

5. Under Ch. 87, Laws 1897, relating to societies organized to secure homes for orphans and providing for turning over children, adjudged by the county court to be abandoned, to one of such societies, is not invalid as conferring on such society an unrestricted authority over such children. Such society occupies the relation of a substitute guardian, and as such its acts are subject toapproval or disapproval of the court making the appointment. State v. North Dakota Children's Home Society, 493.

6. Where in an action by the guardian of the estate of minors on a note which is in terms payable neither to such guardian nor to his wards, but to another person, and is not indorsed, the ownership is challenged by an express denial, evidence that the note was delivered to the county court by the payee, who formerly had been guardian of the estate of such minors, to cover a shortage from his unlawful use of the trust funds, and that it was accepted by that court, sufficiently establishes the title in the wards. Shepard v. Hanson, 194.

HABEAS CORPUS.

1. Habeas corpus is a proper proceeding to secure bail for one unlawfully deprived of his liberty upon an order of the court committing him without bail. State v. Collins, 464.

2. Habeas corpus resorted to by a mother for the purpose of securing possession of her children, claimed to be unlawfully detained by a coropration standing in the position of guardian toward such children, the writ on hearing, however, denied. State v. North Dakota Children's Home Society, 493.

HABITUAL DRUNKARDS.

1. It is unlawful for druggists holding a permit to sell intoxicating liquor to habitual drunkards. State v. Donovan, 203.

HEAD OF FAMILY.

1. The husband and not the wife is primarily the head of the family. A wife who is a debtor does notoccupy the relation of head of the family for the purpose of claiming exemptions of personal property from seizure and sale by legal process. Ness v. Jones, 587.

2. When from necessity the wife is compelled to accept the burden of maintaining the family, the law concedes to her the family headship for the purpose of claiming exemptions. Ness v. Jones, 587.

3. The husband, and not the wife, under facts of the case, *held*, the family head. Ness v. Jones, 587.

HEIRS. See Succession, 223; Estates of Deceased Persons, 223.

1. The heirs of a deceased mortgagor are bound by a foreclosure by advertisement, made under the power of sale contained in the mortgage after the mortgagor's death, and must redeem within a year from the sale or their rights are terminated. Grandin v. Emmons, 223.

HOMESTEADS. See Mortgages, 453, 531.

1. The action of United States land officers in accepting proof under homestead entry is not conclusive as to the homestead character of the property after the acceptance of the proofs. Brokken v. Baumann, 453.

2. A husband made proof to the land department of five years residence and cultivation of his homestead entry. His shanty was not habitable, and after submitting his proofs he moved the same from the land. His wife never lived on the land, and the husband did not reside thereon after submitting proof. Under these circumstances the land was not the homestead of the husband under the state law, § 3605, Rev. Codes, and was not exempt. Brokken v. Baumann, 453.

3. Mere intention to occupy land as a homestead is not sufficient to exempt it as a homestead, under § 3605, Rev. Codes, in the absence of some acts indicative of carrying such intention into immediate execution. Brokken v. Baumann, 453.

4. Before a homestead right attaches to land, there must have been actual or constructive residence on the land with a view to making it a home. Brokken v. Baumann, 453.

5. A mortgage executed by husband and wife on the homestead to secure a debt of the husband is a waiver by the wife of her rights therein. Roberts v. Roberts, 531.

6. A wife having waived her homestead rights by signing a mortgage for her husband's debt, on foreclosure after the husband's death, she cannot claim that she was surety for her husband. Roberts v. Roberts, 531.

HOMICIDE. See Bail, 464; Hareas Corpus, 464.

1. In capital cases, unless proof is evident or the presumption great, bail may be granted as matter of judicial discretion. State v. Collins, 464.

2. In capital cases accused is entitled to bail before trial as a matter of right, unless the proof of guilt is evident or the presumption thereof great. State v. Collins, 464.

HUSBAND AND WIFE. See Mortgages, 160, 531, 219; Homestead, 531.

INCOMPETENCY—See Public Officers, 63.

INFANTS. See Guardian and Ward.

1. Chapter 87, Laws 1897, to secure homes for children is not in contravention of § 96, Const., as imposing nonjudicial duties on judges of the supreme court. State v. North Dakota Children's Home Society, 493.

2. Chapter 87, Laws 1897, to secure homes for children does not conflict with § 111, Const., conferring exclusive jurisdiction on county courts in probate matters. State v. North Dakota Children's Home Society, 493.

INJUNCTIONS. See Judgments, 16, 26; Intoxicating Liquors, 157.

1. An action in equity will not lie to enjoin the collection of a judgment taken against defendant by default through his mistake, inad-

INJUNCTIONS—Continued.

vertance, surprise or excusable neglect, he having a sufficient remedy by motion under the statute. Kitzman v. Minnesota Thresher Mfg. Co., 26.

2. The collection of a personal property tax may be, in a proper case, enjoined. Shaffner v. Young, 245.

3. Where an ultra vires agreement was entered into between the officers of a municipal corporation and a private corporation for the furnishing of lights to the city, but where no appropriation was first made or tax levied to meet the expenditure, an action was sustained in behalf of a tax payer to enjoin such unlawful disbursements. Roberts v. City of Fargo, 230.

4. In an action to quiet title by the former owner of real estate against the purchaser at foreclosure sale under a power, no redemption having been made within the time allowed by law, plaintiff was adjudged entitled to an order enjoining defendants from asserting any claim or demand to the premises, and giving possession thereof to the plaintiff. Grandin v. Emmons, 230.

5. The remedy by injunction is, as a general rule, withheld where it is sought to restrain the collection of a personal property tax. In such cases the remedies at law are ordinarily deemed to be adequate, and hence the general rule is that equity will not intervene in such cases. Shaffner v. Young, 245.

6. A complaint in a suit in equity to enjoin a sheriff seizing property on a tax warrant in a county other than that where the warrant was issued, failing to show that the sheriff's trespass was one which would cause irreparable injury, is insufficient. Shaffner v. Young, 245.

7. A tax-payer is entitled to sue to enjoin the unlawful disbursement of municipal funds upon a contract for lighting the city, where no appropriation was made, or tax levy had, before letting the contract. Roberts v. City of Fargo, 230.

8. A sheriff seizing property under pretended authority contained in a tax warrant of distraint issued from another county, is a trespasser and may be enjoined from such seizure by a suit in equity. Shaffner v. Young, 245.

9. Where the law under which a municipal corporation is created prohibits the city from contracting debts, liabilities or expenses until provision has first been made to meet and discharge the same, the fulfillment of a contract made by the city involving an expenditure without such provision first being made, can be enjoined at the suit of a tax-payer. Roberts v. City of Fargo, 230.

INSTRUCTIONS. See MALICIOUS PROSECUTION, 48.

1. A certain instruction concerning exemplary damages examined and held erroneous as invading the province of the jury. Lindblom v. Sonstelie, 140.

2. The following instruction approved in an action for malicious prosecution: "I leave it for you to say from all the evidence in the case whether defendant acted in good faith in consulting his own attorney, employed by him in a civil action, and if you find that he did not act in good faith in consulting with such attorney, then he cannot plead such advice in defense of this action." Merchant v. Pielke, 48.

INSTRUCTIONS—Continued.

3. The following instruction in an action for malicious prosecution, sustained: "It is not enough for defendant to prove generally that all the facts were laid before the attorney, but it must be shown what facts were submitted." Merchant v. Pielke, 48.

INTOXICATING LIQUORS. See CONTEMPT, 154.

1. The authority conferred upon county courts to issue permits to registered pharmacists to sell intoxicating liquors for medicinal, mechanical and scientific purposes, by Ch. 63 of the Penal Code, is limited to granting permits to sell at the particular place petitioned for. Sales made at a place other than that for which the petition was granted are unlawful sales, and the person making such sales is not exempt from the consequences imposed by said chapter for unlawful sales, even though the seller's permit does not specify the particular place for which issued. State v. Hilliard, 436.

2. Section 7616, Rev. Codes, prohibits sales by druggists to persons whose relatives have served the notice therein provided. The offense, by this section described, is consummated by a sale after notice, whether the person to whom sold is in the habit of becoming intoxicated or not. State v. Donovan, 203.

3. A place kept by a druggist who has a permit to sell intoxicating liquors, becomes a common nuisance under the provisions of § 7605, Rev. Codes, when such druggist sells intoxicating liquors therein unlawfully and without the protection afforded by his permit. State v. Donovan, 203.

4. The record of sales which druggists holding permits are required to keep is competent evidence to show the names of persons to whom sales were made and the kind and quantity of liquor sold and the purpose for which sold. State v. Donovan, 203.

5. A druggist cannot protect himself in a prosecution for the unlawful sale of intoxicating liquors from producing the record of sales required to be kept under § 7596, Rev. Codes, on the ground of any constitutional protection. State v. Donovan, 203.

6. A druggist holding permit is prohibited from selling liquor to persons who are in the habit of becoming intoxicated, and sells at his peril of the fact whether he knows the person to have the habit or not. State v. Donovan, 203.

7. Criminal contempt proceedings under the statute relating to intoxicating liquors are governed by § 7605, Rev. Codes, and not by § 5942, Rev. Codes. State v. Massey, 154.

8. A final order in a contempt case adjudging defendant guilty is appealable. State v. Massey, 154.

9. Under § 7605, a citizen of a county in which a liquor nuisance exists may maintain an action in the name of the state to abate it without the consent of the state's attorney or attorney general. State v. Bradley, 157.

10. A place kept by a druggist, who has a permit to sell intoxicating liquors, becomes a common nuisance, under the provision of § 7605, Rev. Codes, when such druggists sells intoxicating liquors therein unlawfully, and without the protection afforded by his permit. State v. Donovan, 203; State v. Donovan, 610.

INTOXICATING LIQUORS—Continued.

11. The authority conferred upon county courts to issue permits to registered pharmacists to sell liquors for medicinal, mechanical and scientifical purposes, by Ch. 63 of the penal code, is limited to granting permits to sell at the particular place petitioned for. Sales made at a place other than that for which the petition was granted are unlawful sales, and the person making such sales is not exempt from the consequences imposed for unlawful sales, even though the seller's permit does not specify the particular place for which issued. State v. Hilliard, 436.

12. Sale of liquor in violation of injunction prohibiting further sale is a criminal contempt. State v. Massey, 154.

13. Procedure in criminal contempt trials as laid down in § 5942, Rev. Codes, does not govern cases arising for illegal sale of intoxicating liquor in violation of injunction under § 7605, Rev. Codes. State v. Massey, 154.

JUDGES. See District Judges, 389, 431, 361; Appeal and Error, 361; Mandamus, 389.

1. Where affidavits and expense bond have been filed, as provided by § 5454a, Rev. Codes, the resident judge of the district court becomes thereby disqualified to exercise further judicial functions in the action. Orcutt v. Conrad, 431.

2. Where an affidavit of prejudice has been filed against a trial judge, and the cost bond given, it becomes his duty, under § 5454a, Rev. Codes, to forthwith call in another judge to try the case, and a neglect to perform this duty may be enforced by mandamus. Gunn v. Lauder, 389.

3. Under § § 5454a, and 8120, Rev. Codes, 1899, authorizing the calling in of another judge in a civil or criminal action on filing affidavits of prejudice of the presiding judge, an accused in a contempt proceeding, under Ch. 34, Code Civ. Pro., is not entitled to have another judge called in to determine the case, as such proceeding is neither a civil nor a criminal action. Township of Noble v. Aasen, 264.

4. Chapter 87, Laws 1897, does not impose non-judicial duties upon judges of the supreme court in violation of § 96 of the state constitution. State v. North Dakota Children's Home Society, 493.

JUDGMENTS. See Claim and Delivery, 440.

1. Judgments which are merely erroneous and not void are binding on the parties until reversed or modified, and cannot be impeached collaterally. Nichols & Shepard Co. v. Paulson, 440.

2. An answer pleading facts showing no service of the summons, and praying for the cancellation of a judgment rendered in the action, is pleading an equitable counterclaim and is a direct attack upon the judgment. Phelps v. McCollam, 536.

3. An action brought to cancel a judgment for lack of jurisdiction in the court to render it by reason of failure to serve the summons is a direct attack upon such judgment. Phelps v. McCollam, 536.

4. A judgment irregularly entered in violation of established procedure may be attacked by a motion addressed to the court entering it. The remedy by motion is confined to irregular judgments and cannot be resorted to for the purpose of revising errors of law. State v. Donovan, 203.

JUDGMENTS—Continued.

5. The assignee of a judgment buys the same subject to equities between the original parties thereto. Minnesota Thresher Mfg. Co. v. Holz, 16.

6. A judgment irregularly entered in violation of established procedure may be attacked by a motion addressed to the court entering it. But the remedy by motion is confined to irregular judgments and cannot be resorted to for the purpose of enabling a court to revise and correct errors of law. State v. Donovan, 203.

7. A court of equity has the power to dismiss an action without prejudice, and when a judgment contains a recital that it was so dismissed the effect of such recital is to prevent such judgment from operating as a bar in another suit brought on the same subject-matter. Prondzinski v. Garbut, 300.

8. A judgment in claim and delivery awarded damages to defendants for the taking of the property. Such judgment did not impair their right to recover the property or its value, also given by the judgment. Nichols & Shepard Co. v. Paulson, 440.

9. A judgment in claim and delivery in the form set out in the opinion, was not void, and a tender of the property to defendants two years after it was taken, in bad condition, did not satisfy the judgment. Nichols & Shepard Co. v. Paulson, 440.

10. One who is not a party defendant on the record in an action, but who participates in the defense and has an interest in the matter in controversy in the action, and participates in the defense for the protection of such interest and not as representing the interest of the defendant of record; and where it is known to the plaintiff that such party so participates for the protection of his own interests, he is bound by the decree rendered in the action. Boyd v. Wallace, 78.

11. Though an assignee of a judgment buys the same in good faith and without notice or knowledge of defenses or equities as between original parties thereto, he nevertheless takes the same subject to such defenses and equities. Minnesota Thresher Mfg. Co. v. Holz, 16.

12. Under § 5298, Rev. Codes, the district court may, at any time within one year after notice of a judgment, relieve a party therefrom when the same was taken against him through his mistake, inadvertance, surprise or excusable neglect. This provides an edequate remedy at law. Therefore an independent action in equity will not lie to enjoin the collection of a judgment so taken. Minnesota Thresher Mfg. Co. v. Holz, 16.

13. An injunction will not be granted to restrain the collection of a judgment taken by default. The remedy by motion to vacate the default is ample. Kitzman v. Minnesota Thresher Mfg. Co., 26.

14. In an application to set aside a judgment by default, where defendant, in support of his application, produced a verified answer to the merits of the case, it was error to permit plaintiff to file affidavits combating the facts contained in the verified answer, since it was only necessary that the defense pleaded be prima facie a good defense. Minnesota Thresher Mfg. Co. v. Holz, 16.

15. A judgment against a school district, if not paid, may be enforced by a mandamus to compel the levying of a tax for its payment. Color v. Coppin, 86.

JUDGMENTS—Continued.

16. Section 5298, Rev. Codes, confers on the district court authority to relieve a party from a judgment order, or other proceeding taken against him through his mistake, inadvertance, surprise or excusable neglect. *Held*, that where defendant sought to vacate a default judgment under this section, his moving papers properly included an affidavit of merits and verified answer setting forth his defense, and affidavit showing his excuse for not appearing and answering. Minnesota Thresher Mfg. Co. v. Holz, 16.

17. Defendant and others were indebted to plaintiff on a note on which judgment was taken by default. Defendant moved to vacate judgment under § 5298, Rev. Codes, on the ground that it was taken through his excusable neglect. As grounds of excuse for his default, he claimed a release from liability on the note, and filed affidavits that he was informed by plaintiff's agents that plaintiff would try to collect the note of the other defendants, and would perhaps sue on the note, and that it would be necessary, in the event of such suit, to make defendant a party thereto, but that no judgment would be entered against him; and further assured defendant that, if, by any mistake, a judgment in such action should be entered against him, plaintiff would at once cancel the same as to him. No counter-affidavits were filed. *Held*, a sufficient showing of excuse for defendant's default, and that a refusal of the court to vacate the judgment was an abuse of discretion. Minnesota Thresher Mfg. Co. v. Holz, 16.

18. Under § 5298, Rev. Codes, granting relief against judgments entered against a party through his excusable neglect, the facts set out in the motion papers for such relief, and relied upon as grounds of excuse for the default, may be met and opposed by counter-affidavits; and in the consideration of the same the ruling to be made in the trial court rests in the sound discretion of that court and the ruling below will not be disturbed in this court, except in cases of abuse. Minnesota Thresher Mfg. Co. V Holz, 16.

19. Personal service of the summons and complaint in an action against a non-resident does not operate as notice of the entry of judgment within § 5298, Rev. Codes, granting relief in certain cases against judgments entered by default when application therefor is made within one year from notice of entry. Minnesota Thresher Mfg. v. Holz, 16.

20. In 1892 judgment was entered against defendant by default, but he had neither notice nor knowledge of the entry thereof until seven years later, when execution was issued thereon and levy made. Under § 5298, Rev. Codes, a judgment taken against a party through his mistake or excusable neglect may be vacated on his application within one year after notice thereof. *Held*, that an application by defendant to vacate, filed before the expiration of a year from his first learning of the existence of the judgment, was in time, since the statute begins to run only on actual notice or knowledge of the judgment. Minnesota Thresher Mfg. Co. v. Holz, 16.

JUDICIAL NOTICE. SEE EVIDENCE, 223.

1. Courts will take judicial notice of the seal of a notary public, and it proves itself prima facie by its appearance upon the certificate of acknowledgment. Grandin v. Emmons, 223.

JURISDICTION. See Justice of the Peace, 353; Appeal and Error, 351, 261; Divorce, 569, 219; Certiorari, 85.

1. The supreme court is without jurisdiction to settle a statement of the case until the refusal of the trial court is shown to settle the same. Taylor v. Miller, 361.

2. The duties placed upon county courts by Ch. 87, Laws 1897, are not in violation of, but in aid of theconstitutional jurisdiction of such courts over guardians. State v. North Dakota Children's Home Society, 493.

3. Under § 5954, Rev. Codes, granting an appeal from final orders adjudging an accused guilty of contempt, and providing that the court may review all the proceedings and affidavits, and other proof, the court has no authority to try the case anew, but sits as a court of review for correction of errors. State v. Massey, 154.

4. An action brought to cancel a judgment for lack of jurisdiction in the court to render it by reason of failure to serve the summons is a direct attack upon the judgment. Phelps v. McCollam, 536.

5. The filing of the transcript of a judgment rendered in justice court does not make the judgment a judgment of the district court to the extent that presumptions will be indulged in favor of the jurisdiction of the justice rendering it. Phelps v. McCollam, 536.

7. Under § 5954, Rev. Codes, appeals may be taken to the supreme court from any final order adjudging the accused guilty of contempt, and on such appeal the supreme court may review all the proceedings had, and affidavits and other proof introduced, and that for the purpose of reviewing questions as to the sufficiency of the evidence a statement of the case may be prepared under Ch. 10, Art. 3, § 5630, relating to appeals in cases tried without a jury, authorizes the supreme court to try anew the questions of fact specified in the statement, or the entire case if a demand for a retrial of the entire case is demanded. *Held*, that all appeals in contempt cases are governed by § 5954, and Ch. 10, Art. 3, and not by § 5630, and in order to review the sufficiency of the evidence the statement of the case must embrace specifications of particulars showing wherein the evidence is insufficient. Township of Noble v. Aasen, 264.

8. Residence in the state for the prescribed time before commencing an action for divorce is jurisdictional. Smith v. Smith, 219.

9. A divorce granted in this state to one not a good faith resident of the state would be without binding force in other jurisdictions. Smith v. Smith, 219.

