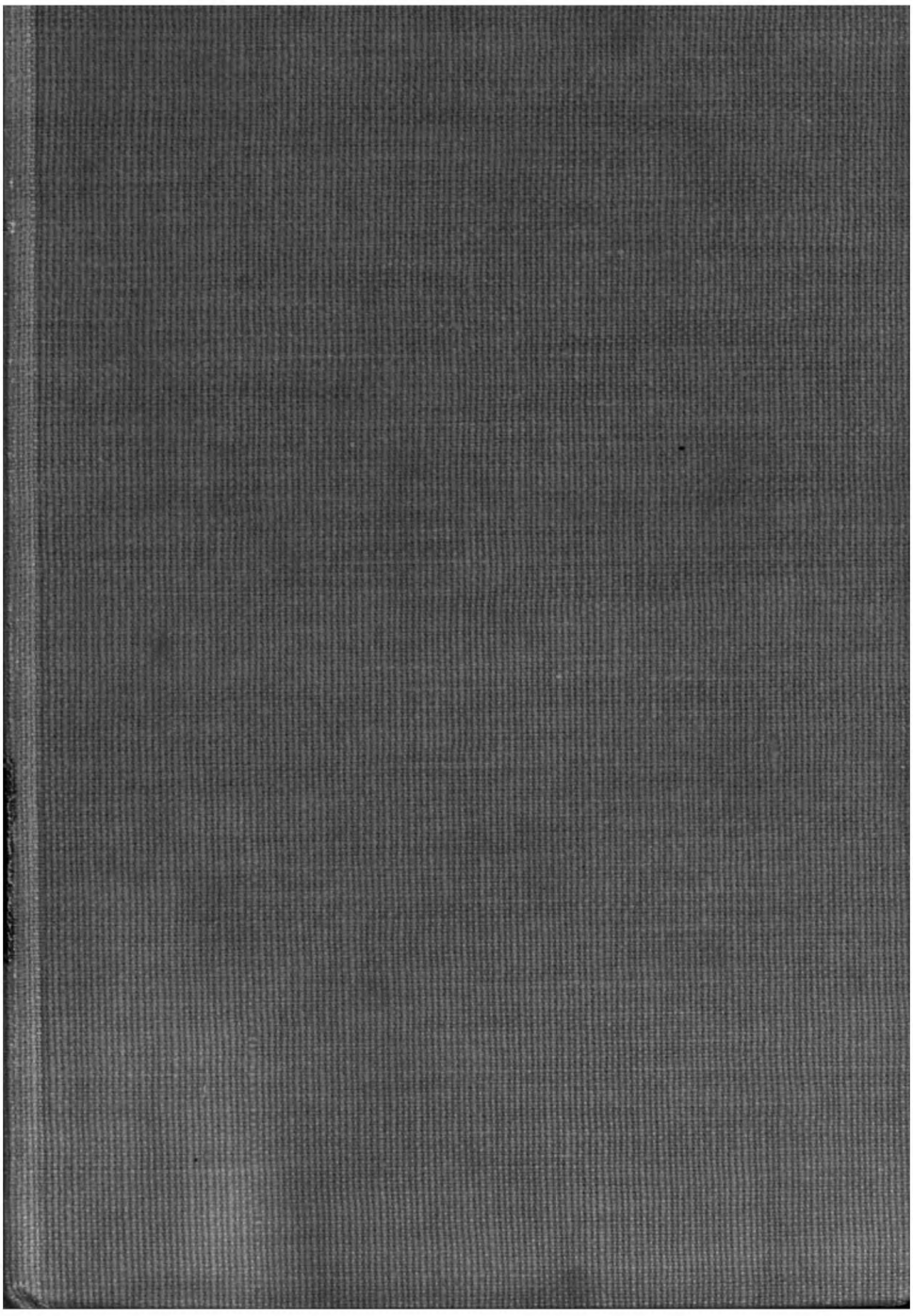

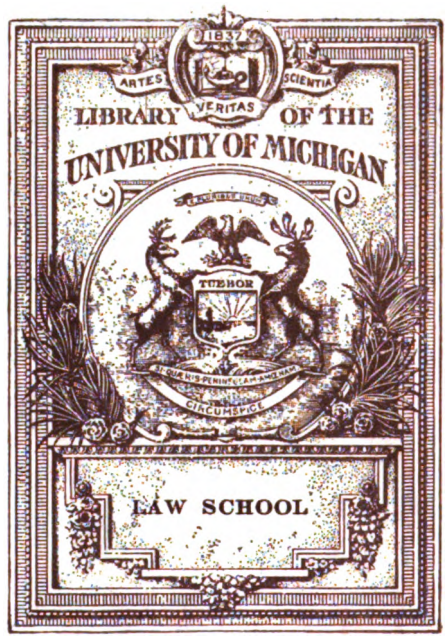

REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA,

FROM MARCH 3d, 1894
TO MARCH 20th, 1895.

Edited by JOHN M. COCHRANE, Reporter.

V

VOLUME 4

GRAND FORKS, N. D.:
HERALD, STATE PRINTERS AND BINDERS
1895

OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

HON. J. M. BARTHOLOMEW of Bismarck, Chief Justice.*

HON. ALFRED WALLIN of Fargo, and

HON. GUY C. H. CORLISS of Grand Forks, Judges.

R. D. HOSKINS, Bismarck, Clerk.

JOHN M. COCHRANE, Grand Forks, Reporter.

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* JUDGE WALLIN succeeded JUDGE BARTHOLOMEW as Chief Justice on the first Monday of December, 1894.

CONSTITUTION OF NORTH DAKOTA.

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

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

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH DAKOTA

JOHN W. JASPER *vs.* ARTHUR H. HAZEN.

Opinion filed March 3rd, 1894.

Findings of Fact—Review on Appeal.

Under § 25, Ch. 120, Laws 1891, this court is required, upon appeal, to review questions of fact in cases tried by the court or referee, when exceptions to the findings are duly taken and returned. But this court will not try the case *de novo*. The findings below are presumed to be correct. Appellant must show error, and a finding based upon parole evidence will not be disturbed unless the error be made clearly to appear.

Deed—Absolute in Form—When Proved a Mortgage.

To support a finding that a deed absolute on its face was intended as a mortgage only, the evidence must be clear, convincing, and satisfactory, and of such a character as will leave in the mind of the chancellor no hesitation or substantial doubt. In reviewing questions of fact upon appeal, in this class of cases, the same strict rule must be applied by the appellate court.

Evidence Sufficient to Sustain Finding.

Evidence in this case examined, and *held* sufficient to warrant the trial court in holding that a deed absolute in form was in fact given as security only.

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

Action by John W. Jasper against Arthur H. Hazen. Plaintiff had judgment, and defendant appeals.

Affirmed.

Benton & Amidon, (*Sumner Ladd* of counsel,) for appellant.

Equity ought to be extremely cautious in its consideration of parole testimony to show a deed in form a mortgage. *Andrews* v. *Ins. Co.*, 3 Mason (U. S.) 6. The evidence must be clear, convincing and equal in force to that upon which a deed will be reformed for mistake. *Kent* v. *Lasley*, 24 Wis. 654. A mere preponderance of proof is not sufficient. *Sloan* v. *Becker*, 34 Minn. 491; *McClellan* v. *Sanford*, 26 Wis. 595, 607. The burden rests upon the moving party of overcoming the strongest presumption arising from the terms of the written instrument. *Holland* v. *Blake*, 97 U. S. 624, *United States* v. *Maxwell Land Grant*, 121 U. S. 325, 381; *United States* v. *Budd*, 144 U. S. 154; *Meade* v. *Ins. Co.*, 64 N. Y. 453; *Ford* v. *Joyce*, 78 N. Y. 618; *Tufts* v. *Larned*, 27 Ia. 330; *Lynn* v. *Barkley*, 7 Ind. 69; *Stockbudge Iron Co.* v. *Hudson Iron Co.*, 102 Mass. 45; Story's Eq. Jur. § 157; 2 Pom. Eq. Jur. § 859. To convert a deed absolute on its face into a mortgage by parole testimony, such testimony must be clear and specific, of a character such as will leave on the mind of the court no hesitation or doubt. Lances Appeal, 112 Pa. St. 456; *Henley* v. *Hotaling*, 41 Cal. 22; *Tilden* v. *Streeter*, 45 Mich. 533; *Johnson* v. *Van Velsor*, 43 Mich. 208; *Kercheval* v. *Doughty*, 31 Wis. 476; *Townsend* v. *Peterson*, 21 Pac. Rep. 619; *Satterfield* v. *Malone*, 35 Fed. Rep. 445; *Munger* v. *Casey*, 17 At. Rep. 36; *Pierce* v. *Traver*, 13 Nev. 526.

M. A. Hildreth, (*Chas. A. Pollock*, of counsel,) for respondents.

The rule which excludes parole testimony to contradict or vary a written instrument has reference to the language used by the parties, it does not forbid an inquiry into the object of the parties in executing and receiving the instrument. *Brick* v. *Brick*, 98 U. S. 516; *Hughes* v. *Edwards*, 9 Wheat 489; *Pierce* v. *Robinson*, 13 Cal. 116. Parole evidence is admissable to show that an absolute conveyance is in fact a mortgage. Jones on Morts. § 285; *Russell* v. *Southard*, 12 How. 139; *Peugh* v. *Davis*, 96 U. S. 332; *Babcock* v. *Wyman*, 19 How. 289. The intention of the parties is the true test

to be gathered from the circumstances surrounding the transaction. *Pugh* v. *Davis*, 96 U. S. 332; *Montgomery* v. *Spect*, 55 Cal. 352. The findings were justified by the evidence. *McMillan* v. *Bissell*, 29 N. W. Rep. 737; *Allen* v. *Fogg*, 23 N. W. Rep. 643; *Manf. Bank* v. *Rugee*, 18 N. W. Rep. 251; *Madigan* v. *Meade*, 16 N. W. Rep. 539; *Rockwell* v. *Humphrey*, 15 N. W. Rep. 394; *Ingwald* v. *Atwood*, 5 N. W. Rep. 160; *Stark* v. *Redfield*, 9 N. W. Rep. 168; *Gay* v. *Hamilton*, 33 Cal. 686; *Raynor* v. *Lyons*, 37 Cal. 452; *Taylor* v. *McLain*, 64 Cal. 514.

BARTHOLOMEW, C. J. This case is before us for the third time. Upon the first appeal a verdict of a jury in respondent's favor was set aside upon the ground that the case should have been tried in equity, and not at law. The case is reported in 1 N. D. 75; 44 N. W. 1018, where a full statement of the issues is given, which need not be here repeated. The case was again reversed, on a question of pleading, in 2 N. D. 401; 51 N. W. 583. It comes before us again upon the merits, judgment for respondent having been entered below upon findings of fact and conclusions of law. These findings are somewhat extended, and every issue made by the pleadings is found in respondent's favor. It is claimed that many of these findings are not supported by the evidence. A reference to the pleadings, as set forth in the former opinion, discloses that the plaintiff, who is respondent here, sought to compel the appellant to account for the value of certain property, real and personal, which it was claimed appellent held as trustee, *ex maleficio*, for respondent, and which he had wrongfully converted to his own use. It will also appear that appellant held the real estate, for the value of which it was sought to compel him to account, by a deed absolute on its face, but which respondent insisted was in fact given to secure the performance of an act which had long since been performed. It is thus apparent that, in considering the evidence necessary to establish appellant's liability in this case, two somewhat different rules of law must be applied. Liability for the value of the personal property may be established under what we may term the "general rule," while liability for the value

of the real estate can only be fixed under the strict rule to be hereafter considered.

Speaking now only of the personal property, the rule that the findings of facts of a trial court, like the verdict of a jury, will not be disturbed by an appellate court when they have substantial support in the evidence, has been so often announced, and is so familiar to the profession, that no authorities need now be cited in its support. But § 5237, Comp. Laws, re-enacted as § 25, Ch. 120, Laws 1891, in speaking of the powers of the Supreme Court on appeal, says: "Any question of fact or of law decided upon trials by the court or by referee may be reviewed when exceptions to the findings of fact have been duly taken by either party and returned." To what extent this provision modifies or controls the general rule above announced is an interesting question that has never been directly passed upon by this court. Nor, so far as we can ascertain, was this provision ever construed by the Supreme Court of the late territory prior to its re-enactment by our state legislature. The provision was incorporated in the Laws of the Territory of Dakota in 1887; and *Waldron* v. *Railroad Co.*, 1 Dak. 351, 46 N. W. 456, and *Mining Co.* v. *Noonan*, 3 Dak. 189, 14 N. W. 426, both of which announce the general rule, were decided prior to that time. This same provision was enacted in Wisconsin in 1860. The first case arising thereunder was *Snyder* v. *Wright*, 13 Wis. 689. From that case, and from *Fisher* v. *Loan & Trust Co.*, 21 Wis. 73, and *Garbutt* v. *Bank*, 22 Wis. 384, it is quite clear that the Supreme Court of Wisconsin felt itself compelled to pass, to some extent at least, upon questions of fact, in cases of this character. The construction placed upon the statute by that court ought to be binding upon us, as we adopted the law after such construction. The difficulty lies in determining just how far that learned court intended to go. That the statute ingrafted a change upon the former practice is certain. To review is to re-examine judicially. Yet we are constrained to believe that the legislature did not intend a "trial *de novo*," in the usual acceptation of that term. It did not intend that this court should take up the parole evidence

as preserved in the bill of exceptions, and pass upon it without any reference to the decision below. Rather, it intended—and such, we think, is the effect of the Wisconsin decisions—that, when a finding of fact made by the trial court was brought into this court for review upon proper exceptions, it should come like a legal conclusion, with all the presumptions in favor of its correctness, and with the burden resting upon the party alleging error of demonstrating the existence of such error. He must be able to show this court that such finding is against the preponderance of the testimony, and where the finding is based upon parole evidence, it will not be disturbed, unless clearly and unquestionably opposed to the preponderance of the testimony. *Randall* v. *Burk Tp.*, (S. D.) 57 N. W. 4. Of the probative force and value of depositions and documentary evidence, this court may be in as good situation to determine as the trial court; and when the finding is based upon this character of evidence, and it reasonably appears to this court, upon a full examination thereof, that the finding is against the weight of the evidence, we think it would be our duty, under the statute, to disturb the finding. But every practitioner of extended experience knows how absolutely essential it is, in order to ascertain the truth from parole evidence, that the tribunal who is to pass upon the evidence should see the witness upon the stand. The printed page containing the evidence gives, oftentimes, a radically different impression from that made at the hearing. The opportunity of observing the witnesses, and their interest or lack of interest in the case, their prejudices and passions, their mental capacities and powers of observation and memory, and the use they have made of these powers, their entire deportment on the stand, and conduct under cross-examination,—these and many other circumstances that attend personal observation,—are undoubted auxiliaries in ascertaining truth. Of all these helps this court is deprived, while the trial court possesses them fully. It is obvious that, if these things be disregarded, mistakes will be made, and injustice be done. As the finding of fact based upon parole evidence comes to us with all

presumptions in favor of its correctness, we must, in reaching our conclusions, throw into the balance in support of the finding, not only the full effect of the printed evidence in the bill of exceptions, but also the full effect of the inferences and impressions that might reasonably and legitimately be drawn from personal observation of the witnesses; and it is only when the scales unmistakably incline the other way, when the finding is thus weighed, that we are warranted in disturbing it. Applying these principles to the evidence in this case bearing upon appellant's liability for the value of the personal property, and it becomes so clear that the findings cannot be disturbed that it would be a waste of time to analyze the testimony.'

More difficult questions confront us when we turn to the other branch of the case, and apply a different rule of law to the evidence. As already stated, appellant's liability for the value of the realty depends upon whether or not a deed absolute on its face was intended to operate as such, or as security only. The rule which admits parole testimony to show that a deed absolute in terms was in fact intended only as security for the performance of some act is too well established to require authorities in its support. Nor do learned counsel in this case greatly differ as to the character and quantity of proof required in such cases. The presumption that an instrument executed with the formality of a deed, or a contract deliberately entered into, expresses on its face its true intent and purpose, is so persuasive that he who would establish the contrary must go far beyond the ordinary rule of preponderance. To demand less would be to lose sight of this presumption, which is one of the strongest disputable presumptions known to the law. 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, specific, satisfactory, and of such a character as to leave in the mind of the chancellor no hesitation or substantial doubt. *Eames* v. *Hardin*, 111 Ill. 634; *Gassert* v. *Bogk*, (Mont.) 19 Pac. 281, affirmed in 149 U. S. 17, 13 Sup. Ct. 738; *Locke* v. *Moulton*, 96 Cal.

21; 30 Pac. 957; *Ensminger* v. *Ensminger*, 75 Iowa, 89, 39 N. W. 208; *Howland* v. *Blake*, 97 U. S. 624; *Kent* v. *Lasley*, 24 Wis. 654. But while counsel agree, practically, that the strict rule thus announced must be applied by the trial court, they disagree entirely as to the rule that should be applied in this court. Counsel, at the request of the court, have filed supplemental briefs upon this question, the great value of which, and the aid that we have received therefrom, we desire here to acknowledge. The statute we have already considered has no direct bearing upon this question, except so far as it requires us to pass, to any extent, upon the weight of testimony. Having once decided that it is our duty to review the evidence, as already indicated, then, whether we apply the rule that requires a mere preponderance, or the rule that requires that clear and convincing testimony that leaves no substantial doubt, is left untouched by the statute.

Respondent contends—and his first proposition is correct—that the case comes to this court with the presumption that chancellor applied the proper rule at the trial. He then argues that this court ought not to attempt to control the conscience of the chancellor, and ought not to say that he was not convinced, or ought not to have been convinced, beyond any substantial doubt, by a certain amount of admittedly competent evidence, when he himself says he was so convinced, and that if he was so convinced the rule was met, and the findings should stand, unless reversible under the general rule that they are against the clear weight of the testimony. The position is not without plausibility. It has the support of the eminent Supreme Court of California. *Brison* v. *Brison*, 90 Cal. 323, 334, 27 Pac. 186; *Mahoney* v. *Bostwick*, 96 Cal. 53, 58, 30 Pac. 1020, and *Penney* v. *Simmons*, (Cal.) 33 Pac. 1121. Possibly, such is the rule in Texas. See *Ullmann* v. *Jasper*, 70 Tex. 446, 7 S. W. 763. The case of *Ensign* v. *Ensign*, 120 N. Y. 655, 24 N. E. 942, is cited by respondent, but does not support his contention, as an examination of the case and of the New York statute will disclose. Section 1337, N. Y. Code Civ. Proc. 1876, in defining the power of the court of appeals in cases taken

to that court on appeal, among other provisions, contains the following: "Except that a question of fact arising upon conflicting evidence cannot be determined upon such appeal unless when special provision for the determination thereof is made by law." And the next section provides for a review upon the facts in the court of appeals, when the general term of the Supreme Court has reversed, upon questions of fact, a judgment entered upon the report of a referee, or upon the decision of a court without a jury. And *In re Ross*, 87 N. Y. 514, where these statutes are fully explained, Judge Earle says that this latter provision is the only one giving the court of appeals power to review questions of fact depending upon conflicting evidence. This statement renders the language in *Ensign* v. *Ensign* readily understood, where the court says: "The referee's determination of the issue having been affirmed by the general term, this court cannot reverse, if there is any evidence tending to sustain the finding of fact on which the judgment rests." *Van Tuyl* v. *Insurance Co.*, 67 Barb. 72, cited by respondent, fairly supports his position. That was a case of reformation of contract. The statement is bald, and there is no discussion of the question. In the much later case of *Erwin* v. *Curtis*, 43 Hun. 292, the general term of the court discusses the point briefly. That was a case brought to declare a quit-claim deed to be a mortgage. The court cites the authorities which hold that the parole evidence, in such case, must be "clear, satisfactory, and convincing," and also the authorities which require the "triors of fact in civil cases to give a verdict to the party in whose favor the evidence preponderates." The court then says: "It is necessary for us, in reviewing the question of fact, as to whether this deed was proven to be a mortgage, to determine the rule governing us, and we hold it to be as stated in," etc., (naming the cases that announce the strict rule.) And the court adds: "With this conclusion in mind we have carefully examined the evidence bearing on the question, and all the circumstances surrounding the parties and the transaction, and we cannot say that there was error committed in the finding below." It is clear,

in this case, that the appellate court adopted for its own guidance, and enforced, the strict rule. In the California cases there is no discussion of the point we are considering. The court simply announces, in general terms, that it will apply the same rule of law to these exceptional cases that is applied to cases generally, and that, sitting as a court for the correction of errors of law, it will not disturb a finding which declares a deed absolute to be a mortgage, if such finding has any substantial support in the testimony. Nor do we find the question discussed anywhere, except the brief discussion in 43 Hun. But we do find in the courts of last resort in many of the states, and in the Federal Supreme Court, the strict rule has been unquestioningly adopted and enforced. We find courts saying, in this class of cases, that, if they could be governed by the preponderance of the testimony, their ruling would be in one direction, but as the law requires the evidence to be clear, convincing, and satisfactory, beyond substantial doubt, they are compelled to rule in the other direction. We find other cases where the trial court has held that a deed absolute on its face was not intended as a mortgage, and the appellate court says that the clear, convincing, and satisfactory evidence shows that it was so intended, and reverses the finding. Some of the cases cited below, as will be seen by inspection, come from states where the appellate court sits as a court for the correction of errors of law; only, in all appeal cases, and where the holding would seem to lead directly to the conclusion that, where the law requires a specific character of evidence to warrant a particular finding, to make such finding in the absence of such character of evidence was as much an error of law as to make a finding in an ordinary case supported by no substantial evidence. We cite the following cases, in all of which the strict rule has, in effect, been applied in the appellate court: *Howland* v. *Blake*, 97 U. S. 624; *Coyle* v. *Davis*, 116 U. S. 108, 6 Sup. Ct. 314; *Cadman* v. *Peter*, 118 U. S. 73, 6 Sup. Ct. 957; *Nevius* v. *Dunlap*, 33 N. Y. 676; *Devereux* v. *Sun Fire Office*, 51 Hun. 147, 4 N. Y. Supp. 655; *Case* v. *Peters*, 20 Mich. 298; *Vary* v. *Shea*, 36 Mich. 388; *Tilden* v. *Streeter*, 45

Mich. 533, 8 N. W. 502; *Reynolds* v. *Campbell*, 45 Mich. 529, 8 N. W. 581; *McMillan* v. *Bissell*, 63 Mich. 66, 29 N. W. 737; *Low* v. *Graff*, 80 Ill. 360; *Bartling* v. *Brasuhn*, 102 Ill. 441; *Newton* v. *Holley*, 6 Wis. 592; *Lake* v. *Meacham*, 13 Wis. 396; *Kercheval* v. *Doty*, 31 Wis. 477; *Harter* v. *Christoph*, 32 Wis. 246; *Lavassar* v. *Washburne*, 50 Wis. 200, 6 N. W. 516; *Meiswinkel* v. *Insurance Co.*, 75 Wis. 147, 43 N. W. 669; *Pancake* v. *Cauffman*, 114 Pa. St. 113, 7 Atl. 67; *McCall* v. *Bushnell*, 41 Minn. 37, 42 N. W. 545; *Bingham* v. *Thompson*, 4 Nev. 224.

We think these cases have gone upon the correct theory. It will not do to say that the strict rule is for the guidance of the trial court only. It is safe to say that there will always in this class of cases, be some evidence to support the plaintiff's claim, If, then, when the case reaches this court, we are conclusively bound to say that the chancellor correctly applied the strict rule of law, that fact requires us to say that the evidence conforms to the findings, and not the findings to the evidence. Moreover, it is this strict rule of law upon which the titles to real estate rest for protection. Remove it, and few titles would be secure. He whose title is assailed in this manner invokes the rule in his defense; and, if that rule is to be applied only in the trial court, then, in case of defeat, he can never bring his case to this court, because at the threshold, he must abandon the very essence of his defense. We think such a holding would, in effect, abrogate the rule. Trial courts, however learned and conscientious, are just as liable to make mistakes upon this point as upon others. We must be governed, in considering this branch of the case, by the rule that requires the evidence to be clear, convincing, and satisfactory. But, in applying this rule, we must be controlled by the same principles that control in applying the general rule. The case comes to us with the presumption in favor of the legality and correctness of the findings. Appellant must establish error, and, where a finding is based upon parole evidence, its error must clearly and unquestionably appear, or it will not be disturbed. This disposes of all preliminary questions, and leaves only the

consideration of the evidence bearing upon appellant's liability for the value of the realty.

What is the character of the proof in this case? At the time of the transaction, the respondent was a farmer, and a man of limited attainments; a German by birth; unable to read writing with accuracy, and unable to write, in English more than his name. Appellant was an energetic, experienced business man. He was an officer in a money loaning corporation, and, as such, had loaned respondent money, and taken a mortgage to secure the same on the land in controversy. It does not appear that the parties had been otherwise connected in business. On or prior to said March 20, 1885, respondent was arrested, charged with a felony. His preliminary hearing before the magistrate had been fixed for the subsequent day, and the respondent had been required to give a bail bond in the sum of $500 for his appearance. Under these circumstances, respondent applied to appellant to sign the bail bond as surety. The bond was signed by appellant, and the deed in question was executed. Respondent says the deed was executed to secure appellant against the liability of the bond. Appellant says it was a sale absolute, the consideration therefor ($500) to be retained by him until relieved from liability on the bond. It will be convenient to recite here that respondent appeared before the magistrate as required by the bond, and upon his preliminary hearing he was bound over to appear at the next term of the district court, and his bail fixed at $1,500 which he was unable to procure; and he remained in the county jail until in June following, when he was indicted, tried, convicted, and sentenced to a term in the state penitentiary, from which he was released in the spring of 1888. The evidence is presented in the abstract at great length, and, as was our duty, we have studied it carefully; and it is necessary to refer at some length to the portion thereof which bears directly upon the question of the character of this instrument. When Jasper first went to Hazen's office, on March 20, 1885, he was accompanied by one Ames, a deputy sheriff, who had him in charge. There was also present

one Clement, who was also an officer in the same corporation with Hazen. It is undisputed that at this first interview nothing was said about an absolute conveyance or a purchase. Jasper offered security, and was asked what security he could give. After Jasper stated the security, Mr. Hazen declined to accept it or to sign the bond, whereupon Jasper and the officer started for the jail. When they had gone about one block, Hazen called them back. Here we meet the first really materially conflict in the testimony. Jasper says that upon their return they went into the office, and Hazen stated that he had concluded to go on the bond provided he (Jasper) would give him a deed of his farm as security, and that he would cancel the deed if Jasper appeared for preliminary examination, and that after a short conversation this was agreed to, and the deed executed. He positively denies that there was any conversation had or contract made on the sidewalk before they entered the office. Hazen swears that when they returned, after starting for the jail, he told the officer that he wanted to see Mr. Jasper, and thereupon the officer withdrew to the distance of 25 or 30 feet, and that he then held a conversation with Jasper upon the sidewalk, and which no one else heard, wherein he offered to sign the bail bond provided Jasper would sell him the farm for $500 over and above the incumbrance thereon; that Jasper agreed thereto and thereupon they went into the office, and the deed was drawn. The officer, Mr. Ames, testified by deposition in this case for both parties. In the deposition taken on behalf of respondent, he says: "I am a messenger of the Northern Pacific Express Company. In the spring of 1885 I was deputy sheriff, and plaintiff was in my custody upon the charge of grand larceny. I accompanied him to the office of defendant, and was present and heard the conversation between them. Mr. Jasper asked Mr. Hazen to go on his bond for his appearance at the preliminary examination to be had before the justice of the peace. Hazen asked him what security he could give, and Jasper replied he could give him his farm as security, and his personal property. Hazen at first said he could not do

it; it was not security enough. I think we then started out for the jail, and had gone nearly a block, when Hazen called us back. He then told Jasper he had concluded to help him, if he would give him a deed of his farm, and a bill of sale of his personal property. We then went into Hazen's office, and Hazen drew up a deed. My understanding was that Jasper gave the deed to secure Hazen for going on his bail bond. To the best of my recolection, Hazen was to deed back the property to Jasper on his appearance for his examination. I could not state the conversation which took place at the time the deed was made out and signed by Jasper without reading it. I understood the deed was given simply as security for Jasper's appearance." In the deposition taken in behalf of appellant, he says: "My impression was that Hazen was to hold the land as security for the bail, but, of course, I cannot say positively. The conversation in the office was very short. I don't think it lasted over ten minutes. * * * I paid no particular attention. I was simply a disinterested listener." This evidence, taken together, shows the witness to be entirely disinterested, and speaks about as positively as to the purpose for which the instrument was executed as any honest man testifying six years after the occurrence, to a matter resting entirely in parole, would care to speak. One Davidson, a witness for respondent, who had charge of respondent's personal property that was subsequently turned over to appellant, testified that, when appellant presented the order for said property, he stated that he had leased the Jasper farm. This appellant denies. Mr. Clement, for appellant, testified that he was present, in one room or the other, in the office, while Mr. Jasper was there, and that he did not hear of any such contract made as that to which Jasper testified. He testified that, personally he did not know what the deal between the parties was. This is all the direct testimony bearing upon the point, and it tends strongly to establish the fact that the instrument was given as security.

There are, however, certain circumstances that greatly strengthen respondent's case: *First*, we notice the great discrepancy

between the value of the property and the alleged consideration. This circumstance, while not sufficient in itself to convert a deed absolute into a mortgage, is nevertheless entitled to much consideration. The trial court found this land to be worth $1,880 above the incumbrances thereon, and the finding has fair support in the evidence. It is true there is a conflict upon this point, but it is perfectly clear that Jasper considered the land worth at least $2,000 above the incumbrances. If we wish to properly understand Jasper's intention, we must view the transaction from his standpoint. This bond was for his appearance at the preliminary examination. It was given on March 20th. The examination was set for the 21st, and was actually held on the 22d. Now, it is scarcely conceivable that a man in Jasper's financial condition, having little else on earth, should sell property of the value of $2,000 for the sum of $500 simply to avoid one day's confinement in the county jail. Again, Hazen testifies that, for a portion of this consideration, he subsequently gave Jasper his promissory note for $225, maturing the 1st of November, 1885. Jasper denies any such transaction. Hazen admits that he has never paid the note, that it has never been presented for payment, and that he has never heard from it, in any form whatever. This circumstance has its significance. Very soon after Jasper reached the penitentiary, he caused a letter to be written to Mr. Hazen, asking about his business generally; how the crops were looking upon the farm, etc. In the fall following he caused another letter to be written to Mr. Hazen, in which he asked what kind of a crop had been raised, and whether it was sufficient to meet the incumbrance, and requesting that, if necessary, personal property be sold to save the farm, as he wanted a home when he came back, etc. Mr. Hazen admits that he received these letters, and says: "The letters showed, distinctively, that he treated the matter as if I was running the farm for him, in substance as he claims now." No answer whatever was ever made to either letter. It would be most unusual, most unprecedented presumption, for a man in Jasper's condition, and of his business experience, to thus boldly,

and without a word of explanation, excuse or extenuation, to assume the existence of certain conditions and circumstances which he knew did not exist, and which he knew that the party to whom he was writing also knew did not exist. It was also unusual for the man who received those letters to permit those statements, so important and vital, to stand unchallenged. It is not to be presumed that Mr. Hazen, during all those years, would have suffered Mr. Jasper to rest in the belief that he (Hazen) was running the farm for his (Jasper's) benefit, and that Jasper would have a home to which to return upon his release, if such were not the fact. Upon appellant's theory of the case, his silence becomes as inexplicable as respondent's presumption. Another circumstance of weight is the fact that, soon after his preliminary examination, Jasper executed and delivered to his neighbor, Davidson, who had charge of his personal property, a lease of the farm for that year. The lease was drawn by Jasper's attorney, and its execution is undisputed. It is true that Jasper subsequently made an arrangement with Hazen, by which Hazen was to have charge of the farm during Jasper's incarceration, and Jasper gave Hazen a written order on Davidson for the personal property, which Davidson delivered on demand, and it does not appear that he insisted upon the lease. But there is nothing whatever to indicate that the lease was not executed in perfect good faith. This was an overt act, committed a few days after the transaction which Hazen claims was a sale, by which Jasper notified Hazen, in no uncertain terms, that he still claimed to be the owner of the land. Nothing could be more inconsistent with the idea of a sale. It must be noticed, too, that if this transaction was a sale, as appellant claims, the whole contract was consummated within five minutes from the time an absolute sale was first mentioned, and appellant purchased a farm at the beginning of seeding time, with the building thereon filled with the personal effects, grain and feed belonging to respondent, and no arrangement whatever was made for removing respondent's property, and no time mentioned for delivering possession of the farm. This would be a very unusual course of business.