10. Until it is shown that the trial court has, on request, refused to settle a statement of the case in accordance with the facts, the supreme court is without authority to settle the statement. Taylor v. Miller, 361.

11. On a petition to the supreme court to settle a statement of the case, where the evidence disclosed that the trial court had not refused to settle the statement in accordance with the facts, a settlement by the supreme court refused. Taylor v. Miller, 361.

12. The supreme court has authority to settle a statement of the case when the trial court has refused, on request made, to settle the same in accordance with the facts. Taylor v. Miller, 361.

JURISDICTION—Continued.

13. The district court, under § 6779, Rev. Codes, acquires no jurisdiction upon appeal from a justice of the peace to try the action anew or to litigate a counterclaim, where the justice had no jurisdiction to determine the issues raised by the pleadings or to allow the counterclaim. Vidger v. Nolin, 353.

14. The omission to annex an affidavit to his return by the assessor as required by § 1551, Comp. Laws, was fatal to the jurisdiction of the taxing officers. Eaton v. Bennett, 346.

15. Under § 6677, Rev. Codes, in actions in justice's courts for unlawful detainer, no counterclaim can be pleaded except as a set-off for rent or damages; in cases where judgment for rent or damages is claimed and where a counterclaim was interposed in justice's court to a complaint where possession of the property alone was claimed, and neither rent nor damages sued for, jurisdiction could not be conferred upon the justice, nor upon the district court upon appeal, to litigate the counterclaim either by consent of the parties or by plaintiffs replying to the counterclaim and not demurring thereto. Vidger v. Nolin, 353.

16. Executors and administrators have no jurisdiction to allow claims against the estate of their decedent after the ten days limited by law for their action has expired. Farwell v. Richardson, 34.

JUSTICES OF THE PEACE.

1. Under § 6771a, Rev. Codes, providing that when the decision of the district court re-opens the case on appeal for the trial of an issue of fact, the decision shall direct that the action shall be retained and placed on the calendar for trial as in other cases. And § 6779, Rev. Codes, declaring that the action shall be tried anew in the district court in the same manner as actions originally commenced therein, where, on appeal to the district court from a justice's judgment against a joint debtor, sustaining a demurrer to such debtor's answer setting up the statute of limitations, the district court overrules the demurrer, it is error not to consider here the evidence to determine whether the defense of limitations was true in fact. Grovenor v. Signor, 503.

2. Under § 6779, Rev. Codes, providing that on an appeal from justice court the action shall be tried anew in the district court in the same manner as actions originally commenced therein, the district court acquires no jurisdiction on such appeal to try the action anew in cases where the justice had no jurisdiction to determine the issues raised by the pleadings, or to allow the counterclaim. Vidger v. Nolin, 353.

3. Upon an appeal from justice court the district court acquires no jurisdiction to try the case anew, nor to litigate a counterclaim in cases where the justice had no jurisdiction to determine the issues raised by the pleadings, or to allow the counterclaim. Vidger v. Nolin, 353.

4. Courts of justice of the peace are of limited jurisdiction, and no presumptions will be indulged in favor of their jurisdiction. Such jurisdiction must affirmatively appear. Phelps v. McCollam, 536.

5. The filing of a transcript of judgment rendered by a justice of the peace pursuant to § § 5498, 6717, Rev. Codes, does not make the judgment one of the district court to the extent that presumptions may be indulged in its favor. Phelps v. McCollam, 536.

JUSTICES OF THE PEACE—Continued.

6. In an action which originated in justice court, brought upon a joint promissory note, containing no words importing a several liability, the note was outlawed unless the running of the statute was interrupted by certain payments alleged to have been made thereon. One of the makers plead the statute of limitations and denied the making of the payments. To this separate answer plaintiff demurred. The justice sustained the demurrer, but the ruling *held* error. Grovenor v. Signor, 503.

LANDLORD AND TENANT. See CHATTEL MORTGAGES, 37. 400, 637; CROPS, 37.

1. The stipulation in the contract for lease, by which a lien was given to the landlord upon the tenant's share of the crop to secure the re-plowing of the land, construed to be a chattel mortgage upon the grain. Willard v. Monarch Elevator Co., 400.
2. A stipulation in a lease of land to reconvey to the grantor in a deed to the leased land on payment of certain debts, *held* not to constitute the deed presumptively a mortgage. McGuin v. Lee, 160.

LEASE.

1. Where the title to crops is reserved in the landlord until conditions are fulfilled, the stipulation is binding. Hawk v. Konouski, 37.

LEGALIZING ACKNOWLEDGMENTS. See CURATIVE LEGISLATION, 373.

1. The deputy sheriff making the sale correctly executed the certificate of sale in the name of the sheriff, per himself as deputy. The acknowledgment was erroneous in that the deputy did not acknowledge it personally and in behalf of the sheriff. *Held*, that the defect, even if fatal, was legalized by § 3585, Rev. Codes, enacted in 1887. McCardia v. Billings, 373.

LEGISLATIVE JOURNALS.

1. Entries in the legislative journals cannot be received to impeach enrolled bills properly authenticated by the officials of the house and senate, and approved by the governor, and filed with the secretary of state. Power v. Kitching, 254.

LIENS. See FACTOR'S LIENS, 311; WAIVER, 311.

LIMITATION OF ACTIONS. See EXECUTORS AND ADMINISTRATORS, 34.

1. A tax deed, regular on its face but voidable because of the illegality of the attempted assessment of the taxes on which the deed was based, will not start running the special statute of limitations found in § 1640, Comp. Laws. Eaton v. Bennett, 346.
2. The statute of limitations embraced in § 1640, Comp. Laws, does not control where the occupant of land claims title by adverse possession under chapter 158 Laws 1899. Power v. Kitching, 254.
3. A purchaser at a tax sale has no vested right in the statute of limitations in force at the date of the sale. The statute may be changed and shortened by subsequent legislation provided that a reasonable time is allowed within which actions may be brought. Power v. Kitching, 254.

LIMITATION OF ACTIONS—Continued.

4. Adverse, open, exclusive and undisputed possession of real estate for a period of ten years, the occupant paying all taxes assessed against the land during said period, will, if claim of title and ownership is in good faith under an instrument which constitutes color of title entitle the occupant to have his title quieted Power v. Kitching, 254.

5. A payment made by one joint debtor does not operate as a new promise which will interrupt the running of the statute of limitations as against another joint debtor. Grovenor v. Signor, 503.

6. Where the maker of a joint note, after denying having made certain alleged payments, sets up limitations as a defense, the sustaining of a demurrer to such answer on the ground that it does not state facts sufficient to constitute a defense, is erroneous, since a payment made by one joint maker does not operate as a new promise which will interrupt the running of the limitations against the other joint maker. Grovenor v. Signor, 503.

7. Where a tax deed was issued in pursuance of an attempted tax sale for the taxes of 1888, the deed being regular on its face but the assignment void because the assessor did not annex any affidavit to his assessment roll in the year 1888, such tax deed, though recorded more than three years prior to the commencement of the action, did not operate to start running the statute of limitations, found in § 1640, Comp. Laws, and hence the action was not barred under said section of the statute. Eaton v. Bennett, 346.

8. The statute of limitations will not protect a tax deed based on a sale for pretended taxes which were never in fact assessed. Power v. Kitching, 254.

LOST INSTRUMENTS. See EVIDENCE, 340.

MALFEASANCE. See PUBLIC OFFICERS, 63.

1. When this action was instituted the defendant was an incumbent of the office of county judge of the county of McIntosh, N. D., and held said office by virtue of an election thereto. Defendant's original title to said office is not in question in this action, nor does the complaint allege that the plaintiff has a special interest in the result of this action which is peculiar to himself. The sole object of the action is to remove the defendant from said office. As grounds of action, the complaint charges the defendant with the forgery of a promissory note; also with divers acts of malfeasance, crime and misdemeanor in office; also with gross incompetency. A preliminary motion was made in the district court to dismiss the action upon the ground that that court was without jurisdiction of the subject-matter of the action. This motion was denied. *Held* that this ruling was error. Wishek v. Becker, 63.

2. The complaint omitted to aver that the defendant had usurped or intruded into said office, or was unlawfully holding or exercising the powers of the same. Nor does the complaint allege that the defendant had done or suffered any act which, "by the provisions of law" operated to work a forfeiture of the office or to create a vacancy therein. *Held*, that the action does not lie under the provisions of chapter 24 of the Code of Civil Procedure, for two reasons: (a) That a private person who has no special interest in the result of the action which is peculiar to himself cannot institute an action in his own name under said chapter; (b) that the complaint did not state a cause of action under said chapter. Wishek v. Becker, 63.

MALFEASANCE—Continued.

3. Construing § 5741, Rev. Codes, 1899, *held*, that said section deals with procedure only, and the said section must be so construed as not to enlarge the grounds of action or the remedies which were obtainable by the quo warranto proceeding which existed prior to the enactment of said section. Wishek v. Becker, 63.

4. Where the object of the suit is only to remove the defendant from office upon some or all the grounds of removal enumerated in in the constitution and statutes, that a civil action, under chapter 24, does not lie in any case, unless facts are alleged showing that the special remedies provided for removals from office, under the Codes of Civil and Criminal Procedure, are inadequate for the purpose. Removals from office in this state may be made by the various methods elaborated for the purpose in the constitution and statutes of the state. These methods are exclusive, unless it shall appear by the complaint, in an action brought under chapter 24, supra, that some of the causes of removal enumerated in section 5743 of that chapter are set out as grounds of action; nor can such an action be brought by an individual in his own name under chapter 24, unless the complaint shows that the plaintiff has a special interest in the action. Wishek v. Becker, 63.

5. Sections 361, 362, Rev. Codes 1899, construed. *Held*, that, when construed together, said sections provide, in effect, that the removals from office contemplated by the same can be effected only "in the manner provided in the Codes of Civil or Criminal Procedure." Neither of said sections attempts to provide a procedure, nor are either of the same self-executing. Wishek v. Becker, 63.

6. Section 362 cannot, under existing laws, be enforced literally, because the several remedies for removals from office as expressly provided in the Codes of Civil and Criminal Procedure, will not, under any circumstances, permit an action to remove an officer to be instituted in the name of the county, nor in the name of an individual, unless the averments in the complaint state a cause of action arising in favor of an individual, under the provisions of chapter 24 of the the Civil Code. Wishek v. Becker, 63.

MALICIOUS PROSECUTION.

1. For the purpose of showing the malice of defendant in instituting a criminal prosecution against plaintiff, evidence showing the relations of the parties, defendant's acts, conduct, declarations and feelings of hostility and ill-will towards plaintiff, was admissible. Merchant v. Pielke, 48.

2. To entitle a plaintiff to prevail in an action for malicious prosecution it is necessary to prove that he has been prosecuted by the defendant either civilly or criminally; that the prosecution terminated in his favor, and that such prosecution was malicious and without probable cause, and resulted in his damage. Merchant v. Pielke, 48.

3. Where in an action for malicious prosecution, defendant relied on the advice of counsel, and it appeared that the attorney consulted was defendant's counsel in a civil cause which involved matters closely connected with the facts involved in the criminal charge, an instruction that "I leave it for you to say, from all the evidence in the case, whether defendant acted in good faith in consulting his own attorney employed by him in a civil action, and if you find that he did not act in good faith in consulting with

MALICIOUS PROSECUTION—Continued.

such attorney, then, he cannot plead such advice in defense of this action," was correct. Merchant v. Pielke, 48.

4. Where, in an action for malicious prosecution, defendant relied on advice of counsel, an instruction that it was not enough for defendant to prove generally that all the facts were laid before the attorney, but it must be shown what facts were submitted, was correct. Merchant v. Pielke, 48.

5. A defendant in an action for malicious prosecution, who seeks to rely upon the advice of counsel as a defense, must show that he communicated to such counsel all of the facts within his knowledge, and all that he could ascertain with reasonable diligence and inquiry, and that he acted on the advice received, honestly and in good faith, in causing the arrest. Merchant v. Pielke, 48.

6. Where the evidence in an action for malicious prosecution showed that plaintiff's arrest was actuated by a high degree of malice, a verdict for $800 was not so excessive as to require it to be set aside. Merchant v. Pielke, 48.

7. Where, in an action for malicious prosecution, it appeared that plaintiff had been under arrest, an instruction permitting her to recover for her deprivation of liberty was not erroneous though she was not actually committed to jail. Merchant v. Pielke, 48.

MANDAMUS.

1. Under § 5454a, Rev. Codes, requiring the district judge to arrange for and procure the judge of some other district to preside at the trial of cases in which he is disqualified by prejudice, where it appears that a district judge was disqualified at the January term and failed to call in another judge by the July term, and at such latter term adjourned the court, after he was informed that another judge would attend and preside in such cases, the supreme court issued a mandamus requiring him to perform the duty imposed on him of calling in another judge. Gunn v. Lauder, 389.

2. When a judgment is obtained against a township on an indebtedness of a school district, and subsequent to the entry of such judgment the township is divided into two school districts, the judgment creditor may proceed to enforce such judgment against such districts, and each will be required by mandamus to levy a tax sufficient to pay its pro rata share of such indebtedness based on the amount of its taxable property. Coler v. Coppin, 86.

3. Mandamus will not lie to compel a county canvassing board to consider the tally sheets or lists found in the poll-books for the purpose of verifying or varying the votes as shown to have been cast by the official statement of the election certified from the various precincts. State v. McKenzie, 132.

4. Where the board of county commissioners has found that a certain petition for the organization of a civil township contained the requisite number of legal voters, and has acted thereon by taking the necessary steps to organize such township, the question as to the sufficiency of such petition is not open to judicial investigation in mandamus proceedings to compel the calling of an election for school officers in such township. State v. Gang, 331.

5. Where an affidavit of prejudice and the cost bond have been duly presented and filed it becomes the duty of the judge against

MANDAMUS—Continued.

whom the same are filed to immediately arrange for and procure the attendance of a judge of another district to try the case, under § 5454a, Rev. Codes, and his failure to do so will be enforced by writ of mandamus issued out of the supreme court, Gunn v. Lauder, 389.

6. Where a contract of a municipal corporation involving the expenditure of city funds was entered into without any statute or ordinance commanding the city council to make such contract, and where the signing of the contract was not preceded by or based upon an ordinance enacted by the council of the city authorizing the council to enter into the contract, the contract cannot be enforced by mandamus or otherwise. Roberts v. City of Fargo, 230.

MANDATORY STATUTES. See STATUTES, 493, 469.

MECHANICS' LIENS.

1. Under § 4793, Rev. Codes, mechanics' liens have priority over all other liens or incumbrances on the building to which they attach. Plaintiff became the mortgagee of certain property during the erection of a building thereon. Later the mechanics foreclosed their liens, but in the foreclosure actions made no claim of priority and the judgments entered in each case established liens as of the date of the judgment, and directed a sale of the premises to satisfy the same. Defendants became purchasers of the premises at the sheriff's sale under the foreclosure proceedings. *Held*, that they acquired only the rights of the lien claimant as established by the judgment, and not the rights he might have acquired had he asserted the priority to which he was entitled, and hence, plaintiff's mortgage being prior to the date of judgment, defendants' lien was subordinate thereto. Bastien v. Barras, 29.

MERGER.

1. Plaintiffs took possession of the sheep in controversy under the present claim and delivery proceedings on August 11th, 1893. Two dayes later the defendant rebonded and regained possession. On November 20th, 1893, defendant sold the sheep and transferred title. It is claimed that an assignment of the factor's lien was made by the factor on January 1st thereafter. *Held*, that the rights of the parties had become fixed prior to the alleged assignment, and that the lien was merged in the present cause of action. Rosenbaum v. Hayes, 311.

MINISTERIAL ACTS.

1. A judge is not prevented from performing ministerial acts in a civil case after the filing of an affidavit of prejudice and cost bond, but is thereby prohibited from performing judicial functions in the action. Orcutt v. Conrad, 431.

MINORS. See INFANTS, 493.

MISCONDUCT IN OFFICE. See MALFEASANCE, 63.

MISDEMEANORS. See MALFEASANCE, 63; CRIMINAL LAW.

MISTAKE. See MORTGAGES, 373; PAYMENT, 594.

1. The plaintiff brought this action to recover a balance alleged to be due for salary as county superintendent. The county interposed a counterclaim for an alleged overpayment of salary, which pay-

MISTAKE—Continued.

ment was induced by plaintiff's overstatement to the board of county commissioners of the number of schools in the county. It is *held* that, inasmuch as such overpayments were made under a mistake of fact, and were induced by plaintiff's false statements, they were not voluntary payments, and can therefore be recovered back by the county. It is *held*, further, that the doctrine of voluntary payment does not apply to payment made from public funds by agents of municipal corporations whose duties and powers in reference thereto are limited and defined by law. It was error, therefore, for the trial court to direct a verdict against the defendant upon its counterclaim upon the ground that the overpayments were voluntary. Wiles v. McIntosh County, 594.

MORTGAGES.

1. The probative weight of a notary's certificate of acknowledgment of a husband and wife to a mortgage is not overcome by testimony of the wife where, in response to the question of whether she executed the mortgage, she answered: "Not that I know of." —and to the question—"You have no recollection?" answered: "I might have alright enough."—and her conduct with reference to the lands tended to show that she did execute the mortgage. McCardia v. Billings, 373.

2. The notice of foreclosure sale required in foreclosures under a power of sale in the mortgage gave the date of the mortgage incorrectly, and such incorrect date was given in all foreclosure papers, including the deed. Such notice correctly stated the mortgagors and mortgagees names, as well as the correct time and place and volume and page of the recording of the mortgage. The land was also correctly described and the correct amount due given. *Held*, that the foreclosure was not void in view of the fact that no prejudice was shown or claimed. McCardia v. Billings, 373.

3. Substantial compliance with the statute prescribing what the notice shall contain in the foreclosure of a mortgage by advertisement under power of sale is sufficient unless prejudice is shown. McCardia v. Billings, 373.

4. The deputy sheriff, making a sale on foreclosure, correctly executed the certificate of sale in the name of the sheriff by himself as deputy. The acknowledgment was erroneous in that the deputy did not acknowledge it for himself personally and in behalf of the sheriff. The defect, if fatal, was legalized by § 3585, Rev. Codes. McCardia v. Billings, 373.

5. A husband and wife executed a mortgage upon the homestead to secure the debt of the husband. The wife did not sign the note, but the mortgage contained a covenant to pay the debt as described in the note. The husband made payments on the note without the wife's knowledge or acquiescence during the life of the mortgage. This action was brought eleven years after the giving of the mortgage, and after the death of the husband. The wife pleads the statute of limitations, as the payments by the husband were made without her consent. *Held*, that the statute of limitations has not run against the mortgage. Roberts v. Roberts, 531.

6. A wife, by joining with her husband in the execution of a mortgage of the homestead, thereby waived her homestead rights in the premises as against the mortgage. Roberts v. Roberts, 531.

MORTGAGES—Continued.

7. Plaintiff redeemed from certain foreclosures upon land owned by the defendant. His right of redemption was based upon a subsequent mortgage, then in process of foreclosure, which mortgage the defendant claimed had, prior thereto, been rendered void by rescission. The holder of the sheriff's certificate received and retained the redemption moneys. No redemption was made by defendant, and sheriff's deeds were issued to plaintiff. Under these circumstances, the right to challenge plaintiff's right to redeem concerned the owners of the sheriff's certificates only, and they, by receiving and retaining the redemption money waived the right to object, and thereby validated plaintiff's redemption. McDonald v. Beatty, 511.