But there is one circumstance in the case that we were at first strongly inclined to think lent support to appellant's position. It is this: On the 23rd day of March, 1885,—the day after the preliminary examination, and while in jail,—respondent signed an order on appellant, in favor of his attorneys, in the following form: "Fargo, D. T., March 23rd, 1885. A. H. Hazen: Pay to the order of Barnett & McEldowney one hundred dollars from the purchase price of the north-east quarter Sec. 32, Tp. 143, range 50." The trial court finds that, when respondent signed the order, he did not know that the words, "from the purchase price," etc., were contained in it. But we did not really understand why respondent signed an order upon appellannt on any account, unless he supposed he had funds in appellant's hands, and there is no suggestion of any source from which such funds could come, except as the purchase price of the land. On consideration, we doubt there being any force in the point. The order was not drawn at the suggestion, request, or with the knowledge of respondent. It was draw by appellant himself, and given to the attorneys, with the statement, in effect, that he would pay the money on it. The attorneys presented it to respondent, with a similar statement. Respondent was in jail, awaiting indictment for a felony. He could not procure bail, and was without money. To a certain extent, he was bound down. Naturally, he was very anxious to receive the best services of his attorneys, and, to that end, anxious to meet their requirements for fees. The opportunity was presented to him, and, if he stopped to think of the motives that influenced appellant, (which is doubtful,) he might not unreasonably conclude that since appellant had the deed in his possession, which he could refuse to return until his advances were repaid, therefore he had concluded to lend aid to that extent, appellant having already refused to go upon the enlarged bail bond. The trial court finds that this order was used by the appellant fraudulently, and with intent to cheat and defraud respondent out of his land. There is a basis for this finding. The form of the order is unique. It suggests a studied design to accomplish some object. If appellant's intention was, from the first, to defraud respondent, it can

readily be seen that this order was a most adroit instrument, and, of all others, most likely to prove effective. As a probative document, the order is two-edged, and the least that can be said is that appellant is not in position to claim anything from it. It will thus be seen that there was much in the testimony and in the surrounding facts and circumstances to corroborate Mr. Jasper. There was little or nothing in the testimony or the surrounding facts and circumstances to corroborate Mr. Hazen. The principals to the transaction, with equal means of knowledge, testified in direct opposition, and with a fullness of detail that precludes all idea of mistake or defective memory. Ingenuity cannot reconcile their testimony, and the broad mantle of charity cannot conceal the fact that one or the other was willfully falsifying. It became the delicate but imperative duty of the chancellor to say which. His decision in favor of either party necessarily threw the opprobrium upon the other. By his finding he has said appellant's testimony was not entitled to credence. In view of his superior advantages in personal observation of the witnesses, and in view of the probability or improbability of their respective stories, can we say the chancellor erred in so holding? Clearly not. When appellant's testimony is disregarded, the defense is without support, and falls to the ground. Upon full consideration of all the testimony bearing upon this branch of the case, we are agreed that the evidence was sufficiently clear, convincing, and satisfactory to fully warrant the findings of the chancellor.

Judgment affirmed. All concur.

(58 N. W. Rep. 454.)

NOTE—Questions of fact will not be tried *de novo* in the Supreme Court. *Klein* v. *Valerius*, 57 N. W. Rep. 1112, S. C. 22, L. R. A. 609.

WM. C. MCGLYNN *vs.* D. B. SCOTT.

Opinion filed February 19th, 1894.

Compromise of Controversy—Consideration of Note.

A compromise of a bona fide controversy constitutes a good consideration for a promise, and such consideration cannot be destroyed by showing that the promisee in fact had no claim. But the parties must act in good faith; and therefore, if one party has no claim, and knows it, the settlement of the unfounded claim he makes will not constitute a sufficient consideration to support a promise to pay him money upon such settlement.

Whether Claim Made—Must be Colorable.

Whether the claim made must not be at least colorable, or whether the promisee must not have reasonable ground for believing it valid, is not decided in this case.

Evidence—Insufficient to Sustain Verdict by Direction of Court.

Evidence examined, and found insufficient to show that a compromise was intended to be made, or that the dispute between the parties was in fact finally settled.

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

Action on a promissory note by William C. McGlynn against D. B. Scott. Plaintiff had judgment, and defendant appeals. Reversed.

George W. Parks, for appellant.

F. S. Parker, for respondent.

CORLISS, J. The plaintiff having recovered judgment against the defendant upon a promissory note, the defendant appeals. The judgment is based upon a verdict which the court directed the jury to find in favor of the plaintiff. One of the defenses to the note relied upon in the trial court was want of consideration. It is the only defense which merits our attention. The facts of this controversy are few and simple. Plaintiff and a man named Densmore were co-partners in the business of selling farm machinery. Some time in the month of August, 1890, a Mr. Thompson purchased a separator of the plaintiff McGlynn and Densmore. According to his testimony, he was to pay $550, and no more, for

the machine laid down at Ellendale, N. D. When the machine arrived, Mr. Thompson, after assisting in removing it from the cars, went with McGlynn to the hotel in the village, and gave his promissory notes for the machine, and also a chattel mortgage to secure these notes. After this had been done, Mr. McGlynn, for the first time during the settlement, informed Mr. Thompson that he wanted Mr. Thompson to pay $41.50 freight. This Mr. Thompson refused to do, saying that he had nothing to do with the freight, and then the parties separated without further controversy about the matter. Mr. McGlynn does not appear to have urged his claim with much force after Mr. Thompson refused to recognize it. Subsequently, Scott, the defendant, who was in the employ of Thompson as foreman, came to the village, and, having hitched his team to the separator, started to take it away under instruction from Thompson. After proceeding a short distance, McGlynn overtook him, and, after getting on the machine, informed Scott that he could not take the machine until the freight was settled for; that he (Scott) was not man enough to take the machine unless the freight was settled for. Scott, evidently impressed with the truth of McGlynn's assertion of superior strength, yielded to the demand, and gave the note in suit for the alleged claim for freight, protesting, all the while, that he knew nothing about the matter; that there was nothing due from him to McGlynn; and that it was a matter for Mr. Thompson to settle. There are only two grounds on which this note can be sustained as being based upon a sufficient consideration. Scott himself owed no debt, and received no value on the execution and delivery of the note. But it was strenuously urged before us that there was a compromise of a disputed claim, and that for this compromise this note was given. In this connection, the counsel for respondent invokes a familiar rule of law. A compromise of a dispute between two persons constitutes a good consideration for the promise of either party to pay a sum of money as the result of that compromise. If there is a bona fide controversy, and the claim of the party to whom the promise to

pay is given is not utterly without foundation, but is colorable, the promise to pay will not be defeated by showing that the claim was in fact a claim which could not have been sustained. But to make out a case of compromise, in order to furnish consideration for a promise which has no other consideration, two things are necessary. There must have been a bona fide controversy, and both parties must have intended to finally settle it by the agreement they enter into. Let us assume, at first, that there was such a controversy. The next inquiry is whether the parties intended to settle it forever when the note in question was given. It is clear that McGlynn did not intend that the question whether he was entitled to freight should be settled by Scott, who knew nothing of the transaction personally, and could not be in a position to determine the question of right between McGlynn and Thompson. That McGlynn did not regard the transaction as the compromise and final adjustment of his claim for the freight is apparent from his testimony before the justice of the peace when the case was originally tried in that court. It was tried in the District Court on appeal from the judgment of a justice of the peace. In the District Court McGlynn was not sworn as a witness. Before the justice of the peace he swore that there was no consideration for the note except the freight he claimed due. He thus distinctly repudiated the idea that the note was taken in way of compromise, or for any other consideration than his claim for the freight, resting his right to recover upon it solely on the validity of that claim. Nor is it possible to believe that Scott, who had no personal knowledge of the matter, would undertake to compromise this matter,—to settle this dispute. His testimony clearly shows that a final adjustment of the controversy was furthest from his thoughts. He says that he protested to McGlynn against being compelled to give his note to get the machine, and in the same breath informed McGlynn that there was nothing due from him, and that the matter was one for Thompson, and not for himself, to settle. What he gave his note for was to get or keep possession of the machine, which McGlynn

was threatening to withhold or take from him by force. He had no purpose deliberately to compromise this disputed claim, of the validity of which he had no personal knowledge, and McGlynn understood that Scott was not compromising this dispute. He was content to stand on the validity of his claim for freight as a consideration for the note. Not only does the case fail to show that the parties intended to compromise this controversy, but it also fails to show that there was, in fact, any settlement of the dispute.

This point brings us to a consideration of the foundation of the validity of a promise which is the culmination of the settlement of a controversy. On what ground can such a promise be sustained? Surely not on the ground that a right has been surrendered, for the rule is well settled that where there is a bona fide controversy, and the claim settled is colorable, the consideration for the promise cannot be destroyed by showing that there was in fact no validity to the claim which was made. It would be illogical to assert that such a promise rests for its consideration upon a surrendered right, and at the same time preclude all inquiry into the question whether, as a matter of fact, a valuable right has been surrendered. The true consideration is the settlement. All litigation is injurious to society. A portion of human energy is absorbed by the friction of legal strife, and so much power is thus exhausted which might otherwise be diverted into other channels. Struggles for victory in the courts engender more or less enmity. Time is consumed, and money is expanded, which would, in the absence of such litigation, be employed for other purposes and in other ways. It is elementary that the courts look with the highest favor upon every honest adjustment of private differences. "With the courts of this country, the prevention of litigation is not only a sufficient, but a highly favored, consideration." 1 Pars. Cont. p. 438. To encourage the settlements by private agreement of controversies, and to discourage, as far as possible, a resort to the regular tribunals, the courts have resorted to this fiction; that the settlement of an honest dispute

constitutes a good consideration for a promise to pay. As a matter of fact, there may be no consideration, so far as the parties themselves are concerned, and yet the compromise will be held to be sufficient to support the promise. The person to whom the promise is made may in fact never have had a legal claim. The person who makes it may never have owed a dollar. In such a case there is, in fact, no consideration between the parties. The promisor is not benefited, and the promisee is not injured, by the compromise. The reverse is the case. The promisee is benefitted, and the promisor is injured by it. Escaping the expense of litigation would not constitute a consideration sufficient to bind the promisor. Such a doctrine would support a promise to pay in order to avoid vexation and expense from suit upon a claim which the promisee knew was utterly without foundation, and which he had presented in bad faith.

A final analysis of the question brings one to the conclusion that the only consideration for the promise in such cases is the settlement, and that this is not a consideration between the parties themselves, within the ordinary rules regulating the sufficiency of consideration to support promises, but is a fiction resorted to by the law to sustain such compromises because public policy demands their encouragement. Of course, cases may arise where other consideration to sustain the compromise may be shown; but most compromises have been upheld on no other ground than the single one of the settlement of an honest dispute, against the attempt which has been made, time and again, to show that the claim of the promisee was not valid. Said the court in *De Mars* v. *Manufacturing Co.*, (Minn.) 35 N. W. 1: "The real conderation which each party receives under a compromise is not the sacrifice of the right, but the settlement of the dispute." In *Kercheval* v. *Doty*, 31 Wis. 476, 484, Chief Justice Dixon places the binding force of compromise upon the same ground. Speaking for the court, he says: "It is not the policy of the law to stir up the embers, or to rekindle, or allow to be rekindled, the fires of past strifes and controversies, the flames of which have once been

extinguished or the burning quenched by reconciliation and compact between the parties. The law loves peace, and hates dissentions and turmoils and litigations, and all its policy and maxims are against their being revived and unnecessarily prolonged." The true consideration for the promise which springs from a settlement being the foreclosure of strife over the matters attempted to be compromised, it follows that there is no consideration for the promise when the agreement does not result in finally precluding all controversy touching the issues in dispute. The talk between McGlynn and Scott, and the giving and the acceptance of the note, settled nothing between McGlynn and Thompson. He was not present. Scott was not authorized to act for him, nor did he assume to represent Thompson in the transaction. McGlynn in no manner expressed or disclosed any purpose to release Thompson from his alleged liability for the freight paid. Nor did he in fact discharge him. Should he recover judgment against the defendant, and be unable to collect it, there would be nothing to prevent him from suing Thompson for the freight. In that event, the whole question, would be open to litigation. There would be no compromise binding on Thompson, therefore he could should that he was under no obligation to pay the freight. Again, if defendant in this action should be held liable, and should sue Thompson for reimbursement, the latter could litigate the whole question of his liability for the freight; for, defendant not having been authorized, so far as this record discloses, to settle the matter, he could hold Thompson responsible for the money paid only on establishing the fact (which Thompson might controvert) that Thompson was under obligations to pay McGlynn the freight. Even if these considerations were not controlling, yet it is clear that, under the evidence, the court should have submitted to the jury the question of good faith of McGlynn and Densmore in making this claim for freight. The only controversy which it is pretended existed between the parties is with respect to the liability of Thompson for the freight under his contract. If McGlynn and Densmore had no valid

claim for freight, and knew it, but made such claim in bad faith, and for the purpose of extorting a settlement from Scott, then the note would be without consideration, even if we shall assume that the parties intended to, and did, compromise the dispute by an agreement which was in other respects valid. It is one of the essential elements of a compromise, when sought to be used as a consideration for a promise, that it should be the compromise of an actual controversy. There must be an honest difference between the parties. Knowledge, on the part of the person who prefers a fictitious claim, that it is utterly without foundation, is fatal to the existence of a bona fide dispute. "To support a compromise there should be a doubtful, bona fide claim, about which the parties stand on an equal footing as to knowledge or ignorance of facts, and in settling it there should be no imposition or deceit. That is no compromise where one party knows he has no claim, but deceives the other party into believing he has one. * * * If one has no claim, and knows it, he is not conceding in a compromise; he is cheating. He has nothing to concede, and his only chance in the doubtful issue is that possibly his fraud may prevail." *Anthony* v. *Boyd*, (R. I.) 8 Atl. 701. In *De Mars* v. *Manufacturing Co.*, (Minn.) 35 N. W. 1, the court said: "But, on the other hand, it is equally true that to constitute a good consideration for a settlement by way of compromise there must have been an actual, bona fide difference or dispute between the parties as to their rights." In *Smith* v. *Farra*, (Or.) 28 Pac. 241, the court said: "It is not every disputed claim, however which will support a compromise, but it must be a claim honestly and in good faith asserted, concerning which the parties may bona fide, and upon reasonable grounds, disagree." No case can be found which has ever questioned this fundamental and just rule. See, on the same point, *Wahl* v. *Barnum*, 116 N. Y. 87, 22 N. E. 280; *Pitkin* v. *Noyes*, 48 N. H. 294; *White* v. *Hoyt*, 73 N. Y. 505; *Ex parte* Banner, 17 Ch. Div. 480; *Miles* v. *Estate Co.*, 32 Ch. Div. 266, 275; *Spahr* v. *Hollingshead*, 8 Blackf. 415; *Creutz* v. *Heil*, (Ky.) 12 S. W. 926; *Bellows* v. *Sowles*, 55 Vt. 39; *Kidder* v. *Blake*,

45 N. H. 530; *Cline* v. *Templeton*, 78 Ky. 550; *Everingham* v. *Meighan*, 55 Wis. 354, 13 N. W. 269; *Turner* v. *Peacock*, 13 N. C. 303; *Feeter* v. *Weber*, 78 N. Y. 334; 2 Pom. Eq. Jur. 9850; 1 Pars. Cont. pp. 438, 439; *Kercheval* v. *Doty*, 31 Wis. 476, 485; *Grandin* v. *Grandin*, (N. J. Sup.) 9 Atl. 756. The law favors the settlement of honest differences, but it will not countenance extortion and fraud. If McGlynn had no claim for freight, and knew it, his conduct was that of a man who was willing to take advantage of the ignorance of Scott of any personal knowledge as to the terms of the contract between McGlynn and Densmore on the one hand, and Thompson on the other, and of the pressing necessity of Scott to secure possession of the machine, to force from him a note without an obligation of either Scott or Thompson behind it to support it.

This brings us to the evidence. When the plaintiff introduced the note in evidence, he had made out a *prima facie* case. It is a familiar rule that a promissory note imports consideration, and our statute has extended this rule to all written instruments. Comp. Laws, § 3538, Subd. 2. Defendant then proved that there was no consideration for the note other than this alleged compromise. Now, assuming that there was, in terms, a compromise, yet defendant could show that McGlynn had no claim, and knew it. He could show that there was in fact no bona fide controversy. In ordinary cases, it may well be that there is a strong presumption as to the good faith of the promisee in making the claim. The very fact that the other party has recognized it sufficiently to settle it is a circumstance of great force, tending to show that he himself regarded it as having some foundation, and the belief of the promisor himself might well be very satisfactory evidence, *prima facie*, that the promisee deemed the claim valid. But in this case the defendant did not have to meet and overthrow so strong a presumption as to the good faith of McGlynn. Having no personal knowledge of the contract between the parties, he was not in a position to know, of his own personal knowledge, of the utter groundlessness of the claim, or the assumption

that it was groundless. Had Thompson himself voluntarily, and without duress of any kind, given the note, there would have been a very strong presumption, not only as to the good faith of McGlynn, but as to the validity of the claim for freight. But such is not this case. Was there any evidence to submit to the jury on the question of McGlynn's good faith? Was there evidence reasonably tending to show that the claim was without foundation, and that McGlynn and Densmore knew it? We think there was. On this record there is not a syllable of competent evidence to show that the contract was in fact as the plaintiff claimed it was. There is no evidence that Thompson agreed to pay the freight. Densmore was sworn as a witness, and merely testified that he did not think the contract was made with him; but he nowhere denies the positive evidence of Thompson and one Emmons that the contract was made with him. McGlynn was not sworn at all. What he testified to before the justice of the peace was proved; but this was not competent evidence as to the terms of the contract. But in this testimony before the justice of the peace he does not appear to have sworn that anything was said about the freight in his talk with Thompson. He merely claimed the freight because it was customary. Thompson admitted that nothing was said to McGlynn about freight; and from his standpoint it was unnecessary that anything should be said, as he had already made an agreement with Densmore; the other partner, under which he was to get the separator for $550, laid down at Ellendale, without freight. Both Thompson and another witness swear that this was the agreement. At the time the court directed a verdict for plaintiff it therefore appeared, by uncontradicted evidence, that McGlynn and Densmore had no valid claim for this freight money. This was a question to be taken into consideration by the jury in determining whether McGlynn honestly thought he could claim the freight money. The transaction was so recent, that, if McGlynn knew what the real contract was, he could not have forgotten the facts when he demanded of defendant the note. It is not conclusively shown that

he knew what the transaction was at the time, but there was evidence tending to show it. Before the note was given, he told Henry Rose that he had just sold Thompson a separator, and would sell him (Rose) one for the same price, and, when asked what the price was, he said $550. In the same conversation, on being informed that it was customary for agents to make such contracts so that the purchaser would have to pay the freight, he expressed surprise, and remarked that he bet Sid (meaning his partner, Densmore) had sold Thompson the separator without saying anything about the freight. The jury might well have found that he inquired of Densmore as to the fact, and ascertained that Densmore had failed to provide for the payment of freight by Thompson. That he did make such inquiry is shown by the testimony of the witness Rose, who says that McGlynn informed him in another conversation that Densmore was no longer his partner; that the only thing he had done was to sell that separator to Thompson, and made a mistake that cost him (McGlynn) $50. Another circumstance which might have satisfied the jury that McGlynn knew that Densmore had not secured an agreement for the freight is the fact that McGlynn, and not Densmore, made the settlement at the hotel when the notes and mortgage was given, and when Thompson said that he had nothing to do with the freight, McGlynn did not then further press his claim. Was Densmore kept away from this settlement because Thompson would know that Densmore knew that no claim for the freight could be made, in view of the terms of the contract? We think there was evidence from which a jury could have been justified in deducing the conclusion that not only McGlynn had no claim, but also that he knew that he had no claim, for the freight money, and simply sought to force the note from Scott as a condition of his getting or keeping possession of the machine. There are numerous decisions which hold that good faith is not sufficient; that the claim must be at least colorable. It is not necessary for us to pass upon this question. No authority can be found which dispenses with the element of good faith of the promisee in making the claim compromised.

On the argument it was urged that the surrender of the possession of the separator furnished a good consideration for the note. But we must assume, for the purposes of this appeal, that McGlynn's claim of right to hold the machine was utterly unfounded, because the question whether Thompson was bound to pay the freight was taken from the jury, although there was positive evidence that he was not bound to pay it. The jury might, on the evidence, have found that Thompson had not agreed to pay the freight. Indeed, we think the jury were bound to find so, there being no evidence to the contrary. If Thompson was under no obligation to pay the freight, McGlynn had no right to withhold from him possession of the machine, Thompson having fully settled for it. The separator was his, and, if he owed nothing for freight, the purchase price was fully settled for, and it was wrongful for McGlynn thereafter to insist on retaining possession of it. Therefore, when he yielded up possession he surrendered nothing of value on this theory of the case; and this theory the jury were justified in adopting, if, indeed, they were not bound to adopt it under the evidence. A consideration, to sustain a promise, must be something of benefit to the promisor, or of detriment the promisee. This elementary principle is recognized by our statute. Section 3530, Comp. Laws, reads as follows: "Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered or agreed to be suffered by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise." No benefit to which he was not entitled was conferred on Scott by the delivery of the separator if, as the jury had a right to find, and perhaps were bound to find, under the evidence, the separator was fully paid for. Thompson would have a right to possession under such circumstances, and Scott was acting for him and under his instructions to get the machine, and was vested with Thompson's right to the possession of the property. Nor was it prejudicial to

the plaintiff to deliver possession to Scott if plaintiff had no lien thereon. The authorities are clear upon this proposition. In *Crosby* v. *Wood*, 6 N. Y. 369, 374, it was held that the surrender of a paper which the person surrending it had no right to retain was not such a consideration as would support an executory contract. This case is cited with approval in *Vanderbilt* v. *Schreyer*, 91 N. Y. 401. See this last case for authorities. See, also, *Morgan* v. *Hodges*, (Mich.) 50 N. W. 876; *Keith* v. *Miles*, 39 Miss. 442; *Association* v. *Wickham*, 141 U. S. 564, 577, 12 Sup. Ct. 84; *Warren* v. *Hodge*, 121 Mass. 106; *Stuber* v. *Schack*, 83 Ill. 191; *Ecker* v. *Bohn*, 45 Md. 278; *Bunge* v. *Koop*, 48 N. Y. 226; *Smith* v. *Easton*, 54 Md. 138; Appeal of Lukens, (Pa. Sup.) 22 Atl. 892; *Smith* v. *Chilton*, (Va.) 6 S. E. 142; *Worthen* v. *Thompson*, 54 Ark. 151, 15 S. W. 192. Although it should be conceded that McGlynn thought he had a valid lien on the separator, yet the surrender of such imagined lien, if there was in fact no lien, would not, of itself, constitute a good consideration for the note. One's belief is not property. It is true that belief will often be controlling when there has been a compromise; but the belief in such cases is important only because it establishes an honest controversy when there is a controversy in fact, and then the doctrine applies that a final settlement of such a controversy is of itself a sufficient consideration to support a promise, although in fact nothing has been surrendered by the promisee. The compromise is binding in such cases, not because the surrender of one's belief is the surrender of anything of value, as the surrender of value is not essential to a valid compromise, but because the law, for reasons already stated, regards the mere settlement of an honest dispute as a good consideration, and the belief of the promisee that he is right is important only because it is one of the elements essential to the establishment of such a dispute. When, therefore, there has been no compromise intended or effected, the mere belief of the promisee that he has a right is of no moment, so far as the question of consideration is concerned. It is the fact that something of value has been give up, and not the promisee's belief that he

had parted with a right, which constitutes a sufficient consideration. The judgment of the District Court is reversed, and a new trial ordered.

WALLIN, J., concurs.

BARTHOLOMEW, C. J. I concur in the result, without adopting all the reasoning of the opinion.

(58 N. W. Rep. 460.)

SAMUEL D. FLAGG *vs.* SCHOOL DISTRICT, NO. 70.

Opinion filed March 19th, 1894.

Municipal Bonds—Provision for Exchange Destroys Negotiability.

An instrument providing for the payment of exchange on a point other than the place of payment, in addition to principal and interest, is not a negotiable instrument; and one who purchases the same before maturity, for value, and without notice of any defense thereto, nevertheless takes it subject to the defense of want of consideration good as between the original parties to the instrument.

WALLIN, J., dissenting.

Certificate of Proper Officer—Evidence of Validity.

Defendant was authorized to issue bonds to fund its outstanding indebtedness in case certain statutory prerequisites were complied with. A record of the proceedings culminating in the decision to issue bonds was to be made in the district, and a certified copy thereof was to be filed with the county clerk, and preserved as a record in his office. It was made the duty of the county clerk to examine such record in his office, and if satisfied, from such examination, that all the requisites of the act with respect to the preliminary proceedings had been complied with, and that the bonds were authorized to be issued as provided for in the act, he was to register the bonds, and indorse upon each of them his certificate in the form prescribed in the statute. The bonds in question were so registered and certified. *Held*, that a purchaser of such bonds, for value, before maturity, and without notice that any of the conditions of the statute relating to proceedings to authorize the issue of the bonds had not been complied with, could rely upon the certificate of the county clerk as finally settling all such matters, and that the court below did not err in rejecting defendant's offer to prove that such conditions had not been complied with.

Bonds Registered and Certified as Legal Under Statute—Not Open to Question in Hands of Bona Fide Purchaser.

By an amendment to the act, it was provided that no district, in which the title to the school site was not in the school board, should bond its debt until it had obtained such title. But it was declared in such amendment that, after the bonds had been registered and certified, their validity should not be questioned in any tribunal, but should be and remain valid and binding. *Held*, that this provision made it the duty of the county clerk to pass upon this question of title before registering and certifying the bonds, and that, therefore, his decision, evidenced by registering and certifying the bonds, that such condition as to title to the school site had been complied with, was final on the point, as against the district, in favor of one who purchased the bonds in good faith, for value, without notice that this condition had not been complied with.

Recitals in Non-negotiable Bond.

The right of a bona fide purchaser of municipal bonds to rely upon a recital or certificate as to facts which the person making the same had authority to determine, does not depend upon the bond being a negotiable instrument. It exists in the case of a bona fide purchaser of a non-negotiable bond as well.

Want of Consideration Cannot be Shown Against a Bona Fide Purchaser.

The statute declared that a committee should audit the claims against the district, and determine the amount of indebtedness to be funded. *Held*, that the auditing by the committee of claims against the district, and the vote of the district to bond to pay such claims, and the issue of bonds accordingly, would preclude an inquiry as to the validity of such claims as a consideration for such bonds, as against a bona fide purchaser of such bonds; that, as against such purchaser, the district could not show, to prove a want of consideration between the original parties, that the bonds were in fact paid for by the one to whom they were originally issued by the district, by the surrender of void claims held by him against the district, provided such claims had in fact been audited and canceled, and bonds voted and issued under the provisions of the statute.

CORLISS, J., dissenting.

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

Action by Samuel D. Flagg against School District, No. 70, Barnes county, to recover interest on bonds. Plaintiff had judgment, and defendant appeals.

Reversed.

G. K. Andrus, for appellant.

The stipulation for payment of exchange renders the bonds non-negotiable. §§ 4456, 4462, Comp. Laws; *Bank* v. *Bynum*, 84 N. C. 24; *Saxton* v. *Stevenson*, 23 N. P. Can. 503; *Nughitt* v. *Johnson*, 28 Fed. Rep. 865; *Windson Savings Bank* v. *McMahon*, 38

Fed. Rep. 283; *Read* v. *McNalty*, 78 Am. Dec. 467; *Carroll Co. Savings Bank* v. *Strother*, 6 S. E. Rep. 313; *Lowe* v. *Bliss*, 24 Ill. 168.

The purchaser of bonds is chargeable with notice of requirements of law under which they are issued. *Ogden* v. *Daviess Co.*, 102. U. S. 634, 26 Law Ed. 263; *Marsh* v. *Fulton County*, 77 U. S. 10; *Hayes* v. *Halley Springs*, 114, U. S. 120; *First Nat. Bank* v. *Distrtct of Doon*, 53 N. W. Rep. 301.

Williams, Goodenow & Stanton and *Ball & Watson*, for respondent.

The defendant is estopped as against a purchaser bona fide from establishing any of the defenses set up in its answer. 1. Dillon Muc. Corp. 523; Burroughs on Pub. Securities 301; *Knox* v. *Aspinwall*, 21 How. 539; *Block* v. *Commissioners*, 99 U. S. 686; *Pompton* v. *Cooper Union*, 101 U. S. 204; *Lynde* v. *County*, 16 Wall. 13; *Bank* v. *Grenada*, 41 Fed. Rep. 87; *Coloma* v. *Eaves*, 92 U. S. 484; *Phelps* v. *Lemston*, 15 Blatchford 132; *Society for Savings* v. *New London*, 29 Conn. 174, 192; *Maddox* v. *Graham*, 2 Metc. (Ky.) 56; *Gulford* v. *Ry. Co.*, 48 Minn. 560; *Donnelly* v. *Cabanio*, 52 Ga. 212; *Lane* v. *Embdon*, 72 Me. 354; *Anderson Co.* v. *Ry. Co.*, 52 Tex. 228.

The provision for exchange does not destroy the negotiability of these bonds. *Bradley* v. *Hill*, 4 Bissell 473; *Leggett* v. *Jones*, 10 Wis. 34; Tiedman on Com. Paper, § 28.

CORLISS, J. Judgment has been recovered and entered in favor of the plaintiff and against the defendant upon interest coupons of certain bonds issued by defendant. The appeal is from such judgment. The court below directed a verdict for the plaintiff, and it was upon this verdict that the judgment was entered.

Among other errors assigned is one based upon the refusal of the trial court to allow the defendant to prove that the bonds in question were issued without consideration. It cannot be doubted that a want of consideration would have constituted a perfect defense to the bonds in the hands of the original taker. But it is urged that the plaintiff is a bona fide holder, for value, before maturity, of the bonds, and their interest coupons. As a matter of fact, this contention of the plaintiff is fully sustained by the

record; but he can derive no protection therefrom unless the bonds or coupons are negotiable instruments, within the rule which entitles the bona fide purchaser of such paper to protection, as against defenses to the same in the hands of the original holder. Are the bonds or the coupons negotiable instruments? If not, we must reverse the judgment, and allow the defendant to make proof, if it can, of its defense of want of consideration. The only provision in the bonds and coupons which it is claimed affects their standing as negotiable instruments is that they shall be paid at St. Paul, Minn., with New York exchange. The rule is familiar to all that the amount to be paid must be certain,—must be ascertainable from the face of the instrument, and from the law which governs the contract. No resort to extrinsic evidence is allowed. Our statute establishes no different rule. "A negotiable instrument is a written promise or request for the payment of a certain sum of money to order or bearer in conformity to the provisions of this article." Section 4456, Comp. Laws. That the provision that the maker, in addition to the sum specified, shall pay an indefinite sum, called "exchange," renders it impossible to ascertain how much money is needed to extinguish the obligation at maturity, without resort to evidence of a fact outside of the paper, cannot admit of a moment's doubt. No court has ever challenged the truth of this proposition. But it is insisted by those courts which uphold the negotiability of instruments embracing such a provision that the amount to be paid is substantially certain; that it can be readily ascertained, as it is fixed by the rate of exchange among bankers the day the paper falls due; that the amount of the exchange is usually very small; and that the spirit of the rule requiring certainty is therefore not violated by this exception to the letter of the rule. Indeed, it is asserted that the provision amounts to no more, in effect, than a requirement that the paper be paid at the place on which exchange is to be paid. The argument is made that, when the maker is called upon to pay exchange on a specified place, he is

really compelled to do no more than pay out the same sum to satisfy the obligation that he would have been forced to pay had it been payable, without exchange, at the place on which the exchange is to be paid. This reasoning is fallacious. There is a marked difference, both to debtor and creditor, with respect to the amount to be paid and received, between cases where the paper is payable at one place, with exchange on another, and cases where the paper is payable, without exchange, at the last named place. Suppose, when the money is payable in this state, the creditor wishes to use the money here. He is doubly benefited by the provision to pay here, with New York exchange. Had the paper been payable in New York, without exchange, he might be compelled to pay exchange on some western point, to bring the money to this state. But by having it paid here he saves this sum, and, in addition, places in his pocket the amount of New York exchange paid him by the debtor. In times of great financial fright, like those through which we have been passing, the difference might be equal to a considerable sum. Nor is the effect the same upon the debtor. Should his money be in New York, he must pay the cost of bringing it west, and also pay the creditor the further cost of sending it back, although the creditor may not desire it remitted, whereas, had the debt been payable in New York, without exchange, he would have saved both of these items of exchange.

But even if it should be conceded that the effect, in dollars and cents, would be the same to both parties, under all circumstances, it would not follow that the courts would be justified in ingrafting this exception upon the law merchant. An agreement to pay a sum of money equivalent to the market price of a specified amount of a certain commodity at a particular time and place is, in its effect upon the parties, the same as an agreement in terms to pay that sum of money. But it would not be seriously urged that the former agreement would constitute a negotiable instrument. It would not be negotiable, because resort would have to be had to extrinsic evidence to settle the amount due, whereas, in

the case where that amount (although precisely the same) is fixed by the terms of the paper, certainty exists upon the very face of the contract itself. It is this certainty which the law merchant requires. To ingraft upon this rule the exception contended for by respondent would be open to serious objections. In analogous cases, there would be no escape from further modification of the doctrine requiring certainty. When once the strict letter of the rule is departed from, the business world is wholly at sea. No one can tell in advance what other anologous provisions, introducing uncertainty into the contract, will be disregarded, as not falling within the spirit of the rule. The spirit of the rule is too vague and intangible for the guidance of business conduct. The commercial world needs, and must have, the certainty of the rule itself, in its plain interpretation. When a departure from its strict letter is once tolerated, the whole subject is removed from the realm of simplicity and certainty, and transferred to the domain of construction, confusion, and doubt. What the business world needs with reference to such matters is not so much a rule based upon principle as a rule simple, definite, and permantley fixed. All these elements will be destroyed by the adoption of the exception that resort may be had to outside evidence to fix the amount of exchange, without affecting the negotiability of the instrument providing for the payment of exchange. And what need is there for an exception? What great benefit will accrue to the commercial world from its adoption? It is said that the business world has practically agreed that the words "with exchange" do not destroy the negotiability of the paper containing them. But it is not within the power of the people to modify or abrogate by usage a settled rule of law. The people must change fixed rules by legislation. It is by no means certain that there is a consensus of opinion on this subject. In the eastern states there will doubtless be found many who would take issue with those who assert that such paper is negotiable. But there is no need for this usage.

The only theory upon which the creditor can justify inserting a

provision for the payment of exchange is that he desires the money remitted to the point specified, to be used by him there. To insert a provision for exchange for any other purpose would be requiring the payment of something which the creditor cannot, in fairness, exact. All he can justly demand is the principal and interest. If he is paid more, it is to enable him to remit the money, or to have it remitted, without expense to himself. In other words, it is contracted for and received by him that he may receive in full the amount of principal and interest at the place on which exchange is paid, without diminution because of being compelled to pay such exchange himself. The creditor can always accomplish this purpose by specifying in the contract, as the place of payment, the place to which he desires the money remitted. He will still receive the full sum, without deduction for exchange, as the debtor must pay it there; and the instrument will not be open to the objection that it is not negotiable, by reason of the fact that the exact sum to be paid cannot be ascertained without resort to extrinsic evidence. If, as has been stated, there is a large amount of paper in the market, containing a provision for the payment of exchange, which is regarded and is being treated by business men as negotiable paper, those who so believe and act are not entitled to have the law strained to protect them, for they must have known that such a provision did in fact introduce into the contract an element of uncertainty, and they also were bound to know that many cases treated such paper as not negotiable. Moreover, most of such paper will be paid or renewed, or be in some way disposed of, in a few months, and in transactions entered into subsequently to this decision the people can conform to the elementary rule that certainty must appear upon the face of the paper. We are asked to protect the few holders of such paper to which there may be some defense good as between the original parties. That we may do this, we are requested to take from the rule that which, above all other elements, renders it beneficial to the commercial world,—its simplicity and certainty. It is said that the amount of exchange

is very small. But the amount is uncertain, within the meaning of the rule, whether a dime or a dollar is to be added to the sum by extrinsic proof. If the amount of the exchange is to determine the negotiability of paper containing provision for exchange, some of it would, and some of it would not, be negotiable, for there are times when the amount of exchange is much more than nominal. To escape such a dilemma the courts must hold that where the uncertain sum to be so added is equivalent to many dollars, as was frequently the case during the past summer, the paper is nevertheless negotiable, within the rule which requires certainty upon the face of the paper as to the amount to be paid. Many cases support the view expressed in this opinion. *Bank* v. *McMahon*, 38 Fed. 283; *Lowe* v. *Bliss*, 24 Ill. 168; *Hughitt* v. *Johnson*, 28 Fed. 865; *Read* v. *McNulty*, 12 Rich. Law, 445; *Bank* v. *Strother*, 28 S. C. 504, 6 S. E. 313; *Palmer* v. *Fahnestock*, 9 U. C. C. P. 172; *Saxton* v. *Stevenson*, 23 U. C. C. P. 503; *Bank* v. *Bynum*, 84 N. C. 24; *Bank* v. *Newkirk*, 2 Miles, 442; *Russell* v. *Russell*, 1 McArthur, 263; *Fitzharris* v. *Leggatt*, 10 Mo. App. 529; *Bank* v. *Goode*, 44 Mo. App. 129; *Caset* v. *Kirk*, 4 Allen (N. B.) 543; *Nash* v. *Gibbon*, Id. 479. An agreement to pay the principal sum and interest, and in addition the cost of sending the money to New York by express, would have been more definite, because those charges remained fixed for a long period, and there would have been certainty from the outset how much money it would take to pay the debt. But, as exchange may vary from day to day, the amount to be paid therefor is uncertain, down to the very day of payment. Yet no one would contend that an instrument containing a provision for the payment of the cost of sending the money to New York by express would be negotiable. While it would have been practically certain from the start how much money it would take to comply with the contract, the certainty would have resulted, not from an inspection of the contract alone, but from the evidence of an extrinsic fact, not liable to change, which however, must be proved, the same as any other extrinsic fact, by evidence outside of the paper. An agreement to pay exchange

between points in this country, where the money standard is the same throughout, is only an agreement to pay for the cheaper mode of remitting funds, resulting from the more refined and complex system under which financial transactions are carried on.

We are aware that there are decisions opposed to our view. In Michigan it was held by a divided court that such instruments are negotiable. *Smith* v. *Kendall*, 9 Mich. 242. The dissenting opinion of Judge Campbell is much more satisfactory to our minds than the prevailing opinion. In the latter case of *Johnson*, v. *Frisbie*, 15 Mich. 286, it is evident that the judges did not intend to express their views upon the question, as an original one, both from the language of the opinion in that case, and from the fact that Judge Campbell, who had so strongly dissented in the first case, wrote the opinion in the second. This opinion merely states that the law was settled by a majority of the court in the prior case, and we have therefore no means of ascertaining from the case of *Johnson* v. *Frisbie* what Judge Cooley's views were on the question, looking at it from the standpoint of principle and business expediency. In a late case in that state (*Bank* v. *Purdy*, 22 N. W. 93,) that court has held a note to be non-negotiable which contains a provision for exchange in connection with a provision for the payment of expenses of collecting if sued upon, and further provisions waiving exemptions, and increasing the rate of interest, if not paid at maturity. These three last named provisions have been held by many authorities (although there is conflict) not to destroy the negotiability of instruments containing them. The case therefore, may,—and in some jurisdictions must,—have turned on the question whether the provision for the payment of exchange destroyed its negotiability. The court said: "The modern tendency to interpolate into such instruments engagements and stipulations not recognized by the law merchant, affecting the certainty as to the amount due and payable thereon, or the time of maturity, or superadding duties to be performed by the maker of additional obligations, other than the payment of a sum certain at maturity, should be discountenanced, and held to destroy

their negotiability, and deprive them of the character of promissory notes, and they should be relegated to the domain of ordinary contracts." In neither of the Wisconsin cases was the question involved. In the later case of *Morgan* v. *Edwards*, 53 Wis. 599, 11 N. W. 21, there is a statement that what was said by the court in the former case (*Leggett* v. *Jones*, 10 Wis. 35) on the point was obiter; and while the court, in the later case, reiterates the former dictum in even stronger language, it is nevertheless the fact that in neither case did the court settle the question authoritatively, as one necessarily involved. In *Bradley* v. *Lill*, 4 Biss. 473, Fed. Cas. No. 1,738, the reasoning of the learned judge is clearly unsound. The opinion exemplifies the truth of the common observation that the use of an illustration is often a dangerous mode of enforcing a point. He likens the case of a note payable with exchange to one payable, with interest, in England, and sued on in New York. He asserts that in the latter case the note would be negotiable. But the court, he says, must, in such case, take proof of an extrinsic fact to fix the amount of interest. The answer to this sophistry lies so plainly on the surface that it is hardly necessary to state it here. The note, in the case put by way of illustration, is negotiable because in England, where it is payable, the amount of interest is ascertainable by an inspection of the note itself. Nothing is uncertain or extrinsic, which the note and the law disclose and establish. The suit being brought, in the case put by way of illustration, in a foreign country, the court must have proof of the laws of the country where the note was payable, to ascertain the rate of interest, because such laws are not judicially noticed; but when the proof is made the court ascertains the amount due, from the face of the note and the terms of the statute, without further evidence. And in England, by whose laws the rate of interest is fixed, and where the note was payable, there has at all times been an absolute certainty as to the amount needed to pay the note at maturity. The test is whether the amount due is certain from the face of the paper at the time and place of payment. Suing

on the instrument in a foreign country cannot destroy its negotiability. The only discussion of this question, in favor of the view that such paper is negotiable, which is worthy of that name, is to be found in the opinion of Judge Mitchell in *Hastings* v. *Thompson* (Minn.) 55 N. W. 968. It embodies all that can be said on that side of the question. It is a position not utterly destitute of strength, but, for the reasons we have already stated, we do not regard it as tenable. It is to be regretted that the Federal Supreme Court has not passed upon the point. There should be only one rule for the nation, and it is to be hoped that, whatever conclusion is ultimately reached by that court, it will be adopted in all of the states. In this circuit it is settled by the decision of Judge (now Mr. Justice) Brewer, in the case of *Hughitt* v. *Johnson*, 28 Fed. 865, that such paper is not negotiable. Had this suit been instituted in the United States Circuit Court for this district, that court would have applied and enforced this rule. Therefore, for us to establish a different doctrine would make the rights of the parties depend upon the court in which the action should be brought. While the decision which we have cited from Pennsylvania (*Bank* v. *Newkirk*, 2 Miles, 442) is a decision of the District Court, it is quite evident what views the Supreme Court of the state would entertain on the question, should it come before that tribunal. In *Woods* v. *North*, 84 Pa. St. 407, that court said that "it was necessary quality of negotiable paper that it should be simple, certain, unconditional,—not subject to any contingency. It would be a mere affectation of learning to cite the elementary treatises and the decided cases which have established this principle. It is very important to the commercial community that it should be maintained with all its rigor." In a recent case in the same court this language is quoted with approval. *Bank* v. *McCord*, 139 Pa. St. 52, 21 Atl. 143.

A majority of this court holds that the bonds and coupons were not negotiable, and were therefore open to the defense of want of consideration. Hence, it was error for the court to exclude the evidence offered to substantiate this defense. The

chief justice, who agrees with me, rests his decision upon the terms of our statute. Comp. Laws, § § 4456, 4462.

It is claimed that the court erred in another particular: The defendant offered to prove that the land on which the school building for which the bonds in suit were issued was situated was not owned by the defendant, or its school board; that it had never been conveyed to the district, or its school board; that proceedings to condemn it as a school site had never been instituted; and that it was, in fact, the property of a third person. This offer was rejected. Would these facts have constituted a defense? The act under which defendant derived its authority to execute bonds is a special act, and is not to be found in the printed volumes. It was approved March 12th, 1885. On the same day the act was amended, and in this amendment it was expressly provided that the indebtedness of no school district mentioned in the original act should be bonded until the land on which the school building was located should have been conveyed, by good and sufficient warranty deed, to the school board of such district, or the title to it should have been obtained by the school board by proper condemnation in the manner provided by law. The existence of this fact of ownership of the site on which the school building was situated was a condition precedent to the existence of any power to issue bonds.

The only possible escape of the plaintiff from this conclusion is by invoking another doctrine,—the doctrine of estoppel from recitals in the bond, or in a certificate attached to it. Upon each bond was indorsed a certificate signed by the county clerk certifying that such bond "is issued in accordance with law, and by authority of a majority of the legal voters of said district present and voting at an election duly held May 11th, 1885, for that purpose, and is duly registered in this office." We will assume at first that this certificate is in terms broad enough to embrace the fact that the title to the school site was in the school board. The question then arises whether this fact is such a fact as the county clerk had authority to investigate, and settle by his

certificate, so as to preclude an inquiry with respect to the same, as against a bona fide purchaser of the bonds. This doctrine rests upon legislative intent. Did the legislature intend to commit the determination of certain facts to the judgment of the officer making the certificate, or the officers issuing the bonds, where the facts are recited in the body of the bond, so that purchasers of such bonds might rely upon such certificate or recital? As we said in *Coler* v. *School Tp.*, 55 N. W. 587, 591. "It is not necessary that the power to determine these facts should have have been expressly conferred upon the district officers by statute." And in that connection we added in that case (quoting with approval) the language of Mr. Justice Brewer in *Inhabitants* v. *Morrison*, 133 U. S. 523, 10 Sup. Ct. 333: "It is enough that full control in the matter is given to the officers named." We stand by this statement of the rule, but the language of § 6 does not bring this case within its purview. The county clerk derives his power to make the certificate upon the bonds from § 6 of the statute. But, as a consideration of § 5 is essential to a right understanding of § 6, we quote them both in full:

"Section 5. No bond shall be issued under this act until the question of issuing the same shall be first submitted to a vote of the district at a school meeting called for that purpose of which school meeting at least ten day's notice shall be given by notices posted in at least three public and conspicuous places in said districts, stating the time and place of meeting and that the said meeting is for the purpose of auditing and settling the indebtedness of said district and issuing bonds to provide for the payment thereof. The notice of such meeting may be signed by any member of the school board or in case of the absence of all the members of the school board or their inability, refusal or neglect to sign the same, by three resident electors of such district; provided that no meeting shall be called for such purpose until the district school board shall have been petitioned therefor in writing by at least one-third of the resident electors; a majority of the legal voters present and voting at such meeting shall first

appoint a committee of three from their number, resident freeholders and possessing other qualifications of electors of the district to audit and settle the indebtedness of the district. Said committee shall at once cause notice to be given of their appointment, and shall in said notice set a time during which the outstanding indebtedness shall be presented to them. Said time shall not be less than thirty days nor more than ninety days, and said notice shall be published in some newspaper of general circulation published in each of the counties of Barnes and Griggs and shall also set forth the time when the committee will make a full report of their duties to the electors of such district, whereupon the electors shall meet at such time and place to receive said report and submit the question of the issuing of bonds to provide for the payment of the indebtedness as audited and settled, and the auditing or settling by said committee shall not be in any manner construed to be binding on said district or be construed as an admission of the legality of any claim or alleged claim against said district and no bonds shall be issued until the claims for which they are issued shall be delivered up and cancelled, and a full record shall be kept of all of the proceedings of said meeting, and the acts of said committee and of the vote cast in the names of all of the persons who voted at said meeting and shall be preserved as a record in the district, and a certified copy of such record shall be filed with the county clerk which shall be kept in his office as a public record. The ballots in favor of or opposed thereto shall contain the words respectively 'For issuing bonds' and 'Against issuing bonds' and if a majority of all the votes cast be in favor of issuing bonds, the school board shall forthwith proceed to issue bonds to the amount of the indebtedness as audited and settled and running for such length of time as shall be determined by the further vote of the resident voters present within the limits prescribed by this act. Section 6. Before said bonds are issued, sold or disposed of, they shall be presented to the county clerk, and the said county clerk shall carefully examine the notices of election and the proof of posting

or publishing the same, and shall also carefully examine all returns of the election and all proceedings of said committee and of said district meetings, and the settlement, auditing and vote authorizing the issuance of said bonds, which examination shall be made from the records filed in his office, as provided for in the preceding section, and if satisfied therefrom that such bonds are authorized to be isssued, as provided for in this act, and the claims for which they are issued are delivered up and cancelled, he shall, in a book kept for that purpose, preserve a registry of each bond, showing in separate columns and entries, the number of the school districts issuing a bond, the denomination thereof, the date of issue and other facts, and upon each bond shall endorse the following certificate: I hereby certify that the within bond for———dollars of school district number—, ———county, Territory of Dakota, is issued in accordance with law, and by authority of a majority of the legal voters of said district present and voting at an election duly held———, 188—, for that purpose, and is duly registered in this office. The blanks shall be filled according to the fact, and the certificate officially signed by the county clerk and attested by the seal of the county."

It will be noticed that the county clerk is not given full control of the matter by section 6. He is merely to settle the questions whether the provisions of section 5 have been complied with. That he has nothing, under the terms of section 6, to do with the determination of the question whether the school board has title to the school site, is apparent from the fact that that matter is not referred to in section 5; from the further fact that his decision is to be based upon the examination of a certified copy of the record of the proceedings referred to in section 5, which requires such record to be kept; and from the still further fact that, at the time sction 6 was passed, section 15 had not been amended, and therefore the law did not at that time contain any provision requiring the ownership of the school site, as a condition precedent to the power to issue bonds. It is thus made apparent that the county clerk was given no authority over this matter by

section 6; that no decision touching it was committed to his judgment by that section. Under such circumstances, it is too clear to justify further argument that, under the language of section 6, his certificate constitutes no estoppel. The public has no more right to rely upon it, so far as this matter was concerned, than the certificate of any utter stranger. We are not without express authority upon this point. *Coffin* v. *Board*, 57 Fed. 143; *German Bank* v. *Franklin Co.*, 128 U. S. 526, 540, 9 Sup. Ct. 159; *Lake Co.* v. *Graham*, 130 U. S. 674, 9 Sup. Ct. 654; *Northern Nat. Bank* v. *Porter Tp.*, 110 U. S. 608, 4 Sup. Ct. 254; *Kelley* v. *Town of Milan*, 21 Fed. 842; *National Bank of Commerce* v. *Town of Granada*, 4 C. C. A. 212, 54 Fed. 100; *McClure* v. *Oxford Tp.*, 94 U. S. 429; *Dixon Co.* v. *Field*, 111 U. S. 83, 4. Sup. Ct. 315; *Brown* v. *Bon Homme Co.*, (S. D.) 46 N. W. 173, 176. In this last case the court said: "There were no recitals in these bonds of the existence of any fact which the chairman and clerk of the board were authorized to ascertain and determine." In *Dixon Co.* v. *Field*, the court said: "If the officers, authorized to issue bonds upon condition are not the appointed tribunal to decide the fact which constitutes the condition, then recital will not be accepted as a substitute for proof. In other words, where the validity of the bonds depends upon an estoppel claimed to arise upon the recital of the instrument,—the question being as to the existence of the power to issue them,—it is necessary to establish that the officers executing the bonds had lawful authority to make the recitals, and to make them conclusive. The very ground of the estoppel is the recitals and the official statements of those to whom the law refers the public for authentic and final information on the subject."

Nor could there have been any hardship in requiring those dealing with the bonds to ascertain whether the district had title to the school site before issuing the bonds. This title, whether under deed or condemnation proceedings, would ordinarily be a matter of public record. We do not think, however, within the meaning of the cases holding that an assessment roll must be

examined despite recitals in the bonds, that the bona fide purchasers of these bonds bought at their peril, if the legislature has given the county clerk authority to determime this question, and embody his decision in his certificate. These cases relate to facts which are necessarily matters of record: *Sutliff* v. *Commissioners*, 147 U. S. 230, 13 Sup. Ct. 318; *Lake Co.* v. *Graham*, 130 U. S. 674, 682, 9 Sup. Ct. 654; *Chaffee Co.* v. *Potter*, 142 U. S. 355, 363, 12 Sup. Ct. 216; *Dixon Co.* v. *Field*, 111 U. S. 83, 92, 4 Sup. Ct. 315; *Nesbit* v. *Independent Dist.*, 144 U. S. 610, 12 Sup. Ct. 746; *Francis* v. *Howard Co.*, 50 Fed. 44; *Bank* v. *City of Terrell*, (Tex. Sup.) 14 S. W. 1003; *Nolan Co.* v. *State*, (Tex. Sup.) 17 S. W. 826. But the title to the school site might be in the school board by an unrecorded deed.

We now come to a provision in the amendment to the act which, in our judgment, requires us to hold that the county clerk's certificate was broad enough to include the fact of title, and that it was the purpose of the legislature to make this certificate final on this point, so far as innocent purchasers were concerned. That amendment, after providing, among other things, that the title must be in the school board before bonds can be issued, declares that "the validity and obligation of any school bond registered and certified as herein provided * * * shall not be questioned in any tribunal, but every such bond shall be and remain binding." While this does not, in terms, vest in the county clerk the power, or make it his duty, to investigate and determine this question of title, the language can have no effect unless it be so construed. It is not necessary that the power to decide and settle such matters be vested in the officer, in express terms. Burroughs, Pub. Secur. p. 321; *Coler* v. *School Tp.*, (N. D.) 55 N. W. 587; *Indabitants of Tp., of Bernards* v. *Morrison*, 133 U. S. 523, 10 Sup. Ct. 333. After the bond is registered and certified in the manner prescribed by the statute, this question of title is no longer open to litigation, as against bona fide purchasers. It was therefore the duty of the county clerk to investigate this matter before registering the bonds and making the certificate. A threatened violation of this

duty could have been restrained by injunction, and the district protected. This provision clearly gives the county clerk full control over the matter with respect to the question of title, as well as regards the matters specified in sections 5 and 6. Where the statute declares that the validity of a bond shall not be questioned after it has been certified by an officer to have been issued in accordance with law, and that same law provides what is essential to the validity of such bond,—*i. e.* that the district issuing should own its school site,—it does not admit of doubt, in the judgment of the court, that such officer, by necessary implication, is vested with the power to decide such matter, and that it is his duty to decide such matter, before making the certificate. Says Burroughs in his work on Public Securities: "The power of the officer to determine whether such conditions have been complied with need not be expressed; it being deduced from the provisions of the statute, and the supposed necessity of the case, that such questions must be determined before the issue of the bonds." Page 321. That the power to decide questions, and thereby estop the municipality, need not be expressly conferred, is clear from other authorities. Judge Dillon says it is sufficient "if, upon a true construction of the legislative enactment conferring the authority, the corporation, or certain officers or a given tribunal, are invested with power to decide whether the condition precedent has been complied with. 1 Dill. Mun. Corp. 523. In *Town of Coloma* v. *Eaves*, 92 U. S, 484, it is said that the rule of estoppel by recitals applies "where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with." In few, if any, of the cases, has there been an express delegation of the power to decide whether conditions precedent to the exercise of power existed, or had been complied with. "It is not necessary that the power to determine these facts should have been expressly conferred upon the district officers by the statute." *Coler* v. *School Tp.*, (N. D.) 55 N. W. 587, 591. In *Coffin* v. *Board*, 57 Fed. 143, the court said that the

recitals, to estop the municipality, must relate to matters of fact "which it may fairly be presumed that the officers of the municipality were left to determine."

It has been urged that to construe the provisions in the amendment that the bonds shall not be questioned in any tribunal after they have been certified or registered by the county clerk as giving the county clerk authority to settle the question of school site would defeat the amendment. The proposition is not sound. The amendment was made to withhold from a district, which did not own its school site when the act was passed, power to bond its floating indebtedness until it has secured such title. Because the county clerk can decide whether in fact it had such title does not take away this restriction upon its power. The county clerk, it is to be presumed, will do his duty. Ordinarily, this presumption accords with the fact. Here is a complete check upon the illegal issue of bonds. The county clerk, doing his duty, refuses to certify and register the bonds, because the district has no title to the site, and they, therefore, cannot be issued. Will the power to decide this question defeat the amendment, in such a case? Again, suppose the county clerk is corrupt, or is deceived. Have not the taxpayers the right to enjoin the illegal issue of bonds? The style of reasoning which we have been answering would in every case defeat the effect of a recital as an estoppel. The argument would invariably be that to hold that it created an estoppel would abrogate the restrictions upon the power to issue bonds, or sweep away the conditions essential to the existence of such power.

Unless we construe this declaration as relating to the question of title to the school site, it is an idle provision in the statute. If it refers to any such defenses as are shut out by the certificate of the county clerk,—*i. e.* those arising under section 5,—then it is merely declaratory of a settled rule of common law, which would have been just as operative without the declaration as with it. Without this clause, such defenses would have been foreclosed by the county clerk's certificate. Why, then, enact it, if that was

the only purpose in enacting it? That the legislature did not intend to enact a meaningless provision is apparent from the fact that in the act, as it was originally adopted before amended, no such provision is found. It was unnecessary. The common law declared that, as to matters which were expressly intrusted to the clerk for decision, his decision was final. But in the amendment a new condition is introduced. With respect to this the clerk had not already been given authority to determine whether it had been fulfilled. If his certificate was to settle this question as to good faith purchasers, some declaration to that effect would be necessary. The common law rule would not apply, for without such declaration the clerk would have no power to decide this question. Hence, if a good faith purchaser was to be protected with respect to this question, it became necessary to declare so in the amendment itself; and what declaration could be more comprehensive than that which makes the certificate of the clerk final as to the validity of the bond? This declaration was not made in the statute, as originally framed and passed, when it could have no effect. It was made for the first time in the amendment, when it could have some effect, *i. e.* the effect we have given it, to foreclose the defense that the district had no title to the school site when the bonds were issued. And yet we are asking to strip it of all significance. We are asked to limit, and further limit, its broad meaning, until it shall mean only what it was unnecessary for the legislature to declare. The construction which we place upon this provision is in harmony with the language in which it is couched. It recognizes that the legislature intended to make a declaration which would have some effect, and it is sustained by the general trend of legislation in such cases, which is almost uniformly in the direction of having all questions as to conditions precedent settled by some officer or tribunal, that a good faith purchaser may rely thereon without being compelled to investigate, at remote points, questions that are more or less difficult of ready solution. It may be true that

the comprehensive significance of the language of the amendment must have some limitation,—that all defenses will not be foreclosed by the county clerk's certificate. But because the clause must be limited in its meaning is no reason why it should be so limited as to render it an idle provision. It can be restricted in its operation so as not to violate any constitutional provision, and yet be construed to embrace the defense that no title to the school site had vested in the district when the bonds were issued.

It cannot be said that the district was without power to bond until it had acquired title to the school site, in any other sense than it would have been without power to bond had it owned its school site, but had taken no proceedings under section 5 to obtain a popular vote on the question of issuing bonds. In both cases after the law had been complied with, the power would be derived from the statute. After a district had obtained title to its school site, no new enactment would be necessary to vest it with power to issue bonds. The act confers the power on the performance of several conditions precedent. Among these conditions is the one requiring the district to own its school site. But it is no more a condition precedent to the exercise of power than a popular vote on the question of issuing bonds. It applies to all districts within the statute, just as the requirements of section 5 do. In all districts there must be a compliance with section 5, and also with the amendment as to title to the school site, to confer power upon the district to issue bonds. The issue of bonds without complying with section 5 would be just as illegal as the issue thereof without complying with the condition as to title to the school site. The language of the amendment is that the indebtedness shall not be bonded "until" the district has acquired title to its school site. The issue of bonds without a popular vote could be restrained, the same as an issue thereof without obtaining title to the school site. In either case the bonds would be illegal, would be issued without authority, and would be void in the hands of those who were not in position to rely upon recitals in or on the bonds. If it was competent for

the legislature to authorize the county clerk to estop the district by recitals in one case, it was also competent for them to vest the same power in him in the other case. We are therefore brought back, directly and inevitably, to the inquiry whether such power was intended to be vested in the county clerk as to the fact of ownership of the school site. Nor would we reach any different conclusion, could we see see any distinction between a condition precedent in the nature of a popular vote and a condition precedent of a different character.

There are many cases to be found where the municipality has been held to be estopped by recitals, although the bonds were in fact issued in the very face of statutory prohibition, or where there has been a positive restriction on the power to issue them in excess of a certain percentage of the assessed valuation of the property of the municipality, or to issue them for so large an amount that the levy of a tax of a certain per cent. would not suffice to pay the annual interest thereon. *Chaffee Co.* v. *Potter*, 142 U. S. 363, 12 Sup. Ct. 216; *Marcy* v. *Oswego Tp.*, 92 U. S. 637; *Humboldt Tp.* v. *Long*, Id. 642. These cases hold that, although the bonds are issued in excess of the power of the municipality (issued for an amount forbidden by statute,) the municipality will be estopped, by recitals made by a person or body having power to determine the question, from setting up such want of power,—from showing that the prohibitions of the law have been violated. These cases go far beyond the necessities of the case, for they were cases where there was such an utter want of power that a new act of the legislature would have been necessary to confer it, whereas in this case the power had been conferred subject to the performance of a condition precedent,—*i. e.* the acquiring of title to the school site,—and no new act was needed to make perfect the power after this condition had been complied with. On principle, these cases are sound. To the extent that the legislature can dispense with certain conditions,—can give unrestricted power,—it may authorize some one to decide finally whether the restrictions it imposes have been observed, so that

innocent holders of the bonds may be protected. If the legislature has the power in this particular case to delegate to a person, officer, or board the authority to decide whether the facts exist which warrant the issue of valid bonds, and does in fact delegate such power, the certificate of such person, officer, or board estops the municipality from asserting the invalidity of such bonds, or all such matters of fact which the legislature could and did intrust to such person, officer, or board for decision. The certificate does not, in terms, state that the facts as to title to the school site are such as to warrant the issuing of bonds; but the form of certificate used is the precise form designated by the statute, and it is that certificate which the statute, in effect, declares shall preclude inquiry into the question of title, as well as other matters. But, independent of this consideration, there would be much force in the contention that the language would be broad enough to embrace all facts submitted to the officer for decision. He certifies, not only as to the fact that a majority of the legal voters voted for the issue of bonds, but also that the bond "is issued in accordance with law." Without discussing or attempting to settle this point, we refer to some authorities bearing upon it. *Lewis* v. *Commissioners*, 105 U. S. 739; *Comanche Co.* v. *Lewis*, 133 U. S. 198, 10 Sup. Ct. 286; *Bernards Tp.* v. *Morrison*, 133 U. S. 523, 527, 10 Sup. Ct. 333; *Montclair* v. *Ramsdell*, 107 U. S. 147, 2 Sup. Ct. 391; *Dixon Co.* v. *Field*, 111 U. S. 83, 4 Sup. Ct. 315; *Moultrie Co.* v. *Bank*, 92 U. S. 631; *Marcy* v. *Oswego Tp.*, Id. 637; *Knox Co.* v. *Aspinwall*, 21 How. 539; *Coler* v. *School Tp.*, (N. D.) 55 N. W. 587, 591, 3 N. D. 249.

Some cases appear to hold that a mere recital that the bond was issued in pursuance of a particular statute is a sufficient recital of performance of all the conditions preceding prescribed by the statute. See *Bernards Tp.* v. *Morrison*, 133 U. S. 523, 10 Sup. Ct. 333; *Montclair* v. *Ramsdell*, 107 U. S. 147, 2 Sup. Ct. 391; *Knox Co.* v. *Aspinwall*, 21 How. 539. We used language in *Coler* v. *School Tp.*, 3 N. D. 249, indicating that such a recital would be sufficient to estop the municipality. What was said there was not

necessary to the decision of the case, and the writer of this opinion in fact intended to say that a recital that the bond was issued in conformity with a particular statute would be a sufficient recital that all the terms of the statute had been complied with, so far as the officer making the statement had power to pass upon such questions. It might with much force be urged that a bare recital that the bond was issued in pursuance of a particular act would constitute no more than a mere reference to the law under which the bond was issued, and not a declaration that the terms of that law had been complied with. If such construction were to be placed upon these words, there would be nothing to estop the municipality, except the mere fact of issuing the bonds. This is not sufficient to render the municipality liable, against proof that the conditions of the statute have not been complied with. *Lake Co.* v. *Graham*, 130 U. S. 674, 9 Sup. Ct. 654; *Buchanan* v. *Litchfield*, 102 U. S. 278; *Carroll Co.* v. *Smith*, 111 U. S. 556, 4 Sup. Ct. 539; *Marsh* v. *Fulton Co.*, 10 Wall. 676. In order that no one may be misled by our inadvertent language in that case, we have decided it best to make this explanation. We leave this question open to discussion whenever it arises, expressing no opinion upon it.