8. The mortgagees in certain mortgages of real estate, before foreclosing the same, contracted orally with the defendant that upon a foreclosure of the mortgages they would purchase the property in at the sale, hold the certificates as security for the amount of their bids and interest, and would not rely on their legal rights thereunder. The holder of a second mortgage, after the foreclosure sale and purchase of the mortgage aforesaid, without knowledge of the agreement, and in good faith, and with the belief that his mortgage was a valid lien, redeemed against such foreclosures. Defendant knew of the redemption but made no objection thereto. He did not disclose to the redemptioner the oral agreement, or tender him the money he had paid to redeem, and was thereby estopped by his conduct and acquiescence in the redemption from asserting any rights arising out of the oral contract as against the plaintiff, who had no knowledge thereof. McDonald v. Beatty, 511.

9. A husband made final proof before the United States land department of a homestead, which was accepted by the department. His residence and improvements thereon were meager, his shanty not habitable, and after final proof the same was removed from the land. His wife never resided on the land, and he did not after submitting proof. Five months after making proof he made a loan, secured by mortgage on the land, the wife refusing to join in the mortgage. The land never became a homestead.—under the state law was not exempt. It was therefore unnecessary for the wife to sign the mortgage, and the same was valid and binding. Brokken v. Baumann, 453.

10. A sheriff's deed to a purchaser under a valid foreclosure and sale conveys to such purchaser all the right, title and interest which the mortgagor had in such lands at the date of the execution and delivery of the mortgage, free from any rights or liens under subsequent incumbrances. Nichols v. Tingstad, 172.

11. A foreclosure under a power of sale entitled a junior mortgagee to the surplus in the hands of the person making the sale, after satisfying the mortgage foreclosed. A junior mortgagee being included in the word "assign" as used in § 5424, Comp. Laws. Nichols v. Tingstad, 172.

12. A notice of mortgage foreclosure sale by advertisement, which is published six times, once each week for six successive weeks, before the sale, is a sufficient compliance with § 5848, Rev. Codes, regulating the publication of notices. Grandin v. Emmons, 223.

13. A power of sale inserted in a real estate mortgage is a power coupled with an interest, and is not revoked or suspended by the

MORTGAGES—Continued.

death of the mortgagor, and when so exercised, and redemption is not made as provided by law, is effective to cut off the rights of redemption of the heirs of such deceased mortgagor. Grandin v. Emmons, 223.

14. A written assignment of a real estate mortgage, the execution of which is acknowledged before a notary public of another state, is entitled to be read in evidence under the provisions of § 5696, Rev. Codes. It is not necessary to have attached the certificate of an officer of higher rank as to the official character and signature of the notary. Grandin v. Emmons, 223.

15. Where a first mortgage upon real estate was foreclosed under the power of sale therein contained, and the foreclosure ripened into a deed, no redemption being made by the second mortgagee within one year from the date of sale, the rights of the second mortgagee in the land were extinguished. Nichols v. Tingstad. 172.

16. The rights of a mortgagor, mortgagee and purchaser under a foreclosure sale are to be determined by the provisions of law in force at the time the mortgage was given. Nichols v. Tingstad, 172.

17. A stipulation in the lease of land to reconvey to the grantor in a deed to the leased land on payment of certain debts, held not to constitute the deed presumptively a mortgage. McGuin v. Lee, 160.

18. A wife holding title to a part of lands, conveyed the remainder, being the homestead of herself and husband. *Held*, that she would not be entitled to claim the deed was a mortgage as against a bona fide purchaser. McGuin v. Lee, 160.

19. A deed absolute on its face cannot be construed to be a mortgage except on evidence clear, specific and satisfactory. McGuin v. Lee, 160.

20. A party may make a purchase of lands either in satisfaction of a precedent debt or for a consideration then paid, and may at the same time contract to recover the lands upon the payment of a certain sum, without any intention on the part of either party that the transaction shall be in effect a mortgage. McGuin v. Lee, 160.

21. Neither the second mortgagee nor his assignee can redeem from a sale under foreclosure of a first mortgage, as a matter of right, unless such redemption is made within a year from such sale. Nichols v. Tingstad, 172.

22. An action to redeem from a first mortgage sale, made in foreclosure under a power, cannot be maintained as a matter of right, no equitable grounds existing in favor of the right to redeem. Nichols v. Tingstad, 172.

23. A stipulation in a lease of lands to reconvey to the grantor in a deed to the leased land on payment of certain debts, *held* not to constitute the deed presumptively a mortgage. McGuin v. Lee, 160.

24. McGuin and wife executed and delivered to Lee a warranty deed of lands partly owned by the wife and partly by McGuin, in consideration of the release and taking up of certain secured and unsecured debts of McGuin, and the leasing to McGuin of such lands for farming purposes. McGuin received a written lease of such lands from Lee at the same time the deed was given. McGuin and

MORTGAGES—Continued.

wife retaining possession. Such lease contained a special provision that Lee would reconvey said lands on payment of a fixed sum at a fixed time, such sum being the sum total of such debts. *Held*, that such stipulation to reconvey on conditions did not constitute the deed presumptively a mortgage. McGuin v. Lee, 160.

25. A wife, holding title to a part of certain lands, conveyed the remainder, being the homestead of herself and husband, and she was not entitled to claim the deed was a mortgage as against a bona fide purchaser. McGuin v. Lee, 160.

26. A deed, absolute on its face, cannot be construed to be a mortgage except on evidence clear, specific and satisfactory. McGuin v. Lee, 160.

27. Evidence examined and *held* not to sustain the contention that a deed absolute in form was in fact intended as a mortgage only. McGuin v. Lee, 160.

28. In an action to foreclose a mortgage upon real estate, where defendant appeared, and in his answer to the complaint alleged ownership of the land in himself; that he purchased the same for value and in good faith, and without notice actual or constructive of the existence of plaintiff's mortgage, judgment was entered for plaintiff because the defendant failed to prove title, excepting by the records in the office of the register of deeds, which were objected to as not the best evidence and the objection sustained. American Mortg. Co. v. Mouse River Live Stock Co., 290.

29. A certificate of acknowledgment of a mortgage by a husband and wife, *held* to show an acknowledgment by both. McCardia v. v. Billings, 373.

30. In a certificate of acknowledgment of two persons, the use of the words "he" and "persons" held to be a clerical error. McCardia v. v. Billings, 373.

31. An acknowledgment by a deputy sheriff of a certificate of foreclosure erroneous in that he did not acknowledge it for himself and in behalf of the sheriff. *Held* cured by § 3585, Rev. Codes. McCardia v. Billings, 373.

32. Evidence of a wife's denying that she ever executed the mortgage in question, examined and *held* that her testimony does not overcome the probative weight of the notary's certificate by that clear and convincing proof adopted as the rule to determine such cases. McCardia v. Billings, 373.

33. The notice of foreclosure sale required in foreclosures, under a power of sale in a mortgage, gave the date of the mortgage incorrectly. This incorrect date was given in all foreclosure papers, including the deed. The notice correctly stated the mortgagors' and mortgagees' names, as well as the correct time and place and volume and page of the record of the mortgage. The land was correctly described, and the correct amount due given. The foreclosure was not void in view of the fact that no prejudice was shown or claimed. McCardia v. Billings, 373.

34. A mortgage securing a negotiable note shares the same immunity from defenses between original parties as the note secured. First Nat. Bank v. Flath, 281.

35. A mortgage given to secure a note was assigned to M., and by him to plaintiff. The only credits on the note were for interest to

MUNICIPAL CORPORATIONS—Continued.

January 15th, 1900, and a small sum paid on the principal. There was a prior mortgage on the land, which was past due, as was also that held by plaintiff. Through the agency of M. at the time he held the mortgage, a loan was arranged to pay off his mortgage and the prior mortgage. The money secured paid the prior mortgage in full, but was not sufficient to pay the mortgage held by him. As to whether the balance was applied on the M. mortgage the evidence was conflicting. A writing subsequently signed by the mortgagors to M. referred to the note and recited several small payments. M. held accounts of the mortgagor for collection, but none of the amounts collected had been applied upon the mortgage. *Held* insufficient to show that such mortgage was paid in full. First Nat. Bank v. Flath, 275.

36. The statutory penalty for failure to satisfy a mortgage of record, provided for in § 4724, Rev. Codes, can be recovered only if the holder of the mortgage has failed to comply with a request to to satisfy the same, and only then by counting strictly upon the statute prescribing the penalty. Peckham v. Van Bergen, 43.

37. Under § 3900, Rev. Codes, providing that several contracts relating to the same matters between the same parties, and made as parts of substantially one transaction, are to be taken together, establishes a rule of interpretation merely and does not unite several contracts into a single contract, hence a realty mortgage and the note secured thereby do not constitute a single contract, but remain as separate contracts except for the purpose of interpretation. First Nat. Bank v. Flath, 281.

38. The right to assert priority of liens over a judgment belongs exclusively to the persons entitled to the lien and not to a purchaser at sheriff's sale under the lien. Bastien v. Barras, 29.

39. Under § 4793, Rev. Codes, a mechanic's lien will have priority over a mortgage executed prior thereto when the building was in process of construction when the mortgage was executed. Bastien v. Barras, 29.

40. Where judgments on mechanic's liens established them as of the date of the judgment, the purchaser under the judgment acquired only the interest of the claimant as established by the judgment, and not an interest relating back to the commencement of the building, hence the mortgage lien took priority of the mechanic's lien because of the failure of the lien claimant to assert his priority in time. Bastien v. Barras, 29.

41. In an action to foreclose a mortgage upon real estate, *held*, that neither a record nor a copy of a record of any conveyance of the land was admissible in evidence against objection until proof, by affidavit or otherwise, had been made that the original was not in the possession or under the control of the party producing such record or copy. American Mortg. Co. v. Mouse River Live Stock Co., 290.

MOTIONS. See PRACTICE, 569.

MUNICIPAL CORPORATIONS. See SCHOOL TOWNSHIPS, 86.

1. Where the journal entries of the proceedings of a city council show that on the passage of an ordinance the ayes and nays were called and a certain number of votes were cast, but omitted to show the

MUNICIPAL CORPORATIONS—Continued.

names of members voting, or how each voted, the same are insufficient to establish that the ordinance was legally adopted. Pickton v. City of Fargo, 469.

2. Under § 2143, Rev. Codes, the journal entries must show how each member of the city council voting on the passage of the ordinance, in fact, voted. Pickton v. City of Fargo, 469.

3. The fact that members of the council named in the journal as present when the meeting assembled answered to their names on roll call will not warrant the presumption that such members remained until a given ordinance was put on its passage and that they voted thereon. Pickton v. City of Fargo, 469.

4. Section 7, Ch. 42, Laws 1899, amending Ch. 41, Laws 1897, and requiring the council on letting a contract to proceed forthwith to appoint a special assessment paving comittee is directory, merely, and does not prevent proceeding under a contract entered into prior to the date of the amendment. Pickton v. City of Fargo, 469.

5. Where a municipal corporation proceeding under Laws 1897, Ch. 41, under contract for street improvements, paid the contractor a large amount of bonds and warrants for work done, the validity of the bonds and warrants, and the right of the contractor to collect the same, were not impaired by chapter 42, Laws 1899, amending the earlier statute and inaugurating a different mode of assessment. Pickton v. City of Fargo, 469.

6. The fee title in streets and highways is in the original owner, subject only to the public easement. Northern Pacific Ry. Co. v. Lake, 541.

7. The erection of buildings in a public street is an invasion of the rights of the public and of the fee owner, entitling the latter to maintain ejectment therefor. Northern Pacific Ry. Co. v. Lake, 541.

8. Where in an assessment proceeding for street improvement, the taxpayers are present and by resolution are assured that no further action will be taken by the council, based on the engineer's estimate then under consideration, and that such estimate will be disregarded, and the assessment is subsequently made on such estimate without a hearing being accorded the taxpayers, such assessment is void. Pickton v. City of Fargo, 469.

9. Section 17, Ch. 41, Laws 1897, providing that no errors or omissions in assessing or levying any tax shall vitiate such assessment, unless by such omission substantial injury has been done, the party claiming to be aggrieved, has no application where there is a total failure to act under the law. Pickton v. City of Fargo, 469.

10. Under the provisions of § 17, Ch. 41, Laws 1897, substantial injury to the suitor will be presumed without special evidence being offered for that purpose where the taxing authorities attempt to assess a tax, either in the absence of legal authority to do so, or where there are omissions which are fundamental to the tax. Pickton v. City of Fargo, 469.

11. No contract requiring a disbursement of city funds can be made by the city council under the provisions of § 2264, Rev. Codes, and no expense can be incurred by a city officer or officers, unless a previous appropriation has been made covering the expense involved in the same. Roberts v. City of Fargo, 230.

MUNICIPAL CORPORATIONS—Continued.

12. A lighting corporation contracting with a city for lights before an appropriation was made or tax levied, as required by § § 2261 and 2264, Rev. Codes, is chargeable with the city's want of power to make such contract previous to such appropriation or levy, and hence cannot recover for lights furnished. Roberts v. City of Fargo, 230.

13. A city incorporated under the general incorporation act, and by § 2264, Rev. Codes, is required to make an appropriation or levy a tax before contracting for an expenditure of money. This requirement is mandatory, hence no contract requiring a disbursement of city funds can be made by the city council, and no expense can be incurred by any city officer or officers unless a previous appropriation has been made covering the expense involved in the same. Roberts v. City of Fargo, 230.

14. Where the officers of a city contract with a private corporation for lighting the city before appropriation has been made or tax levied to pay for such lighting, as required by § § 2261 and 2264, Rev. Codes, such agreement being ultra vires, and involving the disposition of public funds in large amounts, an action will lie by a taxpayer to enjoin such unlawful disbursements. Roberts v. City of Fargo, 230.

15. The power of city officers to sign contracts in behalf of the city upon a mere resolution of the city council, without the previous passage of an ordinance, is unquestioned. Roberts v. City of Fargo, 230.

16. A contract with a municipal corporation, involving the expenditure of public funds should be preceded by or based upon an ordinance enacted by the council of the city, authorizing the council to enter into the contract, or authorizing an officer of the city to make or sign the same. Roberts v. City of Fargo, 230.

MURDER. See HOMICIDE, 464.

1. Under § 6, Const. and § 8446, Rev. Codes, providing that all persons may be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great, in capital cases the accused is entitled to bail before trial as a matter of absolute right, unless the proof of guilt is evident or the presumption thereof is great. State v. Collins, 464.

2. The admission to bail in capital cases is a matter of judicial discretion. State v. Collins, 464.

NEGLIGENCE. See RAILROADS, 215.

1. Plaintiff, in an action against defendant, a carrier, for killing his horse during shipment, *held*, not entitled to recover under the pleadings. Ausk v. Great Nor. Ry. Co., 215.

2. Evidence in an action against a common carrier for killing a horse during shipment, *held* not admissible under the pleadings. Ausk v. Great Nor. Ry. Co., 215.

3. While barb wire fences may be lawfully used for fencing purposes, nevertheless conditions may exist to render its use dangerous and render the persons responsible for its construction or neglected condition and liable for damages resulting therefrom. Kuhnert v. Angell, 59.

4. A land owner directed defendant to have a fence erected inclosing certain lands owned by a non-resident whose agent defendant was for the purpose of leasing and collecting rent. The land owner

NEGLIGENCE—Continued.

included in his directions a provision for guard rails where the accident occurred. Defendant employed a sub-agent to erect the fence in accordance with such instruction. The latter failed and neglected to put on the guard rails. *Held*, that defendant was not liable for injury resulting from the negligence of the sub-agent. Kuhnert v. Angell, 59.

NEGOTIABLE INSTRUMENTS. See Alteration of Instruments, 551.

1. Where a written instrument is, by a material alteration, converted into a negotiable promissory note, such note is void even in the hands of a bona fide holder. Porter v. Hardy, 551.

2. Where certain persons signed a note, negotiable in form, and left it with an agent of the payee to procure other signatures to it, and it was not to be delivered until certain conditions had been performed and the other persons had signed, but it was, in fact, delivered to the payee before the conditions were performed and before the other persons signed it, such facts *held* to constitute a defense as against the payee. Porter v. Andrus, 558.

3. Where certain persons signed a note, negotiable in form, and left it with payee's agent, who was not to deliver it until certain conditions were performed and others had signed, and he delivered it to the payee before the conditions were performed and before the others signed, and the payee transferred it, by written guaranty of payment indorsed thereon, before maturity, to the plaintiff, as security for a pre-existing debt, without any new consideration, plaintiffs *held* not indorsees, in due course, within the meaning of § 4884, Rev. Codes. Porter v. Andrus, 558.

4. A mortgagor executed a note and mortgage to a surety to secure him against any liability such surety might incur with the understanding, evidenced by a separate contemporaneous instrument that the mortgage was to be cancelled when the debt was paid, before maturity the mortgagee assigned the note to a bank which gave its face value for it without any notice of the contemporaneous agreement, and in good faith. *Held*, that such bank was an indorsee in due course, and holds the note freed from any defense existing between the original parties. First Natl. Bank v. Flath, 281.

5. Good faith in the purchase of a negotiable note does not require the purchaser to make inquiries as to the purpose for which it was given, or as to the existence of possible defenses. First Natl. Bank v. Flath, 281.

6. Defendant was plaintiff's agent at the town of C. and had authority to draw on plaintiff through its agent at H. in case of emergency. On October 31st, 1895, he drew on plaintiff, through such agent, for $1,000.00. The agent at H. sent him $500, stating that it was all he had and that he would send the balance later. The agent at H. testified that on the following day he delivered to a trustworthy person, who was a passenger on the train to C. the other $500, but he was unable to give the name of the party to whom he delivered it. Defendant testified positively that he never received the additional $500. There were letters in evidence written after the transaction, in which defendant called attention to a mistake in his cash report which had been made by charging himself with the full $1,000.00. *Held*, that the evidence was sufficient to support the finding that defendant never received the last $500,

NEGOTIABLE INSTRUMENTS—Continued.

and that a note given by him for settlement, in which such amount was included, was to that extent without consideration. Andrews v. Schmidt, 1.

7. The fact that a negotiable promissory note is made payable at a particular office does not make the party in charge of said office the agent of the holder of such note to receive payment, unless the note is actually in possession of said party. Corey v. Hunter, 5.

8. Where, in an action on a negotiable note by an indorsee, the burden to prove a good faith purchase was shifted to the plaintiff, by the introduction of evidence showing fraud between the original parties thereto, such burden is sustained prima facie, by showing a purchase for full value and before maturity. First Nat. Bank v. Flath, 281.

9. Plaintiff was defendant's head clerk and had been charged by the latter with misappropriating money belonging to defendant, and after repeated accusations against him plaintiff executed the note in suit to cover the money alleged to have been taken. On the trial plaintiff denied positively that he ever took money from defendant and testified minutely to all the money he had received during his employment with defendant, from which it appeared that his receipts from legitimate sources were amply sufficient to cover his expenditures during that time. Defendant furnished no evidence to the contrary. *Held*, that the evidence was insufficient to show a defalcation. Peckham v. Van Bergen, 43.

10. A pledgee of a negotiable promissory note, who has received the proceeds of a collateral note and applied the same upon the debt secured by such collateral note in ignorance of the fact that the sum so received and applied was the proceeds of such note, and has not altered his position by reason of such ignorance, cannot thereafter enforce the payment of such collateral note. Second Natl. Bank of Winona v. Spottswood, 114.

11. The maker of a negotiable promissory note, who pays the same to a person who has not the note in his possession and is without authority to collect it, does so at his peril. Second Natl. Bank of Winona v. Spottswood, 114.

12. Where the maker of a negotiable promissory note pays the same to a person who has not the note in his possession and is without authority to collect the same, he does so at his peril. Second Nati. Bank of Winona v. Spottswood, 114.

13. Where the maker of a negotiable promissory note paid the same to a third person who did not have the note in his possession and had no authority to collect the same, but who turned the money so collected over to the holder of the note and the money was received by the holder of the note, such payment was *held* effectual to discharge the debt. Second National Bank of Winona v. Spottswood, 114.