It is not necessary, to estop the defendant, that the certificate should be that of an officer of the municipality issuing the bonds. This power may be vested in any officer or body. Burroughs, Pub. Secur. p. 321; 1 Dill. Mun. Corp. (3d Ed.) § 523. But it seemed to be intimated on the argument that, the negotiability of such bonds being destroyed by the provision for exchange, they did not come within the rule of estoppel by recitals. If this view is sound, then the defendant would not be estopped by the certificate of the county clerk, as a majority of the cases have concluded that the bonds are not negotiable. But we are clear that there is no connection between the two doctrines. The municipality is estopped by recitals on the ground that, for the convenience of the business world, the legislature has designated some one who shall settle the question whether the law has been complied with in certain particulars. Persons who pay value, who

act in good faith, and have no notice that there was any failure to comply with the statute, have the right to rely upon the decision of the person to whom the legislature has for that purpose intrusted the decision of such matters. The estoppel depends, not upon the form of the security, but upon the facts that the person was authorized to decide such matters, and that the holder of the bonds, or some one under whom he claims, has paid value for the bonds, in good faith, without notice of any irregularity or illegality in the proceedings. The fact of the negotiability of the security has never entered into the consideration of the question of estoppel, and has never been regarded as forming an element in building up the doctrine of estoppel by recitals, although, in most of the cases, it is true that it appears that the bonds were in fact negotiable. Mr. Burroughs, in his work on Public Securities, says on this subject: "The doctrine, however, is one that is entirely independent of the question of negotiability. If it is correct, it applies equally to non-negotiable paper." Page 322. He reiterates this statement at pages 327 and 354. What we have said with reference to the defendant being estopped by the certificate of the county clerk from showing that the title to the school site had not been vested in the school board applies with equal force to several defenses which the defendant sought to prove on the trial. Defendant offered to prove that the question of issuing the bonds was never submitted to a vote of the resident electors of the district at any school meeting called for that purpose; that no notice, as required by section 5 of the act, was ever given, by posting in three conspicuous places in the district stating the time, place, and object of the meeting, and that it was for the purpose of auditing and settling the school indebtedness of the district, and issuing bonds to provide for payment thereof; that the school board of the defendant was never petitioned in writing by at least one-third of the resident electors of said district to call a meeting to audit and settle the indebtedness of the district; that a committee was never appointed to audit and settle the indebtedness of the district; that the same was never

audited and settled by a committee from the district, or the school board; that the claims for the bonds in suit were never given up to the defendant, or canceled; that the resident electors of the defendant never authorized or sanctioned, or in any manner ratified, the issuing of the bonds. All of these matters were settled against the defendant by the certificate of the county clerk that the bonds were issued in accordance with law. They were matters which the statute made it his duty to decide before he appended his certificate to the bonds, as will be seen by reference to sections 5 and 6 of the statute, and upon his decision the plaintiff could confidently rely; he being a purchaser in good faith, for value, and without notice of any irregularities in the proceedings. There was therefore no error in excluding proof of these defenses. Defendant also offered to prove that the persons who signed the bonds as director and as clerk were not the qualified director and clerk of the defendant. If the offer had been to prove that they were not director and clerk, either *de jure* or *de facto*, the court would have been obliged to receive the evidence. Even a bona fide purchaser of a negotiable municipal bond must take the risk of the signatures being forged, or that the persons signing are not in fact officers of the municipalities issuing the bonds. *Coler* v. *Cleburne*, 131 U. S. 162, 9 Sup. Ct. 720; *Anthony* v. *County of Jasper*, 101 U. S. 693; 15 Am. & Eng. Enc. Law, p 1292. But the offer was not to prove that the persons who signed these bonds were not actually exercising the functions of these offices, respectively, even as *de facto* officers. Defendant merely proposed to prove that they were not qualified officers of the district. There was no error in rejecting this proof. A *de facto* director and a *de facto* clerk could bind the district the same as *de jure* officers could.

The defendant also offered to prove that the assessed valuation of all of the property in the defendant district in the year 1883 was only $4,000, and that the legal voters of the district never designated a site for the school district house at any meeting; that they never authorized the school board to build a school

house, or to issue any warrants for which the bonds in suit were given; and that they never ratified or sanctioned the matter in any manner. These offers, by themselves, would not have constituted a defense to this action. Perhaps the purpose of the defendant was to show that the debts which were funded by the issue of those bonds were void, under the decision of the Territorial Supreme Court and of this court in the cases of *Farmers' & Merchants' Bank* v. *School Dist. No. 53*, 6 Dak. 265, 42 N. W. 767, and *Capital Bank of St. Paul* v. *School Dist. No. 53*, 1 N. D. 479, 48 N. W. 363. But it would not follow from the fact that the warrants were void that the bonds themselves would also be void, in the hands of an innocent purchaser. This would not necessarily establish a want of consideration. The bonds might have been sold originally for cash, as the statute authorizes, and the subsequent application of the proceeds to pay void claims would not operate to the prejudice of the one who had paid value for them. Indeed, a majority of the court are of opinion that defendant cannot establish a want of consideration for the bonds by showing that they were issued in exchange for void warrants, provided the warrants had in fact been audited, surrendered, and canceled. This ruling will control the trial court on the new trial of this case. From this view, however, I am compelled to dissent. The statute in express terms, declares that the auditing of the claims against the district shall not render valid such of them as may be invalid. They remain as void in the hands of the holder of them after they are audited as they were before. The holder of them cannot enforce them against the district; and, when he surrenders them in exchange for bonds, it is clear that he has parted with nothing of value, and therefore has paid nothing for the bonds. It is the same as though he had paid counterfeit money for them. The bonds in his hands are not the bonds of the district, not because there was not power to issue them, but because the district has received no consideration for them. Not being negotiable, the plaintiff would take them subject to this defense of want of consideration, unless the district should be

held to be estopped from insisting that warrants, after they have been audited and canceled, are void, as against a purchaser who pays value for the bonds. In other words, the district must be held to be estopped, not only as to the existence of power to issue the bonds, but also as to the fact whether they were sold for a valuable consideration. To so hold is to go beyond all authority, and to extend the doctrine of estoppel by recitals to matters which have been governed by other rules.

At this point it becomes necessary to make an important distinction. It is necessary to correct solution of this problem to keep constantly in mind the distinction between the defense of want of power and the defense of want of consideration. The bonds not being negotiable, the defendant will be successful if either defense is established. But it cannot prove the invalidity of the indebtedness audited to establish want of power, because the certificate of the county clerk is a final decision by an authorized officer that a sufficient amount of district indebtedness has been audited and canceled to warrant the issue of the bonds so certified. It was for this purpose that this certificate was required to be made. Power to bond to fund indebtedness would depend upon the existence of debts to be funded, and would be only commensurate with such indebtedness. Such bonds could not be negotiated if this question as to the existence of sufficient indebtedness to warrant the issue of the bonds actually issued were left open to future investigation and decision. To preclude all inquiry into it, as against innocent holders of the bonds, the legislature provided for the indorsement upon such bonds of the certificate of the county clerk, who is charged with the duty of ascertaining such fact, and this was done that the question of power should not thereafter be open to investigation. But the utmost scope of the legislative intent was by the certificate to settle the question of power, and no other question. This is always the object of recitals in such bonds. The sole purpose is to foreclose inquiry into the question of power, by estopping the municipality from showing that certain conditions precedent to

the issue of bonds have not been complied with, or do not exist, and no case can be found where they have been held operative to estop the municipality from showing want of consideration. The certificate of the county clerk is not an assurance to the public that the bonds have been in fact sold for value. The sale does not take place until after the certificate is indorsed thereon. No one would buy them before. No one ever does purchase such securities in advance of their being put in such shape that he can buy them with safety, so far as the question of power is concerned.

The statute in express terms, provides that before the bonds are sold, they shall be so certified. This certificate, from the very nature of the case, cannot embrace a fact which must occur after the certificate is made, which is not intrusted to the county clerk for decision, and of which he cannot be expected to have any personal knowledge; the bonds being subsequently sold by other officers, *i. e.* the proper officers of the school district. It is not a certificate that the bonds were sold for cash, or for audited warrants, or that they were sold at all. It is a statement to the public that, if the bonds are sold, the one who buys them may confidently rely upon their being power to issue them. If this certificate creates an estoppel, not only as to power, but also as to consideration, then it follows that it cannot be shown, as against one who has bought them as non-negotiable paper, and therefore subject to the defense of want of consideration, that they were sold for void warrants, which had never been audited. Indeed, upon this theory, it cannot be shown that, as a matter of fact, they were given away. But it is said that while the purchaser must take the risk of their being given away, or issued in exchange for void warrants, which had not been audited, yet, if they were in fact issued for warrants which have been audited, the validity of such warrants cannot be inquired into. Right here is the pivotal point of this case, so far as this question is concerned. What is there in the statute to warrant a purchaser of such bonds in assuming that any warrant which has been audited is a valid warrant? There is nothing. On the contrary, the

statute explicitly declares to the world that a void warrant is still void, although it may have been audited; that the holder of it cannot enforce it; and that, if he surrenders it in exchange for bonds issued by the district, he has paid nothing of value for the bonds so issued. The law merchant declares to the one who subsequently buys such bonds that the fact that the bonds were void in the hands of the first holder, for want of consideration, can always be shown as against him (the subsequent purchaser.) Whence comes this guaranty to the public that the audited warrants are valid? It does not come from the certificate of the county clerk, for that merely asserts that the auditing committee have adjudged enough warrants to be valid to authorize the issuing of the bonds in question. What particular warrants have been decided to be valid is not stated. What effect this decision of the auditing committee is to have upon the warrants themselves, we must look into the statute to determine. The statute, in express terms, declares that it shall not have the effect to validate such warrants as were before void. So far, however, as the question of power is concerned, the decision of the auditing committee is final, because the statute expressly authorizes the issue of bonds, to the extent that such claims are adjudged to be legal by such committee. The language of the statute is that the "school board shall forthwith proceed to issue bonds to the amount of the indebtedness as audited and settled." There is power to issue bonds to that extent, whether such claims are valid or not; and the certificate of the county clerk is final, that claims enough have been so audited to authorize the issue of the bonds on which the certificate is indorsed. But right here the statute draws the line, and declares that, while the question of power cannot be assailed by showing that not enough valid warrants were audited to justify the issue of bonds issued, yet, nevertheless, such warrants as were void before they were audited are still void for all other purposes; and, if they are declared to be void for all other purposes, how can a purchaser of bonds, who takes subject to the defense of want of consideration, insist

that the district is estopped from showing that they were void, for the purpose of proving that nothing was paid for the bonds which were issued in exchange for them? The estoppel cannot rest upon the certificate, because it may be shown despite the certificate that the bonds were given away, or issued in exchange for void warrants, which had not been audited. The estoppel must rest upon the circumstance that the warrants in exchange for which the bonds have been issued had in fact been audited. As to such warrants, what representation does the statute make to the public? It declares to the purchaser that these warrants, although audited, may in fact be void, and that auditing them does not make them valid; that, if void, he who surrenders them for bonds gives nothing for value for such bonds, and therefore cannot enforce them. The law merchant here steps in, and informs the purchaser of such bonds, when they are not negotiable, that, if they were issued in exchange for such void warrants, he takes them subject to the same defense as was effectual against them in the hands of the first holder.

I fully agree with the majority of the court in the view that, if the bonds were originally sold for cash, they cannot be invalidated by showing that the audited claims are illegal. The certificate of the county clerk settles the question of the necessity of issuing the bonds on which such certificate is indorsed. Section 5 of the act, in terms submits to the committee therein referred to the decision of the question of the fact of indebtedness for the purpose of funding, and the amount thereof. It is true that this decision is not to be binding upon the district as an admission of the legality of any claim. But the obvious purpose of this provision is to save the district from being bound by their decision, as against the holders of such claims. So far as the public were concerned, they had a right to rely on the decision of this board as to the amount of bonds necessary to fund the indebtedness of the district, and to purchase the bonds relying upon the correctness of such decision. The authorities amply sustain this proposition. *Sherman Co.* v. *Simonds*, 109 U. S. 735,

3 Sup. Ct. 502; *National Bank of Commerce* v. *Town of Grenada*, 41 Fed. 87, 92, 93. See, also, *Hackett* v. *Ottawa*, 99 U. S. 86; *Ottawa* v. *Bank*, 105 U. S. 343. But, speaking for myself, I do not think that they have any right to rely upon the auditing of such warrants as establishing their validity, so that the surrender of them constitutes a sufficient consideration for a bond issued in exchange for such warrants. But, on the question of power, we are all agreed that the recitals in the bonds estop the district. The bond, upon its face, recites that it was issued "for the purpose of liquidating indebtedness incurred for building school house." Section 6 requires the county clerk, before registering the bond and making his certificate, to ascertain whether the provisions of section 5 have been complied with, and whether the bonds are authorized to be issued as provided for in the act. The county clerk has decided this question in the affirmative by registering the bonds, and by making the certificate to which we have already referred. He has thus certified that the committee have decided that the bonds are necessary to fund the indebtedness of the district, and that such indebtedness has been surrendered up and canceled. We all hold that one who paid cash for these bonds at the time they were originally issued would be protected, as against the defense that there were in fact no outstanding debts of the district to fund. So would a purchaser from him. There was no attempt to prove that the record in the district or in the county clerk's office failed to show a compliance with the law. Whether a bona fide purchaser is bound to take notice of such records, or either of them, or the absence of any such records, it is not necessary for us to decide. While the statute requires these records to be kept, there is authority for the doctrine that such a purchaser can rely on the recitals in the bond, or on the certificate indorsed upon it. *Lewis* v. *Comanche Co.*, 35 Fed. 343; *Rock Creek Tp.* v. *Strong*, 96 U. S. 271; *Gibbs* v. *School Dist.*, 88 Mich. 334, 50 N. W. 294.

We hold that the district is estopped by the certificate of the county clerk from proving as a defense that it had no title to its

school site at the time the bonds were issued. A majority of the court (the Chief Justice and the writer of this opinion) hold that the bonds are not negotiable, and are therefore open to the defense of want of consideration in the hands of the plaintiff. But a majority of the court (the Chief Justice and Judge Wallin) hold that want of consideration cannot be shown by proving that the bonds were paid for by void warrants, if such warrants were in fact audited and canceled under the provisions of the statute. And all the members of the court are agreed that all the other defenses referred to in the opinion are foreclosed by the certificate of the county clerk. Because the court below refused tc allow defendant to prove want of consideration for the bonds, the judgment is reversed, and a new trial ordered.

BARTHOLOMEW, C. J. A proper disposition is made of this case in the opinion prepared by Judge Corliss. But, to avoid any possible misconception, I desire to state my individual views more fully upon one point than they are stated in the opinion of the court. It will be noticed that Judge Corliss and myself hold that the bonds in suit are not negotiable by reason of the additional contract to pay exchange on New York. This holding, of course, in the absence of any other controlling circumstances, opens the bonds to the defense of want of consideration, even in the hands of a bona fide purchaser before maturity, as plaintiff is shown to be. Judge Wallin, on the contrary, holds that the bonds are negotiable; hence, in his view, all inquiry into the consideration is barred. But, while I believe the bonds to be non-negotiable, yet I believe the inquiry into the consideration is, to a large extent, limited by the terms of the statute under which the bonds were issued, and the recitals in the certificate of the clerk. Judge Corliss finds nothing in the statutes and recitals which should, in his judgment, restrict the inquiry into the consideration; hence, he holds that no restriction exists. The judgment below is reversed solely because the learned trial court refused to permit any inquiry whatever into the question of consideration. The error in that ruling goes only to the extent to which a majority of

this court can unite in saying that the question of consideration was open. For the guidance of the trial court on the new trial, it is necessary that the line be clearly defined, and the holding of this court understood.

These bonds were issued under unusal conditions. The statute which authorized their issue proceeded upon the theory that the school districts of Barnes county had a large amount of outstanding indebtedness, and that the validity of a portion or all of this outstanding indebtedness was questioned, and the power to fix the amount of indebtedness for the payment of which bonds should be issued was left entirely with the district itself. The first step required by the statute was the calling of a meeting of the voters of the district, at which meeting the voters selected three of their own number to act as a committee to audit and settle the indebtedness of the district. This committee was required to give public notice of the time and place where it would meet to audit and settle such indebtedness, and also of the time and place where it would make a full report to the district, at which time and place the voters were required to meet to receive such report, and vote upon the question of issuing bonds for the payment of the indebtedness, as audited and settled. If their was an affirmative vote, under the terms and provisions of the statute, then the school board was required forthwith to issue bonds to the amount of the indebtedness, as audited and settled; but, before the bonds could be disposed of, they must be presented to the clerk for the certificate, as set out in the foregoing opinion. A provision to in the statutes declared that the auditing and settling by the committee should not be construed to be binding on the district, or as an admission of the legality of any claim or alleged claim. Upon this provision my Brother Corliss builds an able argument to show that, where bonds were issued and delivered in exchange for such claims, a recovery on the bonds may be defeated by showing that such claims were in fact invalid, and hence no consideration was given for the bonds. I fully agree with him that the action of the committee, alone, could not bind the district, or

estop it from disputing the validity of the claim; but I entirely disagree with him as to the result that follows from that circumstance, when bonds have in fact been voted and issued, and exchanged for such claims. In my judgment, that provision in the statute was intended to meet a case where, after the committee had audited and settled certain claims, the district, by vote, refused to issue bonds for the payment of such claims. If then suit should be brought against the district on the original claims, the action of the committee could not be shown to establish the legality of the claims, or to estop the district. But if we are to go further, and after the tribunal authorized by law and appointed by the district has declared certain claims valid, and after the district, with full knowledge of all the facts, has ratified the action of that tribunal by voting to issue bonds for the payment of the claims thus allowed, and after the bonds have been in fact issued and exchanged for the allowed claims, if then we permit the district, when sued on the bonds, to declare them worthless because the claim for which they were exchanged was invalid, then we may well ask why was the act ever passed? Why this expensive and protracted preparation for the enactment of so light a farce? An examiniation of the statute will show that it expressly authorizes and contemplates a direct exchange of the bonds for the allowed claims. True, the district is not limited to that. It may sell for cash. But the exchange is expressly authorized. Does it not involve a contradiction to say that when the amount of bonds, and the purpose of their issue, have been fixed as the law directs, and when the bonds have been voted and issued as the law directs, and when they have been exchanged for the exact consideration that the law directs, nevertheless the bonds are without consideration, and worthless? Did the law intend to direct the issuance of worthless bonds? The certificate does not foreclose the question of consideration in this case, more than in any other. But it establishes certain facts, to-wit, that the committee had audited and settled certain claims; that the district had, by vote, ratified that settlement, by directing the

issuance of bonds to pay such claims, as audited and settled; that the bonds had issued; and that the original claims (presumably resting in warrants) had been delivered up and canceled. Under these circumstances, when the claim owner receives the promised bonds in exchange for his surrendered and canceled claim, I contend that the district is estopped, by every principle of the law of estoppel, from saying that such bonds are without consideration. But whether or not the claim owner ever received the bonds in exchange is not fixed by the certificate. When the certificate was made the bonds were in the hands of the school board. They were yet to be disposed of by them. If they sold them for cash, as the law directs, or if they exchanged them for surrendered claims, as the law directs, the question of want of consideration cannot be successfully raised. But if the bonds were given away, or if, through fraud or favoritism, they were sold for less than their value, or less that the statute directs, such facts might be shown, to establish want of consideration. The offer of defendant was broad enough to cover any wrongful or fraudulent disposition of the bonds by the school board, and for that reason, and that alone, I consent to a reversal in this case.

WALLIN, J. I concur in what is said by the Chief Justice upon the question of consideration.

(58 N. W. Rep. 499.)

MESSENA B. ERSKINE *vs.* NELSON COUNTY.

Opinion filed December 2nd, 1893.

Counties—Ultra Vires Contracts—Curative Act.

To legalize void evidences of municipal indebtedness, the purpose to validate them must be clearly expressed by the legislature, or be deducible from the statute by necessary implication. The statute referred to in the opinion examined, and *held* to so far validate void county warrants theretofore issued that the plea of *ultra vires* could not thereafter be interposed as a defense thereto.

CORLISS, J., dissenting.

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

Action by Messena B. Erskine against the County of Nelson to recover on county warrants. From the judgment rendered, plaintiff appeals.

Modified.

Newman & Resser, for appellant.

The bonding act was mandatory in fact although permissive in form, its object was to enable the county to pay outstanding warrants for which it had received consideration. The holders of these warrants were to be benefited by the provisions of the law. Southerland on Statutory Const. 598; *Supervisors* v. *United States*, 4 Wall. 435; *Mason* v. *Fearson*, 9 How. 259; *Galena* v. *Amy*, 5 Wall. 705; *Ry. Co.* v. *Napa Co.*, 52 Cal. 435; *Stanton* v. *Ashbury*, 41 Cal. 525; *Peo.* v. *Supervisors*, 51 N. Y. 401; *Conway* v. *Supervisors*, 68 N. Y. 114; *Lockport* v. *Supervisors*, 49 Hun. 32.

The legislature is presumed to have acted upon evidence and to have had full knowledge of all facts involved in their action and not to have done a vain thing. Sutherland on Stat. Const. 331; *Brown* v. *The Mayor*, 63 N. Y. 239; *Shaver* v. *Eldred*, 114 N. Y. 243. The provision for the payment of the warrants validates them by implication and is as effectual for that purpose as though the statute expressly declared the warrants valid. Southerland on Stat. Const. § 334; *United States* v. *Babbit*, 1 Black. 55; *Beloit*

v. *Morgan*, 7 Wall. 619; *Brown* v. *Mayor*, 63 N. Y. 339; *Nelson* v. *Mayor*, 63 N. Y. 535.

Wm. H. Standish, for respondent.

The warrants were issued for sums beyond what could be realized from the taxes levied for the then current year—were not authorized by a vote of the people and are *ulra vires* and void. *Crampton* v. *Zabroski*, 25 Law Ed. 1670, 11 Otto 601; *United States* v. *Macon County*, 8 Otto 624, 25 Law Ed. 331; *Anthony* v. *Jasper County*, 101 U. S. 693, 25 Law Ed. 1005; *Wells* v. *Supervisors*, 102 U. S. 625, 26 Law Ed. 122; *City of Parkersburg* v. *Brown*, 1 Sup. Ct. Rep. 442; *Ogden* v. *County*, 102 U. S. 634, 26 Law Ed. 263; *Hopper* v. *Town of Covington*, 6 Sup. Ct. Rep. 1025; *County of Daviess* v. *Dickinson*, 6 Sup. Ct. Rep. 897; *Dixon County* v. *Field*, 111 U. S. 834; *Lake County* v. *Rollins*, 9 Sup. Ct. Rep. 651; *Lake County* v. *Graham*, 9 Sup. Ct. Rep. 654; 1 Dillon Muc. Corp. 44; *Capital Bank of St. Paul* v. *School Dist. No. 53*, 1 N. D. 479, 48 N. W. Rep. 363; *Bank* v. *Willow Lake School Tp.*, 1 N. D. 26, 44 N. W. Rep. 1002. The corporation is not estopped to set up the defense of *ultra vires*, it is bound only where its agents or officers, keep within the limits of the chartered power. 1 Dillon Muc. Corp. 567, 361; *Wall* v. *Monroe County*, 13 Otto 74; *Mayer* v. *Ray*, 19 Wall. 468; *Hodges* v. *Buffalo*, 2 Denio 110; *Halstead* v. *Mayor*, 3 N. Y. 430; *People* v. *County*, 11 Cal. 170; *Sturdefant* v. *Liberty*, 46 Me. 457; *Smith* v. *Chesire*, 13 Gray 318; *Dalrymple* v. *Whittingham*, 26 Vt. 185; *Hubbard* v. *Linden*, 28 Wis. 674. These warrants having been issued without authority of law are void in the hands of purchasers. *Goodnow* v. *Commissioners*, 11 Minn. 12; *County* v. *Wolcott*, 13 Otto 559; *Gould* v. *Town*, 23 N. Y. 463; *Bissell* v. *Ry. Co.*, 22 N. W. Rep. 289; *Clark* v. *City of Des Moines*, 19 Ia. 199; Field on *Ultra Vires*, 449. The evidence of ratification should be as clear as that of an original authority and no act operates as a ratification, unless with a full knowledge of the circumstances it was so intended to operate. *Wisconsin Bank* v. *Morley*, 19 Wis. 72; *Savage* v. *Davis*, 18 Wis. 608; *Dodge* v. *McDonnell*, 14 Wis.

601; *Awings* v. *Hull*, 9 Peters 607; 1 Parsons on Const. 54; *Dickinson* v. *Conway*, 12 Allen, 493; *Gill* v. *Bailey*, 17 N. H. 18; *Hozeldew* v. *Batchelder*, 44 N. H. 40. The intention of the legislature to validate the warrants must clearly appear from the terms of the curative act. Dillon Muc. Corp. 637, § 544; *Hayes* v. *Holly Springs*, 5 Sup. Ct. Rep. 785, 114 U. S. 120.

BARTHOLOMEW, C. J. The plaintiff sought to hold the defendant liable upon certain county warrants. These warrants were regular in form, and purported to be used for debts incurred by the county; but it is uncontroverted that, in so far as the trial court refused to give judgment upon these warrants against the defendant, the warrants were originally illegal and void. The debts which they represented were obligations which the board of county commissioners had no authority to create, because the expenditures at the time were in excess of the amount which could be provided for by the current revenue of the county from the tax levy of the year. It is unnecessary to refer to the statute or other authority which renders void these warrants representing such expenditures. The counsel for plaintiff makes no contention against their original invalidity, but strenuously urges here that they have been transmuted into legal obligations of the county by an act of the legislature passed March 13, 1885, which provides as follows:

"An act to authorize the county commissioners of Nelson County, Dakota, to fund the outstanding indebtedness thereof.

"*Be it enacted by the legislative assembly of the Territory of Dakota:*

"SECTION 1. That the board of county commissioners of the County of Nelson, in the Territory of Dakota, be empowered, and are hereby authorized, to issue bonds for not less than five hundred (500) dollars each, the total amount of such issue not to exceed thirty thousand (30,000) dollars; said bonds to draw interest at a rate not to exceed eight (8) per cent. per annum, payable annually at the county treasurer's office of said Nelson County. Said bonds shall specify on their face the date, amount, for what purpose issued, the time and place of payment and rate

of interest. Said bonds and coupons thereto attached shall be severally signed by the chairman of the board of county commissioners of said Nelson County, and attested by the clerk or auditor of said Nelson County, said bonds to be payable at the office of the county treasurer of Nelson County, or such other place as the board of county commissioners may designate.

"SEC. 2. Said bonds shall be dated the first day of July, A. D. 1885, and shall be payable in twenty (20) years, with the privilege of calling in said bonds at any time after ten (10) years.

"SEC. 3. The board of county commissioners of said Nelson County is hereby authorized, and it is made their duty to levy a sufficient tax for each year, besides the ordinary tax authorized by law, to be levied for the purpose of paying the interest of said bonds; *provided further*, that seven (7) years after the time of issue of said bonds, it is made the duty of said board of county commissioners to levy a sinking fund for the purpose of paying off and redeeming said bonds, said tax not to exceed two (2) mills on the dollar of the valuation of said county in any one year.

"SEC. 4. It is hereby made the duty of the county treasurer of Nelson county to negotiate the sale of said bonds, and to call in all outstanding county warrants whenever the bonds are sold, and he, said county treasurer, shall be allowed two (2) per cent. commission as his fees, and no more, for negotiating said bonds, and paying out said money; *provided further*, said bonds shall not be sold for less than par.

"SEC. 5. That after issuing the bonds mentioned in § 1 of this act, no warrants shall be issued by the county board unless at the time of issuing the same there is money enough in the county treasury of Nelson County to pay the warrants so issued.

"SEC. 6. This act shall take effect and be in force from and after its passage and approval.

"Approved March 13th, 1885."

Respondent's counsel contends that there was no intent or purpose on the part of the legislature, in the enactment of this

statute, to validate any invalid warrants. His position may be thus stated in brief: To legalize void evidences of municipal indebtedness, the purpose to validate them must be clearly expressed by the legislature, or be deducible from the statute by necessary implication, and that in the statute in question there is neither a clearly expressed nor necessarily implied intention to validate any invalid warrants of Nelson County. The legal proposition involved in this position is sound, both upon principle and authority. Dill. Mun. Corp. § 544; *Hayes* v. *Holly Springs*, 114 U. S. 120, 5 Sup. Ct. 785; *Beloit* v. *Morgan*, 7 Wall. 619; *Brown* v. *Mayor*, 63 N. Y. 239. But we encounter here the ever-recurring difficulty of applying recognized legal principles to the facts of a given case. It might greatly lessen the labor of courts if the legislative intent were always expressed in clear and unequivocal language. It might benefit the tax payers and the state if validating acts were always couched in express and unmistakable terms. But it is not the province of a court to dictate the language that shall clothe legislative enactments. Courts may say in certain cases, as they do in this, that they will accept no doubtful construction, but, when that which it is clearly provided shall be done cannot be done without accomplishing a certain result, it must be presumed that it was the legislative purpose to accomplish such result, and courts cannot excuse their failure to give effect to this legislative purpose by saying that the legislature might have used more apt terms in which to declare it. It must then be our sole purpose, in this case, to ascertain whether the legislature, by the enactment in question, clearly and necessarily evinced the legislative intent and purpose to validate the invalid warrants of Nelson County.

At the time of the passage of said act, certain facts existed,—some of them notorious, and others of them of record, and brought to our attention by the abstract in this case,—of which we must not lose sight, if we would correctly measure the legislative purpose. The defendant county was organized in June, 1883, without funds in its treasury, and the act in question was passed

at the first session of the legislature thereafter. The total assessed valuation of the county for the year 1883 was $230,330, and the total levy for all county purposes and for roads and bridges was 10 mills on the dollar, making the total revenue for that year $2,303. The assessed valuation of said county for the year 1884 was $771,823. There was no levy whatever for that year, and consequently no authorized revenue for that year. The statute was passed prior to the time fixed by law for the assessment and levy in 1885, and hence dealt with the fiscal affairs of the county as they were left by the tax proceedings for the years 1883 and 1884. Under the law of the then Territory of Dakota, the county commissioners of the defendant county were without power to issue warrants in excess of the amount that could be raised from the tax levy of the current year. All warrants in excess of that amount were *ultra vires* and void. As we have seen, that amount for the year 1883 was $2,303, and for 1884 it was nothing. Prior to March 13, 1885,—the date of the approval of said act,—the defendant county had executed and delivered its warrants to the full amount of $32,739.16. Of this sum, warrants to the amount of $30,436.16 were in excess of the limit fixed by law, and hence invalid. But the county had actually paid upon its warrants the sum of $4,411.53. This the county had been able to do, because, although the trial court found that there was no levy in 1884, yet there was a pretended levy; and the sums voluntarily paid as taxes under such pretended levy, added to the amount realized from the levy for 1883, enabled the county to make such payments. And, as the amount thus paid exceeded the authorized revenue for the two years, it follows that all unpaid warrants were in excess of the limit, and void. But the outstanding warrants, all of which were unauthorized, with the accumulated interest thereon, amounted, at the date of the passage of said act, to the sum of $29,955. The act authorized funding bonds to the amount of $30,000, barely sufficient to cover all outstanding warrants. If, as has been suggested, the act, in speaking of county warrants, meant valid warrants, and no others, then it is

clear that there were no warrants whatevever upon which the act could take effect. No single step could be taken under the act, and it becomes a useless blot upon the statute book. If, on the other hand, by the use of the terms "county warrants," the legislature meant all instruments that were such in form, which had been put forth by the county, purporting on their face to be valid obligations of the county, and if it was the purpose to validate all such instruments, and provide for their payment, then every sentence of the act becomes instinct with life and purpose and usefulness.

The claim is made, however, that there were some valid outstanding warrants; that it is almost universal that there are some delinquent, uncollectible taxes; and that, to the extent of such delinquency, the outstanding warrants would be valid. It seems a sufficient answer to say that there is no claim in the record that there was any delinquency in 1883. But granting the usual percentage of delinquency upon a total tax but little in excess of $2,000, the amount thereof, when compared with the amount of bonds authorized by the act, is too insignificant to affect the rule of construction.