14. In an action by a guardian of the estate of minors upon a promissory note, which is in terms payable neither to such guardian nor to his wards, but to another person, and is not indorsed either generally or by special indorsement, the ownership of which is challenged by an express denial in the answer, it appeared that the note was delivered to the county court by the payee, who formerly had been guardian of the estate of said minors, to cover a

NEGOTIABLE INSTRUMENTS—Continued.

shortage arising from his unlawful use of the trust funds, and that the same was accepted by said court. *Held*, that the title thereto is established in the wards. Shepard v. Hanson, 194.

NEWMAN LAW. See APPEAL AND ERROR, 351, 366, 383, 416, 546.

NEW TRIAL. See APPEAL AND ERROR, 111; STATEMENT OF THE CASE, 111.

1. Under the Newman law, § 5630, Rev. Codes, where the case was tried below to a jury, but after motion for directed verdict had been made by both parties the jury was withdrawn and the case submitted to the court for determination, and the case could not be tried anew in the supreme court because all the evidence offered had not been received, the judgmnt was reversed and a new trial ordered. Hagen v. Gilbertson, 546.

2. The supreme court will not weight conflicting evidence and will not disturb the order of a trial court granting or denying a new trial where there is a substantial conflict in the evidence. Flath v. Casselman, 419.

NOTARY PUBLIC. See ACKNOWLEDGMENT, 223.

1. A written assignment of a real estate mortgage, the execution of which is acknowledged before a notary public of another state, is entitled to be read in evidence under § 5696, Rev. Codes, without further proof, when the certificate of acknowledgment attached thereto is authenticated by the signature and official seal of such notary. It is not necessary to have attached thereto the certificate of an officer of a higher rank to the character and signature of such notary. Grandin v. Emmons, 223.

NOTICE.

1. All persons entering into contractual relations with public corporations or their officers are chargeable with notice of their powers and the limitations upon their powers. Roberts v. City of Fargo, 230.

2. A notice of mortgage foreclosure sale by advertisement which is published six times, once in each week for six successive weeks, before the sale, is a sufficient compliance with § 5848, Rev. Codes, requiring the publication of notices. Grandin v. Emmons, 223.

3. A mortgage securing a negotiable note shares the same immunity from defenses between original parties as the note secured. First Natl. Bank v. Flath, 281.

4. The recording of an instrument defectively acknowledged does not operate as notice to the public. American Mortg. Co. v. Mouse River Live Stock Co., 290.

5. The service of the summons and complaint in an action against a non-resident does not operate as notice to him of the subsequent entry of judgment, for want of an answer. Minnesota Thresher Mfg. Co. v. Holz, 16.

6. Time within which a defendant may move to vacate a judgment entered against him by default does not begin to run until he is served with actual notice of the entry of judgment against him. Minnesota Thresher Mfg. Co. v. Holz, 16.

NOTICE—Continued.

7. A motion to set aside a default judgment may be made at any time within one year after actual notice or knowledge of the entry of judgment. Minnesota Thresher Mfg. Co. v. Holz, 16.

NOTICE OF SALE. See Foreclosure, 223; Mortgages, 223.

NOTICE TO PRODUCE. See Practice, 446.

NOVATION.

1. Defendant and another, as partners, purchased a machine from plaintiff, though the co-partners name did not appear in the notes and mortgage given to plaintiff. The machine was sold by defendant to his co-partner with plaintiff's consent, and afterwards such co-partner guaranteed the payment of the note by an indorsement. Defendant stated that he requested plaintiff to fix the matter with his co-partner and take the latter's notes and return defendant's notes, but they could not do so; and also that he understood he was released. Plaintiff denied that a release was ever given, and was corroborated by such co-partner. *Held*, insufficient to establish that there was a release of defendant and a substitution of his co-partner. J. I. Case Threshing Machine Co. v. Olson, 170.

NUISANCES. See Intoxicating Liquors.

1. Where in an action to abate a nuisance, the trial court, sitting without a jury, has found that it is not a nuisance, such finding cannot be reviewed by this court in the absence of a statement of the case containing all of the evidence offered in the trial court, and a demand for a retrial as required by § 5630, Rev. Codes, Teinen v. Lally, 153.

2. A privy is not a nuisance per se but may become so under some circumstances. The question whether it is a nuisance is a question of fact. Tienen v. Lally, 153.

3. Section 7605, Rev. Codes, provides that the attorney general, his assistant, state's attorney or any citizen of the county where a liquor nuisance exists, or is kept or maintained, may maintain an action in the name of the state to abate and perpetually enjoin the same. *Held*, that a citizen of a county where such nuisance exists may maintain an action in the name of the state to abate it without any authority or consent from the state's attorney or attorney general to bring the same. State v. Bradley, 157.

4. A private citizen may employ his own attorney and bring an action in the name of the state to abate a liquor nuisance without authority from the state's attorney or attorney general. State v. Bradley, 157.

5. In an action to abate a liquor nuisance, the complaint *held* sufficient when in the form set forth in State v. McGruer, 9 N. D. 566, and where it alleges that the defendant owns and operates the place in question; that he holds a druggist's permit issued by the county court, but that his acts in and about the sales of intoxicating liquors have been and are in violation of his permit, and in violation of law. State v. Donovan, 203.

6. Construing § 7605, Rev. Codes 1899. This action was brought under said section to abate a liquor nuisance, and the trial court dismissed the action. From the judgment of dismissal the plaintiff appealed to this court, and after a trial anew this court reversed

NUISANCES—Continued.

said judgment and directed the trial court to reverse the same, and enter judgment for plaintiff as demanded in the complaint. This was not done. On the contrary, the trial court, after the defendant had filed a bond, and paid the accrued costs of the action, entered judgment abating the action; and such judgment was entered upon the theory that the action could properly be abated under the provisions of said statute relating to the abating of actions. The action was brought against the owner of the premises in which the nuisance was maintained, and such premises were not leasehold premises. *Held*, that under such conditions the defendant was not in a position, under said section, to ask for an abatement of the action, and that the action was improperly abated. State v. Donovan, 610.

ORDINANCES. See MUNICIPAL CORPORATIONS, 230.

1. Before a city organized under the general incorporation act can enter into valid contracts involving the expenditure of city funds, an ordinance should be enacted by the council authorizing the making of the contract, designating the officers of the city who shall sign the same and providing for the raising of funds to meet the expenditure. Roberts v. City of Fargo, 230.

OWNERSHIP.

1. Ownership of a promissory note payable to a person other than the plaintiff, and not endorsed, may be proved by parole to be in plaintiff. Shepard v. Hanson, 194.

PAROLE EVIDENCE. See EVIDENCE, 103.

PARTIES. See REMOVAL FROM OFFICE, 63; MALFEASANCE, 63.

1. An application for a writ of certiorari must be made by the party beneficially interested. Sanderson v. Winchester, 85.

2. The mortgagor and supbsequent mortgagees or incumbrancers of property mortgaged are deemed in law parties to a foreclosure proceeding by advertisement under a power of sale, and are bound by such foreclosure the same as though they were made parties and served with process in an action for the foreclosure of such mortgage. Nichols v. Tingstad, 172.

3. A resident tax-payer may maintain an action to enjoin the unlawful disbursement of moneys by a municipal corporation. Roberts v. City of Fargo, 230.

4. Plaintiff suing upon a promissory note payable to a third person, and not endorsed, may show by parole evidence that the note was delivered to him by the payee in satisfaction of a debt, and that he is the owner thereof with authority to sue and recover thereon. Shepard v. Hanson, 194.

5. In every divorce suit the state, for the enforcement of its policy concerning the marital relation, constitutes the third party, and no admission can be made by the other parties which will affect the public interests. Therefore, an admission in defendant's answer that plaintiff's residence was bona fide when the action was commenced will not conclude the court from examining the plaintiff as to his residence. Smith v. Smith, 219.

PARTNERSHIP.

1. An insolvent co-partnership engaged in a general merchandise business executed a mortgage upon its entire stock of merchandise to secure the payment of certain pre-existing individual debts of the partners. Said mortgage provided that the mortgagors should remain in possession and continue the business practically without change, and gave them control of the proceeds of sales. The mortgagors reserved the right to sell the mortgaged goods for cash, and out of the proceeds of the sales thereof to pay all of the expenses of conducting the business, and to replenish the stock of goods, which stock was to be kept up to the same value as when the mortgage was given. They also agreed to account monthly, and promised to pay at such accounting to the mortgagees, upon the mortgage debt, the net profits of the business. The mortgage contained no provisions covering new goods. It is *held*, in an action of conversion by the mortgagees against the sheriff who seized said goods under a warrant of attachment issued in an action against the partnership by partnership creditors, that said mortgage is fraudulent and void as to creditors, for the reasons: First, that the necessary effect of the conditions contained therein was to hinder and delay partnership creditors in their collection of their claims, and was primarily for the benefit of the mortgagors; and for the further reason that it was an attempted appropriation by an insolvent partnership of its property to the payment of debts which the partnership was under no legal or moral obligation to pay, to the prejudice of partnership creditors. Bergman v. Jones, 520.

2. Where a decree dissolved a partnership between the parties to the action and directed the division between them of certain specified partnership assets, and also gave one partner a money judgment against the other for a certain amount, but in no manner made such judgment a lien upon the share of the assets belonging to the debtor partner, and the specified assets were subsequently divided as directed, and afterwards the debtor partner appealed from the money judgment, the other party cannot be heard to say that by the division he was deprived of the right to have his judgment declared a lien upon the share of the partnership assets belonging to the debtor partner under § 4377, Rev. Codes, giving each partner a lien on the other partner's shares for the payment of any balance due him, since he lost that right when he failed to secure it under his decree. Wishek v. Hammond, 72.

3. Defendant and another, as partners, purchased a machine from plaintiff. The co-partner's name did not appear in the notes and mortgage given to plaintiff. The machine was sold by defendant to his co-partner with plaintiff's consent, and afterwards such co-partner guaranteed the payment of the note by an indorsement. Defendant stated that he requested plaintiff to fix the matter with his co-partner and take the latter's notes and return defendant's notes, but they would not do so; and also that he understood he was released. Plaintiff denied that a release was ever given and was corroborated by such co-partner. *Held*, insufficient to establish that there was a release of defendant and a substitution of his co-partner. J. I. Case Threshing Mach. Co. v. Olson, 170.

PAYMENT. See Mortgages, 275; Negotiable Instruments, 114.

1. Where the maker of a negotiable promissory note pays the same to

PAYMENT—Continued.

a person who has not the note in his possession and is without authority to collect it, he does so at the peril of having to pay it a second time. Second Natl. Bank of Winona v. Spottswood, 114.

2. Evidence in the case reviewed and considered, and *held*, that the mortgage in suit was not paid as a matter of fact or by operation of law. First Natl. Bank v. Flath, 275.

3. Where a negotiable promissory note was transferred before maturity as collateral and was afterwards paid off in property, not to the holder but to the payee, who collected without authority and who, after converting the property into money, transmitted the proceeds to the holder as his own money and the holder applied the same to the secured debt only, not applying it also to the collateral, and not knowing that he was dealing with the fund derived from the collateral, this was a discharge of the collateral debt notwithstanding such ignorance on the part of the holder. Second Natl. Bank of Winona v. Spottswood, 114.

4. Where the sheriff, under execution, levied upon an account due from defendant, and defendant paid the account to the sheriff, taking a receipt therefor, without notice of the assignment of the account, the assignment having been made in fraud of creditors, *held*, that the payment operated as a discharge of the debt. Faber v. Wagner, 287.

5. A mortgage given to secure a note was assigned to M. and by him to plaintiff. The only credits on the note were for interest to January 15th, 1900, and a small sum paid upon the principal. There was a prior mortgage on the land, which was past due, as was also that held by plaintiff. Through the agency of M. at the time he held the mortgage, a loan was arranged to pay off his mortgage and the prior mortgage. The money secured paid the prior mortgage in full but was not sufficient to pay the mortgage held by him. As to whether the balance was due on the M. mortgage the evidence is conflicting. A writing subsequently signed by the mortgagor to M. referred to the note and recited several small payments. M. held accounts of the mortgagor for collection, but none of the amounts collected had been applied on the mortgage. *Held*, insufficient to show that such mortgage was paid in full. First Natl. Bank v. Flath, 275.

6. Defendant was indebted to W. for threshing and the latter perfected a lien on the grain. Subsequently the account and lien were transferred to plaintiff without consideration. After the transfer to plaintiff certain creditors of W. obtained judgments against him, and the sheriff under execution levied on the debt due from defendant to W. on account of threshing. After the levies were made, but before receiving notice of the tranfer, defendant paid to the sheriff the amount of the debt, taking a receipt from the sheriff, and the amount was applied on the execution. *Held* that the debt having been lawfully and fully paid prior to the commencement of the action by plaintiff, he was not entitled to recover. Faber v. Wagner, 287.

PENALTIES AND FORFEITURES. See Counting on Statute, 43.

1. In an action to recover a statutory penalty against the owner of a chattel mortgage for refusal to satisfy the same when the debt

PENALTIES AND FORFEITURES—Continued.

secured has been paid, the complaint must allege a demand for a satisfaction before suit, and strictly count upon the statute giving the penalty. Peckham v. Van Bergen, 43.

PESONAL PROPERTY. See Sales, 95; Damages, 95; Banks and Banking, 95

PERSONAL RIGHTS.

1. The rights of suitors are to be determined by the law existing when the cause of action arose. Such rights cannot, except as to mere rules of procedure and evidence, be measured by a different legal status created while the action is pending either by a judicial decision or by a statute. Shaffner v. Young, 245.

PHARMACISTS. See Intoxicating Liquors, 436, 610.

PLEADING.

1. In an action for unlawful detainer, under § 6677, Rev Codes, no counterclaim can be pleaded in justice's court except as a set-off for rent or damages in cases where judgment for rent or damages is claimed. Vidger v. Nolin, 353.

2. In a case where a counterclaim is interposed by the defendant in an action for possession of realestate, under § 6677, Rev. Codes, no damages nor rent being claimed, the right to object to any evidence in support of a counterclaim is not waived by replying in place of demurring to such counterclaim. Vidger v. Nolin, 353.

3. Where, in an action to recover of a county treasurer a sum of money alleged as an over-payment, the complaint avers that defendant was paid a certain sum as salary in 1895, and a certain sum as salary in 1896, and that such amounts fully paid all claims for salary for such years, it is error to strike out as irrelevant and frivolous an answer denying payment of said amounts, and alleging that only certain smaller amounts were paid as salary in such years. Kidder Co. v. Foye, 424.

4. Where, in an action to recover of a county treasurer a sum alleged as an over-payment, the complaint alleges that defendant was paid certain sums for salary in 1895 and 1896, and that no salary was due to defendant when he presented a claim in 1897, it was error to strike out an answer alleging that defendant had a claim for salary for 1897, and that he claimed that another claim was presented to the county board and an accounting had resulting in an allowance of the claim to defendant. Kidder Co. v. Foye, 424.

5. In an action by Kidder county to recover of defendant moneys claimed to represent an over-payment by the plaintiff to defendant on account of his salary as county treasurer, the defendant, by his answer, denied the allegations of the complaint, except those qualified, explained or admitted thereby. This denial included a denial of plaintiff's statement in the complaint to the effect that no salary was due defendant when he presented a claim to the county board. The answer further alleged that the defendant had a claim on account of salary at said date, together with another claim of defendant which were presented to the county board, and that as a result of the presentation of such claims an accounting was had and a compromise reached which resulted

PLEADING—Continued.

in the allowance of the claims. This averment of the answer was, on motion, stricken out by the trial court as irrelevant and frivolous, and the ruling *held* error. Kidder Co. v. Foye, 424.

6. Where the trial court directed the answer of defendant to be amended in such a manner as to make a paragraph thereof more definite in certain particulars enumerated in the order, and where the answer in the paragraph assailed contained admissions and denials which were responsive and definite when considered with reference to the matters of fact pleaded in another paragraph of the complaint, the order requiring an amendment was erroneous. Kidder Co. v. Foye, 424.

7. In an action for malicious prosecution the complaint must contain an averment of loss of time and its value, else evidence thereof cannot be received. Merchant v. Pielke, 48.

8. In disposing of a motion to strike out portions of an answer as irrelevant and frivolous the legal sufficiency of the answer as a pleading is not involved, and the court can only inquire whether the matter sought to be eliminated is relevant to the issues and, if relevant, whether the same is frivolous in character. Kidder Co. v. Foye, 424.

9. Averments contained in pleadings should be literally construed and with a view to expediting a speedy trial upon the facts and merits in furtherance of justice. Kidder Co. v. Foye, 424.

10. Plaintiff sued the Great Northern Railway Company for negligently killing his horse during shipment from Grand Rapids, to Moorhead, Minn. The contract was in writing and with another company than the defendant. *Held*, that the complaint having alleged that the stock was received by defendant as an initial carrier at Grand Rapids, proof that it received it at some other place as a connecting carrier was not admissible without an amendment of the complaint. Ausk v. Gt. Nor. Ry. Co., 215.

11. In suing the last of several connecting carriers for a loss, it is necessary to allege that the carriers were joint contractors, or that the property was delivered to and received by the defendant. Ausk v. Gt. Nor. Ry. Co., 215.

12. A complaint in a suit in equity to enjoin a sheriff seizing property on a tax warrant in a county other than that where the warrant was issued, failing to show that the sheriff's trespass was one which would cause irreparable injury, is insufficient. Shaffner v. Young, 245.

13. The form of a complaint to abate a liquor nuisance, and the necessary averments therein are as set forth in State v. McGruer, 9 N. D. 566. State v. Donovan, 203.

14. An admission in defendant's answer that plaintiff's residence within the state was bona fide when an action for divorce was commenced, *held*, not to conclude the court from examining plaintiff as to his residence; and the evidence disclosing that plaintiff's residence was not bona fide within the state when the action was commenced, divorce denied. Smith v. Smith, 219.

15. A complaint in a suit to enjoin a sheriff seizing property on a tax warrant in a county other than that where the warrant was issued is defective in that it fails to show that the sheriff's trespass was

PLEADING—Continued.

one which would cause irreparable injury. Shaffner v. Young, 245.

16. In an action for divorce where the defendant, by answer, admitted plaintiff's averment that he was, at the time of commencing the action, a bona fide resident of the state, *held* not to preclude the court from inquiring into the bona fides of the residence. Smith v. Smith, 219.

17. Plaintiff in an action against defendant, a common carrier, for killing his horse during shipment, *held* not entitled to recover under the pleadings. Ausk v. Great Nor. Ry. Co., 215.

18. Where personal property was sold under a special warranty that if not satisfactory it should be returned to the plaintiff, and upon the property proving unsatisfactory was not returned by the purchaser, *held* that, in an action for the purchase price, the defendant could not counterclaim his damages by reason of a breach of warranty because the property was not returned according to contract. James v. Bekkedahl, 120.

19. In an action in equity to enjoin the defendant, who claimed to act officially as sheriff, from selling certain personally property of plaintiff which defendant had seized to satisfy an alleged personal tax against plaintiff, where the property was seized within the county of Williams under authority contained in a warrant of restraint issued by the treasurer of Mercer county, the complaint omitted to allege issuable facts to show that the trespass of the defendant was one which would cause irreparable damage to plaintiff, nor did the complaint set out issuable facts sufficient to bring the case within any recognized head of equity, *held*, that a cause of action for relief by injunction was not set forth. Shaffner v. Young, 245.

20. In tax cases the rule is that special facts must be inserted in the bill or complaint calling for equitable relief, and when none such are averred the suitor will be relegated to his legal remedies. Shaffner v. Young, 245.