It is urged upon us that these facts which we have been considering were not known to the legislature; that a bill was presented to that body entitled "An act to authorize the county commissioners of Nelson County, Dakota, to fund the outstanding indebtedness thereof," and that such bill was passed without investigation by the legislature as to whether or not Nelson county had any indebtedness, and, if any, how much; that such matters were left entirely to the discretion of the county commissioners. We are not allowed to cast upon the popular branch of goverment this imputation of ignorance and negligence. On the contrary, we are bound to presume that it performed its duty intelligently and faithfully; and, unless the contrary appear from its own records, we think such presumption ought to be conclusive here. At § 331, Suth. St. Const., it is said: "It is not to be presumed that the legislature have assumed the existence of a

fact upon which an act of legislation is based, without evidence. On the contrary, courts are bound to presume that they acted upon good and sufficient evidence, and that presumption is conclusive on the question of the validity of the act. It was so held on an objection to the validity of an act organizing a new county, —that it did not contain the population required by the constitution. It is presumed, as well on the ground of good faith as on the ground that the legislature would not do a vain thing, that it intends its acts, and every part of them, to be valid, and capable of being carried into effect." In *Road Co.* v. *Woodhull*, 25 Mich. 99, Judge Cooley says: "The legislature will not only choose its own modes of collecting information to guide its legislative discretion, but, from due courtesy to a co-ordinate department of the government, we must assume that those methods were the suitable and proper ones, and that they led to correct results. And, if the records show no investigation, we must still presume the proper information was obtained; for we must not suppose the legislature to have acted improperly, unadvisedly, or from any other than public motives, under any circumstances, when acting within the limits of its authority." Again, in *De Camp* v. *Eveland*, 19 Barb. 81, it is said: "It is not to be presumed that the legislature have assumed the existence of a fact upon which an act of legislature is based without evidence. On the contrary, courts are bound to presume that they acted upon good and sufficient evidence, and this presumption is conclusive." See, also, *Lusher* v. *Scites*, 4 W. Va. 11; *Humboldt Co.* v. *Churchill Co. Com'rs*, 6 Nev. 30; *Farmers' Loan & Trust Co.* v. *Chicago, etc., Ry. Co.*, 39 Fed. 143. Under these authorities, we are bound to say that, when the legislature authorized the issuance of the bonds of Nelson County to the extent of $30,000 for the purpose of funding outstanding indebtedness, it did so with full knowledge of the financial condition of Nelson County. And, knowing that the outstanding warrants amounted to nearly or quite the full amount of bonds authorized, it also knew that such warrants were beyond any limit allowed by law, and were necessarily invalid. We say

the legislature knew this, because it knew that Nelson County was but just organized, and its resources were limited. Its assessed valuations for the years 1883 and 1884 were of record in the territorial auditor's office, and the total tax that could have been realized on such valuations under the highest levy permissable to the county would not have equaled, in both of said years, one-third of the amount of the bonds authorized, and the ordinary percentage of delinquency would not have equaled one-tenth of of such amount. Hence, we say that the legislature knew that Nelson County had outstanding warrants amounting to nearly $30,000, and knew that all such warrants were beyond the limit allowed by law, and consequently void. Yet the legislature, after authorizing the issuance of bonds to the amount of $30,000, in express terms declared: "It is hereby made the duty of the county treasurer of Nelson County to negotiate the sale of said bonds, and to call in all outstanding county warrants whenever the bonds are sold." But it was not possible that the treasurer should perform this duty thus unequivocably thrust upon him without paying warrants issued in excess of authority. Hence, the intention of the legislature that such warrants should be paid is unmistakable and unavoidable. Thus far in this discussion, we have not stopped to inquire whether § 1 of the act was mandatory upon the county commissioners, or directory only, for the reason that, before the warrants upon which this action was brought were last presented for payment, the commissioners had in fact issued bonds under the act to the full amount of $30,000, and said bonds had been negotiated, and the proceeds thereof were in the treasury of the defendant county. But, upon a ground not heretofore mentioned, the learned counsel for respondent claims that there were certain legal warrants outstanding upon which the act could take effect. It is urged that, although not appealed from, yet the finding of the court that there was no levy in 1884 should be disregarded, as a matter not in issue, and contrary to the admissions in the pleadings. Let this be conceded *pro argumento*, and it will but strengthen our conviction. If the levy for 1884

was as high as the law permitted, the county revenue arising therefrom would be $7,718. To this add the sum of $2,303,—the revenue for 1883,—and we have a total for the two years of $10,021. As heretofore stated, the county had paid during said time $4,411.53, leaving a possible balance of $5,609.47 in valid, outstanding warrants. Under the authorities already cited, the presumption is conclusive here that the legislature knew that the outstanding warrants of Nelson County, valid and invalid, amounted to nearly $30,000. Did it authorize bonds in that sum for the purpose of paying less than one-fifth of the amount? To so hold compels us to say that the legislature did an unadvised, useless, and utterly incomprehensible thing. This the authorities sternly forbid. We are then forced to say that the legislature intended to provide for the payment of all outstanding warrants, or it intended to clothe the county commissioners with power to say what warrants should be paid and what should not. But the power to validate invalid evidences of municipal indebtedness is a purely legislative power, and cannot be delegated. If the act sought to throw such power into the hands of the county commissioners, it is unconstitutional and void. But, as between a construction that upholds and one that defeats the statute, the canons of construction leave us no choice. We must uphold the law. Further, how can we say that the legislative mandate to the treasurer to call in "all outstanding warrants" means "all such warrants as the county commissioners may direct?" The interpolation is wholly inadmissable. Let it be granted that certain outstanding warrants were valid. As to such warrants the first section of the act, while in form permissive, was in fact mandatory upon the board of county commissioners. Suth. St. Const. § 598; *Supervisors* v. *U. S.*, 4 Wall. 435; *People* v. *Board of Sup'rs of Niagara Co.*, 49 Hun. 32, 1 N. Y. Supp. 460; *People* v. *Sup'rs of Otsego Co.*, 51 N. Y. 401; *People* v. *Supervisors of Livingston Co.*, 68 N. Y. 114. But there is no discrimination in the act itself. All outstanding warrants are treated in the same manner, unless, indeed, it was the purpose to clothe the commissioners with

power to declare outstanding evidences of municipal indebtedness invalid. But that power is purely judicial, as the power to validate when invalid is purely legislative, and neither power can be exercised by a board of county commissioners. It would seem to follow that the act was entirely mandatory or entirely directory, and in our judgment it was mandatory. Had the act in terms validated all outstanding warrants, its mandatory character would not be questioned; but, if the warrants were validated by necessary implication, they were none the less valid, and the act not less mandatory. Viewing the action of the legislature in the light of the existing facts and circumstances conclusively presumed to have been known to the legislature, and the legislative purpose to validate and provide for the payment of all outstanding warrants cannot be doubted or evaded. Nor did that purpose work any injustice to the taxpayers of the defendant county. The county officials had incurred indebtedness for services, and in constructing roads, bridges, and improvements, far in excess of their legal powers. The county commissioners (the fiscal agents of the county) examined the bills and accounts, and declared them meritorious, and issued their warrants in payment therefor. The county had the benefit of the services and improvements. The moral obligation to pay was complete. The legislature added the legal obligation, but, instead of imposing the burden of payment on the infant county, it was extended through a long series of years, until, presumably, the financial condition of the county would be such that payment could be accomplished without hardship. Certainly, no fair minded taxpayer could object to such a course.

The learned trial court, as appears by its findings of fact and conclusions of law, decided this case exclusively upon the ground that the warrants upon which the action is based were void because issued in excess of the amounts of the current revenues of the years in which they were issued. We hold, upon grounds hereinbefore fully stated, that the act of March 13, 1885, cured that defect, and deprived the county of the defense of *ultra vires*.

The legislature had power to authorize the issue of warrants to the amount issued before they were issued, and hence it likewise possessed the power to subsequently ratify and validate those actually issued. If the county had any defense to the warrants on the merits,—such as a want of consideration to support them, or fraud in their issuance,—and such facts had been established at the trial, and found by the court, a very different question would have been presented to this court for determination. In the supposed case it would have devolved upon this court to decide whether the legislature could constitutionally legalize warrants issued fraudulently or without consideration, in whole or in part. There are no such findings in the record, and the legal presumptions are that the warrants were issued upon sufficient consideration, and without fraud. The sole ground upon which respondent endeavors, in this court, to uphold the action of the trial court, is that the warrants sued upon, and which appellant admits were originally *ultra vires*, were not validated by the subsequent legislative enactment. This ground failing, it follows that plaintiff is entitled to judgment for the full amount of such warrants. The trial court is directed to so modify its judgment as to award judgment in plaintiff's favor for the amounts prayed in the complaint. Appellant will recover costs in this court.

Modified and affirmed.

CORLISS, J., (dissenting.) The plaintiff sought to hold the defendant liable upon certain alleged county warrants. These instruments were county warrants in form, and it appears to be in the main undisputed, so far as this record is concerned, that these warrants were issued for debts incurred by the county. It is also uncontroverted that, in so far as the trial court refused to give judgment upon these warrants against the defendant, the warrants were originally illegal and void. The debts which they represented were obligations which the board of county commissioners had no authority to create, because the expenditures at the time were in excess of the amount which could be provided for by the

current revenue of the county from the tax levy of the year. It is unnecessary to refer to the statute or other authority which renders void these warrants representing such expenditures. The counsel for the plaintiff makes no contention against their original invalidity, but strenuously urges here that they have been transmuted into legal obligations of the county by an act of the legislature passed March 13, 1885, which provides as follows:

"An act to authorize the county commissioners of Nelson County, Dakota, to fund the outstanding indebtedness thereof.

"*Be it enacted by the legislative assembly of the Territory of Dakota*:

"SECTION 1. That the board of county commissioners of the County of Nelson, in the Territory of Dakota, be empowered, and are hereby authorized, to issue bonds for not less than five hundred (500) dollars each, the total amount of such issue not to exceed thirty thousand (30,000) dollars; said bonds to draw interest at a rate not to exceed eight (8) per cent. per annum, payable annually at the county treasurer's office of said Nelson County. Said bonds shall specify on their face the date, amount, for what purpose issued, the time and place of payment and rate of interest. Said bonds and coupons thereto attached shall be severally signed by the chairman of the board of county commissioners of said Nelson County, and attested by the clerk or auditor of said Nelson County; said bonds to be payable at the office of the county treasurer of Nelson County, or at such other place as the board of county commissioners may designate.

"SEC. 2. Said bonds shall be dated on the first day of July, A. D. 1885, and shall be payable in twenty (20) years, with the privilege of calling in said bonds at any time after ten (10) years.

"SEC. 3. The board of county commissioners of said Nelson County is hereby authorized, and it is made their duty to levy a sufficient tax for each year, besides the ordinary tax authorized by law, to be levied for the purpose of paying the interest of said bonds; *provided further*, that seven (7) years after the time of issue of said bonds, it is made the duty of said board of county commissioners to levy a sinking fund for the purpose of paying

off and redeeming said bonds, said tax not to exceed two (2) mills on the dollar of the valuation of said county in any one year.

"SEC. 4. It is hereby made the duty of the county treasurer of said Nelson County to negotiate the sale of said bonds, and to call in all outstanding county warrants whenever the bonds are sold, and he, said county treasurer, shall be allowed two (2) per cent. commission as his fees, and no more, for negotiating said bonds, and paying out said money; *provided further*, said bonds shall not be sold for less than par.

"SEC. 5. That after issuing the bonds mentioned in § 1 of this act, no warrants shall be issued by the county board unless at the time of issuing the same there is money enough in the county treasury of Nelson County to pay the warrants so issued.

"SEC. 6. This act shall take effect and be in force from and after its passage and approval.

"Approved March 13th, 1885."

At the outset we are informed by the title to the act, not that its purpose is to validate void county warrants, but to fund "the outstanding indebtedness" of the county. It is true that the title of a statute is not necessarily controlling; but something very convincing in the body of the act to the contrary of this avowed object of the law must be found, to overthrow this clearly expressed purpose merely to provide means for paying the outstanding indebtedness of the county. I find nothing to warrant me in construing this as a statute to validate void warrants, in that portion of the statute which makes it the duty of the county treasurer to sell the bonds, and call in all the "outstanding warrants." These words "outstanding warrants," are more naturally applicable to valid warrants than to void warrants. When we find them employed in a statute whose sole purpose, as disclosed by its title, is to fund the "outstanding indebtedness" of the county, is there any escape from the conclusion that they relate only to such warrants as represent county indebtedness? In no proper sense is a paper in the form of a county warrant, but issued without authority, and against the

commands of a statute, an indebtedness of the county. It is urged, however, that if only valid warrants were to be provided for there was no occasion for the enactment of the statute, as all such warrants would be paid out of the annual revenue. But it is well known that, while in theory the revenue from taxation should equal the total tax levied, yet in practice it often falls short of it, because of the failure to collect all taxes due. Sales of property to enforce collection will not bring cash to the treasury when no purchasers can be found. Because of inability to obtain cash for taxes, it might well happen that it would be necessary to provide another mode of payment for valid county warrants. In some of the counties, (and Nelson County was not more fortunate than other counties,) many farmers found themselves unable, through repeated crop failures, to pay their taxes. Nor does it necessarily follow that, because all legal warrants would be paid out of current revenues if the affairs of the county were lawfully managed, the legislature was bound to assume that all of them had been so paid. It might easily happen that the county treasurer would pay the warrants in their numerical order, and in this way the illegal warrants of one year might be paid out of the revenue of the next year; completely exhausting such revenue, and leaving the valid warrants of that year entirely unprovided for. It is not utterly impossible for it to have been a fact that very few of the legal warrants of either year had been paid at the time the act in question was passed. The revenues of these years might have been improperly spent. Valid warrants to the amount of over $10,000 could have been issued during these two years. It seems to me an extraordinary doctrine that the legislature inquired whether a strictly legal levy had been made during the year 1884 before passing this law. Nor is it important whether they made such inquiry or not. It is not controverted that there were some steps taken towards a legal levy. If the power of a county to incur debts depends upon their being in fact a valid tax levy for the county,—if the validity of tax proceedings are indispensible,—then very few valid warrants, in such cases, have been

issued. The county may contract an indebtedness equal to the amount of taxes it can collect during the year, on the theory that the taxes are legal. Whether the taxes are legal or not is entirely immaterial, provided there are some steps taken towards the levy of a tax.

The prevailing opinion in this case, in assuming that there were no valid warrants outstanding at the time of the passage of this act, assumes a fact which I am unable to find in this record. I know it was possible for there to have been valid warrants outstanding at that time, for the reasons already stated, and it appears from this record that such was the fact. The court expressly finds that at the time the act was passed only $4,411.53 of over $32,000 of warrants had been paid. As valid warrants to the amount of over $10,000 might have been issued during the years 1883 and 1884, how can it be said that the legislature was bound to know that all of these unpaid warrants were void, when over $5,000 of them might have been valid? But what I regard as a conclusive argument against this reasoning is that it embodies still another unwarranted assumption. It assumes that the legislature was as fully in possession of all the facts regarding the illegality of these warrants as this court, after careful judicial investigation. This assumption is unreasonable, because it nowhere appears upon the face of the bill that the question whether these warrants were illegal was called to the attention of the legislature, or was in their minds, when the act in question was passed. This act does not pretend to legalize illegal warrants, or to deal with them in any way. On the contrary, its provisions relate to such warrants as constitute indebtedness of the county, *i. e.* valid warrants. When the legislature was asked to pass a law to fund the outstanding indebtedness of the county, and was informed that there were warrants outstanding to about the amount of $30,000, there was nothing in the circumstances of the case, or in the nature of the legislation asked at their hands, to call their attention to the question whether these warrants were

illegal, or to lead to an investigation of the matter. They were merely asked to give the county authority to fund such of them as constituted indebtedness of the county, not exceeding $30,000. They did not give power to fund $30,000 of warrants and pretended warrants. It is only on the theory that they are presumed to have made a careful investigation of this question, which was not before them, so far as this act shows, that it can be said that they intended to legalize void warrants on the ground stated in the prevailing opinion, that it was only for void warrants that such funding measure was necessary. If they did not make such investigation, they knew nothing of the validity or invalidity of the warrants. To support the contention that the legislature investigated the question of their legality, it is necessary to assume, in the first instance, that the act relates to illegal as well as valid warrants. This is the very question to be determined. It is hardly logical to assume it in order to prove it. It is a rational assumption that they took it for granted that these alleged warrants which were outstanding were valid warrants, there being nothing in the statute to raise the question of invalidity, and the act being limited to valid warrants. The absence of all language showing a purpose to legalize the warrants is to my mind conclusive that the question of their illegality was not before them, and had not occurred to them. It would have been easy to have expressed such a purpose, had such been the legislative will. Whenever the legislature has wished to legalize county warrants, they have not found it difficult to express this purpose in unmistakable language. In one instance we find the contrast sharply presented between the funding of outstanding indebtedness and the legalizing of county warrants. The tittle of an act passed in 1881 is "An act authorizing the board of commissioners of Hutchinson County to fund certain outstanding indebtedness and legalizing warrants issued by the commissioners of Armstrong County." The act declares "that the board of commissioners of Hutchinson County are hereby authorized to fund such indebtedness of said county as may exist on the first day of March, 1881,

and also to fund the outstanding warrants issued by authority of the commissioners of Armstrong County prior to the date of the delivery of the books of said Armstrong County to the officers of said Hutchinson County, which warrants issued in the regular order of business of said acting commissioners of Armstrong County are hereby legalized." Laws 1881, Ch. 16. The act in question in this case embraces only the funding feature. It does not also "legalize" the warrants. Power to incur indebtedness binding upon a municipal corporation must be clearly conferred. No doubtful implication will suffice. Shall the act which is to ratify an illegal exercise of authority be less explicit?

I regard it as a dangerous doctrine that after extravagance has issued pretended obligations of a municipality in excess of authority, and in the very face of statutory prohibition, cunning can outwit the wise and salutory restrictions upon municipal expenditures, by concealing, in artfully framed statutes, its purpose to legalize the void obligations, and then secure from the courts a construction of the law which the language of the act not only did not reveal, but studiously buried from sight. When a bill is introduced to legalize void indebtedness, it must disclose its purpose upon its face, to the end that every legislator may act intelligently,—may meet that issue upon its merits. A court which, after a measure, whose real purpose to legalize is concealed by its author from the legislature, has skulked through the legislative halls in the disguise of ambiguous and doubtful language, aids in throwing off the cloak of deception, will find that it has encouraged like practices in the future. I do not say that deception was in the mind of the one who framed this statute. But I venture the prediction that practically every member who voted for it will be dumfounded at finding such radical consequences wrapped up in this simple funding law. Whatever rule may elsewhere obtain, in my judgment, we should lay down as a rule to be rigidly enforced that the purpose to validate a void obligation must be expressly declared, or be deduced from the law by the clearest necessary implication. The case of *Brown*

v. *Mayor*, 63 N. Y. 239, is one in which the purpose to validate was necessarily embraced in the act. In that case the commissioner of public works had entered into a contract with plaintiff "for regulating, grading and setting curb and gutter stone in Tenth avenue from Manhattan to 155th street, and flagging the sidewalks thereof." The contract was held void because it was not founded upon sealed proposals, and was not let to the lowest bidder after advertisement, as required by the statute. The court, however, held that the contract had been validated by a subsequent act of the legislature, which provided as follows: "The board of the assessors of the City of New York are hereby authorized and directed to assess upon the property intended to be benefited, in the manner provided by law for making assessments for local improvements, the expense which has been, or shall be actually incurred by the mayor, aldermen and commonalty of the City of New York for regulating, grading and setting curb and gutter stones and flagging the sidewalks in the Eighth avenue, from Fifty-Ninth street to One Hundred and Twenty-Second street, in said city; also in the Tenth avenue, from Manhattan street to One Hundred and Fifty-Fifth street in said city." The law required all expense connected with this particular work, whether incurred or to be incurred, to be assessed upon the property benefited by the improvement. Here was a legislative declaration that the amount of expenses already incurred and to be incurred under any contract relating to the improvement to these parts of streets should be raised by assessments upon the property benefited. The money so raised was clearly intended to be used in paying these expenses, and this would involve payment of the expenses under the void contract. I do not wish to be regarded as expressing my approval of this case. I think the doctrine that a void claim against a municipality can be legalized by anything short of a very clear manifestation of such purpose is fraught with danger, —is repugnant to sound policy. Let it once be understood that the courts demand an unequivocal expression of the purpose to

validate the void obligation, and there will be found no difficulty in so framing statutes as to express this purpose in unmistakable language. Let the contrary rule prevail, and funding statutes will become the stalking horses to cover the secret wish of interested parties to secure the legitimation of void debts, when it would not be safe to reveal such purpose to the legislature; and, to the surprise of legislators, the innocent funding bill for which they voted will be found to be a wide reaching and radical measure, to create, and not merely to fund, legal obligations.

The case of *Beloit* v. *Morgan*, 7 Wall. 619, which is relied upon by plaintiff's counsel, is, in my judgment, distinguishable from the case at bar. The town of Beloit have issued certain bonds in payment for railroad stock, which were void, the legislature created out of a portion of the territory embraced within the limits of such town the City of Beloit. No other bonds had at that time been issued for railroad stock by the town of Beloit, except those already referred to. Under these circumstances the legislature declared that "all principal and interest upon all bonds which have heretofore been issued by the town of Beloit for railroad stock or other purposes, when the same, or any portion thereof shall fall due, shall be paid by the town and City of Beloit in the same proportions as if said town and city were not dissolved." The court laid stress on the fact that the act could have no effect, as to bonds issued for railroad stock, unless it was held to apply to those void bonds, as they were the only bonds which had been issued for that purpose by the town, and that the act declared that such bonds should be paid. Said the court: "No bonds were issued in payment for railroad stock, but those to a part of which this controversy relates. The language used by the legislature is clear and explicit. No gloss can raise a doubt as to its meaning. It distinctly affirms, and the affirmation is repeated, that the bonds shall be paid." The more recent decision of the Federal Supreme Court fully sustains my conclusion. *Hayes* v. *Holly Springs*, 114 U. S. 120, 5 Sup. Ct. 785. The facts of that case are as follows: The constitution of Mississippi

declared that the legislature should not authorize any county, city, or town to become a stockholder in, or to lend its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a special election or regular election to be held therein, should assent thereto. A city in that state subscribed for stock in the Selma, Marion & Memphis Railroad Company, after an election held to vote on that question, but neither the election nor the subscription was authorized by the legislature. There being a vote of more than two-thirds in favor of the proposition to subscribe for the stock, the subscription was made, and bonds to pay for the stock were issued They were, of course, void. But subsequently the legislature passed an act which declared that "all subscriptions to the capital stock of the said Selma, Marion & Memphis Railroad Company, made by any county, city or town of this state, which were not made in violation of the constitution of this state, are hereby legalized, ratified and confirmed." Laws 1872, Ch. 75, p. 313. This act more strongly indicates a purpose to validate the void subscription and bond than does the act relied on in this case indicate a purpose to legalize void warrants; and yet the court was clearly of the opinion that it had no such effect, and there was no dissent in the case. Counsel for plaintiff seeks to distinguish this case on the ground that the legalizing statute was not applicable to the subscriptions and bonds in question, for the reason that it validated only such subscriptions as were not made in violation of the constitution. This reasoning of the counsel assumes that the subscription in question did violate the constitution. But it did not. The subscription was not void because the constitution prohibited it, but because there was no statute authorizing it. The case was one of a want of power, and not of the violation of the fundamental law. The subscription was such a one as the constitution permitted the legislature to authorize. The only trouble with it was that the legislature had failed to authorize it. The case was in no manner different from what it would have been, had the constitution been silent on the subject,

and there had been no statute authorizing the subscription; and yet, in such a case, it would not be pretended that the subscription would have been in violation of the constitution. The constitution merely restricted the legislature in the exercise of its power to authorize such subscriptions, and is it only with reference to such subscriptions as the legislature were prohibited from authorizing that it could be said that the subscription would be in violation of the constitution. But the subscription made was one which the legislature might have authorized. The following language of the court in that case embodies my conception of the true doctrine: "The intention of the legislature to confirm and ratify the subscription in question cannot be ascertained with certainty from the language of the act, which is too vague to form the basis of so important an authority as that sought to be deduced from it. As is said in *State* v. *Stoll*, 17 Wall. 425, 436, if the legislature intended to do what is claimed, 'it was bound to do it openly, intelligibly, and in language not to be misunderstood;' and, 'as a doubtful or obsecure declaration would not be justifiable, so it is not to be imputed.' "

The argument that the legislature should not be presumed to have passed an idle act has but little weight, under the circumstances of this case. There might have been several thousand dollars of valid warrants outstanding when the acts was passed. I believe that there were. If so, the act would have force when construed as a mere funding law. The legislature does not declare that the county shall bond to the amount of $30,000. It says that this shall be the limit. Whatever amount, under this sum, shall be needed to pay warrants, may be raised by the issue of bonds. Suppose that the legislature had said in terms that only valid warrants should be paid. Would it be argued that illegal warrants must be paid because to hold otherwise would render the act of no effect? Had the statute in terms spoken of valid warrants, it would not have been clearer. We have seen that the legislature knew what language to employ when they desired to legalize void warrants. They used explicit language in such a

case, but in this act, they refrain from the use of such language, and expressly limit the law to valid warrants by describing it as a law to fund the indebtedness of the county. It seems to me that the fallacy of the reasoning that the legislature must be presumed to have known all the facts is two-fold: Their attention was not called by the prepared bill to any matters connected with the validity of these warrants, and we have no means of knowing that they had evidence that all of these warrants were void. We do not know it ourselves. There is nothing in the language of the cases cited in the prevailing opinion warranting the rule that this court must assume that the legislature had investigated a mass of facts which were entirely foreign to the measure they were about to pass,—a measure to provide for the funding of the county indebtedness by the issue of bonds to the necessary amount, not exceeding $30,000. I know of no decision which holds that the legislature must be presumed to have investigated facts not suggested by a bill before them, for the purpose of forcing into the act, by a strained construction, a meaning not apparent on the face of the act itself,—a meaning directly opposed to the terms of the statute; a meaning which finds no support, except upon the theory that the legislature, without any hint as to their relevancy from the act itself, have examined into these facts. What right have we to say that such an investigation, even if made, convinced the legislature that there were nothing but void warrants to be funded? It is said that the provision requiring the treasurer to call in all outstanding warrants, etc., is conclusive that void warrants were intended to be legalized. But the treasurer is not directed to call in pretended warrants. He has no power or right to do so. The instruments he is to call in are warrants, and warrants are instruments which represent the indebtedness of some municipality; and he is distinctly informed that it is only warrants of that kind —only real warrants, and not *pseudo* warrants—that he is to pay, by the very title of the act, which speaks of the funding of the indebtedness as being the sole purpose of the statute. It cannot

be said that to hold that the county commissioners were to pay only valid warrants out of the proceeds of the bonds sold would vest them with judicial power. Not at all. They were not to determine this question finally. Should they refuse to pay a valid warrant, they could be compelled to pay it. Should they undertake to pay a void warrant, they could be restrained from doing so. They would merely determine, as the officers of any other corporation would determine, what were valid claims against the corporation. No one ever dreamed that the decision of such a question as the basis of business action was the exercise of judicial power. It is a decision that is being made thousands of times every day by business men, when asked to pay some claim or some pretended obligation. They do not decide it finally. They merely decide it for the purpose of governing their conduct in paying or refusing to pay the claim presented. So with reference to these outstanding warrants. The county commissioners could not finally determine which were to be paid and which were not to be paid. They could only decide the matter as other business men decide similar questions, in determining whether they will pay a claim or contest it in the courts.

The statute, upon its face, is simply a funding law. Nothing else can be made of it, unless extrinsic circumstances are to be considered. Now, there is no rule better settled than that which forbids an examination of extrinsic facts,—which prohibits an inquiry as to consequences when the act, upon its face is unambiguous. Courts look to consequences, and investigate circumstances, not to introduce doubt and uncertainty into an act, the meaning of which is plain upon its face, but to aid in solving doubts which the very terms of the act itself create. When the legislature has passed a statute which in terms is clearly a mere funding law, what right have we to construe it as a legalizing statute because investigation may lead us to the conclusion that the outstanding legal warrants against the county were less in amount than the sum for which the county might issue its bonds to fund its indebtedness? What right have we, at all, to look beyond the

language of the act itself? For my part, I believe we have no right to fix the judicial eye upon anything but the words of the plain statute itself. The rule which I invoke is ancient, and it is universally recognized. "If the meaning of statutes is doubtful, the consequences are to be considered in the construction of them; but, if the meaning is plain, no consequences are to be regarded, for that would be assuming legislative authority." 4 Bac. Abr. 652. See *Coffin* v. *Rich*, 45 Me. 507. The court said: "It is only when the words of the statute are obscure or doubtful that we have any discretionary power in giving them a construction, or can take into consideration the consequences of any particular interpretation." In *Salling* v. *McKinney*, 1 Leigh, 42, the court said: "In the construction of statutes, we are told, from high authority, that, when the words are doubtful and uncertain, it is proper to inquire what was the intent of the legislature, but, where they have expressed themselves in plain and clear words, it is very dangerous for judges to launch out too far, in searching into their intent." In *Hoke* v. *Henderson*, 4 Dev. 1, it is held that "in construing a statute, if the words are ambiguous, resort should be had to the probable consequences which would arise from the one or the other construction; but, if the meaning of the language of the statute is plain, there can be no such reason." In *U. S.* v. *The Sadie*, 41 Fed. 396, the court said, (quoting with approval the language of the court in *U. S.* v. *Rector, etc., of Church of Holy Trinity*, 36 Fed. 304:) "Where the terms of the statute are plain, unambiguous, and explicit, the courts are not at liberty to go outside of the language, to search for a meaning which it does not reasonably bear, in the effort to ascertain and give effect to what may be imagined to have been the intention of congress." Mr. Sutherland says, in his work on Statutory Construction: "And, if the legislature has expressed its intention in the law itself, it is not admissable to depart from that intention on any extraneous consideration or theory of construction. Very strong expressions have been used by the courts to emphasize the principle that they are to derive their knowledge of the legislative

intention from the words or language of the statute itself, which the legislature has used to express it, if a knowledge of it can be so derived." Section 236, p. 312. He says further, in § 237, on p. 312: "It is, beyond question, the duty of courts, in construing statutes, to give effect to the intent of the lawmaking power, and seek for that intent in every legitimate way, but * * * first of all in the words and language employed; and if the words are free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation. The statute itself furnishes the best means of its own exposition, and, if the sense in which words were intended to be used can be clearly ascertained from its parts and provisions, the intention thus indicated will prevail, without resorting to other means in aiding in the construction." Again on p. 313, he says: "The legislative intent being plainly expressed, so that the act, read by itself, or in connection with other statutes pertaining to the same subject, is clear, certain, and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms." In *Alexander* v. *Worthington*, 5 Md. 485, the court said: "The language of a statute is its most rational exposition, and, where its language is susceptible of sensible interpretation, it is not to be controlled by any extraneous considerations."

In conclusion, I wish to express my pleasure that the majority of this court are able to reach a conclusion contrary to this opinion, and hold the county liable on these warrants. To a new state, its financial honor is of the highest importance. To develop its resorces, capital is indispensable, and every thing that savors of repudiation, in any form, tends to frighten capital from its borders.

(58 N. W. Rep. 348.)

BESSIE T. CLYDE *vs.* C. D. JOHNSON.

Opinion filed March 19th, 1894.

Service By Mail.

When a paper is served by mail, the time of such service is the date of mailing, and service by mail cannot be converted into personal service by showing the actual date at which the paper was taken from the post office by the party to whom it is addressed.

Waiver of Irregularity in Service.

Where a pleading is served too late, the irregularity in the service is waived by the retention and nonreturn of the copy delivered.

Action for Surplus on Foreclosure—Pleadings.

Under § 5424, Comp. Laws, the sheriff, after making a foreclosure sale by advertisement, where a surplus remains in his hands arising upon such sale, is required to pay over such a surplus on demand "to the mortgagor, his legal representatives or assigns." *Held*, where it appears that the mortgage under which the sale was held was executed by two parties as mortgagors, that one of such parties cannot, as mortgagor, maintain an action for any surplus arising on the sale, without alleging that the entire right to the surplus had been transferred to the party bringing the action.

Time When Material Must be Alleged.

Ordinarily the time when facts happen is not material, and hence need not be alleged in a pleading; but where the time when a fact occurred is essential to the cause of action or defense, the statement of the fact, without stating the time of its occurrence, is sufficient on demurrer.

Transfer of Title After Sale by One of Two Mortgagors.

Accordingly *held*, where it was alleged in the complaint that the title to the mortgaged premises was, after the mortgage was executed, transferred by one of the mortgagors to the other, but it did not appear when such transfer was made with reference to the date of the foreclosure sale, that the complaint is demurrable for insufficiency. The ommission to aver the date of the transfer of title was fatal, because the time was essential to the right of action. If the transfer was made subsequent to the foreclosure sale, such transfer would not itself operate to assign to the grantee the right to the surplus which vested in the mortgagors jointly on the day the sale occurred. Mere transfer of title after sale will give no right of action for the surplus to the grantee.

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

Action by Bessie T. Clyde against C. D. Johnson to recover the surplus arising from the forclosure of a mortgage. From an order sustaining a demurrer to the complaint, plaintiff appeals.

Affirmed.

A. W. Clyde, for appellant.

For the purposes of demurrer the complaint must be liberally construed, every reasonable intendment is in its favor. The demurrer cannot take the place of a motion to make more definite and certain. Comp. Laws, 4924, 4925, *Morse* v. *Gillman*, 16 Wis. 533; *Flanders* v. *McVickers*, 7 Wis. 377; *Roe* v. *Lincoln*, 56 Wis. 66; *Redman* v. *Ins. Co.*, 51 Wis. 298; *Grannis* v. *Hooker*, 29 Wis. 66; Pomeroy's Rem. § 549. An action lies at the suit of the mortgagor or his legal representatives or assigns for the surplus arising from foreclosure sale. Comp. Laws, 5424, *Johnson* v. *Day*, 2 N. D. 297; *Millard* v. *Truax*, 10 N. W. Rep. 358; *Kennedy* v. *Brown*, 15 N. W. Rep. 498.

M. F. Mason and *A. S. Drake*, for respondent.

When the service of a paper by one party has the effect of setting time to run against the opposite party, the time which thus begins to run shall be twice as long when the service is by mail as when made personally. 5331 Comp. Laws; *Dorlon* v. *Lewis*, 7 How. Pr. 132; *Cusson* v. *Whalon*, 5 How. Pr. 305; *VanHome* v. *Montgomery*, 5 How. Pr. 238; *Washburne* v. *Herrick*, 4 How Pr. 15; 4 Waits Practice, 620. When demurrer was served too late the delay was waived by not returning the copy served. *Rogers* v. *Rockwood*, 13 N. Y. Supp. 939. It is alleged that plaintiff is mortgagor and is entitled to surplus by virtue of a deed of conveyance of the property sold to her made and delivered by A. W. Clyde. It is not alleged that A. W. Clyde so conveyed before the sale made by the defendant sheriff. *C. Aultman & Co.* v. *Siglinger*, (S. D.) 50 N. W. Rep. 911.

WALLIN, J. In this action the summons was served without the complaint. Defendant appeared by his attorneys, who caused notice of appearance to be served upon plaintiff's attorney, and demanded in such notice that a copy of the complaint be served upon them at Fargo, N. D. Pursuant thereto, plaintiff's attorney served a copy of the complaint upon defendant's attorneys by mail, and duly registered the letter containing such copy of the

complaint, and took the usual receipt given at the post office for registered mail matter. In due course plaintiff's attorney received through the post office the usual return receipt, which indicated upon its face that the registered letter had been received by defendant's attorneys at Fargo, N. D., at a date stated in such receipt. More than 30 days subsequent to receiving the registered letter, but within 60 days from the date at which plaintiff's attorney mailed such registered letter, the defendant's attorneys served upon the attorney of the plaintiff a demurrer to the complaint. When the demurrer came on for argument in the District Court, plaintiff's counsel appeared, and filed objections to such argument, and claimed that defendant was in default, because, as counsel claimed, the demurrer was served too late. It does not appear that the trial court made a specific ruling upon the points raised by plaintiff's objection, but, inasmuch as the trial court proceeded to hear and determine the issue of law raised by the demurrer, and made no reference in its ruling upon the demurrer to plaintiff's preliminary objections, it will be assumed for plaintiff's benefit that such objections were in fact and formerly overruled.

The preliminary questions raised are: *First.* Was the service of the demurrer too late? *Second.* If such service was too late, was the irregularity in the service waived by the retention of the copy of the demurrer? We are clear that the service of the demurrer was not too late. The service could be properly made by mail. Comp. Laws, § 5329. "In case of service by mail the paper must be deposited in the post office, addressed to the person on whom it is to be served, at his place of residence and the postage paid." Id. § 5330. "When the service is by mail it shall be double the time required in cases of personal service." Id. § 5331. If the complaint had been personally served upon defendant's counsel, they would, under the statute, have been required to serve their answer thereto, within 30 days from the date of such personal service. Id. § 4895. But the complaint was served by mail, and it follows, under § 5331, *supra*, that the defendant had double time

in which to answer, *i. e.* 60 days; and the demurrer was served within 60 days. But appellant's counsel contends that the facts above set forth show a personal service by delivery of a copy of the complaint under Id. § § 4898, 4899; and that the return receipt, signed by the defendant's attorneys at the date of receiving the registered letter, constitutes proof that the copy of the complaint was received by delivery on the day the registered letter was taken from the post office at Fargo by defendant's attorneys. The theory of counsel that service by mail is a personal service, because it is shown that the letter mailed was received on a date certain, is novel. No authority is cited in support of the contention, and we think none can be found. There is no written admission of service, signed by defendant's attorneys; nor does the record show that an affidavit or other proof was filed in the court below, showing that the copy of the complaint which was inclosed in a letter and mailed at Ashley, N. D., was ever received in fact by defendant's counsel. Conceding that the returned receipt shows when the registered letter was taken from the post office, it yet fails to constitute proof that the copy of the complaint was personally served on defendant's counsel at that time. Nor do we think that service of a paper by mailing the same can be converted into personal service by showing the fact that the paper was received at the time it was taken from the post office by the attorney to whom it is addressed. The law permits the service of papers by mail in lieu of personal service under certain circumstances, but we think no authority can be shown for a mode of serving papers compounded of service by mail and personal service. The service by mailing is complete when the paper is mailed; none the less so in a case where the letter containing the paper is never received by the attorney to whom it is addressed. 4 Wait, Pr. 620, 622, and cases cited; *Trust Co.* v. *Keeney*, 1 N. D. 411, 413, 48 N. W. 341. But it is also quite clear, if the demurrer was served too late, that the irregularity was waived by plaintiff's counsel by not returning the copy served upon him. 4 Wait, Pr. 624; *Rogers* v. *Rockwood*,

(Sup.) 13 N. Y. Supp. 939. The record is silent as to whether the copy of the demurrer was returned, but the plaintiff alleges error in proceeding to a hearing on the demurrer. It was not error to take up and dispose of the issue raised by the demurrer if the alleged irregularity had been waived. The burden is on the plaintiff to show error. This court will presume, until the contrary is shown, that the court below proceeded regularly. *Garr, Scott & Co.* v. *Spaulding*, 2 N. D. 414, 51 N. W. 867.

Passing to the merits, we find that the demurrer to the complaint was upon the ground that the complaint does not state facts sufficient to constitute a cause of action. The complaint is as follows: "That on the 27th day of May, 1893, said defendant was, and still is, sheriff of said McIntosh County, State of North Dakota. That as such officer, the defendant, on the said 27th day of May, 1893, in the county aforesaid, at the instance of one Jessie Johnstone, assignee of a certain mortgage, executed June 20, 1888, by Arthur W. Clyde and Bessie T. Clyde, plaintiff herein, upon the northwest quarter of section 27, in township 129, of range 70, situted in said county, and containing 160 acres, did, pursuant to notice of foreclosure of said mortgage by advertisement, make sale of said premises at public auction to the hightest and best bidder for the same, namely, John Johnson, for the sum of $401.37, of which there was required to satisfy said mortgage and all legal costs and expenses of such foreclosure in full no more than the sum of $357.37, and the remaining $51 arising from said sale as aforesaid is surplus, payable to plaintiff, who is entitled to the same as mortgagor, and by virtue of a deed of conveyance of said property so sold, to her made and delivered by said Arthur W. Clyde. Nevertheless defendant has, refused, and still refuses, to pay over to plaintiff the said surplus sum of $51, or any part thereof, although plaintiff has duly demanded the same of him. Wherefore plaintiff demands judgment against said defendant in the sum of $51, and her costs herein." It is apparent from a perusal of the complaint that such facts as are attempted to be set out therein are not directly stated, but are only suggested by

way of inference and recital. There is no direct statement that any mortgage was executed and delivered to any person, or that a mortgage was in fact assigned by any person to any person, or that any sum of money was paid to the sheriff upon the forclosure sale, or that any sum did in fact arise upon such sale, nor is it clearly averred that any surplus was in fact ever in the sheriff's hands. Some of these recited facts are material; others may not be, but all are badly pleaded. Facts should be stated, and not set out by mere recital, or by way of inference. Bliss, Code Pl. § 318. But, aside from verbal criticism, we are of the opinion that the complaint is vulnerable to the demurrer in matter or substance. A vital feature of the complaint is set out in the following language: "And the remaining $51 arising from said sale, as aforesaid, is surplus payable to plaintiff, who is entitled to the same as mortgagor, and by virtue of a deed of conveyance of said property so sold, to her made and delivered by said Arthur W. Clyde." This language, liberally construed, is in effect the averment of a legal conclusion. It avails nothing to state that plaintiff is entitled to the surplus as mortgagor, or by reason of any deed of conveyance, unless the conclusion is based upon specific facts set out in the pleading. We are unable to discover from any facts averred in the complaint that the plaintiff, as mortgagor, is or can be, legally entitled to any surplus in the sheriff's hands arising upon the mortgage sale. It is alleged that the mortgage was a joint mortgage, executed by plaintiff and one Arthur W. Clyde. If there was a foreclosure sale by advertisement made by the defendant under a power of sale in such mortgage, and a surplus arising upon such sale remained in defendant's hands, it will be the duty of the defendant (under Comp. Laws, § 5424) to pay such surplus on demand to the "mortgagor, his legal representatives or assigns." In this case there were two mortgagors, and hence any claim to a surplus in the sheriff's hands is a joint claim in favor of the mortgagors, and is not an individual claim of either. There is no allegation that Arthur W. Clyde

ever assigned his interest in any surplus in the sheriff's hands to this plaintiff, and hence there are no facts stated entitling the plaintiff to recover in virtue of her relation as mortgagor, or on account of being the assignee of any claim to surplus which may have belonged to the mortgagors jointly.

But it is asserted that the plaintiff is entitled to recover the alleged surplus because Arthur W. Clyde conveyed the mortgaged property to the plaintiff by a deed of conveyance made by him, and delivered to the plaintiff. But how does this averment aid the plaintiff, in the absence of an averment stating the time of the delivery of the deed with reference to the date of the sheriff's foreclosure sale? If, on the day of the sheriff's sale, the mortgagors were still the owners of the land, a subsequent transfer of the title to plaintiff would not operate to transfer the right to a surplus arising on the sheriff's sale. The sale fixed the right to the surplus on the day the sale was made. The transfer of the title to plaintiff is of no significance whatever with reference to the right to the surplus, unless it was made prior to the sheriff's sale. If such transfer was made after the execution of the mortgage, and prior to the sheriff's sale, the plaintiff would become an assignee, within the meaning of the statute, and in that capacity could sue for such surplus; but there is no such allegation. This, we think is a fatal omission, and renders the complaint not merely uncertain, but bad on demurrer for insufficiency. The complaint is insufficient, because a vital fact is omitted from it. Generally the time at which a material fact occurred is unimportant, and therefore need not be averred. In such cases the fact only is essential, and the date of no importance; but there are cases (and it is obvious that this is one) where time is vital to the right to recover, and in such exceptional cases the fact is unimportant, unless coupled with a statement of the date of its occurrence. In such cases it is elementary that an averment of the time is essential, and the time must be truthfully stated. Bliss, Code Pl. § § 282, 283; *People* v. *Ryder*, 12 N. Y. 433. In *People* v. *Ryder*, *supra*, the court say: "If the time when a fact

happened is material to constitute a cause of action, it should undoubtedly be stated. The fact, without the time, would be insufficient to constitute the cause of action; but if the time is immaterial I do not think a demurrer will lie for omitting to state it. * * * Suppose the plaintiff alleges that he gave notice to the indorser of the dishonor of the note, but omitted to state when such notice was given; here the time is material. The fact stated will not constitute or aid in constituting a cause of action, unless it occurred at a certain time. Disconnected from the time, it would be entirely immaterial; still it would be a notice." In criminal pleading the governing principle as to stating time is the same as in civil cases. Ordinarily the precise time at which an offense is committed is not material, but when time is a material ingredient of the offense it must be stated with precision. This well settled rule is voiced by our Code of Criminal Procedure (§ 7245.) See, also, generally, *Price* v. *Doyle*, (Minn.) 26 N. W. 14; *Lockwood* v. *Bigelow*, 11 Minn. 113 (Gil. 70.) "The occurrence of a fact, at a particular time, if material, will not be presumed in favor of the pleader in the absence of a proper allegation in the pleading." *Balch* v. *Wilson*, 25 Minn. 299; *Williams* v. *Nesbit*, 65 Ind. 171. Counsel for respondent have urged that the case of *C. Aultman & Co.* v. *Siglinger*, (S. D.) 50 N. W. 911, is decisive against the complaint in this case. We prefer, however, to rest our decision upon the points already stated. The South Dakota case is instructive, and we cite it as containing a valuable discussion of some of the questions involved in this case. The order sustaining the demurrer is affirmed. All concur.

(58 N. W. Rep. 512.)

J. E. PAULSON & CO. *vs.* G. A. WARD, *et al.*

Opinion filed March 19th, 1894.

Creditors Bill—Allegations.

A complaint in equity which alleges that the grantors in a certain conveyance were insolvent, and were being pushed by their creditors, and that such conveyance was without consideration, and wholly voluntary, and made with intent to hinder, delay, and defraud the creditors of the grantors, sufficiently sets forth the facts constituting the fraud.

Defective Complaint Cured by Finding.

When a complaint is defective by reason of the omission of a certain allegation, not jurisdictional, but is not objected to on that ground, and evidence of the omitted fact is introduced without objection, and the court finds that such omitted fact existed, the defect in the complaint cannot be urged in the appellate court for the first time.

Action in Aid of Legal Process—Execution.

Equity clearly recognizes an action in aid of a legal process, which action, while closely allied to a creditor's bill proper, is clearly distinct therefrom, and in such action it is not necessary that an execution be issued, and returned *nulla bona*. As the purpose of the action is to procure the removal by a court of equity of obstructions that hinder the enforcement of the legal process, the execution should be levied upon the property, and remain outstanding until equity removes the impediments.

Conveyance to Secure Honest Debt Not Fraudulent.

In order to set aside a conveyance of land, as a fraud upon creditors, it is not sufficient to show that the grantors intended by the conveyance to hinder, delay, and defraud their creditors, or that the grantee knew of such intent on the part of the grantors, or knew that such must be the necessary result of the conveyance, when the sole object of the grantee was to secure an honest indebtedness owing to him from the grantors.

Fraud by Grantee—Evidence Sustains Finding.

Evidence in this case *held* sufficient to sustain a finding that the grantee participated in the fraudulent intent to hinder, delay, and defraud the creditors of the grantors.

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

Action by John E. Paulson and P. S. Peterson, co-partners as J. E. Paulson & Co., against J. A. Ward and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

J. F. Selby, (*M. A. Hildreth*, of counsel,) for appellant.

The complaint is insufficient, it simply avers that the transfer was fraudulent. It should allege the facts and circumstances of the fraud. *Kinder* v. *Macy*, 7 Cal. 206; *Harris* v. *Taylor*, 15 Cal. 348; *Meeker* v. *Harris*, 19 Cal. 280; *Kent* v. *Snyder*, 30 Cal. 667; *Jones* v. *Massey*, 79 Ala. 370. The rule is universal that before a creditor's bill can be filed, an execution must have been returned *nulla bona*. The fact that the writ has been issued and returned unsatisfied is not sufficient, the return must show as a reason for its being unsatisfied that the officer could find no property whereon to make a levy. *Buckeye Engine Co.* v. *Donan Brewing Co.*, 47 Fed. Rep. 6; *Baskam* v. *Neff*, 47 N. W. Rep. 1132; *Taylor* v. *Bowker*, 28, L. Ed. 368; *Webster* v. *Clarke*, 25 Me. 313. The mere fact that the grantor remained in possession for a time does not show that the property is held in trust for him. *Verner* v. *Verner*, 1 So. Rep. 52; *Scott* v. *Davis*, 20 N. E. Rep. 139; *Stewart* v. *Mills County Bank*, 41 N. W. Rep. 318. A creditor who receives a conveyance from his debtor in good faith, without intent to defraud will be protected. *Rockford Boot & Shoe Co.* v. *Mastin*, 39 N. W. Rep. 219. To render a conveyance void for fraud upon creditors, the grantee must be shown to have knowledge of and in some way participated in the fraud. *Frazier* v. *Passage*, 30 N. W. Rep. 334; *Wood* v. *Elliott*, 7 S. W. Rep. 624. A debtor may give preference to certain creditors. 4654 Comp. Laws. *Oppenheimer* v. *Halss*, 4 S. W. Rep. 562; *Rothell* v. *Grimes*, 35 N. W. Rep. 392; *Bank* v. *Riddell*, 2 N. Y. Supp. 331; *Talbotts Assignee* v. *Ewalt*, 7 S. W. Rep. 631; *Vincent* v. *McAlpine*, 9 S. W. Rep. 165; *Horton* v. *Fancher*, 14 Hun. 172; *First National Bank* v. *Rinnour*, 27 Pac. Rep. 159; *Sutton* v. *Dana*, 25 Pac. Rep. 90. There is no allegation in the complaint that at the time of the transfer, the defendants were insolvent or that they had not sufficient property remaining to pay their debts. *Sell* v. *Bailey*, 21 N. E. Rep. 338.

Carmody & Leslie, for respondents.

The allegations in the complaint were sufficient. *Durant* v. *Pierson*, 8 N. Y. Supp. 904; *Union National Bank* v. *Reed*, 12 N. Y. Supp. 920; Bump on Fraudulent Conveyances, 553; *Garesche* v.

MacDonald, 15 S. W. Rep. 379. The appellant did not in the court below make the point that the complaint does not allege that defendants had not sufficient amount of property remaining after the alienation of the property to pay their debts, and they cannot raise the question for the first time on appeal. *Village* v. *G. N. Ry. Co.*, 52 N. W. Rep. 913; *Waterhouse* v. *Block*, 54 N. W. Rep. 342; *Doherty* v. *Holiday*, 32 N. E. Rep. 315; *Hanson* v. *Miller*, 32 N. E. Rep. 548; *Reed* v. *Nixon*, 15 S. E. 416; *Benton* v. *Beattie*, 22 At. Rep. 186; *Martyn* v. *Larmar*, 39 N. W. Rep. 285. An objection on a specified ground is a waiver of all other grounds and a general objection will be considered as limited to the specific ground mentioned or pointed out. *Floyd* v. *State*, 2 So. Rep. 683; *Garrett* v. *Trabue*, 3 So. Rep. 149, The sheriffs return was sufficient. *Daskam* v. *Neff*, 47 N. W. Rep. 1132. If the evidence shows that issuing an execution would be of no avail, none need be issued or returned. *Town* v. *Smith*, 16 N. E. Rep. 812; *Eiler* v. *Crull*, 14 N. E. Rep. 79; *Mason* v. *Pierson*, 63 Wis. 239. When a person is insolvent any transfer by him which reserves to him an interest in the property transferred, which is not shown by the transfer is fraudulent. *Newel* v. *Wagner*, 44 N. W. Rep. 1014; *North* v. *Belden*, 13 Conn. 376; *Butts* v. *Peacock*, 23 Wis. 359; *Dean* v. *Skinner*, 42 Ia. 418; *Young* v. *Hermans*, 66 N. Y. 374. Any secret reservation of a valuable right to the grantor renders an absolute conveyance void as to existing creditors. *Strong* v. *Lawrence*, 58 Ia. 55; *Simms* v. *Gains*, 64 Ala. 392.

BARTHOLOMEW, C. J. This action was brought by the present respondents in aid of an execution issued upon a judgment in their favor, and against the property of G. A. Ward and Jessie S. Ward and H. H. Hall. The aid which is asked at the hands of a court of equity consists in setting aside two real estate conveyances; one made by the Wards—who are husband and wife—to the defendant Patterson, the other made by Hall, who is the son of Jessie S. Ward, to Patterson. The District Court granted the relief prayed, and defendants appeal. We will discuss the points

in the order in which they are presented in the able brief of appellant's counsel.

It is first urged that the complaint does not set forth sufficient facts and circumstances of the fraud alleged to sustain an action for equitable relief. It is true that a bald statement that a transfer is fraudulent, or that it was made and received with intent to hinder, delay, and defraud the creditors of the grantor is not sufficient. The facts that enter into the transaction and impart its fraudulent character must be stated. The statement in this case is somewhat meager, but, we think, sufficient. The complaint avers "that, as they (plaintiffs) are informed and believe, the defendant Daniel Patterson never really and in truth purchased said real estate, or any part thereof, and that he never paid any consideration for the said deeds of said land, but that said deeds were wholly voluntary and without consideration." And this was followed by the allegation of intent upon the part of all the defendants to hinder, delay, and defraud the creditors of the Wards and Hall. The voluntary character of the transfer, coupled with the insolvency of the grantors, as pleaded, and with the fact that creditors of the grantors were pushing their claims to judgment, if true, rendered the transfer necessarily fraudulent as to such creditors.

Next, it is urged that the complaint does not allege that the debtors had not sufficient property remaining to pay their debts after the alienation. The allegation of lack of other property is contained in the complaint, but it is claimed that it refers to the time of the commencement of this action, and not to the time of the alienation. This is undoubtedly true, but when we look at this objection to the complaint, as urged in the trial court, we find it runs: "For the further reason that it (the complaint) does not state sufficient facts, or allegations that may be construed to be facts, that at the time of the commencement of this action the defendants did not have property out of which their demands might have been satisfied." The objection that is now urged is not the objection that was made below. Had it

been made, undoubtedly the complaint would have been amended to cover the point, as evidence was introduced without objection on this point to show that the grantors were insolvent at the time the deeds were executed, and the court finds "that neither of the defendants Ward and Hall were possessed of any property, real or personal, on said 20th day of December, 1888 (date of transfer,) or have been since that date, save such as were covered by such deeds or chattel mortgages, or chattel mortgages subsequently issued to said Patterson, and from which an execution could be collected." The evidence showed, without substantial conflict, that all real estate owned by the debtors was transferred to Patterson on December 20, 1888, and all personalty then owned by them was mortgaged to Patterson on that date, and all personalty subsequently acquired was so mortgaged as soon as received. Under these circumstances this objection cannot be urged in this court for the first time. See *Martyn* v. *Larmar*, 75 Iowa, 235, 39 N. W. 285; *Waterhouse* v. *Black*, (Iowa) 54 N. W. 342; *Benton* v. *Beattie*, 63 Vt. 186, 22 Atl. 422; *Reed* v. *Nixon*, 36 W. Va. 681, 15 S. E. 416; and the copious citiation of authorities in note to § 470, Elliott, App. Proc.

But a further point is made that equity is without jurisdiction in this case, because it is not shown that an execution had been issued on the judgment in favor of plaintiff, and returned *nulla bona*. This purely formal requirement is a necessary condition precedent to the right to file a creditor's bill proper. *McElwain* v. *Willis*, 9 Wend. 548; *Crippen* v. *Hudson*, 13 N. Y. 161; *Dunlevy* v. *Tallmadge*, 32 N. Y. 457; *Adsit* v. *Butler*, 87 N. Y. 585; *Taylor* v. *Bowker*, 111 U. S. 110, 4 Sup. Ct. 397. But we are convinced that, for two sufficient reasons, the point is not applicable in this case. Respondents seem to have acted with caution, and advisedly. The complaint is dated January 15, 1891. It is alleged, and so found by the court, that on the 27th day of December, 1890, an execution was duly and properly issued upon the judgment that the respondents had obtained against the Wards and Hall and placed in the hands of the sheriff of the proper county, being the county

wherein the real estate in controversy is situated, and in which all the said debtors resided, and that on January 3, 1891, the said sheriff made his return on said execution, stating that he had made diligent search, and could find no personal property in his county belonging to the said defendants in the execution, or any of them, upon which he could levy such execution, and no real estate belonging to said defendants, or either of them, except the real estate in controversy; that he levied said execution upon said real estate, but was requested by plaintiffs' attorneys not to sell the same until the determination of an action to be instituted to remove the obstacles in the way of such sale. The execution was returned entirely unsatisfied. This was, under the circumstances, equivalent to a return *nulla bona*, and would have furnished jurisdiction for a creditor's bill. But on January 13, 1891, an alias execution was issued on the judgment, and placed in the hands of the sheriff, who on the same day indorsed thereon his inability to find any personal property belonging to the defendants therein upon which to levy such execution, and thereupon levied upon the real estate in controversy, and still holds the same under the levy. It is in aid of this alias execution that this action is brought. In such an action it is neither necessary or proper to show a return *nulla bona*. The execution should remain outsanding, particularly where the property is personalty whereon a lien exists only by virtue of the levy, and it can do no harm, and is the better practice in any case. The action is not strictly a creditor's bill. That action is intended to discover assets, and to reach equitable and intangible estates and interests that could not be reached by the common law process, and also to set aside fraudulent conveyances. The action in aid of legal process, while closely allied to the credior's bill proper, is yet clearly distinct. It is never employed to discover assets or to reach intangible assets. It can only be employed where there are tangible assets, in their nature subject to execution, and upon which the plaintiff has obtained a specific lien. Where that lien depends upon the levy of execution, a return of the execution would of course

destroy the lien; hence, it is generally said in these cases that the execution must remain outstanding. When a court of equity has removed the obstruction or incumbrance that prevents a proper enforcement of the lien, then satisfaction is had through the process from the law court. This remedy is not exclusive. A party may proceed to sell under the levy, and the purchaser subsequently take the proper steps to obtain possession. But equity does not consider the legal remedy adequate in these cases, because a sale under such circumstances necessarily tends to a sacrifice of the property. To prevent that, equity will interfere before the sale, and brush away the obstructions. We think these views fully sustained by the New York cases cited *supra*, and *Newman* v. *Willetts*, 52 Ill. 98; *McKinney* v. *Bank*, 104 Ill. 180; *Webster* v. *Clark*, 25 Me. 313; *Zoll* v. *Soper*, 75 Mo. 460; *Pashby* v. *Mandigo*, 42 Mich. 172, 3 N. W. 927; *McKenna* v. *Crowley*, (R. I.) 17 Atl. 354; *Cornell* v. *Radway*, 22 Wis. 260.

Lastly, a reversal is claimed on the ground that the evidence does not support that finding of fact made by the trial court wherein it is found that the defendant Patterson, the grantee in the conveyances, participated in the intent and purpose to hinder, delay, and defraud the creditors of the Wards and Hall. We had occasion very recently, in the case of *Jasper* v. *Hazen*, 58 N. W. 454, to announce the extent to which the court would go in reviewing the facts in cases tried by the court under the power of review conferred by § 5237, Comp. Laws. In testing the sufficiency of this evidence, we concede that, in order to set aside these conveyances as against Patterson, the grantee, it is not sufficient to show that the grantee knew that the object of the grantors in making the conveyance was to hinder, delay, and defraud their creditors, or that such must necessarily be the result of such conveyances, provided the sole object of the grantee in taking the conveyances was to secure an honest indebtedness owing by the grantors to him. *Cooper* v. *Bank*, (Ala.) 11 South. 760; *Nadal* v. *Britton*, (N. C.) 16 S. E. 914; *Young* v. *Clapp*, (Ill. Sup.) 32 N. E. 187; *Bannister* v. *Phelps*, 81 Wis. 256, 51 N. W. 417 It is claimed that such was the case in this instance.

The following facts are admitted, or proved too conclusively to question: On December 12, 1888, respondents began an action against the Wards and Hall to recover the amount then owing by said parties to respondents. Judgment was obtained January 18, 1889, and it was upon this judgment that the executions heretofore mentioned were issued. On December 20, 1888, after respondents' action was brought, but before judgment, the Wards deeded to Patterson, by deed absolute on its face, about 1,000 acres of land. The consideration named in the deed was $25,000. The land was worth $20,000. At the same time Hall deeded to Patterson 320 acres of land for the express consideration of $8,000. The land was worth $6,400. At the same time the Wards and Hall joined in a chattel mortgage to Patterson covering all their personalty, and all crops to be grown on the land transferred, for a series of years. This mortgage was given to secure notes of same date, maturing one each year for eight years, the aggregate amount being $49,080. The notes drew no interest. These conveyances were immediately placed of record. While the deeds were absolute on their face, they were in fact accompanied by a defeasance, which was not recorded. The deeds were intended as security for the sum of $30,000, and the chattel mortgage was given to secure the same debt, and nothing else. This sum Patterson agreed to furnish in the following manner: The Wards and Hall were at that time owing Patterson $13,932; and Patterson assumed other indebtedness of said parties, amounting to about $14,778, and the balance of $1,290 was to be paid in cash. This arrangement rested in parol, and respondents had no knowldge of its existence. The debts so assumed by Patterson were all liens upon the lands transferred, being either in judgment or secured by mortgages. The Wards and Hall were clearly insolvent, and their creditors were pushing them. Within a very short period after these transfers were made, judgments were entered against them amounting to over $6,000. It is perfectly clear that if they intended to remain in control, and have the use of this large property, they must get it beyond the reach of execution.

They provided for such debts as were liens by giving security on all their property, but did it in such a manner as to make their indebtedness appear much larger than it was in fact, and their assets much smaller. There is left little opportunity to doubt the intent on the part of the grantors to hinder, delay, and defraud their creditors. Did the grantee Patterson know of that intent when he took the conveyances? The trial court answers in the affirmative. There is in this case a large accumulation of documentary evidence, introduced as exhibits. Of the probative force and effect of these instruments we may be in as good position to determine as the judge who presided at the trial. But this particular question rests in the parol evidence and the surrounding circumstances. As we held in *Jasper* v. *Hazen*, we cannot disturb a finding of a trial court that is based upon parol evidence, where that court had the many advantages that flow from a personal observation of the witnesses, unless such finding is clearly against the preponderance of the testimony. In solving this particular question, much depends upon whether or not Patterson was chargeable with the knowledge of one Hanson, through whom the negotiations were made. The trial court finds that Hanson was the agent of Patterson. Appellants claim that the evidence does not so show, but does show that he was the agent of the Wards and Hall. Hanson was a witness for appellants, and testified that he procured the loan for Ward; that he tried to procure it from other parties besides Patterson. He does not say that Ward ever employed him for that purpose, or ever paid or promised to pay him. Patterson says he did not employ Hanson, but yet Hanson frequently drew papers for him. The evidence shows that Hanson and Patterson had business connections at that time; had such connection before that time, and have had since, the exact nature of their business relations at that time is not disclosed. It certainly must have been close and confidential if, as Patterson swears, Hanson frequently drew papers for him without any request or employment on his part. We are not prepared to believe that Hanson was conducting these negotiations

without expectation of benefit, directly or indirectly, to himself. The grantors were compelled to account for every dollar received by them from the crop of 1888, and each succeeding year to the trial. It does not appear that they ever paid Hanson anything. *Further*, it is undisputed that Hanson placed the papers of record for Patterson, and that, in the furthur transactions in extending or paying the mortgages and judgments, Patterson assumed Hanson acted for him; and more than $10,000 of the indebtedness held by Patterson against the grantors at the time of the transaction was originally secured by mortgage running to Patterson and Hanson jointly. Certainly, this finding of the trial court is not against the preponderance of the evidence.

It is undisputed that Hanson was fully acquainted with the financial stress of the grantors. He had talked with respondents about their claim, and had suggested paying them 50 cents on the dollar. He knew the grantors were insolvent, and that they could not continue in business unless they could place their property beyond the reach of execution. Patterson is chargeable with this knowledge. But, aside from Hanson's knowledge, it is incredible that a capitalist,—a banker,—who had been doing business with certain clients for years, and had loaned them $14,000, did not fully understand their financial condition. We believe Patterson understood it as fully as Hanson, and, so understanding it, he must have known the intent with which they made the transfer. Did he receive the conveyances for the purpose of aiding to any extent in carrying out that intent? An examination of the exhibits must answer this question. It is urged, and he so testifies, that he sought to get security, for what was owing him. But it does not appear that he ever complained of his security. He was not the moving party. It was the grantors. He did not solicit them for more security, but they solicited him for money to take care of their secured debts. Moreover, without stopping to make the demonstration, it is certain from the figures that he in no manner improved his security, nor could any man of business prudence have regarded it as an improvement. That could

not have been his purpose. Was it a good faith loan made by a capitalist solely for the purpose of placing his funds at interest? The deeds which were given for security only were absolute in form. The defeasance was separate. The deeds were recorded. The defeasance was not. Any creditor searching the record would have seen that the grantors had disposed of all their realty. At the trial no explanation was offered to show why the transaction took that form rather than the usual form of mortgage, which would have developed in one instrument the true character of the deal. This circumstance itself has been held a sufficient evidence of fraud to warrant a cancellation of the conveyance as against the grantee (*North* v. *Belden*, 35 Am. Dec. 83,) and there is much persuasiveness in the argument that the grantee in such a case actively participates in deceiving the creditors of the grantors to their prejudice. We do not hold in this case that such fact constitutes fraud on the part of the grantee, but, in connection with the other facts, it is of force.