21. A complaint in an action to compel specific performance of a parol contract to enter into a written contract for the purchase of real estate, which does not allege that prior to the commencement of the action plaintiff tendered, or offered to perform his part of the agreement, fails to state a cause of action and a court of equity will not compel specific performance of such contract, unless plaintiff shows a full performance on his part, or an offer of such performance, prior to the commencement of the action. Kulberg v. Georgia, 461.

22. An answer pleading facts showing no service of the summons, and praying for the cancellation of a judgment rendered in the action, is pleading an equitable counterclaim and is a direct attack upon the judgment. Phelps v. McCollam, 536.

PLEDGES.

1. Where a lease of a farm recited that the landlord was to hold back a certain part of the tenant's share of the crop until certain plowing was done, and was to have a lien thereon for the value of the plowing, such provision constituted a chattel mortgage, and not a pledge, nor an agreement for a pledge. Willard v. Monarch Elev. Co., 40.

PLEDGES—Continued.

2. A pledgee of a negotiable promissory note, who has received the proceeds of a collateral note and applied the same upon the debt secured by such collateral note in ignorance of the fact that the sum so received and applied was the proceeds of such note, and has not altered his position by reason of such ignorance, cannot thereafter enforce the payment of such collateral note. Second Natl. Bank of Winona v. Spottswood, 114.

POWERS. SEE MORTGAGES, 223.

1. A power of sale in a real estate mortgage is a power coupled with an interest. Grandin v. Emmons, 223.

2. The power of sale in a mortgage is not revoked or suspended by the death of the mortgagor and when exercised, and redemption is not made as provided by law, the foreclosure is effective to cut off the rights of redemption of the heirs of the deceased mortgagor. Grandin v. Emmons, 223.

3. The mortgagor and all subsequent mortgagees or incumbrancers of the property mortgaged are deemed, in law, parties to a foreclosure proceeding by advertisement under a power of sale, and are bound by such foreclosure the same as though they were made parties and served with process in an action for the foreclosure of such mortgage. Nichols v. Tingstad, 172.

4. A notice of mortgage foreclosure sale by advertisement, which is published six times, once each week for six successive weeks before the sale, is a sufficient compliance with § 5848, Rev. Codes, regulating the publication of notices. Grandin v. Emmons, 223.

PRACTICE.

1. On appeal from a final order in a contempt case, a statement of the case must be settled as in jury trials. The supreme court sits for the review and correction of errors only in this class of cases. State v. Massey, 154.

2. Section 5630, Rev. Codes, has no application to contempt cases. State v. Massey, 154.

3. A court of equity has power to dismiss an action without prejudice, and when a judgment contains a recital that it was so dismissed the effect of such recital is to prevent such judgment from operating as a bar in another suit brought on the same subject-matter. Prondzinski v. Garbut, 300.

4. Evidence and pleading considered and *held*, that plaintiff wholly fails to sustain his allegation of ownership in fee, and hence cannot maintain this action; nor is plaintiff in a position to require the defendant, Cornwell, to vindicate his title as alleged in the answer. Plaintiff omitted to allege that he was in possession, nor does the evidence show that he was ever in possession. In this class of actions the parties on both sides are confined to their allegations and cannot, except by consent, show any right or title other than that alleged. Dever v. Cornwell, 123.

5. It is error to direct a verdict for plaintiff in an action upon a promissory note where there are several defenses, but one defense only is not sustained by the evidence. Shepard v. Hanson, 194.

6. Where an order setting aside a divorce was granted on a second hearing of a motion to show cause why the vacating order should

PRACTICE—Continued.

not be set aside on the ground that it was obtained by fraud and deceit practiced on the trial court, the motion was properly granted. Clopton v. Clopton, 569.

7. An appeal from an order setting aside a divorce decree, and a motion to vacate the order, are alternative remedies. Clopton v. Clopton, 569.

8. The hearing of a motion for an order to show cause why an order vacating a divorce decree should not be set aside is tantamount to the granting of leave to make the motion. Clopton v. Clopton, 569.

9. Its within the discretionary power of the district court, where an order setting aside a divorce has been entered, to allow a second hearing of a motion to show cause why the order should not be vacated. Leave must be asked and obtained to make the second motion. Clopton v. Clopton, 569.

10. A judgment irregularly entered in violation of established procedure may be attacked by a motion addressed to the court entering it, but the remedy by motion is confined to irregular judgment and cannot be resorted to for the purpose of enabling a court to revise and correct errors of law. State v. Donovan, 203.

11. Under the provisions of § § 5298, 5722, Rev. Codes, a district judge has power to extend the time within which exceptions to a charge may be taken either before or after such time has elapsed, but such extension should be granted only upon good cause shown and in furtherance of justice. Lindblom v. Sonstelie, 140.

12. In an action on an award defendant may interpose an equitable defense tending to impeach it. Caldwell v. Brooks Elev. Co., 575.

13. Where arbitrators refuse to consider evidence in an action or an award the award is vitiated. Caldwell v. Brooks Elev. Co. 575.

14. Every reasonable intendment will be presumed in favor of an award. Caldwell v. Brooks Elev. Co., 575.

15. Arbitrators appointed in writing to adjust disputes between plaintiff and defendant were duly sworn before entering upon the discharge of the duties, and the fact that a subsequent oath taken by them, and reduced to writing, was defective, was of no consequence. Caldwell v. Brooks Elev. Co., 575.

16. Where evidence is properly objected to, the objection need not be repeated when other evidence of the same class is offered. American Mortg. Co. v. Mouse River Live Stock Co., 290.

17. In an action against a railway company for damages for killing a horse, *held*, that evidence showing liability was inadmissible, the the averment in the complaint not being broad enough to justify the same. Ausk v. Great Nor. Ry. Co., 215.

18. It is error in the trial of an action on a note, in which several defenses are pleaded, to direct a verdict for plaintiff on the sole ground that one of such defenses is not sustained when there is substantial evidence to sustain any of the other defenses. Shepard v. Hanson, 194.

19. The procedure in contempt trials, as laid down in § 5942, Rev. Codes, does not govern in contempt matters arising under the intoxicating liquor statute. State v. Massey, 154.

PRACTICE—Continued.

20. Trials for contempt, under the statute relating to intoxicating liquors, are governed by the special proceedings prescribed in § 7605, Rev. Codes. State v. Massey, 154.

21. Personal service of summons and complaint does not operate as notice of the entry of a default judgment. Minnesota Thresher Mfg. Co. v. Holz, 16.

22. On motion to vacate default judgment, supported by a verified answer setting up a defense, it is error to allow plaintiff to file counter-affidavits combating the facts set out in the answer. Minnesota Thresher Mfg. Co. v. Holz, 16.

23. Facts set out as grounds of excuse on motion to set aside default judgment may be opposed by counter-affidavits. Minnesota Thresher Mfg. Co. v. Holz, 16.

24. Where the complaint in a case charged delivery and acceptance of stock by defendant at Grand Rapids, a delivery and acceptance at another point could not be proved without an amendment of the complaint. Ausk v. Great Nor. Ry. Co., 215.

26. In an action for unlawful detainer, under § 6677, Rev. Codes, no counterclaim can be pleaded in justices court except as a set-off for rent or damages in cases where judgment for rent or damages are claimed. Vidger v. Nolin, 353.

27. Where a counterclaim is interposed to an action for unlawful detainer of real estate, no damages or rent being claimed in the complaint, the right to object to the introduction of any evidence in support of such counterclaim is not waived by replying in place of demurring thereto. Vidger v. Nolin, 353.

28. In an action for unlawful detainer in justice's court, the right to possession of the real estate is the only fact that can rightfully be litigated unless damages or rent are claimed in the complaint. Vidger v. Nolin, 353.

29. Upon an appeal from justice's court the action is required to be tried anew in the district court, under §6779 , Rev. Codes, in the same manner as actions originally commenced in the district court. The district court therefore acquires no jurisdiction upon such appeal to try the action anew, nor to litigate a counterclaim in cases where the justice has no jurisdiction to determine the issues raised by the pleadings, or to allow the counterclaim. Vidger v. Nolin, 353.

30. An order of the trial court striking out parts of an answer as frivolous *held* error. Kidder Co. v. Foye, 424.

31. An order directing an answer to be amended and made more definite *held* erroneous. Kidder Co. v. Foye, 424.

32. In disposing of a motion to strike out portions of an answer as irrelevant and frivolous the legal sufficiency of the answer as a pleading is not involved, and the court can only inquire whether the mater sought to be eliminated is relevant to the issues and, if relevant, whether the same is frivolous in character. Kidder Co. v. Foye, 424.

33. A motion for a new trial will be overruled when made upon the ground that the evidence is insufficient to sustain the verdict, and where there is substantial conflict in the evidence. Flath v. Casselman, 419.

PRACTICE—Continued.

34. In a civil action where an affidavit of prejudice is filed, and expense bond given and filed, as provided by § 5454a, Rev. Codes, the judge against whom the same is filed is immediately disqualified from exercising further judicial functions in the action. Orcutt v. Conrad, 431.

35. Where, on motion to vacate a judgment under § 5298, Rev. Codes, defendant introduced in his moving papers an answer to the merits of the case, it was error to permit plaintiff to file counter-affidavits to combat facts contained therein, since it was only necessary that the defense pleaded be prima facie a good defense. Minnesota Thresher Mfg. Co. v. Holz, 16.

36. The practice for setting aside a judgment taken against defendant by default because of his inadvertance, surprise, excusable neglect or mistake, is by motion and not by an independent action in equity to enjoin the collection of the judgment. Kitzman v. Minnesota Thresher Mfg. Co., 26.

37. Where the pleadings disclose that the contents of a document in the possession of the adverse party will necessarily have to be proven in order to establish a link in the proof of the other party's cause of action or defense, a notice to produce such document at the trial is not necessary in order to permit the introduction of secondary evidence of its contents. Nichols & Shepard Co. v Charlebois 446.

38. Foundation for secondary evidence of the contents of a lost deed must be laid by showing diligent search for original in every place where prudence or foresight would suggest it might be found. McManus v. Commow, 345.

39. Under § 5942, Rev. Codes, providing that when an accused is produced in a contempt proceeding under warrant, or under an order to show cause, the judge, unless accused admits the offense charged, must cause interrogatories to be filed specifying the facts of the offense charged against him. An accused, whether brought into court under order to show cause or under a warrant of attachment, unless he admits the offense charged is entitled to have such interrogatories filed. Township of Noble v. Aasen, 264.

40. The accused in a contempt case, by mere silence and failure to object to the proceedings on the ground that no interrogatories have been filed does not waive his right to have them filed. Township of Noble v. Aasen, 264.

41. An order convicting one of contempt will be vacated if interrogatories were not filed against him as required by § 5942, Rev. Codes. Township of Noble v. Aasen, 264.

42. In ejectment by the fee owner against defendant, whose sole defense was that their buildings were upon a street, plaintiff was entitled to a direction of a verdict in its favor. Northern Pacific Ry. Co. v. Lake, 541.

43. Where a motion has been once heard, the right to apply for an order a second time on the same ground is not a strict legal right and leave to do so should be sparing granted to prevent abuse and vexatious litigation. Clopton v. Clopton, 569.

PRACTICE—Continued.

44. In an action to foreclose a mortgage upon real estate one defendant alone appeared and, by answer, alleged ownership of the land; that he purchased the same for value and in good faith, without notice actual or constructive of the existence of plaintiff's mortgage. To prove title at the trial defendant offered certain pages of a deed record book kept in the office of the register of deeds, showing a chain of title. To this evidence objection was properly made to the effect that no foundation had been laid for such evidence, in that no proof by affidavit or otherwise was furnished that the original was not in the possession or under control of the party producing the record. The objection was properly sustained. American Mortg. Co. v. Mouse River Live Stock Co., 290.

45. The purpose of an objection to testimony is to call the court's attention to the fact that the same is inadmissible under the rules of evidence. Where the objection is sustained and the evidence is excluded, no advantage can be taken of such ruling on appeal upon the ground that the objection was not sufficiently specific. American Mortg. Co. v. Mouse River Live Stock Co., 290.

46. Where, in an action on a negotiable note by the indorsee, the burden to prove a good faith purchase has shifted to the plaintiff by the introduction of evidence showing fraud between the original parties thereto, such burden is sustained prima facie by showing a purchase for full value before maturity. First Natl. Bank v. Flath, 281.

47. Frivolous matter may be stricken from a pleading on motion seasonably made. Kidder Co. v. Foye, 424.

48. Where a letter, purporting to have been written by one of the counsel for plaintiff, was found by the trial judge in the envelope containing plaintiff's deposition, and was by order of the court filed with the clerk, but was not offered in evidence, such letter was not properly before the court and its contents could not be considered for the purpose of discrediting the testimony given in the deposition. Corey v. Hunter, 5.

PREJUDICE AND BIAS.

1. In a civil contempt proceeding the accused is not entitled, upon filing affidavits of prejudice of the presiding judge, to have another judge called in to determine the case. Noble Tp. v. Aasen, 264.

2. Where an affidavit of prejudice has been filed in a proper case and cost bond given, it becomes the duty of the judge against whom it is filed to immediately call in another judge to try the case. This duty will be enforced by mandamus. Gunn v. Lauder, 389; White v. Lauder, 400.

3. In a civil action, where affidavits and an expense bond have been seasonably filed, as provided by § 5454a, Rev. Codes 1899, the resident judge of the district court within which the action is pending is thereafter disqualified to exercise further judicial functions in the action. The mandate of said section is that "the court shall proceed no further in the action." When so disqualified, the resident judge has certain ministerial duties to perform connected with the calling in of an outside judge, but is inhibited by the statute from exercising any judicial functions in the action. Orcutt v. Conrad, 431.

PREJUDICE AND BIAS—Continued.

4. The resident judge who appointed a receiver in this action after being disqualified to act therein, was not a competent court, and hence was devoid of authority to act in the matter of appointing a receiver. Orcutt v. Conrad, 431.

PRESUMPTIONS. See Evidence, 95-254.

1. An enrolled bill properly authenticated by the officials of the senate and house of representatives, approved by the governor, and filed with the secretary of state, is conclusive upon the courts, and the same cannot be impeached by entries in the journals. Power v. Kitching, 254.

PRINCIPAL AND AGENT.

1. A general agent having charge of the bank's collections has no authority to compromise or settle claims for a less sum than due by virtue of such general agency to collect alone. First Natl. Bank of Langdon v. Prior, 146.

2. Where defendant's authority as agent was limited to leasing and collecting rent for certain premises of his principal, but did not extend to making improvements, such authority was not broad enough to render him liable for injuries sustained by reason of the unsafe condition of the premises. Kuhnert v. Angell, 59.

3. Defendant was agent of a land owner who directed him to have a fence erected across a trail which was commonly used by the public. The directions for its erection included a provision for guard rails at the point where the accident occurred. Defendant employed a sub-agent to erect the fence in accordance with such instructions, but the latter failed and neglected to put on the guard rails. By § 4348, Rev. Codes, a sub-agent lawfully appointed represents the principal and the original agent is not responsible to third persons for his acts. Therefore defendant was not liable to plaintiff for injuries resulting to plaintiff's horses because of the negligent construction of the fence. Kuhnert v. Angell, 59.

4. Evidence that an agent had been in the habit of loaning funds of his principal and collecting thereon as it became due, and on instructions from his principal reinvesting the same, did not warrant a finding that such agent had ostensible authority to foreclose a mortgage running to his principal. Corey v. Hunter, 5.

5. Plaintiff, being the owner of a note secured by a real estate mortgage containing a power of sale, transmitted the interest coupons to an agent for collection, the plaintiff herself retaining the principal note, not yet due, and the mortgage, such agent having no express authority to do more than collect such interest and remit the same to plaintiff. *Held*, that the agent had no implied authority to foreclose the mortgage. Corey v. Hunter, 5.

6. Where defendant's authority, as agent, was limited to leasing and collecting rent for certain premises of his principal, but did not extend to making improvements, such authority was not broad enough to render him liable for injuries sustained by reason of the unsafe condition of the premises. Kuhnert v. Angell, 59.

7. An agent clothed with authority to lease the lands of his principal, is not authorized to lease the same to himself. Such authority extends to leasing to third persons, and a lease attempted to be made to himself in reliance upon such agency is wholly unau-

PRINCIPAL AND AGENT—Continued.

thorized and without force or legal effect as a contract. Clendenning v. Hawk, 90.

8. The rule that a principal may validate the unauthorized acts of his agent by ratification so as to make them valid from their inception, is modified by the provision that such ratification cannot affect the rights of third persons which have intervened prior to such ratification. Clendenning v. Hawk, 90.

PRINCIPAL AND SURETY.

1. A mortgagor executed a note and mortgage to a surety to secure him against any liability such surety might incur with the understanding, evidenced by a separate contemporaneous instrument, that the mortgage was to be cancelled when the debt was paid. Before maturity the mortgagee assigned the note to a bank which gave its face value for it without notice of the contemporaneous agreement, and in good faith. Such bank became an indorsee in due course and holds the note freed from any defenses existing between the original parties. First Natl. Bank v. Flath, 281.

PROBATE. See Estates of Deceased Persons, 34.

PROCESS. See Summons, 536.

PUBLICATION.

1. A notice of mortgage foreclosure sale by advertisement which is published six times, once in each week for six successive weeks before the sale, is a sufficient compliance with § 5848, Rev. Codes, regulating the publication of notices. McDonald v. Nordyke-Marmon Co., 9 N. D. 290, followed. Grandin v. Emmons, 223.

2. By § 1255, Rev. Codes 1895, the notice of tax sale was required to be published "once a week for three consecutive weeks preceding the sale." This language means that the publication must continue for and during three full weeks of seven days each—a total period of twenty-one days, preceding the sale, therefore the notice of tax sale for the taxes of 1895 published first on September 17th, 1896, again on September 24th, 1896, the last publication on October 3rd, 1896. The sale took place on October 5th, 1896. Excluding the date of the first publication, the notice was published only eighteen days before the sale, and was sufficient. Dever v. Cornwell, 123.

PUBLIC RECORDS.

1. The record of sales which druggists holding permits are required to keep by § 7506, Rev. Codes, is competent evidence to show the names of persons to whom sales were made, the kind and quantity of liquor sold, the date of sale, and the purpose for which sold, as such records are public records. State v. Donovan, 203.

PUBLIC CORPORATIONS. See Municipal Corporations, 230-245.

1. All persons entering into contractual relations with a public corporation or its officers are chargeable with notice of the limitations upon their powers. Roberts v. City of Fargo, 230.

PUBLIC OFFICERS. See Scire Facias, 63; Quo Warranto, Removal from Office.

1. Chapter 24, Rev. Codes, provides a civil action for the removal of officers in lieu of the old procedure by quo warranto and scire

PUBLIC OFFICERS—Continued.

facias. Section 5743 thereof specifies the offenses which will justify the beginning of such action for removal, and provides that the action may be brought by the state or any person having a special interest therein. *Held*, that an action for the removal of a county judge could not be brought under this chapter by a private person who had no special interest in the result thereof. Wishek v. Becker, 63.

2. Section 361, Rev. Codes, 1899, provides that county officers shall be subject to removal in the manner provided by the codes of criminal or civil procedure for misconduct, malfeasance or gross incompetency. Section 362, Rev. Codes, provides that the board of county commissioners in the name of the county, or any person in his own name, may make such a charge and bring the action, but it does not provide any procedure therefor. *Held*, that an action to remove a county judge from office on the ground of his commission of a felony and gross incompetency could not be brought by a private person, and the provision in § 362 permitting such action must be deemed non-enforceable. Wishek v. Becker. 63.

3. Where plaintiff, a private citizen, brought an action for the removal of defendant from the office of county judge on the grounds of misdemeanor in office and gross incompetency, a motion to dismiss should have been granted since such action cannot be maintained by a private person. Wishek v. Becker, 63.

4. An action for the removal of a county judge on the ground that he has been guilty of a felony, and is grossly incompetent to discharge the duties of his office, is not an action under Rev. Codes, § 5743, providing that when any person shall usurp, intrude into, or unlawfully hold or exercise any public office or shall have done or suffered an act which operates a forfeiture of his office, an action may be commenced by a private person for his removal. Wishek v. Becker, 63.

5. Chapter 24, Rev. Codes, provides a form of civil action for the removal of county officers for misconduct, etc. Section 5743 thereof specifies the offenses which will justify the commencing of such action. *Held*, that a civil action to remove a county judge on grounds not specified in § 5743, but made grounds of removal by the constitution and statutes of the state, will not lie in the absence of a showing that the remedies provided for removals under the codes of civil and criminal procedure are inadequate for the purpose. Wishek v. Becker, 63.

6. It is illegal for a person seeking the appointment to a public office to agree that the fees arising from such office shall inure to the benefit of the firm he is contracting to enter. This under the provisions of sections 6911 and 6912, Rev. Codes. Wishek v. Hammond, 72.

QUIETING TITLE.

1. Any person who claims title to real estate in this state may perfect title thereto by taking and retaining adverse, open, exclusive and undisputed possession of such real estate for a period of ten years, and by paying all taxes assessed against the land for said period, under chapter 158, Laws 1899. Power v. Kitching, 254.

2. In an action to quiet title to real property, plaintiff claims title under

QUIETING TITLE—Continued.

a deed from A., who claims title under an alleged lost deed from C. *Held*, that the proof of the execution and delivery of such lost deed, and the contents thereof, must be established by clear and satisfactory evidence. McManus v. Commow, 340.

3. In an action to quiet title, where plaintiff claimed under tax deeds void for lack of jurisdiction of the taxing officers, the statute of limitations in § 1640, Comp. Laws, was not started in favor of the tax title claimant. Eaton v. Bennett, 346.

4. A tax deed in the form prescribed by § 1639, Comp. Laws, issued by the county treasurer and purporting to be based upon a tax sale of the land, describing the same, is sufficient under the statute to constitute color of title, even if the tax upon which it was issued was void by reason of irregularities in the tax proceedings appearing on the face of the deed sufficient to render the deed void on its face. Power v. Kitching, 254.

5. In an action to quiet title, the plaintiff must allege in his complaint, and in case of contest, show upon the trial, some title to the land, otherwise he does not put himself in a position to attack the claim of any other person to the same. Dever v. Cornwell, 122.

6. In an action to quiet title to realty which plaintiff claims under a deed from A., who claims under an alleged lost deed, evidence that such alleged lost deed never came into plaintiff's possession, but was retained by A., with the latter's testimony that he had searched for such deed several times, the last just previous to the trial, in all the places where he kept such papers, and it could not be found is sufficient to admit secondary evidence of the contents of such deed. McManus v. Commow, 340.

7. McGuin and wife executed and delivered to Lee a warranty deed of lands partly owned by the wife and partly by McGuin in consideration of the release and taking up of certain secured and unsecured debts of McGuin, and the leasing to McGuin of such lands for farming purposes. McGuin received a written lease of such lands from Lee at the same time the deed was given, McGuin and wife retaining possession. Such lease contained a special provision that Lee should reconvey such lands on payment of a fixed sum at a fixed time, such sum being the sum total of such debts. *Held*, that such stipulation to reconvey on condition did not constitute the deed presumptively a mortgage. McGuin v. Lee, 160.

8. In an action to have a warranty deed declared a mortgage plaintiff must show it to be a mortgage by conclusive evidence. McGuin v. Lee, 160.

9. McGuin and wife delivered to Lee a warranty deed of lands partly owned by the wife and partly owned by McGuin in consideration of the release and taking up of secured and unsecured debts of McGuin and the leasing to McGuin of such lands for farming purposes. McGuin received a written release from Lee when the lease was given. McGuin used the land under the lease and when requested to quit the premises requested another year to secure another place, without mentioning that he considered the deed a mortgage, and the conduct of both parties showed that they regarded the deed as a sale. The wife had delivered the deed unconditionally after acknowledging it and informing the notary that she understood the nature of it. *Held*, insufficient to sustain a contention that such deed was in fact a mortgage. McGuin v. Lee, 160.

QUO WARRANTO.

1. By § 5741, Rev. Codes, it is provided that the remedies formerly obtainable by writ of scire facias, the writ of quo warranto and proceedings by information in the nature of quo warranto may be obtained by civil action in the district court, did not enlarge the grounds of action or the remedies which were formerly obtainable by quo warranto proceedings. Wishek v. Becker, 63.

RAILROADS.

1. In an action against a carrier for negligently killing a horse during shipment, it was alleged that it was shipped from Grand Rapids Minn., to Moorhead, Minn. The contract at the former place was in writing and with a company other than defendant, and there was no allegation of any joint relation between defendant and such company. *Held*, that proof that the horses were loaded in a car of defendant and were unloaded and reshipped in a car of defendant and over its line was inadmissible under the pleadings. Ausk v. Great Nor. Ry. Co., 215.

RATIFICATION. See PRINCIPAL AND AGENT, 90.

REAL ESTATE. See TAXATION, 103.

REAL PARTY IN INTEREST. See CERTIORARI, 85.

1. An application for writ of certoirari denied because the petitioner is not the party beneficially interested. Sanderson v. Winchester, 85.

2. One who is not a party to the record but who participates in the trial to protect his interest, and this fact is known to the adverse party, may be bound by the decree. Boyd v. Wallace, 98.

3. The right to assert priority of lien in a foreclosure action belongs to the lien claimant and it cannot be asserted by a purchaser of the premises at sheriff's sale. Where the lien claimant did not assert or prove his priority in the foreclosure suit. Bastien v. Barras, 29.

4. An action for removal of a public officer cannot ordinarily be brought in the name of an individual tax payer, neither in the name of the county. Wishek v. Becker, 63.

RECEIVERS. See JUDGES, 431.

1. The appointment of a receiver by a district judge after an affidavit of prejudice has been filed against him is void. Orcutt v. Conrad, 431.

RECORDS AS EVIDENCE.

1. Neither a record nor a copy of a record of any conveyance of land is admissible in evidence against objection until proof by affidavit or otherwise is made that the original is not in the possession or under the control of the party producing such record or copy. American Mortg. Co. v. Prouty, 290.

REDEMPTION.

1. The power of sale in a mortgage is not revoked by the death of the mortgagor, and a foreclosure under the power is effective to cut off the rights of redemption of the heirs of the deceased mortgagor if not exercised within one year from the date of sale. Grandin v. Emmons, 223.

REDEMPTION—Continued.

2. The rights of a mortgagee under a second mortgage to redeem against a foreclosure of the first mortgage, are controlled by the statutes in force at the time the mortgage was given, and such right of redemption in the second mortgagee is extinguished if not exercised within one year from the date of the sale. Nichols v. Tingstad, 172.

3. An action to redeem from a foreclosure sale under a first mortgage cannot be maintained after the expiration of a year from the sale. Nichols v. Tingstad, 172.

4. McGuin's wife held the title to part of certain lands in her own name, and joined with her husband in the execution and delivery to Lee of a warranty deed of such lands as well as of other lands owned by her husband, the other lands being their homestead. She delivered the deeds to such lands through a notary to Lee unconditionally, Lee having no notice of any intention on her part to convey the lands other than expressed in the deed. *Held*, that she could not claim the deed to be a mortgage as against Lee, who acted upon and relied upon the transfer as an absolute deed. McGuin v. Lee, 160.

5. A redemption from a mortgage sale, based on a subsequent mortgage on the premises, acquires all the rights of the purchasers at the sale, including the right to demand and receive a sheriff's deed. McDonald v. Beatty, 511.

REMOVAL FROM OFFICE. See Public Officers, 63.

1. A civil action does not lie under chapter 24, Rev. Codes, to remove a county judge from office unless facts are alleged showing that the special remedies provided by the codes are inadequate. Wishek v. Becker, 63.

2. A civil action to remove a county judge from office for malfeasance will not lie under chapter 24, codes civil procedure, when brought by a person having no special interest therein. Wishek v. Becker, 63.

. Remedies for removal from office, defined in the codes, will not permit an action to remove a judge to be instituted in the name of a county, nor in the name of an individual unless the complaint states a cause of action under chapter 24, code civil procedure. Wishek v. Becker, 63.

4. A motion to dismiss a civil action charging defendant (county judge) with malfeasance in office, on the ground that the court had no jurisdiction of the subject matter, *held*, properly denied. Wishek v. Becker, 63.

5. Sections 361 and 362, Rev. Codes, construed and *held* that when construed together said sections provide, in effect, that the removals from office contemplated by the same, can be effected only in the manner provided in the codes of civil procedure. Neither of said sections attempt to provide a procedure, nor are either of the same self-executing. Wishek v. Becker, 63.

RENTS AND PROFITS. See Forcible Entry and Detainer, 353; Pleading, 353.

REPLEVIN. See Claim and Delivery, 440.

RES JUDICATA.

1. A court of equity has the power to dismiss an action without prejudice, and when a judgment contains a recital that it was so dismissed the effect of such recital is to prevent such judgment from operating as a bar in another suit brought on the same subject-matter. Prondzinski v. Garbut, 300.

2. Whether a judgment in fact constitutes a bar is to be determined in the action in which it is pleaded and not in the action in which it was rendered. Prondzinski v. Garbut, 300.

RESTRAINT OF TRADE. SEE INJUNCTIONS, 600.

ROADS AND STREETS.

1. The fee title in streets and highways is in the original owner, subject only to the public easement. Northern Pacific Ry. Co. v. Lake, 541.

2. The erection of buildings in a public street is an invasion of the rights of the public and the fee owner, entitling the fee owner to maintain an ejectment action therefor. Northern Pacific Ry. Co. v. Lake, 541.

SALES. SEE PRINCIPAL AND AGENT, 90; FRAUDULENT CONVEYANCES, 287.

1. In an action for damages for refusal to accept machinery sold pursuant to a contract stipulating for the giving of certain security, it is not error to refuse to submit to the jury whether an offer to take the machinery on less security should have been accepted. Minneapolis Threshing Mach. Co. v. McDonald, 408.

2. In an action on a note given in payment of an engine, wherein a defense of breach of warranty was interposed and rescission of the contract by defendant, evidence *held* to sustain a verdict for plaintiff for the amount claimed. Flath v. Casselman, 419.

3. A contract for the sale of a threshing rig, consisting of an engine, separator, weigher, self-feeder and other articles constituting a complete threshing outfit, for one lump sum, without fixing a price on each separate article is an entire contract. Nichols & Shepard Co. v. Charlebois, 446.

4. In an action for damages for refusal to accept machinery sold the buyer cannot testify as to the circumstances under which he signed the contract, the answer having alleged no affirmative defense. Minneapolis Threshing Mach. Co. v. McDonald, 408.

5. The measure of damages for refusal to accept machinery sold pursuant to the contract of sale is the difference between the price agreed on and the market value of the machinery at the time and place of the refusal to accept. Minneapolis Threshing Mach. Co. v. McDonald, 408.

6. In an action for damages for refusal to accept machinery sold pursuant to a contract to give security, the rule that it is the duty of the person claiming damages to minimize such damages to the lowest sum possible is not applicable. Minneapolis Threshing Mach. Co. v. McDonald, 408.

7. Where a buyer agrees to pay freight on the property in advance of the delivery to him, and afterwards refuses to accept the property pursuant to the contract of sale, the seller, in an action for damages for refusal to accept, can recover for freight charges paid by him. Minneapolis Threshing Mach. Co. v. McDonald, 408.

SALES—Continued.

8. Where a warranty, given on the sale of machinery, requires the purchaser, in case of failure to conform to the warranty, to give written notice to the vendor and its agent, stating particularly what parts and wherein it fails to fill the warranty, a notice stating that the separator failed to clean the grain without wasting it is sufficient. Nichols & Shepard Co. v. Charlebois, 446.

9. Where a warranty requires the vendee, in case of defects in the machinery, to give the vendor reasonable time to get to the machine and remedy defects, evidence that the vendor wholly ignored the vendee's letter stating the particulars in which the machine failed to fill the warranty, and no attempt was made to remedy the defects after the notice was given, justified a finding that the vendee complied with the conditions of the warranty in such respects. Nichols & Shepard Co. v. Charlebois, 446.

10. In an action on notes given for the purchase price of a machine an amendment to defendant's answer at the trial so as to recover for certain freight paid by him on the machine, or to recover back a note given to plaintiff's agent for the amount of freight advanced by him, is unavailing where it does not appear that any freight was paid, or that the note belonged to plaintiff, or that he had anything to do with the freight transaction. Nichols & Shepard Co. v. Charlebois, 446.

11. Evidence examined and *held*, that men's gloves sold by sample were equal to the samples in quality and workmanship. James v. Bekkedahl, 120.

12. When conditions are required to be performed by the buyer under a contract of sale of personal property in case of breach, the buyer must comply with such conditions before he can claim damages by reason of such breach. James v. Bekkedahl, 120.

13. Defendant purchased ladies' gloves under a special warranty that if they were not satisfactory, or if they ripped, they should be returned to the plaintiff who would furnish new ones. Five pairs were returned to defendant by customers as not satisfactory, the defendant having sold them to customers under a similar warranty. The defendant sent the five pairs to the plaintiff who repaired them and sent them back to defendant, and he retained them without objection and again sold them. The customers returned other gloves to defendant as not satisfactory but he did not send them back to plaintiff claiming it would be useless. *Held*, that the defendant could not counterclaim his damages by reason of a breach of the warranty as to gloves not returned by him. James v. Bekkedahl, 120.

14. Where a contract for the sale of separator and attachments provided that security by chattel mortgage should be given on the property purchased and on an engine and six horses; that defendant would pay the freight on the property in advance of its delivery, and defendant refused to accept the property, being dissatisfied with giving security on the horses, plaintiff sued for damages on account of the refusal to accept the property. *Held* that plaintiff could recover the freight charges paid by its agents, and properly pleaded in the complaint. Minneapolis Thresh. Mach. Co. v. McDonald, 408.

15. The value of property to a buyer is deemed to be the price at which an equivalent thing could, within a reasonable time thereafter,

SALES—Continued.

be bought in the nearest market; but this presumption raised by § 5012, Rev. Codes, is inapplicable as a means of estimating the value of property which in itself or through an equivalent has no market value. Patterson v. Plummer, 95.

16. The value of a written instrument is presumed, under § 5012, Rev. Codes, to be that of the property to which it entitles the owner, so far as it is applicable to certificates of stock in a national bank, fixes the presumptive value of such stock at its par or nominal value, and the burden to show a greater value is upon the person asserting it. Patterson v. Plummer, 95.

17. The measure of damages recoverable for the breach of an agreement to deliver personal property, where the contract price has not been paid, is the excess, if any, of the value of the property to the buyer over the amount due on the purchase price. Patterson v. Plummer, 95.

SCHOOL DISTRICTS.

1. A school district may be compelled by mandamus to levy a tax for the payment of a judgment obtained against it. Coler v. Coppin, 86.

2. A school township organized under Laws of 1883, Chapter 44, became, by such organization ipso facto, liable for the debts of the old district whose territory was included in such township. Coler v. Coppin, 86.

3. Upon the organization into a civil township of a portion of the territory comprising a school township corporation, such civil township continues for school purposes as a part of such school township corporation until segregated therefrom by the commissioners and county superintendent of schools on petition of the voters. State v. Gang, 331.

SCIRE FACIAS. See Removal from Office, 63.

SECONDARY EVIDENCE.

1. The common law of evidence, requiring proof of the execution of written instruments to be made by the testimony of subscribing witnesses, is no longer in force in this state; citing Chap. 59, Laws 1897. McManus v. Commow, 340.

2. Before secondary evidence of the contents of a lost instrument is permitted, such diligence should be required to be shown in attempting to produce the original as will leave no reasonable supposition that the original is in existence, or can be produced. Evidence examined, and *held*, that sufficient foundation was laid to admit secondary evidence. McManus v. Commow, 340.

3. Neither a record nor a copy of a record of any conveyance of land is admissible in evidence against objection until proof by affidavit or otherwise is made that the original is not in the possession or under the control of the party producing such record or copy. American Mortg. Co. v. Mouse River Live Stock Co., 290.

SET-OFF. See Counterclaim, 353; Forcible Entry and Detainer, 353.

1. In an action for the possession of real estate under the forcible detainer act (§ 6677, Rev. Codes) no counterclaim can be pleaded in justice's court, except as a set-off for rent or damages in cases where judgment for rent or damages are claimed. Vidger v. Nolin, 353.

SHERIFFS.

1. A sheriff seizing property on a tax warrant other than where the warrant is issued for taxes in his county, is a trespasser and may be enjoined from such seizure by a suit in equity. Shaffner v. Young, 245.

2. A complaint to enjoin a sheriff from levying a distress warrant on personal property which did not allege irreparable damage was insufficient to authorize equitable relief by injunction. Shaffner v. Young, 245.

3. A sheriff's deed to a purchaser under a valid foreclosure sale under a power of sale, conveys all the grantor's interest at the date of the mortgage free from all subsequent incumbrances. Nichols v. Tingstad, 172.

SPECIFIC PERFORMANCE. SEE CONTRACTS, 461; PLEADING, 461.

1. Plaintiff alleged that he made a parol contract with defendant for for the purchase of realty to be paid for in the future, the contract to be reduced to writing after certain improvements were made on the property; that he made such improvements, but defendant refused to sign the written contract, and asked that defendant be compelled to sign the contract. His complaint contained no allegation that before the commencement of the action plaintiff tendered, or offered to perform his part of the agreement. *Held*, that the complaint did not state a cause of action. Kulberg v. Georgia, 461.

2. Equity will not compel parties to sign contracts, nor will it compel specific performance of contracts, unless plaintiff shows performance on his part, or offer of performance. Kulberg v. Georgia, 461.

3. A purchaser of land cannot be compelled to accept a deed and pay the price in a case where it appears that the vendor's title is so clouded by claims and demands that the same is not a marketable title. Easton v. Lockhart, 181.

4. Where, before the action was instituted by plaintiff, he was fully advised of all defects in defendant's title, and since the suit was commenced, plaintiff manifested no disposition to perform equitable obligations resting upon him, but manifested a disposition to remain in possession of defendant's land and enjoy rents, issues and profits without incurring any obligations, and without paying the purchase price in to court, *held*, that defendant is entitled to recover costs and disbursements, also the rents and profits of the land less such compensation as would reimburse plaintiff for improvements made before discovering the defects in defendant's title. Easton v. Lockhart, 181.

5. Where a purchaser was given possession under a conditional contract to purchase, and the condition was not performed because of a defect in tile, it was error for the court, in a suit for specific performance to permit plaintiff to remain in possession pending a suit to remove clouds on a title. Easton v. Lockhart, 181.

6. Where an agreement to purchase land was conditional, and the condition was never performed, it was error to decree the purchaser specific performance. Easton v. Lockhart, 181.

7. Plaintiff, being desirous of purchasing the land from defendant, and not having the money arranged to borrow it, promising the lender that the title was good which was required as a condition of the

SPECIFIC PERFORMANCE—Continued.

loan. The terms were agreed to with defendant and the latter, claiming to have good title, permitted plaintiff to take possession before the examination of the title. The loan was subsequently refused. Plaintiff had broken the land and made improvements thereon, and in his complaint for specific performance offered to pay the purchase price into court. The court adjudged that defendant should prosecute certain suits to remove clouds on the title, and that pending the determination of such suits plaintiff should remain in possession and should remain without paying the purchase money into court. *Held*, that such judgment was erroneous, as it was inequitable to permit plaintiff to remain in possession pending litigation of indefinite duration and of uncertain result. Easton v. Lockhart, 181.

SPECIFICATIONS OF PARTICULARS.