A number of the mortgages and judgments assumed by Patterson have been paid, and satisfactions thereof executed and delivered to Patterson. In several instances these satisfactions were withheld by Patterson from the records. As already stated, the contract by which Patterson assumed these obligations rested entirely in parol. On the records they still stood as the absolute debts of the grantors. The chattel mortgage executed at the same time formed a part of the same transaction, and is a proper matter to be considered as throwing light upon the purpose of the grantee in receiving the deeds. That mortgage was for $49,080. The real debt was $30,000. From the proceeds of the sales of property covered by this mortgage, after the execution of the mortgage and prior to the date of the trial below, about $34,000 were realized. The greater part of this money was deposited in the bank of which Patterson was president, and what was not so deposited was deposited with Hanson, who was acting for Patterson. Of this amount, $12,573 had been applied on the indebtedness secured, leaving a balance of about $4,000, then

overdue of the money so deposited. Of the money so deposited, $21,933 were checked out by Ward, and used by him in paying farming and ordinary household and family expenses. This was not only done with Patterson's knowledge, but on more than one occasion, when Ward's account at the bank was overdrawn, Patterson deposited his personal check to Ward's credit, in order to balance the account. Of course this points unmistakably to an understanding between the parties, by which there was such a secret reservation in favor of the mortgagors as renders the chattel mortgage void, under the circumstances under which this mortgage was given. *Newell* v. *Wagness*, 1 N. D. 62, 44, N. W. 1014, and cases there cited; also *Bank* v. *Holdredge*, (Wis.) 55 N. W. 108; *Gillespie* v. *Cooper*, (Neb.) 55 N. W. 302. And while, as to the chattel mortgage, the fraud might be a matter of legal presumption, we think the facts of the entire transaction clearly show actual fraud on the part of all the respondents. The Wards and Hall were, in fact, the owners in fee of 1,360 acres of land, worth $27,300, and of personal property worth $8,000, making their total assets $35,250. They owed Patterson $30,000, and owed unsecured debts to various persons, including these respondents, amounting to about $6,000. There total liabilities exceeded their assets by less than $1,000. But the record showed an absolute sale of all their realty, leaving their total assets at $8,000. It showed an existing indebtedness to Patterson of $49,080, unsecured judgments, about $6,000, and on the mortgages and judgments that Patterson had assumed by parol, and some of which were paid and not satisfied of record, about $10,000 more, making their total liabilities over $65,000, and showing an excess of liabilities over assets of $57,000. When it is remembered that this condition is reached by placing of record whatever would show diminished assets and increased liabilities, and withholding from record whatever would show diminished liabilities and increased assets, the mind is irresistibly led to the conclusion that there was a purpose in so doing, and that such purpose was to hinder, delay, and defraud the creditors of the Wards and Hall. As Patterson

was in a large measure directly responsible for this condition of the record, it is clear that he participated in the purpose. The judgment of the District Court is in all things affirmed. All concur.

(58 N. W. Rep. 792.)

RUSSELL & CO. *vs.* JOHN AMUNDSON.

Opinion filed June 2nd, 1894.

Action for Possession of Personal Property—Pleading—Denial Upon Information and Belief.

In an action to recover the possession of an engine, plaintiff claimed title and took possession under a chattel mortgage pleaded, but not set out by copy in the complaint. The engine was described in the complaint as follows: "One 13 horse S. S. S. B. engine, complete, No. 3,784, manufactured by the plaintiff." Defendant answered: "And now comes said defendant, and, for answer to plaintiff s complaint, denies generally and specifically each and every allegation contained in plaintiff's complaint, except that the said engine is now in the possession of this defendant, which said denial is made upon the defendant's best information and belief." *Held*, that the answer is in effect a general denial, and that it puts in issue all material facts averred in the complaint, except that the defendant admitted that he was in the possession of the particulai engine described in the complaint.

Denial Upon Information and Belief—When Proper.

Held, fnrther, that a denial upon information and belief is authorized by the Code in a case where the party making the denial has information inducing a belief that the facts sought to be denied are untrue, but has not absolute knowledge that they are untrue. In such cases a general denial, or a denial of knowledge or information sufficient to form a belief, would be improper.

Identification of Property by the Evidence.

Plaintiff's evidence tended to show that he had sold a certain engine in May, 1889, to one A., in the State of Wisconsin, and taken notes therefor, secured by a chattel mortgage upon the engine from A. to plaintiff. The mortgage was put in evidence, and it embraced a description of the engine in the precise words in the description set out in the complaint, and above quoted, except that the description in the mortgage omitted the words "No. 3,784." *Held*, that the description as contained in the mortgage, when construed in connection with the description set out in the complaint and the denial in the answer, did not, as a mere matter of legal construction, identify the engine in question as the engine described in the mortgage.

Failure of Proof—Verdict Directed for Defendant.

At the close of the testimony, the trial court instructed the jury to return a verdict for the defendant. *Held*, that the instruction was proper. No testimony being offered to establish the indentity of the engine, and the identity not being made out as a matter of legal construction from the description in the mortgage, considered with reference to the pleadings, there was a total failure on plaintiff's part; *i. e.* a failure to show that his mortgage covered the property in controversy in the action.

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

Action by Russell & Co., a corporation, against John Amundson. From a judgment for defendant, plaintiff appeals.

Affirmed.

Frank J. Young, for appellant.

G. K. Andrus, for respondent.

WALLIN, J. This action is for the recovery of the possession of personal property. At the close of the evidence, upon defendant's request, the trial court directed the jury to return a verdict for the defendant. This instruction was excepted to, and is assigned as error in this court. The verdict, as returned, was to the effect that defendant was the owner of the property, and entitled to the possession thereof. The value of the property was not found by the jury. Upon this verdict, as soon as returned, judgment was entered in the alternative, as follows: "In case delivery cannot be had for judgment in the sum of three hundred dollars, the value of the property," etc. This judgment was entered on December 23, 1893. Subsequently, and pursuant to an order of the trial court, said judgment was, on February 9, 1894, modified by leaving out the value of the property. The modified judgment was for the possession and return of the property, with costs of the action, and was therefore in strict conformity to the verdict. It does not appear that any exception was taken either to the entry of the original or modified judgment. Error is not assigned in this court upon the order for the entry of the modified judgment or upon the entry thereof, but error is assigned here upon the entry of the original judgment, now

vacated. The entry of the original judgment was irregular, because it did not correspond to the verdict, but it was vacated by the trial court, and no proceeding was ever taken upon it. The error was clearly without prejudice. The modified judgment is appealed from, and it is the only existing judgment in the action. It omits the value of the property awarded by the verdict to the defendant. If the defendant does not object to such a judgment, surely the plaintiff cannot be heard to complain. Plaintiff demurred to defendant's answer generally for insufficiency. The demurrer was overruled, and the ruling is assigned as error in this court. For reasons which will appear fully hereafter, we are of the opinion that the demurrer was properly overruled. The chief contention of the plaintiff arises upon its assignment of error, based upon the exception to the instruction of the trial court directing the jury to find for the defendant. The entire evidence is incorporated with the record, and has been carefully considered; but, inasmuch as we have reached the conclusion that the instruction complained of is clearly right, we shall have occasion to refer only to that part of the record which bears upon the ruling in question.

Paragraph 2 of the complaint is as follows: "That the said plaintiff is entitled to the immediate possession of the following described personal property, to-wit: One 13-horse S. S. S. B. engine, complete, No. 3,784, manufactured by this plaintiff, and sold to one J. H. Arms, in the township of Loyal, County of Clark, and State of Wisconsin, on the 25th day of May, A. D. 1889, which said engine is now in the possession of this defendant." The complaint also sets out, in substance, that plaintiff has a special property in "said engine," by virtue of a chattel mortgage executed and delivered by said J. H. Arms, to the plaintiff on the 25th day of May, 1889, in the township of Loyal, County of Clark, and State of Wisconsin, to secure the payment of certain notes given by said J. H. Arms for the purchase money of said engine; that the mortgage was duly filed in said township of Loyal, and was renewed and kept alive pursuant to the laws of

the State of Wisconsin; that default was made in the payment of said notes; and that, by the terms of the mortgage, the plaintiff had a right to take possession of the property, and foreclose pursuant to law; that defendant unlawfully detained the possession of the engine from the plaintiff, and refused to deliver it to plaintiff upon demand therefor. The demand for judgment was in the usual form. In addition to the qualified general denial hereinafter set out, the defendant pleaded in his answer an affirmative defense, to the effect that he was the owner of the engine, and entitled to the possession thereof, by virtue of his purchase of the engine under a foreclosure proceeding which defendant took against the engine, under a lien filed by defendant, and arising out of certain repairs made upon the engine by defendant as a blacksmith. Much is said in the briefs of counsel touching the validity of the lien proceeding, but, in the view which this court has taken of the case, it will not be necessary to pass upon any question connected with the lien matter. At the time the engine was taken possession of by plaintiff, under the chattel mortgage, the defendant was in the actual and peaceable possession thereof, and was claiming title as owner. The defendant's title would be good, under the circumstances, as against a trespasser; and defendant would clearly be entitled to a verdict awarding the possession to him, as against the plaintiff, if the plaintiff failed at the trial to show by competent testimony that he was entitled to a special property in the engine by virtue of his alleged mortgage thereon. In brief, the plaintiff, by his complaint, assumed the burden of showing at the trial that he had a chattel mortgage upon the identical engine which the plaintiff took of the defendant's possession. In our opinion, there is a signal failure of proof upon the vital point of identity. We think there is no evidence in the case tending to show that the engine taken from the defendant was the same engine sold to J. H. Arms, and by him mortgaged back to the plaintiff. But, to bring out this point clearly, the issues made, by the pleadings must be considered in connection with the evidence. Defendant's qualified

general denial reads: "And now comes said defendant, and, for answer to plaintiff's complaint, denies generally and specifically each and every allegation contained in plaintiff's complaint, except that the said engine is now in the possession of this defendant, which said denial is made upon the defendant's best information and belief." This denial, we think, puts several material allegations of the complaint in issue, including the alleged sale to Arms, the execution and delivery of the mortgage and notes, the renewals of the mortgage, and the plaintiff's right to the possession of the engine. It is obvious, therefore, that the answer is not demurrable for insufficiency. It clearly raises issues which are vital to a determination of the rights of the parties. We think the answer does not contain a "specific denial," within the meaning of the statute. No fact alleged in the complaint is enucleated and denied, and this, we think, is necessary to a statutory, specific denial. But whether the words "generally and specifically" are both eliminated, or left standing in the paragraph of the answer we have quoted, a good general denial of each and every allegation contained in the complaint will remain, with the qualification stated, viz. "except that the said engine is now in the possession of this defendant." An examination of the language of the answer in which the denial is couched discloses that the denial was carefully worded, with a view of putting every material fact alleged in the complaint in issue, except only the bare fact that defendant was in possession of that particular engine which is described in paragraph No. 2 of the complaint, which we have quoted in full, and which contains the only description of the engine which is found in the complaint, and to which alone the answer responds.

Among the averments of the complaint which are put in issue by the denial contained in the answer is the averment that the plaintiff has a special property by virtue of a chattel mortgage pleaded in the complaint in that particular engine, which defendant claims to own, and which was in defendant's possession until seized by the plaintiff under the mortgage. The answer admits

that the engine described in the complaint is in defendant's possession, but denies that the plaintiff had a mortgage upon such engine. There has been some diversity of opinion in the courts upon the point, but the better rule is that a denial made upon "information and belief" is sufficient when made in a certain class of cases. In strictness, it is the only proper form of denial in a case where, with reference to the fact sought to be denied, defendant has certain information which induces him to believe that such facts are untrue, and yet has not absolute knowledge that such facts are untrue. Having information inducing a belief, which falls short of knowledge, defendant cannot truthfully deny the fact absolutely, nor can he truthfully deny that he has neither knowledge nor information sufficient to form a belief as to the fact. Of course, there is a class of cases in which a party is legally presumed, *prima facie*, to possess knowledge; and in such cases a party will not be permitted to deny on his mere information and belief, nor to deny knowledge or information sufficient to form a belief. Bliss, Code Pl. § 326, and note 4; *Stacy* v. *Bennett*, 59 Wis. 234, 18 N. W. 26; *Jones* v. *City of Petaluma*, 36 Cal. 230; *Bennett* v. *Manufacturing Co.*, 110 N. Y. 151, 17 N. E. 669.

At the trial, plaintiff introduced testimony tending to show that it sold an engine of its own manufacture to one Arms, at Loyal, in the State of Wisconsin, in the month of May, 1889; that, to secure the payment of notes for the purchase price, Arms executed and delivered to plaintiff a chattel mortgage upon the engine, which mortgage, by successive renewals, had been kept "alive, and was valid at the time the engine was taken from the defendant." A copy of said mortgage was put in evidence, and the only engine mentioned therein was described as follows: "One 13-horse S. S. S. B. engine, complete, No.——, manufactured by Russell & Co." There was no extrinsic evidence offered in the case tending to show that the engine found in defendant's possession at Barnes County, N. D., was the same engine sold in the State of Wisconsin to Arms, and by him mortgaged to the plaintiff. No witness attempted to testify that he saw the engine

which plaintiff sold to Arms at the time of the sale, or at any time, or that the engine taken out of defendant's possession was and is in fact the same engine which was sold to Arms by the plaintiff. There is not a scintilla of evidence in the record tracing the engine from Wisconsin to this state, or in any way tending to identify the engine sold to Arms with that taken by plaintiff from the defendant. But the claim is strenuously urged that the defendant has admitted by his answer that he was in the possession of the engine sold and mortgaged. We cannot so construe the pleadings. The admission in the answer is that defendant has in his possession a "13-horse S. S. S. B. engine, complete, No. 3,784, manufactured by the plaintiff." The description in the chattel mortgage did not embrace a 13-horse S. S. S. B. engine, which was numbered 3,784. Had the description in the mortgage included the number of the engine found in the defendant's possession, such description would, we think, alone have sufficed to make out a *prima facie* case upon the question of the identity of the engine taken from the defendant with that described in the mortgage. There is no evidence in the record tending to show that the plaintiff never manufactured but one solitary 13-horse power S. S. S. B. engine, and an inference that effect would not only be exceedingly unreasonable, intrinsically, but would be strongly rebutted by the fact that the engine claimed by defendant is numbered 3,784. We think that the description in the mortgage is legally sufficient as as a description, and that, under it, the holder of the mortgage, aided by the description, could have introduced parol evidence to identify the engine in question with that sold to Arms and mortgaged to the plaintiff. *Sargeant* v. *Solberg*, 22 Wis. 127; *Harris* v. *Kennedy*, 48 Wis. 500, 4 N. W. 651; *Bank* v. *Oium*, (N. D.) 54 N. W. 1034.

In the case there was no parol identifying evidence, and hence, at the close of the testimony, the question of identity was not a question of fact to be submitted to the jury, but was, on the contrary, a question of law to be resolved by the court upon a construction of the description in the mortgage, compared with

that in the complaint, when read in connection with the admission in the answer. We think the trial court was clearly right, upon a construction of all the writings, in holding that the plaintiff had failed in establishing the vital fact of the identity of the engine found in defendant's possession with that described in the mortgage. To hold contrariwise would necessarily lead to the absurd conclusion that the mortgage alone, unaided by parol evidence, would (so far as the description is concerned) authorize the holder of the mortgage to seize and retain any 13-horse power S. S. S. B. engine ever manufactured by the plaintiff, regardless of the place where, or the person with whom, such engine is found. Such an interpretation of the law, as applied to the facts contained in this record, would be not less grotesque than unjust. Finding no prejudicial error in the record, the judgment must be affirmed. All concur.

(59 N. W. Rep. 477.)

In re WEBER.

Opinion filed June 23, 1894.

Final Judgment—Entry in Judgment Book.

Under the statutes of this state regulating the entry of judgments in District Courts, a final judgment does not become such, and has no force or effect, until entered by the clerk in the judgment book.

Order Dismissing Action—Not a Judgment.

An order of the District Court dismissing an action for jurisdictional reasons, as well as in other cases, will authorize the clerk of the District Court to enter judgment, but such an order does not itself constitute a judgment, nor is it a final determination of any question. An order of dismissal, whether entered in the minutes of the court or recorded in a book labeled "Order Book" or written out, signed by the judge, and filed, is still an order, and does not constitute a final determination or final judgment.

Order Dismissing Appeal from Justice Court—Not Appealable.

No appeal will lie from an order of the District Court dismissing an action originating in that court or an appeal from a Justice Court for jurisdictional reasons. Such an order is not appealable under the first subdivision of § 24, Ch.

120, Laws 1891. The order is authority for the entry of a judgment; hence it does not "prevent the entry of a judgment from which an appeal might be taken."

Action Pending.

Until judgment is entered upon the order, the action is not determined, but is pending in the District Court.

Judgment for Costs—Reviewed Upon Appeal.

Where an action, originating in the District Court or brought there by appeal, is dismissed for want of jurisdiction in the District Court to determine the same, § 5194, Comp. Laws, expressly authorizes a judgment to be entered for costs. The section reads: "When an action is dismissed from any court for want of jurisdiction, or because it has not been regularly transferred from an inferior to a superior court the costs must be adjudged against the party attempting to institute or bring up the action." The right to enter judgment for costs under this section depends upon the validity of the dismissal, and this court on appeal from such a judgment will review the dismissal upon the merits, as well as any question touching costs which properly arises upon the judgment record.

BARTHOLOMEW, C. J., dissenting.

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

Application of Gertrude Weber for a writ of certiorari to C. L. Mayer, justice of the peace in the City of Wahpeton. From the judgment on the return, the Traveler's Insurance Company appeals.

Affirmed.

McCumber & Bogart, for appellant.

W. E. Purcell and *L. B. Everdell*, for respondent.

WALLIN, J. From the record transmitted to this court it appears that on the 15th day of December, 1890, in an action then pending in Justice Court in Richland County, presided over by said C. L. Mayer, wherein the Traveler's Insurance Company was plaintiff and Gertrude Weber was defendant, for the unlawful detention of certain lots and an hotel thereon, situated in the City of Wahpeton, in said county, a judgment was entered in favor of the plaintiff, whereby it was adjudged that the plaintiff was entitled to the possession of said lots and premises, and that said defendant unlawfully detained the same. The judgment was rendered upon complaint of the plaintiff, and evidence in support thereof, and there was no evidence and no answer on the part of the

defendant. On the day the judgment was rendered, the defendant Gertrude Weber, appealed from said judgment to the District Court of said county upon questions of law and fact, and a new trial was demanded in the District Court. No statement of the case was settled or filed in said Justice Court. On the 10th day of January, 1891, upon the application of the plaintiff in said action, the District Court, after hearing counsel, made its order in writing, which order concluded as follows: "It further appearing that said appeal is without authority of law, now, therefore, it is ordered that the said appeal be and the same is dismissed, and the clerk of said District Court is hereby ordered to return to said justice all papers and records sent him in said action by said justice." The order was filed with the papers in said action, but was not entered in the judgment book nor in the judgment docket, but said order was recorded at length in a book kept in the office of the clerk of the District Court known as the "Order Book." No attempt has ever been made to appeal from such order. The fifth subdivision of § 24, Ch. 120, Laws 1891, specifies as among those orders from which an appeal may be taken to this court: "From orders made by the District Court vacating or refusing to set aside orders made at chambers, where by the provisions of this act, an appeal might have been taken in case the order so made at chambers had been granted or denied by the District Court in the first instance." The defendant proceeded on the theory that the order of dismissal was not appealable because made at Chambers, but that it would have been appealable if made by the court, and under the foregoing provisions he moved in the District Court to set aside the order of dismissal. This motion was denied, and from the order denying the motion to set aside an appeal was taken to this court. That appeal was dismissed. See *Insurance Co.* v. *Weber*, 2 N. D. 239, 50 N. W. 703. The court did not decide in that case whether or not the order of dismissal was an appealable order, but held that such order was, under our system, a court order when made, and hence no motion to set it aside was proper. If not appealable, the

order refusing to set it aside was not appealable, and, if appealable, the appeal must be taken direct from the original order, and not from an order refusing to set it aside. When the remittitur in the case cited was filed in the District Court, that court entered a judgment for costs against the appellant, including the costs in both courts. Certified copies of the dismissal and of the order of this court and of the judgment of the District Court, entered upon the order of this court, were filed in the Justice Court, and thereupon the justice issued execution upon the original judgment in his docket, and placed the same in the hands of the proper officer for service. While the officer was proceeding under the execution, and upon application therefor, the District Court issued a writ of certiorari to the justice, requiring him to certify and return to said court all his proceedings in said case. The justice made return, and, after argument, the court entered an order stating, in effect, that at the time of the issuance of the execution by the justice, he, the said justice, was entirely without jurisdiction, because no judgment dismissing the appeal from the justice had ever been entered in the District Court, and directing that the execution, and all the proceedings thereunder, be set aside and annulled. From a judgment entered on this order this appeal was taken.

We notice first that the propriety of the remedy pursued in this case has not been questioned; hence, we must not be understood as holding that certiorari is or is not the proper remedy in cases of this character. The case has been submitted to us on the theory that certiorari was the appropriate remedy, and we decide it accordingly. If the position of the learned trial court that no judgment of dismissal had been entered in that court be correct, and if a formal judgment of dismissal be necessary, then an affirmance must follow. Otherwise we must reverse the judgment. It is contended by respondent's counsel that the document which we have called the order of dismissal, meaning the dismissal of the appeal from Justice Court, which was entered on January 10, 1891, is not a judgment, and further contended that,

under our statutes, there can be no judgment until the proper entry is made in the judgment book. If it be conceded, and we think it must be, that a technical judgment is required to dismiss an appeal from a Justice Court, then respondent is right. A mere order of determination made by the District Court does not constitute a final judgment under our statutes. Before any judgment can have any force as such, it must, in our opinion, be entered in the judgment book. This question involves the examination of the statutes of this state regulating the rendition and entry of judgments in the District Courts. Section 5024, Comp. Laws, reads: "A judgment is the final determination of the rights of the parties in the action." Section 5095 reads: "Judgment, upon an issue of law or fact, or upon confession, or upon failure to answer, may be entered by the clerk upon the order of the court or the judge thereof." Section 5101 reads: "The clerk shall keep among the records of the court a book for the entry of the judgments, to be called the 'Judgment Book.'" Section 5102 reads: "The judgment shall be entered in the judgment book, and shall specify clearly the relief granted or other determination of the action." Section 5103 provides for making up the judgment roll, and directs that the roll shall be made up by the clerk after the entry of the judgment. This is apparent also from the requirement that the roll shall embrace a "copy of the judgment." Under § 5104 a judgment will become a lien upon real property only when docketed in another book, known as the "Judgment Docket." Section 5102, *supra*, is a copy of § 273 of Ch. 66, of the General Statutes of Minnesota of 1878, and the section of the Comp. Laws regulating the making and filing of a judgment roll by the clerk of the District Court is also copied substantially from § 275, Ch. 66, of the General Statutes of Minnesota for 1878. The point involved in the case at bar has been considered and passed upon by the Supreme Court of Minnesota in several cases, and the holding of that court has always been, in effect, that the entry of the judgment is issential to its existence as a final adjudication. That court, in *Rockwood* v. *Davenport*, 37

Minn. 533, 35 N. W. 377, reviewing the former decisions, and quoting from the statute, which says: "The judgment shall be entered in the judgment book, and specify clearly the relief granted, or other determination of the action,"—then proceeded: "By § 275, the clerk is required, 'immediately after entering the judgment,' to attach and file, as the judgment roll, certain papers, among them a copy of the judgment. Section 277 provides for docketing the judgment 'on filing the judgment roll.' These facts follow in regular sequence: *First*, the entry of the judgment; *second*, the making up and filing of the judgment roll; *third*, the docketing. To support either a judgment roll or docketing there must be a judgment entered. As this court stated in *Williams* v. *McGrade*, 13 Minn. 46, (Gil. 39,) 'if a copy of the judgment constitutes a part of the judgment roll, the original must exist.' There can be no judgment capable of being docketed or enforced in any manner until it is entered in the judgment book. Until that is done, it does not matter that a party is entitled to judgment, either by default of defendant or upon a decision or direction of the court. It has frequently been decided that an order or direction for judgment by a court or by a referee is not a judgment so that an appeal can be taken from it. That, to constitute a judgment, it must be entered in the judgment book as the statute directs, has always been held by this court. *Brown* v. *Hathaway*, 10 Minn. 303, (Gil. 238;) *Washburn* v. *Sharpe*, 15 Minn. 63, (Gil. 43;) *Williams* v. *McGrade*, 13 Minn. 46, (Gil. 39;) *Hodgins* v. *Heaney*, 15 Minn. 185, (Gil. 142;) *Thompson* v. *Bickford*, 19 Minn. 17, (Gil. 1;) *Hunter* v. *Stove Co.*, 31 Minn. 505, 18 N. W. 645." The reasoning of the learned court in the case from which we have made extracts above, based as it is upon statutes identical in their language with those in this state, seems to our minds both sound and conclusive upon the question under discussion. We are aware that California and some of the other states, under systems somewhat resembling our own, have emphasized the distinction between the "rendition" and the "entry" of a judgment; but we are convinced that it will serve to simplify and make certain an

important feature of practice to hold, as was said in one of the cases cited, "there can be no judgment capable of being docketed or enforced in any manner until it is entered in the judgment book." What was said by this court in *Gould* v. *Elevator Co.*, 54 N. W. 316, is in entire harmony with the decisions cited. In that case we said: "In this state, where an order for the entry of a judgment is given, it is the duty of the clerk under § 5095, *supra*, to enter final judgment in the judgment book, and then place a copy of said judgment in the roll (Comp. Laws, § § 5101, 5103;) and the coming in of a verdict and order for judgment entered in the minutes, or subsequently written out, signed by the judge, and filed, will give the clerk authority to enter judgment pursuant to the order. Where the action is tried by the court, the findings should indicate clearly the character of the judgment to be entered, and such findings, without further direction from the court or judge, will authorize the entry of judgment. In no case should a judge be called upon to sign a judgment." This language indicates clearly that, in the opinion of this court, it is not the order of the District Court or judge, which, under § 5095, Comp. Laws, must precede the entry of judgment, that constitutes the judgment. We think that under existing statutes the final determinations of District Courts never assume the authoritative form of a final judgment until the previous adjudication is recorded at length in an official record, called a "Judgment Book." Comp. Laws, § § 5101, 5102. See, also, *Bowman* v. *Tallman*, 28 How. Pr. 482, and *Knapp* v. *Roche*, 82 N. Y. 366.

In the view taken by this court a judgment was necessary to accomplish a dismissal of the appeal from Justice Court. A motion was regularly made to dimiss the appeal. Argument was had on the motion, and the court signed a writing which recited: "Now, therefore, it is ordered that the said appeal be and the same is hereby dismissed." Section 5323, Comp. Laws, reads: "Every direction of a court or a judge made or entered in writing, and not included in a judgment, is denominated an order,"—and the statute following: "An application for an order is a motion."

The application for the order of dismissal was by motion. That writing fulfills every requirement of an order. It fulfills none of the requirements of a judgment. It is not "a final determination of the rights of the parties in the action," because it looks forward to further proceedings, viz. to the entry of a judgment. The order of dismissal was filed and recorded at length by the clerk in a book kept in his office, labeled "Order Book." Our attention has not been called to any statute which authorizes the clerks of District Courts in this state to keep a record called an "Order Book." But in our view of the practice, if the order in question had been entered in the official minutes of the court, as would be proper practice in a case where such an order is made when the clerk is present, its entry in the minutes would not operate to change its character as an order, and transmute it into a final judgment. We are not called upon to decide in this case whether the order of dismissal, if entered in the judgment book, would constitute a regular judgment. No such entry was made as a matter of fact. But we do not hesitate to say that, in our opinion, the practice of embodying in one compound document an order for judgment and a final judgment is loose practice, and should be avoided by the profession. Counsel for appellant contend that similar orders, *i. e.* orders of dismissal made upon jurisdictional grounds, have uniformly been held final and appealable in other states. This is true. There are many such holdings. *Elderkin* v. *Spurbeck*, 2 Pin. 129; *Ketchum* v. *Freeman*, 24 Wis. 296; *Zoller* v. *McDonald*, 23 Cal. 136; *Ross* v. *Evans*, 30 Minn. 206, 14 N. W. 897, and other cases. The grounds upon which these rulings have been placed is that courts directing the dismissal of such cases, being wholly without jurisdiction of the action, are powerless to enter a final judgment of dismissal. This reasoning is not quite clear to a majority of this court. It is conceded that in such cases the court possesses the requisite authority to decide upon its own jurisdiction, and, further, that the court has a right to formally announce its decision of the question by an order of court, either entered in its minutes or written out, signed, and filed with the

clerk. This authority being conceded, we confess our inability to see why the logic of the situation does not require that the court should go one step further, and cause its final determination of the jurisdictional question to be announced as in cases of its other final determination, viz. by the entry of a formal judgment of dismissal. But in view of the numerous decisions upon the point made in other states, we should, under the rule stare decisis, feel bound to adhere to the practice of not entering a formal judgment of dismissal in cases where the dismissal is made on jurisdictional grounds, if we thought that the cases cited from other states were in point here. After a rehearing, and upon further consideration of the point, a majority of the members of this court are of the opinion that the cases cited are not precedents which can be followed in this state. The leading Minnesota case upon the question (*Ross* v. *Evans*, 14 N. W. 897,) states the ground of the rule as follows: "No costs were allowed or were taxable, and no further action of the court was required." This language would be wholly inappropriate as applied to a case arising in this state. Under a statute of this state expressly dealing with cases of dismissals for want of jurisdiction, further action is required at the hands of the District Court, and costs in such cases are expressly allowed to the party procuring the dismissal. We think that, at the time the cases ciited from Wisconsin, Minnesota, and California were decided, no similar statute had been enacted in either of the states mentioned. Section 5194, Comp. Laws, reads: "When an action is dismissed from any court for want of jurisdiction, or because it has not been regularly transferred from an inferior to a superior court, the costs must be adjudged against the party attempting to institute or bring up the action." Two features of this statute deserve a special notice: *First*, it applies to cases originating in the District Courts, as well as those begun in courts inferior to that court; *second*, the right to enter judgment for costs, depends wholly upon the antecedent ruling that the court is without jurisdiction of the case. In such cases it is obvious that the right of the prevailing party to have

judgment entered in his favor for costs depends entirely upon the legal validity of the dismissal. On appeal from such a judgment, it certainly would be reversed where it appeared that the dismissal was error. The statute defines a judgment as follows: "A judgment is the final determination of the rights of the parties in the action." Comp. Laws, § 5024. But the term judgment is often used in different senses, and it does not necessarily signify a final determination of the rights of the parties. A judgment, within the meaning of the appeal law, may be final which does not attempt to pass upon the issues or upon the merits of the controversy between the parties. This well settled rule is stated in Hayne on New Trials and Appeals (p. 555,) as follows: "The judgment is final if it disposes of the action or proceeding in which it is made so far as the court which made it is concerned, without reference to the question whether the claims of the parties may not be litigated in some other action or proceeding." If, then, such an adjudication is a final judgment, it must, we think, logically follow that it should be entered of record in the manner provided by the statute for the entry of all other final judgments, viz. by an entry of judgment in the judgment book. Our position, therefore, is that in this class of cases, as in other cases of dimissal, there should be a formal judgment entered, embracing an adjudication of dismissal, as well as for costs in favor of the prevailing party. Such a judgment would authorize an execution, and would, when docketed, become a lien upon real estate to the amount of the costs; and, moreover, on appeal from such a judgment, the court of review could dispose of all questions in the case on one appeal. On the other hand, two appeals might become necessary,—one to settle the question of the validity of the dismissal, the other to settle questions of costs alone.

We think that an order of the District Court dismissing an action or an appeal for want of jurisdiction is, in effect, when construed in the light of the statute authorizing a judgment for costs in such cases, equivalent to an order for the entry of a

formal judgment embracing a dismissal and costs, and that such orders should, in strictness, direct the entry of such judgment in terms. When such an order is entered or filed, formal judgment thereon can be entered without further action of the court or judge. It is well settled that orders for judgment are not appealable orders. *Lamb* v. *McCanna*, 14 Minn. 513, (Gil. 385;) *Hodgins* v. *Heaney*, 15 Minn. 185, (Gil. 142;) *Thorp* v. *Lorenz*, (Minn.) 25 N. W. 712. Our conclusion is that in this state an order of the District Court directing a dimissal is one which looks forward to and requires the entry of a formal judgment, and therefore is not an appealable order under the statute regulating appeals to this court. The statute does not make such an order appealable in terms, and it is quite clear that an order which is the basis for the entry of a formal judgment cannot be construed as an order which "prevents a judgment from which an appeal might be taken." Our view of the matter is that, upon appeal from a judgment of dismissal embracing the costs, it would be the duty of this court to review the dismissal upon its merits, as well as any question connected with costs which might properly appear upon the face of the judgment record. The Supreme Court of South Dakota has recently had occasion to decide the precise question we are discussing. There the appeal was taken from a judgment after the time for an appeal from an order had expired. The dismissal of the circuit court of an appeal taken from a justice judgment was made upon jurisdictional grounds, and the order of dismissal was followed by an entry of judgment, from which the appeal was taken. The case is particularly in point because it arose under the identical statutes which are in force in this state, and its facts are on all fours with those in the case at bar. *Mouser* v. *Palmer*, (S. D.) 50 N. W. 967. The time for appeal from the order of dismissal had expired before the appeal was taken, and the learned court expressly held that the appeal was from a judgment, and not from the order. The court, after holding the appeal was valid, proceeded to consider the merits of the

dismissal as embodied in the judgment of the court below. The case is direct authority for reviewing the question of dismissal by means of an appeal from a judgment entered upon an order of dismissal. No appeal will lie in that state or in this, or in California, from a judgment until the judgment is entered in the judgment book, and hence we must conclusively presume that the judgment in the South Dakota case was so entered before the appeal was taken, although the case as reported does not show affirmatively that the judgment was entered. See *Brady* v. *Burke*, (Cal.) 27 Pac. 52. Under § 6136, Comp. Laws, which provides that in certain cases the District Court shall "order the appeal to be dismissed," the argument is advanced that the statute requires that such dismissal shall be made by an order only. It must be conceded that no judgment of dismissal or other judgments can, in any case, be regularly entered in the District Courts of this state until an order therefor is first made by the court or a judge thereof. *Gould* v. *Elevator Co.*, (N. D.) 54 N. W. 316, 3 N. D. 96. But it is transparently clear to our minds that in enacting § 6136, *supra*, the legislative purpose was not either to establish or regulate the practice of District Courts with respect to the mode of entering final determinations of record. Other provisions of the Code of Civil Procedure deal specifically with the procedure in entering judgments in the District Courts. See numerous citations upon this point already made.