1. The statement of case as settled under § 5630 Rev. Codes, must contain the specifications required by said section, else the supreme court will not try the case anew. Eakin v. Campbell, 416.

2. A statement of the case, with requests for retrial of particular facts, *held* insufficient in failing to specify any fact to be tried, as required by § 5630, Rev. Codes. Douglas v. Richards, 366.

3. Where none of the specifications in the statement of a case embodied a request to retry any particular fact except one, the court will not, except as to the one request, retry any issue of fact, nor consider any question of law depending on the facts or the evidence. Douglas v. Richards, 366.

4. Upon an appeal in contempt cases, in order to review the sufficiency of the evidence the statement of the case must embrace specifications of particulars showing wherein the evidence is insufficient. Twp. of Noble v. Aasen, 264.

5. Upon appeal under § 5630. Rev. Codes, where the action was tried below without a jury, the statement of the case must embrace all the evidence affered in the trial court and a demand for a retrial of the entire case, or of some particular fact therein, else the supreme court is without authority to review the evidence. Teinen v. Lally, 153.

STATEMENT OF THE CASE.

1. Where application was made to the supreme court to settle a statement of the case on the ground that the trial court refused to settle the same, it appeared that plaintiff proposed a statement of the case to the trial court for settlement. The court refused to sign the same until an amendment was made to the proposed statement, setting out certain matters of fact not found in the proposed statement and which the trial court claimed to be true and pertinent to the issues. Plaintiff's counsel declined to acquiesce in the amendment as proposed by the trial court, and upon such refusal the court refused to settle and allow the proposed statement. *Held*, that the supreme court was without authority to settle the statement of the case when it does not appear that the trial court on request refused to settle the same in accordance with the facts. Taylor v. Miller, 361.

2. In a case tried to the court without a jury plaintiff caused a statement of the case to be settled which embodied all the evidence relating to the validity of certain taxes, and which contained a statement to the effect that the appellant desired a retrial of cer-

STATEMENT OF THE CASE—Continued.

tain questions urged in support, which the statement denominated questions of fact. The questions set out in the statement did not embody a request to retry any particular fact, they omitting to specify any fact to be tried as required by § 5630, Rev. Codes. Therefore, neither questions of law or fact are determined on the appeal. Douglas v. Richards, 366.

3. A statement of a case settled in a civil action tried before a jury is governed by § 5467, Rev. Codes, and not by § 5630, governing causes tried by the court, and therefore requires only the substance of the evidence to be stated. Northern Pacific Ry. Co. v. Lake, 541.

4. An objection that a statement of a case on appeal is defective is not proper ground for dismissal of the appeal. Northern Pacific Ry. Co. v. Lake, 541.

5. Where the statement of the case disclosed that evidence offered on the trial was excluded by the court, on objection made; that by consent of the parties during the trial the jury was withdrawn and the case submitted as a court case, but because, from the statement of the case, the supreme court could not determine the theory of procedure upon which the judgment appealed from was rendered, and the record disclosed incongruities of practice and procedure, the judgment was reversed and a new trial granted, notwithstanding the stated case demanded a re-trial in the supreme court. Hagen v. Gilbertson, 546.

6. To secure a trial de novo on appeal where tried below without a jury, under § 5630, Rev. Codes, it is necessary that the statement of the case as settled shall in fact contain all the evidence offered and proceedings had at the trial, as well as the specifications required by said section. Therefore the failure of appellant to incorporate in the statement certain exhibits which were offered in evidence in the trial court, or to have the same identified as constituting part of such statement, precludes a retrial of the case. Eakin v. Campbell, 416.

7. In a case tried to the court without a jury, upon appeal the statement of the case must embrace all the evidence. The certificate of the trial court that the statement embodies all the evidence is prima facie sufficient, but is not conclusive where the record on its face shows that the statement does not contain all the evidence. Littel v. Phinney, 351.

8. Appeals in contempt cases are governed by § 5954, and Ch. 10, Art. 3, Rev. Codes, and not by § 5630, and in order to review the sufficiency of the evidence the statement of the case must embrace specifications of particulars showing wherein the evidence is in sufficient. Township of Noble v. Aasen, 264.

9. Where, on appeal from a judgment under § 5630, Rev. Codes, appellant does not settle in his statement of the case all the evidence offered and received upon the trial, the case will not be tried anew in the supreme court, but on motion of respondent the judgment of the court below will be affirmed. Geils v. Fleugel, 211.

10. A statement of the case upon appeal from a judgment, wherein a trial de novo is demanded in the supreme court under § 5630, Rev. Codes, must contain all the evidence offered upon the trial below, including all documents offered in evidence, and if the statement does not have incorporated in it all the evidence offered, including

STATEMENT OF THE CASE—Continued.

documents, the judgment of the lower court will, on motion, be affirmed. Kipp v. Angell, 199.

11. On an appeal from a final order in a contempt case, a statement of the case must be settled as in jury cases. The supreme court, in such matters, sits as a court of review for the correction of errors and will not try the case anew. State v. Massey, 154.

12. Where a statement of the case embraces all the evidence offered on the trial, but contains neither a demand for a retrial of the entire case nor of any particular fact, the supreme court is without authority to retry all or any of the facts in issue. Teinen v. Lally, 153.

13. Where an action was tried in the district court without a jury, and appeal taken from the judgment, but in the statement of the case, a trial anew being demanded, certain papers and exhibits offered and received upon the trial are omitted from the statement of the case, the judgment of the court below will be affirmed. Geils v. Fluegel, 211; Kipp v. Angell, 199.

14. In a case tried to the court without a jury this court is without authority to try the case anew unless the statement of the case embraces all the evidence. The certificate of the trial court to the effect that the statement embodies all the evidence is sufficient prima facie, but is not conclusive of the fact, where the record shows on its face that the statement does not contain all the evidence. Littel v. Phinney, 351.

15. Upon appeal, under the provisions of § 5630, Rev. Codes, where a trial anew was demanded in the supreme court, the trial judge appended a certificate to the statement of the case, to the effect that the same embodied all the evidence and exhibits offered at the trial. Among other evidence offered and received on the trial were certain documents, (eight in number) which were respectively identified as exhibits. None of said exhibits were incorporated in the statement, nor did the same contain a copy or purported copy of said exhibits, or either of the same. The statement did embrace a reference to said exhibits which was sufficiently specific to identify the same; but as to some of the same no attempt was made in the statement to give even a portion of their contents in a condensed form, or at all. *Held*, that the statement was insufficient, and a trial anew cannot be had. United States Sav & L. Co. v. McLeod, 111.

16. Authority to try civil actions anew in the supreme court is derived solely from the statute, and when the statute is not complied with the supreme court is devoid of authority to enter upon a new trial of the facts or upon a re-investigation of the questions arising upon the evidence. Littel v. Phinney, 351.

17. In a case tried to the court without a jury, the supreme court cannot try the case anew unless the statement of the case embraces all the evidence. The certificate of the trial court to the effect that the statement embodies all the evidence is sufficint prima facie, but is not conclusive of the fact where the record shows on its face that the statement does not contain all the evidence. Littel v. Phinney, 351.

18. Where a case was tried to the court below without a jury and the certificate of the trial judge to the statement of the case recited that the statement embodied all the evidence offered upon the

STATEMENT OF THE CASE—Continued.

trial, but where the statement itslf contradicted the certificate the prima facie character of the certificate was overcome, the judgment of the trial court affirmed without prejudice to further proceedings to determine the rights of the parties without respect to the subject-matter involved in the action. Littel v. Phinney, 351

19. To secure a trial de novo in the supreme court in actions tried below to the court without a jury, under § 5630, Rev. Codes, it is necessary that the statement of the case settled shall in fact contain all the evidence offered and proceedings had at the trial as well as the specifications required by said section, and the failure of appellant to incorporate in the statement the exhibits which were offered in evidence in the trial court, or to have the same officially identified as constituting a part of the statement, precludes the supreme court from trying the case anew. Eakin v. Campbell, 416.

20. It is imperative that exhibits offered upon the trial in cases tried below without a jury. under § 5630, Rev. Codes, shall be actually embodied in the statement of the case, or be officially made a part thereof when it is not feasible to physically embody them therein. The judge's certificate that the statement contains all of the evidence offered and proceedings had is not conclusive. Eakin v. Campbell, 416.

21. The supreme court is without authority to settle a statement of the case on appeal when it appears that the trial court has not refused on request to do so in accordance with the facts. Taylor v. Miller, 361.

STATUTES.

1. Section 2143, Rev. Codes, requiring that on the passage of an ordinance the ayes and nays shall be called and entered upon the journal of the proceedings, is mandatory and not discretionary. Pickton v. City of Fargo, 469.

2. The requirements of § 1551, Comp. Laws, directing the assessor to attach to his return, or assessment roll, an affidavit of authentication in the form therein prescribed, is mandatory and vital to the taxes based on the assessment. Eaton v. Bennett, 346.

3. An enrolled bill properly authenticated by the officials of the senate and house of representatives, approved by the governor, and filed with the secretary of state, is conclusive upon the courts, and the same cannot be impeached by entries in the journals. Power v. Kitching, 254.

4. A statute attempting to change the boundaries of a county without making provision for submitting the matter to a vote of the county for ratification, is unconstitutional and void. Shaffner v. Young, 245.

5. A statute embracing two distinct and independent subjects, both of which are expressed in its title, is adversely commented upon although the legality of the enactment is not determined. Shaffner v. Young, 245.

6. Chapter 158, Laws 1899, entitled "An act relating to titles to real property,' is not unconstitutional under section 61 of the state constitution, but the title is faulty because too general. Power v. Kitching, 245.

7. In construing a statute adopted from another state, and there construed by the court of last resort, it will be presumed that the

STATUTES—Continued.

construction placed upon the statute by the courts of the state from which it was adopted is adopted therewith. State v. Bradley, 157.

8. Section 2264, Rev. Codes, requiring a city to make an appropriation or levy a tax before contracting for an expenditure, is mandatory. Roberts v. City of Fargo, 230.

9. In construing the titles to legislative enactments each case must stand upon the language employed by the legislature and be governed by its own peculiar facts and conditions. The language should have a liberal construction. Power v. Kitching, 254.

10. An enrolled bill, properly authenticated by the officials of the senate and house of representatives, approved by the governor and filed with the secretary of state, cannot be impeached by entries in the journals. Power v. Kitching, 254.

11. Section 1180, Rev. Codes, relating to exemptions from taxation, is not repugnant to § 176 of the state constitution because narrower in its terms than the constitutional provisions. Engstad v. Grand Forks County, 54.

12. Under § 1180, Rev. Codes 1899, real estate used for public charity and not owned by an institution, but by a private individual, is not exempt from taxation. Engstad v. Grand Forks County, 54.

13. Section 361, Rev. Codes, provides for the removal of county officers who shall be guilty of misconduct, malfeasance, or gross incompetency, in the manner provided in the code of civil and criminal procedure. Section 362 permits the board of county commissioners in the name of the county, or any person in his own name, to bring such action. *Held*, that neither of these sections is self-executing, but contemplates that removals of officers shall be effected only in the manner provided in the codes of civil or criminal procedure. Wishek v. Becker, 63.

14. Section 5454a, Rev. Codes, providing for the filing of an affidavit of prejudice and cost bond against a trial judge, in so far as it provides that the court shall proceed no further in the action after the filing of the affidavit and bond, is mandatory, and the court thereafter can exercise no judicial functions but can perform ministerial acts. Orcutt v. Conrad, 431.

15. Section 1551, Comp. Laws, requiring an assessor to attach to his return or assessment roll an affidavit of authentication in the form therein prescribed, is a mandatory statute intended for the benefit of the tax payer, and a compliance therewith is vital to the taxes based on the assessment. Eaton v. Bennett, 346.

16. Courts will not inquire into and determine the constitutionality of statutory provisions at the instance of parties who are not interested or affected by such provision. State v. Donovan, 203.

17. The title of Ch. 158, Laws 1899, to-wit: "An act relating to titles to real property," is faulty because too general, but the subject of the act is expressed in the title. Therfore the law is not unconstitutional as in conflict with § 61 of the State Constitution. Power v. Kitching, 254.

STATUTES CITED AND CONSTRUED.

REVISED CODES.

Section.	Page.
110	69
136	69
359	68
361	64-65-66-69-70-71
361 to 364	66
362	64-66-67-70-71
486	137
487	137
492	137
495	136
525	136
526	136-139
527	136
547	136
563	140-416
575	416
601	380
652	594-596-600
658	332-337-338-339
659	332-339
660	337
664	338
671	334
1180	54-56-58
1180 subd. 6	54-56-57-58
1243	248-251
1255	123-129
1268	123-126-127
1388	67
1790	407
1981	599
2108 to 2343	232-242
2140	235
2143	470-480-481
2190	236-240
2261	230-236
2261 to 2264	235
2262	236-240
2263	236
2264	236
2264	230-236-237-239-240-242
2273	271
2280	271
2757	222
2764	592
2765	592
3199a-3199f	496
3267	608
3360	546
3403	228
3419	228
3486	607
3487	608
3491	260
3491a	258
3515	346
3520	340-345-346
3520 subd. 2	346
3573	226
3575	226
3576	226
3580	456
3585	373-382
3586	226
3605	454-460-457
3620	459
3625	587-589-590-591
3625 subd. 1	590
3766	510
3888a	344
3900	281-287
3917	510
3926	607
3927	601-607-608-610
3937	555
3973	122
3983	608
4085	95
4263	301
4265	309
4273	301-309
4318	95
4321	10
4322	11
4348	59-62
4350	228
4377	72-74
4646	563
4680	83
4710	228
4724	48
4733	171
4738	171
4745	403
4746	403
4793	29-32
4833	413
4836	311-317-322
4884	283-558-562-563
4885	283
4977	145
4985	95-98
4988	413
5009	413
5010	95-98
5011	98
5012	96-98-100
5032	186
5048	109
5052	108-109

STATUTES—Continued.

Section.	Page.
5053	322
5055	529
5130	562-563
5179	393
5181	71
5191 to 5195	260
5220	510
5234	230
5252 subd. 7	583-539
5274 subd. 2	540
5285	540
5292	220
5298	16-21-27-28-140-143-144
5304	568
5304 subd. 3	564-567
5307	566
5330	567
5345	66
5348	67
5352 subd. 8	581
5371	386-387
5432	143
5433	143
5447	445
5454a	264-267-363,364-389-390-391-393-399-431-432-433-434-435
5462	364
5464	365
5467	113-143-541-544
5469	364-365-366
5472 subd. 7	588
5474	143
5477	143
5484 subd. 3	445
5498	536-537-538
5507	289
5510	289
5514	288-289
5516	587-590
5540	517
5606	214
5610	383-387
5611	283-386-387-388
5616	383-386-387-388
5627	589
5630	31-65-73-111-112-113-153-154-155-202-203-213-229-264-269-316-320-353-367-370-416-417-453-515-532-537-541-544-546-548-549-552-601-605-606-612-616.
5696	223-226-290-296-297
5722	140-143-144
5741	63
5742	63
5743	64-68-69
5743 subd. 2	68
5844	223
5848	223
5857	228
5897 to 5903	38
5898	37-336
5902	386
5937	268
5942	264-154-157-270-271-272
5843	265-274
5944	265-274-275
5949	275
5950	275
5954	155-264-269
5983	577
5986	577
5987	577
5988	577
6099	85
6407	35-37
6677	353
6680	358
6717	536-537-538
6771a	504-509
6779	354-359-360-504-509
6841	311-325
6842	311-325
6911	73-76
6912	73-76
7080	67
7095	67
7550	59-60-61
7593	438
7594	438
7596	203-209
7597	204-209-210
7599	439
7603	159-160
7605	154-155-156-157-158-159-160-206-207-208-210-273-203-205-437-438-610-612-614-615.
7605 Chap. 63	159-205
7616	204-209-210
7796 to 7838	69-70
7824	65-69
7838	65
8040	273
8120	264-267-435
8446	464-467-468

Chapter.	Page.
24	63-64-67-68-69-70-71
26	60
39	590

STATUTES—Continued.

CODE CIVIL PROCEDURE.

Chapter.	Art.	Page.	Chapter.	Art.	Page.
10	8	264-269	26	---	66
14	---	269	30	---	126
19	---	126	33	---	269
24	---	63-67-68-69-70-71	34	---	272-273-264

CIVIL CODE.

Chapter.	Art.	Page.	Chapter.	Art.	Page.
24	---	64	43	7	287

POLITICAL CODE.

Chapter.	Art.	Page.	Chapter.	Art.	Page.
10	---	335	8	12	416
28	---	232-242			

COMPILED LAWS.

Section.	Page.	Section.	Page.
704	335	4328	83
706	335	4354	228
707	335	5085	365
776	488	5118	289
1388	66-67-72	5120	289
1546	483-488	5124	288-289
1551	200-346-348-487	5148	176
1620	489-490	5345 to 5361	66
1627	489	5348	66-67
1638	348-483-492	5411	179-228
1638 to 1640	346	5414	226
1639	255-257-348-483-484-492	5420	176
1640	255-259-347-483-490-492	5421	179
2452	151	5424	173-178
2813	228	5428	176
2829	228	5437	173-176-177
3269	151-295	7080	67
3272	295	7095	67
3288	295	Year 1887	172-175-176-180
4007	228	Art. 1, Chap 10	336

CONSTITUTION.

Section.	Page.	Section.	Page.
6	464-467	111	500
11	491	168	245-250
13	203-208	176	54-57-58
61	254-258-493-496-499	197	69
96	494-501	208	587-591

STATUTES—Continued.

SESSION LAWS.

Year.	Chapter.	Section.	Page.
1867-1868	13	---	545
1870-71	33	---	545
1883	44	---	86-87
1883	44	136 to 141	88
1883	44	144	88
1890	132	72	106
1890	---	174	106
1890	---	179	106
1890	62	---	337
1890	62	35	337-338-339
1890	62	36	338-339
1890	62	42	338
1890	62	39	338
1890	62	40	338
1891	100	7	103-104
1891	100	48	123-127
1891	178	---	611-613
1893	82	---	505
1895	1	---	295
1895	25	---	254-249-245
1897	75	---	596
1897	---	---	473
1897	99	---	123-128-129
1897	99	1	123-128
1897	126	92	127
1897	59	---	340-344
1897	126	74	371
1897	5	---	453
1897	41	---	469-472-474
1897	---	7	469-470
1897	---	17	470-478
1897	41	7	472
1897	41	8	474
1897	87	---	493-495-496
1897	87	1	497-501
1897	87	2	497
1897	87	3	497
1897	87	4	497
1897	87	5	497
1897	87	6	497
1899	57	---	254-349-245
1899	57	1	249-250
1899	158	---	262-260-258-254-255
1899	158	---	263
1899	42	---	469-470-472
1899	42	6	474
1901	178	---	160

SUMMONS.

1. The service of a summons on the husband cannot be made by leaving a copy with his wife at the dwelling house of a neighbor where she is temporarily staying, the husband having left the state with the intention of remaining permanently. Phelps v. McCollam, 536.

SUNDAY.

1. Acquiring possession of property on Sunday *held* not to defeat the possession or lien of a factor thereon. Rosenbaum v. Hayes, 311.

2. A Sunday transfer of property, even when prohibited by law, is effective so far as executed. The law merely refuses to lend its aid to enforce executory features of the contract or to help the parties to regain their former position. It requires them to remain in the position in which they place themselevs. Rosenbaum v. Hayes, 311.

3. Whether the transfer of possession of certain sheep constituted servile labor or not within the meaning of § § 6841 and 6842, Rev. Codes, and was prohibited, is not determined. Rosenbaum v Hayes, 311.

SUPERSEDEAS. See APPEAL AND ERROR, 383.

TAXATION. See ASSESSMENT AND TAXATION.

1. A tax deed resting upon a pretended tax which was never legally assessed, is voidable for want of jurisdiction of the taxing officials even though the deed is regular on its face. Such a deed will not be protected by the statute of limitations. Power v. Kitching, 254.

2. A tax deed, in the form prescribed by § 1639, Comp. Laws, 1887, issued by the county treasurer, and purporting to be based on a tax sale of the land, and describing the same, is sufficient color of title to support adverse possession. Power v. Kitching, 254.

3. A tax deed will constitute color of title under Ch. 158, Laws 1899, though the tax was void by reason of irregularities in the tax proceeding, which appear on the face of the deed, sufficient to render it void on its face. Power v. Kitching, 254.

4. A sheriff seizing property on a tax warrant other than where the warrant is issued for taxes in his county, is a trespasser, and may be enjoined from such seizure by a suit in equity. Schaffner v. Young, 245.

5. A complaint to enjoin a sheriff from levying, which did not allege irreparable damage, *held*, not sufficient to authorize equitable relief by injunction. Schaffner v. Young, 245.

6. Under Ch. 158, Laws 1899, relating to the validation of defective titles, and declaring that claimants, to realize the benefits of such act, must have occupied the land, under claim of title thereto, openly, adversely and exclusively for ten years, a claim of title will suffice if the occupant claims title and ownership in good faith under an instrument which constituted color of title under the law. Power v. Kitching, 254.

7. A tax deed, voluntarily executed, will constitute color of title under Laws 1899, Ch. 158, relating to the validation of titles claimed by adverse possession, though the tax was void by reason of irregularities in the tax proceeding which appear on the face of the deed sufficient to render it void on its face. Power v. Kitching, 254.

8. The city of Fargo entered into a contract with a private corporation for the furnishing to the city at $500 per month, of electric light. No appropriation was first made for the expenditure and no tax levied before entering into the agreement. *Held*, that the contract was ultra vires and void. Roberts v. City of Fargo, 230.

TAXATION—Continued.

9. Taxes which are illegal need not be tendered, or paid, as a condition precedent to the commencement of an action to avoid a tax deed predicated thereon. Eaton v. Bennett, 346.

TENDER. See TAXATION, 346.

THRESHERS' LIEN.

1. Defendant was indebted to Wagner on account for threshing grain. Wagner perfected a statutory lien upon the grain threshed by him by filing a verified account with the register of deeds. Subsequently the account and lien were transferred to plaintiff by an assignment in writing executed by Wagner, and delivered to plaintiff. The assignment of the account and lien were made without consideration, and with intent to defraud the creditors of Wagner, and plaintiff shared in such fraudulent intent. The transfer of the account and lien, while good as between the parties thereto, was fraudulent and void as to the execution creditors of Wagner. Faber v. Wagner, 287.

TORTS. See NEGLIGENCE, 215.

TOWNSHIPS.

1. A township may be compelled by mandamus to levy a tax for the payment of a judgment duly docketed against it. Coler v. Coppin, 86

2. Upon the organization into a civil township of a portion of the territory comprising a school township corporation, the civil township continues for school purposes as a part of such school township until segregated therefrom by the commissioners and county superintedent of schools upon petition of the voters. State v. Gang, 331.

3. The board of county commissioners having found that a petition for the organization of a civil township contained the requisite number of legal voters, acted thereon by taking the necessary steps to organize such township. The question as to the sufficiency of such petition is not open to judicial investigation in mandamus proceedings to compel the calling of an election for school officers in such township. Following State v. Langlie, 5 N. D. 594. State v. Gang, 331.

TRESPASS. See TAXATION, 245.

1. A sheriff seizing property under pretended authority contained in a tax warrant of distraint issued from another county is a trespasser and may be enjoined from such seizure by a suit in equity Shaffner v. Young, 245.

TRIAL. See PRACTICE.

1. Upon the trial of an accused for contempt of court, under § 5942, Rev. Codes, whether brought into court by order to show cause, or under a warrant of attachment. unless he admits the offense charged, accused is entitled to have interrogatories filed specifying the facts and circumstances of the offense charged against him. His silence and failure to object to the proceedings upon the ground that none have been filed will not waive his statutory right. Noble Tp. v. Aasen, 264.

TRIAL—Continued.

2. The purpose of an objection to testimony is to call the courts attention to the fact that the same is inadmissible under the rules of evidence. Where the objection is sustained, and the evidence is excluded no advantage can be taken of such ruling on appeal upon the ground that the objection was not sufficiently specific. American Mortg. Co. v. Mouse River Live Stock Co., 290.

3. Where defendant, one of the joint makers of a promissory note, by his answer alleged that he was released from payment, it was incumbent upon him to establish this defense by a preponderance of the evidence. J. I. Case Threshing Mach. Co. v. Olson, 170.

4. In an action to foreclose a mortgage upon real estate, where defendant alleged ownership of the land, and that he purchased the same for value in good faith without notice, actual or constructive, of the existence of plaintiffs mortgage, and to prove title offered the record of the deed in the deed record of the county, to which objection was made,, *held*, that under § 5696, Rev. Codes. neither the record nor a copy of the record of the conveyance was admissible in evidence until proof by affidavit or otherwise is made that the original was not in the possession or under the control of the party producing such record or copy. American Mortg. Co. v. Live Stock Co., 290.

5. Where upon a trial evidence is properly objected to, the objection need not be repeated when other evidence of the same class is offered. American Mortg. Co. v. Live Stock Co., 290.

6. Where, in an action on a promissory note, there are several defenses, it is error to direct a verdict for the plaintiff because one defense is not sustained by the evidence. Shepard v. Hanson, 194.

7. The proofs must follow and correspond with the pleadings. A variance without amendment is fatal. Ausk v. Great Northern Ry Co., 215.

8. In an action against a carrier to recover for loss of stock during shipment, the complaint charged a delivery and acceptance of the stock by defendant at Grand Rapids. *Held*, that a delivery and acceptance at some other place could not be relied on without an amendment of the complaint. Ausk v. Great Northern Ry. Co., 215.

9. A trial de novo under § 5630, Rev. Codes, cannot be had in the supreme court upon appeal from a final order in a contempt case. State v. Massey, 154.

10. In an action between a mortgagee and mortgagor it is not necessary to show that the execution of a chattel mortgage was witnessed. J. I. Case Threshing Mach. Co. v. Olson, 170.

11. Contempt proceedings under Ch. 24 of the Code of Civil Procedure. are neither civil nor criminal actions, and the accused is not entitled to have another judge called in to determine the case upon filing affidavits showing prejudice of the presiding judge. Township of Noble v. Aasen, 264.

12. In the trial of contempt proceedings, under § 5942, Rev. Codes, unless the defendant admits the offense charged he is entitled to have interrogatories filed specifying the facts and circumstances of the offense charged against him. Twp. of Noble v. Aasen, 264.

TRIAL—Continued.

13. In cases of contempts of a civil nature, where an actual loss has been produced by the commission of the offense, the injured party may have the same assessed upon hearing and the accused may be required to pay the same. Twp. of Noble v. Aasen, 264.

14. A verdict may properly be directed for defendant in an action for failure to deliver personality where there was no evidence of damage. Patterson v. Plummer, 95.

15. Where a letter, purporting to have been written by one of the counsel for plaintiff, was found by the trial judge in the envelope containing plaintiff's deposition and was by order of the court filed with the clerk but was not offered in evidence, such letter was not properly before the court and its contents could not be considered for the purpose of discrediting the testimony given in the deposition. Corey v. Hunter, 5.

TROVER AND CONVERSION. See Conversion, 400.

TRUSTS AND TRUSTEES. See Principal and Agent, 90.

1. Where defendant promised to extend the time of payment for plaintiff to redeem from a mortgage foreclosure, and in violation of such promise, upon which plaintiff relied, defendant took a sheriff's deed on such foreclosure, the defendant became an involuntary trustee of the real estate in question for plaintiff, under § 4263, Rev. Codes. Prondzinski v. Garbutt, 300.

2. A trustee who wrongfully disposes of trust property is liable to the beneficiary for the value of the same with interest. Where an election is made to have the property replaced the trustee cannot defeat the beneficiary's legal right thereto by refusing to replace, or by placing it out of his power to do so, and thus compel the beneficiary to accept the proceeds. Prondzinski v. Garbutt, 300.

3. The rule that a trustee who wrongfully disposes of the trust property is liable to the beneficiary for its value, with interest, was not changed by § 4273, Rev. Codes, giving the beneficiary the right to require a restoration of the property with its fruits, or to recover the proceeds with interest. Prondzinski v. Garbutt, 300.

4. Where a defendant promised to extend the time of redemption for plaintiff to redeem from a mortgage foreclosure, and in violation of such promise, on which plaintiff relied, defendant took the sheriff's deed on such foreclosure, he thereby became an involuntary trustee for the realty for plaintiff, under § 4263, Rev. Codes, defining who are involuntary trustees. Prondzinski v. Garbutt, 300.

5. In an action by a guardian of the estate of minors, upon a promissory note which is in terms payable neither to such guardian nor to his wards, but to another person, and is not endorsed either generally or by special endorsement, the ownership of which is challenged by an express denial in the answer, it is *held*, under the evidence referred to in the opening opinion, showing that said note was delivered to the county court by the payee, who formerly had been guardian of the estate of said minors, to cover a shortage arising from his unlawful use of the trust funds, and that the same was accepted by said court, that title thereto is established in the wards. Shepard v. Hanson, 194.

ULTRA VIRES. See Municipal Corporations, 230.

1. Where an ultra vires agreement by a public corporation involved the disposition of public funds, a tax-payer was *held* entitled to sue to enjoin such unlawful disbursement. Roberts v. City of Fargo, 230.

2. A lighting company entering into a contract with a city, when no appropriation or tax levy has been made before the contract to meet the expenditure, as required by § 2264, Rev. Codes, has notice of the limitation upon the powers of the municipality, and the contract is ultra vires and void, and its enforcement can be enjoined. Roberts v. City of Fargo, 230.

3. It is ultra vires the powers of a national bank to loan upon real estate security, but no one other than the United States, in the person of the comptroller, can object. Such a transaction is good and enforceable between the parties. First Natl. Bank v. Flath, 285.

4. Where an ultra vires agreement by a public corporation involved the disposition of public funds, a tax payer of the city was entitled to sue to enjoin such unlawful disbursements. Roberts v. City of Fargo, 230.

5. Section 2264, Rev. Codes, requiring the city to make an approprition or levy a tax before contracting for municipal expenditure is mandatory. Roberts v. City of Fargo, 230.

6. A private corporation entering into an ultra vires contract with a city was chargeable with notice of the city's powers, and therefore could not recover for light furnished. Roberts v. City of Fargo, 230.

UNDUE INFLUENCE. See Negotiable Instruments, 43.

1. Plaintiff was head clerk in defendant's store. Defendant entertained the belief that plaintiff had been appropriating to himself funds of defendant and one evening at about nine o'clock asked plaintiff to go with him into a bank which stood across the street and to which he had the key. Defendant's brother and his bookkeeper were secreted in a room in the rear of the building. Immediately on entering the room and producing a light defendant accused plaintiff of taking money from the store. Plaintiff indignantly denied the charge and defendant repeated it in positive terms, telling plaintiff that his defense was useless, that he (defendant) had procured an expert bookkeeper to look up the account and that he had positive evidence that plaintiff had stolen a large amount. Defendant at the time had some papers in his hands which he referred to as containing proofs of his statements. Defendant represented that if plaintiff confessed and arranged the matter it would be kept secret, and referred to the effect knowledge thereof would have on plaintiff's wife and aged parents. After repeated accusations plaintiff confessed the taking of more than $500.00 and executed a note to defendant for $900.00, secured by a mortgage on his homestead. *Held*, that the note and mortgage were obtained by undue influence. Peckham v. Van Bergen, 43.

VALUE. See Claim and Delivery, 440.

1. The value of property to a buyer is deemed to be the price at which an equivalent thing could, within a reasonable time thereafter, be bought in the nearest market. But § 5010, Rev. Codes,

VALUE—Continued.

is inapplicable as a means of estimating the value of property which in itself or through an equivalent has no market value. **Patterson v. Plummer, 95.**

2. Section 5012, Rev. Codes, which provides that the value of a written instrument is presumed to be that of the property to which it entitles the owner, so far as it is applicable to certificates of stock in a national bank, fixes the presumptive value of such stock at its par or nominal value, and the burden to show a greater value is upon the person asserting it. Patterson v. Plummer, 95.

VARIANCE.

1. In an action against a carrier for the negligent killing of a horse, proof as to the termini of the transportation, varying materially from the allegations of the complaint in this regard, will be fatal to a recovery. Ausk v. Great Nor. Ry. Co., 215.

VENDOR AND PURCHASER. See Fraudulent Conveyances, 287; Sales, 95.

VERDICT. See Damages, 48; Evidence, 416-419.

1. A verdict for $800, damages, in an action for malicious prosecution, *held* to be not excessive. Merchant v. Pielke, 48.

2. In an action for damages where no damages are proved, a verdict may properly be directed for the defendant. Patterson v. Plummer, 95.

3. A verdict will not be set aside as contrary to the evidence where there is substantial evidence to sustain it. Flath v. Casselman, 419.

4. A verdict by direction of the court is erroneous and will be vacated where there is a substantial conflict in the evidence. Shepard v. Hanson, 194.

5. In reviewing an order of a trial court overruling or granting a motion for a new trial, where the motion is based entirely on the insufficiency of the evidence to sustain the verdict, the supreme court will only inquire whether there is evidence of a substantial character supporting the verdict. Flath v. Casselman, 419.

VESTED RIGHTS. See Constitutional Law, 123.

1. The limitation of the legislative authority to cure defects in tax proceedings is as well settled as is the general right of the legislature to enact curative laws, but the rights of parties who have become vested before the curative legislation takes effect cannot be interfered with in this manner. Dever v. Cornwell, 123.

VOTES AND VOTERS. See Elections, 132.

WAIVER. See Pleading, 352.

1. A wife holding title to a part of certain lands conveyed the remainder, being the homestead of herself and husband. *Held*, that as against the grantee she was not entitled to claim the deed was a mortgage, and that the homestead right was waived. McGuin v. Lee, 160.

2. Mechanic's lien claimants are, by statute, given priority over all other liens or incumbrances on the building, erection or other

WAIVER—Continued.

improvement to which the lien attaches. Plaintiff became the mortgagee of certain property during the erection of a building thereon. Later the mechanics foreclosed their lien, but in the foreclosure actions made no claim of priority and the judgments entered in each case established liens as of the date of the judgments, and directed a sale of the premises to satisfy the same. Defendants became purchasers of the premises at the sheriff's sale under the foreclosure proceedings. *Held*, that they acquired only the rights of the lien claimant as established by the judgment and not the rights he might have acquired had he asserted the priority to which he was entitled; hence, plaintiff's mortgage being prior to the date of the judgment, defendants lien was subordinate thereto. Bastian v. Barras, 29.

3. In a case where a counterclaim is interposed by the defendant in an action for possession of real estate, under § 6677, Rev. Codes, no damages nor rent being claimed, the right to object to the introduction of any evidence in support of such counterclaim is not waived by replying in place of demurring to such counterclaim. Vidger v. Nolin, 353.

4. A defendant accused, under § 5942, Rev. Codes, of contempt is entitled to have interrogatories filed specifying the facts and circumstances of the offense charged against him. His mere silence and failure to object to the proceedings upon the ground that none have been filed will not waive his statutory right. Twp. of Noble v. Aasen, 264.

5. A factor's lien is waived by a special agreement, such as an extension of time of payment beyond the period when the lien would naturally terminate; or by an intentional waiver, such as the acceptance of other security with intent to rely upon it exclusively or an agreement to look to the personal responsibility of the debtor. Rosenbaum v. Hayes, 311.

6. The burden of showing a waiver of the lien is on the party asserting it. Rosenbaum v. Hayes, 311.

WARRANTY. See Sales, 120.

1. Where ladies' gloves were sold under a special warranty that if they were not satisfactory, or if they ripped, they should be returned to the plaintiff, who would furnish new ones; and where the gloves proved unsatisfactory and ripped, but the defendant did not return them to plaintiff, *held*, that he could not counterclaim his damages in a suit for the purchase price because of his failure to return the gloves as stipulated in the warranty. James v. Bekkedahl, 120.

WITNESSES. See Evidence, 340.

1. The common law of evidence, requiring proof of the execution of written instruments to be made by the testimony of subscribing witnesses is no longer in force in this state. McManus v. Commow, 340.

2. In an action between a mortgagee and mortgagor, *held*, that it is not necessary to show that the execution of a chattel mortgage was witnessed. J. I. Case Threshing Machine Co. v. Olson, 170.

3. The provisions of § 13 of the Constitution, that no person shall be compelled in any criminal case to be a witness against himself,

WITNESSES—Continued.

will not protect a witness against the production of public records such as those required by § 7596, Rev. Codes, to be kept by a druggist having a permit to sell intoxicating liquors. State v. Donovan, 203.

4. In an action for breach of contract for refusal to accept a separator which defendant had agreed in writing to purchase, the answer not alleging fraud, duress or mistake in the execution of the contract, evidence by defendant of the circumstances under which he signed the contract was irrelevant and an objection thereto properly sustained. Minneapolis Thresh. Mach. Co. v. McDonald, 408.

5. In an action for damages for failure to accept goods sold, defendant was not competent to testify as to its value, no foundation being laid in the qualification of the witness. Minneapolis Thresh. Mach. Co. v. McDonald, 408.

6. The provisions of § 13 of the State Constitution, that no person shall be compelled in any criminal case to be a witness against himself, will shield a witness against the production of private books and papers, but that protection does not extend to public records such as those required to be kept by § 7596, Rev. Codes. State v. Donovan, 203.

7. The formality of witnessing the execution of a mortgage is not contemplated by the statute, except as a prerequisite to filing in order that may become constructive notice to incumbrancers or purchasers of the property mortgaged. J. I. Case Threshing Mach. Co. v. Olson, 170.

WOMEN.

1. In an election contest a finding that plaintiff had a majority of the votes cast on the official precinct return, and that she also had a majority on a count of the ballots of the only precinct in dispute, is sufficient to support a judgment declaring plaintiff elected and awarding to her the affice in dispute. Eakin v. Campbell, 416.

2. The wife is not the head of the family within the meaning of the exemption law, where her husband is living with her. Ness v. Jones, 591.

WORDS AND PHRASES.

1. A private individual is not an "institution" within the meaning of the revenue law. Engstad v. Grand Forks County, 54.

2. The word "head" as used in exemption statute referring to the head of a family is used in the singular and contemplates that but one person can be head of the family at a time. Ness v. Jones, 591.

3. The word "forthwith," as contained under § 5454a, Rev. Codes, means that the duty is to be performed promptly and with all convenient dispatch. Gunn v. Lauder, 393.

4. The use of the singular number where a plural should have been used, *held* not to destroy the legal effect of an acknowledgment. McCardia v. Billings, 373.

5. Where the statute required a publication of notice of tax sale to be made "once a week for three consecutive weeks preceding the sale," this language means that the publication must continue for and during three full weeks of seven days each, a total period of

WORDS AND PHRASES—Continued.

twenty-one days, preceding the sale. Dever v. Cornwell, 123.

6. "Residence," in the statute as to divorce, means "domicile." Smith v. Simth, 219.

7. The phrase "ordinary course of business" means according to the customs of commercial transactions. First Natl. Bank v. Flath, 285.

8. A creditor is one in whose favor an obligation exists by reason of which he is or may become entitled to the payment of money. Soley v. Aasen, 109.

9. The word "forthwith" as used in § 7, Ch. 42, Laws 1899, is directory. Pickton v. City of Fargo, 478.

10. The word "assignes" includes a junior mortgagee. Nichols v. Tingstad, 172.