We will say, in conclusion, that a majority of the members of this court are convinced that the practice of entering final judgment in this class of cases should not, under our statute, be discriminated from the practice in recording other final determinations of the District Courts of this state in civil actions, including judgments of dismissal not made on jurisdictional grounds. Under the statute awarding costs, a judgment for costs is authorized, and we think that such a judgment must necessarily include a judgment of dismissal. No judgment has been entered in this case, and it follows that this action was still pending in the District Court when this proceeding was commenced to prevent

proceedings in Justice Court based upon a judgment entered in that court from which an appeal was taken to the District Court. Whether such appeal was or was not authorized by law has never been finally determined by the District Court. The District Court has by an order passed upon the right to appeal, but such order was purely interlocutory, and, until judgment upon the order is entered, the question is not finally disposed of by the District Court.

The judgment must be affirmed.

CORLISS, J., concurs.

BARTHOLOMEW, C. J., (dissenting.) I am unable to concur in all of the foregoing opinion. In my judgment, an attempted appeal that gives the appellate court no jurisdiction of the case is properly dismissed by an order. No judgment of dismissal is necessary or proper, and the order of dismissal is a final appealable order. I will state my reasons, and apply them to this case briefly.

The action was forcible entry and detainer, and was brought to determine the rights of the parties to the possession of certain realty. In Justice Court the defendant practically defaulted, but undertook to appeal from the judgment against her. Motion was made in the District Court to dismiss the appeal. On the hearing of the motion, the court made an order stating, *inter alia*: "And, it further appearing that said appeal was without authority of law, now, therefore, it is ordered that said appeal be and the same is hereby dismissed." The correctness of that order is not questioned. It stands as the law of the case. Was it effective to dismiss the case? The majority opinion says it was not, and that the case still remains and will remain pending in the District Court until the clerk makes a formal entry in the judgment book reciting the substance of the order, and concluding with a judgment for costs. The argument is this: Our statute permits an appeal from "an order affecting a substantial right, made in any action when such order in effect determines the action and

prevents a judgment from which appeal might be taken." This was an order dismissing an appeal for want of jurisdiction. But § 5194, Comp. Laws, provides: "When an action is dismissed from any court for want of jurisdiction, or because it has not been regularly transferred from an inferior to superior court, the costs must be adjudged against the party attempting to institute or bring up the action." Therefore, say my brothers, the order of dismissal could not be a final appealable order, because it does not terminate the action, and must be followed by a judgment for costs. I disagree. The order of dismissal did, in my judgment, in effect terminate the action. After its entry, no further step could be taken by either party; at best, there remained only the clerical duty to enter judgments for costs which the law imperatively demanded. The action was terminated. Did the order prevent a judgment from which an appeal might be taken? I think it did, under our statute, which declares a judgment to be "the final determination of the rights of the parties in the action." Clearly, after the order of dismissal no final determination of the rights of the parties could be made. The dismissal barred any such judgment. Nor do I think we are warranted in assuming that when the legislature used the word "judgment" in the appeal law it did not mean the judgment as defined by statute. If the order of dismissal in this case was not a final appealable order, it might be difficult to conceive such an order. Take a case where a defendant appears specially, and moves to dismiss by reason of defective service of summons. If the motion be granted the case is terminated, and the order appealable. *Ryan* v. *Davenport*, (S. D.) 58 N. W. 568, and yet the defendant would be entitled to costs under § 5194. If the motion be denied, the order is not appealable, because the case stands for hearing on the merits. The principal is identical in this case. Again, § 6136, Comp. Laws, speaking of dismissals of appeals from Justice Court in certain cases, says, "The same shall be dismissed by the order of the court." That language is plain, and I deem it safer to make the case correspond with the statute rather than refine upon the statute to make it correspond with the desired case.

It is conceded in the majority opinion that by the great weight of authority, in the absence of statutes granting costs, when appeals are dismissed for want of jurisdiction, such dismissals are effected by order; that the court can enter no judgment for costs, and take no action except to brush the case from the calendar. No reason was suggested at the argument, nor is any suggested in the majority opinion, why it should take other or greater process to dismiss the appeal in the one case than in the other. If an order will dismiss the appeal when costs are not allowed, it is incomprehensible to me why the same instrument will not effect the same purpose when costs are allowed. The statute directing costs presupposes a dismissal. There was a reason for the statute. It was unjust to compel a party to employ counsel and follow a fictitious appeal to the higher court, and there procure its dismissal, and yet be able to recover no costs. To remove that injustice this statute was enacted. It is strange if so simple a purpose can be effected only by a total change in the method of obtaining dismissals for want of jurisdiction. Nor do I think the majority opinion at all strengthened by reference to the case upon which it is based,—*Mouser* v. *Palmer*, 50 N. W. 967. That is a South Dakota case, and the statutes there are the same as ours. It is based upon *Zoller* v. *McDonald*, 23 Cal. 136, and *Bowie* v. *Kansas City*, 51 Mo. 459. The former expressly holds that an order dismissing an appeal for want of jurisdiction is a final appealable order. The Missouri case holds that to be a final judgment which, under the holding in the majority opinion as to what constitutes a judgment, and in which I concur, would constitute no judgment whatever in this state. It was simply an order of dismissal for failure to amend, and it is stated that "no final judgment was rendered in form," and the court adds: "But the case was entirely out of court, dismissed against the will of plaintiff, and was a finality so far as plaintiff was concerned." In other words, it performed the service that I claim for the order in this case. It ended the case, although no judgment for costs or otherwise was entered. The case is an

authority for the appealability of the order of dismissal in this case. My associates find support for a distinction between cases when costs are and are not allowed in the language in *Ross* v. *Evans*, 30 Minn. 206, 14 N. W. 897. When the language is read with the context I do not think it is or was intended to be decisive of that point. In holding the order of dismissal in that case appealable and final, the court use the language quoted by Judge Wallin: "No costs were allowed or were taxable, and no further action of the court was required," and immediately adds: "From the nature of the case, if the court had not required any jurisdiction to take cognizance of the action, the order was necessarily a final one, which prevented further proceedings in the District Court." The condition of this case on appeal to the District Court was the same. That court was without jurisdiction to take cognizance of the case as such. Dealing with the case, it could do nothing but dismiss it. It could enter no judgment affecting the rights of the parties. By virtue of the statute, costs could be recovered against the party who undertook to bring up the case on appeal. But that did not affect the status of the case. That was dismissed. Costs are not a necessary part of a judgment. *Mouser* v. *Palmer, supra.* They "are an incident or appendage of the judgment" (*Scott* v. *Burton*, 6 Tex. 322,) and their omission does not render the balance of the judgment less final and appealable (*Williams* v. *Wait*, [S. D.] 49 N. W. 209.) Had the dismissal in this case been entered in the judgment book, without costs, it would have been final and appealable under the logic of my associates. But it would have been in form and effect an order only. No execution or process could have issued on it. It would have been a lien upon nothing. It would have settled no rights. It would have performed no functions of a judgment, and all of the functions of an order. It would have been entered upon the determination of no issue raised by pleadings, either of law or fact. It would have been entered in response to a motion, —the proper application for an order. And yet my associates insist that the dismissal must be by judgment, and cannot be by

order. It is true, as claimed, that the rule of practice adopted by my associates is, in theory at least, productive of greater uniformity and simplicity in case of appeal to this court. But I cannot for that reason alone adopt, without protest, a rule which I believe to be contrary to the clear weight of authority, and destructive of our statutory definition of a judgment and of an order, and in direct opposition to the provision which declares that an appeal from Justice's Court may be dismissed by order of of the District Court.

(59 N. W. Rep. 523.)

TRAVELERS' INS. CO. *vs.* GERTRUDE WEBER.

Opinion filed June 23, 1894.

Bond on Appeal—Construction—Liability.

In an action on an undertaking given on appeal to this court, *held*, under circumstances set forth in the opinion, that the word "judgment" could not be expunged from the undertaking, and the word "order" inserted in its place, as a clerical error. There was no attempt to reform the undertaking on the ground of mistake.

BARTHOLOMEW, C. J., dissenting.

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

Action by the Travelers' Insurance Company against Gertrude Weber and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

McCumber & Bogart, for appellant.

W. E. Purcell and *L. B. Everdell*, for respondents.

CORLISS, J. On this appeal the plaintiff complains of the decision of the trial court holding that plaintiff is not entitled to recover the value of the use and occupation of certain premises in an action on an undertaking given on appeal. Plaintiff instituted, in Justice Court, proceedings to recover possession of such real property under the statute of forcible entry and detainer. Judgment was there rendered against the defendants. An appeal

having been taken to the District Court, that court made an order which in terms dismissed the appeal. We have already held in *Re Weber*, 59 N. W. 523, that such order was not effectual to dismiss the appeal, but was in legal effect only an order for judgment of dismissal. Therefore, unless judgment has been entered on that order, the case is still pending in the District Court. The defendants, regarding the order purporting to dismiss the appeal as a chambers order, and therefore not appealable, sought to review it in the only manner permitted by law, on the assumption that it would have been an appealable order if made by the court. They made a motion to set it aside, and then appealed to this court from the order refusing to vacate it. It was on this appeal that the undertaking in question was given. We held that the order purporting to dismiss the appeal from Justice Court was a court order, and not a mere chambers order, and that, therefore, it was not proper to review it by moving to vacate it, and then appealing from the order denying such motion. *Insurance Co.* v. *Weber*, 2 N. D. 239, 50 N. W. 703. Accordingly the appeal to this court was dismissed. Thereupon this action was brought upon the undertaking given on such appeal. As the decision of this case will rest upon the construction of the undertaking, it is necessary to set forth a copy of a portion of it. After the formal part, the undertaking reads as follows: "The condition of the foregoing bond is such that whereas the above bounden Gertrude Weber has appealed from an order of this court made in said action on the 13th day of March, 1891, denying the motion of said Gertrude Weber to vacate and set aside an order made by the judge of said court on the 10th day of January, 1891, dismissing an appeal taken by the said defendant from a judgment rendered in the Justice Court of this county and state against the said defendant, and from the whole thereof: Now, therefore, if the said Gertrude Weber shall well and truly pay, or cause to be paid, to the said plaintiff, the Travelers' Insurance Company, all costs that shall be adjudged against her on said appeal, and will not commit, or suffer to be committed, any waste of the property

involved in this action, and shall, if the judgment be affirmed, pay the value of the use and occupation of said property, from the time of the appeal until the delivery of the possession thereof, pursuant to judgment, then and in that case this obligation to be void; otherwise, to remain in full force and effect." It will be noticed that the liability of the obligors is by the terms of the undertaking conditioned on an affirmance of the judgment, *i. e.* the judgment rendered by the justice of the peace. The court has not affirmed such judgment, and therefore, unless this word "judgment" can be expunged, and the word "order" inserted in its place, the contingency on which the obligors were to be liable on the undertaking has not happened. There has been no attempt to reform the instrument on the ground of mistake, and we must therefore hold that the insertion of the word "judgment" was a clerical error, if we are to decide in favor of the liability of the defendants on the undertaking. This we might feel constrained to do if the judgment of the justice of the peace had not been referred to in the undertaking. But it is. Not only are the two orders mentioned, but the judgment also is referred to. Having specified the judgment as well as the orders, the obligors expressly made their liability depend upon the affirmance of such judgment. That they intended to be bound only on affirmance of such judgment is apparent from the fact that other provisions of the undertaking show that the parties contemplated that they should be liable for the use and occupation of the premises only in the event of its being finally decided that plaintiff was entitled to the possession of such premises. They have agreed to pay the value of such use and occupation from the time of the appeal "until the delivery of the possession pursuant to judgment." No such final judgment has been rendered. On the contrary, the final judgment in the case may be favorable to the defendants, as the case is still pending in the District Court. The obligors never contemplated that they should be liable for the value of the use and occupation while the question of right still remained unsettled. They had no thought of being forced to pay the

plaintiff for such use and occupation only to have him refund the amount on being ultimately defeated in the case. If the liability of the obligors were fixed by the dismissal by this court of the appeal from the order, then no subsequent action of the District Court in the original case would affect their liability. The result would be that judgment would have to be rendered on the undertaking against the obligors, and in favor of the plaintiff, although at the time it was rendered the District Court in the original proceeding had, by its own action or under the mandate of this court, taken jurisdiction of the appeal from the Justice Court, and rendered judgment against the plaintiff on the merits; holding it not entitled in that proceeding to the possession of the land, for the value of whose use and occupation defendants herein would, nevertheless, be bound to account to the plaintiff. The plaintiff, under this construction of the undertaking, would be allowed to recover for the use and occupation of premises after the court had decided that at no time during the pendency of the appeal to this court had plaintiff any right to their possession. When the obligors agreed to be liable for such value "until the delivery of such possession thereof pursuant to judgment," they meant that the liability should be dependent upon the plaintiff's securing such a final decision as would forever settle its rights to possession.

It is said that, the undertaking having been given on appeal from the order denying the motion to vacate the order purporting to dismiss the appeal from Justice Court, it must be assumed that the obligors intended to make their liability contingent on the affirmance of that order. In answer to this contention, we say that, the undertaking having been given (except in so far as it secured costs on this appeal) for the sole purpose of obtaining a stay of proceedings under the judgment of the justice of the peace which awarded possession of the premises to the plaintiff, it is fair to presume that the parties intended that the liability should be dependant on the affirmance of such judgment. Nor would it have been impossible for this court to have affirmed in

legal effect such judgment on such appeal. Had we held that the first order was a chambers order, and that an order without a judgment was effectual to dismiss an appeal from Justice Court, and had we further decided that the District Court did not err in dismissing the appeal, we, by our decision, would have finally settled the right of the plaintiff under the judgment in Justice Court to secure possession of the premises in question, and this would in legal effect have affirmed such judgment. It would have been a final decision by this court that the District Court was right in holding that no appeal from the judgment would lie, —that the judgment must forever stand. We are clear that under such circumstances the defendants would have been liable on the undertaking for the value of the use and occupation of the premises, provided the undertaking is a valid instrument. It is certainly not valid as a statutory undertaking. There is no statute authorizing it. The plaintiff might have proceeded to execute the judgment in his favor despite the execution of this undertaking. Whether the undertaking given on appeal to the District Court embraces the value of the use and occupation of the premises until that appeal is finally disposed of in the Supreme Court, provided it is brought to this court, we do not decide, nor do we decide whether such undertaking would have stayed proceedings pending the appeal to this court. But we are clear that the appellant on the appeal from the order could not, by the giving of any other undertaking, have stayed on that appeal the execution of the judgment awarding the possession of the premises to respondents. It is not necessary for us to express an opinion whether the undertaking is not good as a common law obligation, for in any event the defendants are not liable (except for the costs of the appeal,) there having been no breach of the undertaking, so far as the value of the use and occupation of the premises are concerned, by the affirmance of the judgment.

The judgment of the District Court is affirmed.

WALLIN, J., concurs.

BARTHOLOMEW, C. J. I dissent upon the grounds stated in my dissenting opinion in the case entitled *In re Weber*, 59 N. W. 523, 4 N. D. 119, and for the further reason that in my opinion the word "judgment" in the appeal bond upon which the action was based was by a clerical error used in lieu of the word "order." It was the "order" from which the appeal was taken. This court was asked to review the order. Nothing more could be reviewed on that appeal, and it was the order, and that only, that could, in any proper use of the terms, be affirmed or reversed on that appeal.

(59 N. W. Rep. 529.)

JOSEPH GANS *vs.* W. W. BEASLEY, *et al.*

Opinion filed June 9, 1894.

Action Against Firm—Sufficiency of Summons.

A summons, otherwise in due form, in which the defendants are designated only by their firm name, is irregular, but not absolutely void, and may be amended in the trial court so as to show the names of the partners. Such a summons, when issued, is sufficient to sustain an attachment.

Attachment Affidavit—Amendment.

The affidavit for attachment stated, in effect, that there was an existing cause of action, in favor of the plaintiff and against the defendants, in the sum of $10,000 and interest, based upon a promissory note, which was set out at length, and which was payable to plaintiff, and purported to be signed by the defendants. The District Court directed the affidavit to be amended, alleging that the note was executed and delivered to plaintiff by the defendants, and was wholly unpaid. *Held*, construing the affidavit, that the amendment was superfluous, and hence that the order directing the amendment, if error, was error without prejudice.

Special Appearance—Construed—General—When.

An appearance which is in terms a special appearance will operate as a general appearance, and confer jurisdiction over the person, if the court is requested to determine questions touching the merits, and not relating to the jurisdiction.

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

Action by Joesph Gans against Washington W. Beasley, George

M. Beasley, and Nat Beasley, co-partners doing business under the firm name of W. W. Beasley & Sons. From an order refusing to vacate an attachment issued by plaintiff, defendants appeal.

Affirmed.

Melville & Stobbs and *James G. Campbell*, for appellants.

A partnership consisting of several persons must sue or be sued by their names at length and not in the firm name. Estees Pl. 510; *Dently* v. *Smith*, 3 Cal. 170; *Smith* v. *Canfield*, 8 Mich. 493; Parsons on Partnership, § 375, 200; *Cady* v. *Smith*, 12 N. W. Rep. 95; *Crandell* v. *Beach*, 7 How. Pr. 271; *Barber* v. *Smith*, 1 N. W. Rep. 992; 1 Waits Pr. 113, 133. If the true name of defendant is unknown plaintiff may use a fictitious name but in the summons and complaint there must be a direct allegation of ignorance of the true name. *Gardner* v. *Kraft*, 52 How. Pr. 499. The affidavit for attachment is jurisdictional and cannot be amended unless expressly permitted by statute and where this is permitted it is by a new and sufficient affidavit. Drake on Attmt. 87; *Freer* v. *White*, 51 N. W. Rep. 807; *Winters* v. *Pearson*, 14 Pac. Rep. 304; *Barnside* v. *Boreland*, 31 N. W. Rep. 620; *Tanner* v. *Hill*, 22 Fla. 391; *Kingsbury* v. *Borland*, 31 N. W. Rep. 620. Such affidavits are strictly construed. *Matthews* v. *Dinsmore*, 5 N. W. Rep. 669; *People ex rel* v. *Blanchard*, 28 N. W. Rep. 669. The affidavit being a jurisdictional paper cannot be amended. *Winters* v. *Pearsons*, 14 Pac. Rep. 302; *Tanner etc., Co.* v. *Hall*, 22 Fla. 391. The undertaking for attachment was defective in that it did not designate the persons for whose benefit it was given and was not executed by plaintiff. Drake on Attmt. 131; *National Exc. Bk.* v. *Stelling*, 9 S. E. Rep. 1028; *Wagner* v. *Booker*, 9 S. E. Rep. 1055.

Alexander Hughes & F. H. Register, for respondent.

The summons in question is in strict compliance with the statute, §§ 4893, 4894 Comp. Laws, except that it is directed to the defendants in their firm name, instead of their individual names. For the purposes of this appeal it must be assumed that the amendments directed to be made by the court have been made

and the sole question is the point whether the court had power to make them. *Van Wick* v. *Hardy*, 39 How. 392. Section 4938, Comp. Laws, confers ample power upon the court to amend the summons in any particular if justice will be promoted thereby. *Pollock* v. *Hunt*, 2 Cal. 193; *Lyman* v. *Milton*, 44 Cal. 630.

The power of amending process does not originate in the Code but is a power existing in the court independently of legislative enactment. *Lane* v. *Bean*, 19 Barb. 51; 1 Abb. Pr. 65; 1 Waits Pr. 489, 492; *Tillman* v. *Himan*, 10 How. Pr. 89; *Weir* v. *Slocum*, 3 How. Pr. 397; *Bank of Havana* v. *McGee*, 20 N. Y. 335; *Gribbon* v. *Freel*, 93 N. Y. 93. The summons is amendable under the Code. *Hatch* v. *Central Nat. Bank*, 78 N. Y. 487; *Irwin* v. *Bank*, 6 Ohio St. 81; *Reeder* v. *Sayre*, 70 N. Y. 180; *Hines* v. *Rutherford*, 67 Ga. 606; *Van Wick* v. *Hardy*, 39 How Pr. 392; *Ruthe* v. *Greenbay R. Co.*, 37 Wis. 345; *Barber* v. *Smith*, 41 Mich. 138; *Bently* v. *Smith*, 3 Caines Cases, 169. A formal variance in suing defendant by a wrong name is amendable at any time. 3 Estee Pl. 218; *Scull* v. *Briddel*, 2 Wash. C. C. 200; *Tibbetts* v. *Parrot*, 1 Cranch C. C. 177; *Hodges & Co.* v. *Kimbal*, 49 Ia. 577; *Newton* v. *Millerville Mfg. Co.*, 17 Abb. Pr. 318; *Welsh* v. *Hull*, 40 N. W. Rep. 797; *Prentiss* v. *Stephen*, 39 N. W. Rep. 364; *Randolph* v. *Burrett*, 16 Pet. 136; *Thompson* v. *Kissell*, 30 N. Y. 383; 49 Am. Dec. 743; *Morse* v. *Barrows*, 33 N. W. Rep. 709. The grounds of plaintiff's claim were sufficiently stated in the affidavit for attachment. It is not necessary to restate the complaint in the affidavit, it is sufficient to state that the express contract upon which defendant was indebted was a promissory note. *Weaver* v. *Haywood*, 41 Cal. 118; *Wheeler* v. *Farmer*, 38 Cal. 203; *Castor* v. *Page*, 9 Ohio St. 397; *Curtiss* v. *Settle*, 7 Mo. 452; *Ellison* v. *Tallen*, 2 Neb. 4; *Teasier* v. *Reed*, 22 N. W. Rep. 225; *Darrington* v. *Minnick*, 19 N. W. Rep. 456; *Crawford* v. *Roberts*, 8 Oreg. 324, 40 N. W. Rep. 322; Waples on Attmt. 87.

The affidavit, undertaking and warrant of attachment may be amended under the power conferred by § 4938, Comp. Laws; *Pierce* v. *Miles*, 6 Pac. Rep. 347; *Irwin* v. *Bank*, 6 Ohio St. 81;

Clark Banking Co. v. *Wright*, 55 N. W. Rep. 1060; *Struthers* v. *McDowell*, 5 Neb. 491; *Wadsworth* v. *Cheney* 13 Ia. 576; *Fitzpatrick* v. *Flannigan*, 16 Otto 648; *Talcott* v. *Rosenbergh*, 8 Abb. Pr. (N.S.) 287; *Vanderhayden* v. *Mallory*, 3 How Pr. 294; *Johnson* v. *Huntington*, 13 Conn. 47; *Gourley* v. *Carmody*, 23 Ia. 212; *Schaffer* v. *Sundball*, 33 Ia. 579; *Lowenstein* v. *Monroe*, 52 Ia. 231; *Simms* v. *Jacobson*, 51 Ala. 186; *Tomney* v. *Gambel*, 66 Ala. 469; *Star* v. *Mayer*, 60 Ga. 546; *Mendes* v. *Freiters*, 16 Nev. 388; *Barber* v. *Swan*, 61 Am. Dec. 129; note *Craftes* v. *Sikes*, 64 Am. Dec. 62; *Morse* v. *Barrows*, 33 N. W. Rep. 706; *Kidd* v. *Dougherty*, 26 N. W. Rep. 510. The sureties upon the undertaking for attachment are not discharged by correcting the title of the cause of action as set out in the undertaking. *Cutter* v. *Richardson*, 125 Mass. 72.

WALLIN, J. Action on a promissory note signed in defendants' firm name, viz. "W. W. Beasley & Sons." On the 7th day of August, 1893, a summons herein was issued, and delivered to the sheriff for service, and was served upon the defendant Washington W. Beasley. The regularity of the summons is not questioned, except as to the manner of describing the defendants in its title. The action is entitled, in the original summons, "Joseph Gans, Plaintiff, vs. W. W. Beasley & Sons, defendants." On said 7th day of August, 1893, and affidavit and undertaking in attachment were filed in said action in the office of the clerk of the District Court. The affidavit was entitled as was the summons, and, omitting formal parts, is as follows: "Joseph Gans came before me personally, and, being first duly sworn, doth say that he is said plaintiff in the above entitled action, which is brought for the recovery of money, and a summons has been issued therein; that a cause of action exists against the defendants and in favor of said plaintiff therein, and the amount of said plaintiff's claim therein is ten thousand dollars ($10,000,) with interest thereon since October 20th at ten per cent. per annum, and the ground thereof is as follows, that is to say: 'Defendants' promissory note to plaintiff, as follows, to-wit: $10,000. Billings, Montana, October 20th, 1892. First day of July, 1893, after date, for value received, we jointly and

severally promise to pay to the order of Joseph Gans, ten thousand and no .100 dollars, with interest at ten per cent. per annum from date until paid, and with attorney's fees in addition to the costs, in case the holder is obliged to enforce payment at law. [Signed] W. W. Beasley & Sons. Payable at First National Bank, Helena, Montana,'—and that the defendants are not residents of this state; that they are about to remove their property from the state with intent to defraud their creditors, and are about to assign and dispose of their property with like intent. And the said affiant doth depose and say that said plaintiff is in danger of losing his said claim by reason of the facts aforesaid, unless a writ of attachment shall issue, and prays that such writ of attachment may be allowed and issued against the property of said defendant therein according to the statute in such case provided; and said affiant says that no previous application has been made therein for such order, and further saith not." The undertaking for the attachment was also entitled as was the summons, and on said day a warrant of attachment issued, having the same title. A levy upon defendants' personal property was made under the attachment on August 8th, and a return thereto filed on the 9th of August, 1893. The summons required the defendants to answer a complaint which would be filed with the clerk of said court, and pursuant thereto a complaint was filed in the action, subscribed by the attorney whose name was affixed to the summons. The complaint was entitled as follows: "Joseph Gans, Plaintiff, vs. W. W. Beasley, George M. Beasley, and Nat Beasley, Co-partners Doing Business under the Firm Name of W. W. Beasley & Sons, Defendants." Defendants not having appeared on August 26, 1893, upon an *ex parte* motion made in plaintiff's behalf, and based upon the papers on file, and also upon certain affidavits also filed with the clerk of the District Court, that court made and filed its order allowing amendments to be made in the original summons and complaint. The summons was amended so as to conform in its title to the title of the complaint as above set out, and the complaint was amended so as to allege that at the

time of making the note sued upon "the defendants, Washington W. Beasley, George M. Beasley, and Nat Beasley were co-partners doing business at Rosebud and vicinity, in the State of Montana, under the firm name of W. W. Beasley & Sons." The amended summons and complaint were then filed, pursuant to the order. The order allowing the amendment is as follows: "It appearing to the satisfaction of the court, by the summons and complaint, and by the affidavits of the plaintiff, Joseph Gans, and F. H. Register, that an action was commenced in the District Court in and for the County of Stark by the said Joseph Gans against the defendants, Washington W. Beasley, George M. Beasley, and Nat Beasley, co-partners doing business under the firm name of W. W. Beasley & Sons, and that said action was brought upon a promissory note made, executed and delivered by said defendants to the said plaintiff, Joseph Gans, in the firm name of W. W. Beasley & Sons, and that at the time said action was commenced, to-wit, on the 7th day of August, 1893, the said plaintiff and his counsel did not know the given names of the said defendants, or either of them; that said defendants, and each of them, were and are nonresidents of the State of North Dakota, and that it was necessary, in order to protect the rights of the plaintiff, that an action should be commenced against the said defendants on the said 7th day of August, 1893, and before the given names of said defendants could be ascertained, and that said action was brought against said defendants in their said firm name, and in the name in which they executed their said promissory note, and that the summons in the said action was on said 7th day of August, 1893, served personally upon W. W. Beasley, the senior member of said firm, who was then in Dickinson, in Stark County, in the State of North Dakota; that the summons contained a notice that the complaint would be filed in the office of the clerk of the said court, and thereafter, and on the 10th day of August, 1893, the said complaint was filed in said court; that between the issuance of said summons and the filing of

said complaint as aforesaid the plaintiff ascertained the given names of the junior members of said firm, to-wit, the sons of said W. W. Beasly, and the persons referred to in the designation 'sons,' in the firm name under which they (these defendants) were doing business as aforesaid, and the full names of said sons were set out in the title of said complaint. And it further appearing to the court that a warrant of attachment was issued in this action on the said 7th day of August, 1893, and delivered to the sheriff of said county for service, and that such sheriff, by virtue of such writ, levied upon and seized the property of the said defendant co-partnership, and the plaintiff, by his counsel, R. H. Johnson, Alexander Hughes, and F. H. Register, having applied to the court for an order permitting the plaintiff to correct and amend his said summons and complaint: Now, therefore, in furtherance of justice, ordered, that the plaintiff be, and he hereby is, permitted to correct and amend his said summons and complaint in the particulars and in the manner shown in copies of the amended summons and complaint hereto attached, and made a part hereof. And it is further ordered that the said amended summons and complaint be filed in the said court, and that the same be served upon the said defendants, and each of them, in the manner required by law."

At a term of the District Court held in September, 1893, a motion was made by the defendants to set aside the order of August 26th, allowing the original summons and complaint to be amended; also, to vacate the original summons and the attachment proceedings in the action. The motion was in writing, and stated that "the said defendants, Washington W. Beasley, George M. Beasley, and Nat Beasley, by James G. Campbell, their attorney, appear specially for the purpose of making this motion." The grounds of the motion are stated as follows: "That the said original summons, so called, is, and was at all times, void on its face; that it was and is not a summons; that it was addressed to no person, and no person was therein or thereby required to answer to any complaint, and there was no substance in it capable of being made good by amendment; that, at or before the

time said writ of attachment was issued against the property of these defendants, no summons was issued against said defendants, and said writ was not issued in any suit then commenced or pending against these defendants; that the writ aforesaid, and the affidavit and undertaking supporting the same, and upon which said writ is based, are not properly entitled, and in neither of said papers are the defendants properly designated by name, or otherwise described, in the title or caption thereof, nor in the body of either of them; that the designation and description of the defendants in said writ are so vague and uncertain that no authority was vested in the sheriff of said county, in and by said writ, to execute the same by a levy upon the property of any person or persons; that the affidavit on which said writ is based is fatally defective in this: that the grounds of the plaintiff's claim are not therein stated; that the undertaking aforesaid is insufficient, and not in accordance with law in this: that it is not signed nor in any manner executed by the plaintiff in said action, and no person or persons are named therein as defendants in the action in which said undertaking is supposed to be given. Said motion is based upon the files and records of said action, and the proceedings therein. James G. Campbell, Attorney for the Said Defendants for the Purpose of This Motion Only." Pending the hearing of said last mentioned motion, the plaintiff, by his counsel, moved the court as follows: "The plaintiff, by his said counsel, moved the court for an order permitting the plaintiff to amend *nunc pro tunc* the said affidavit of attachment, the warrant for attachment, and the undertaking in the attachment issued in this case, by correcting the title of the action, as set out in each of said papers in this action, by setting out the individual names of the defendants, and their co-partnership relation, and by making a more specific statement of the grounds of the plaintiff's cause of action in the affidavit for and warrant of attachment; and, the court having considered each of said motions, ordered: Said motion of the plaintiff be, and the same is hereby, granted, and the defendants' said motion is overruled and denied. And it is

further ordered that the order heretofore made in this action, directing the summons and complaint and their service, as amended, is affirmed, and that the said amended summons and complaint, and each of them, have the same force and effect as if they had each been correctly drawn and prepared. And it is further ordered that the title of this action, as set out in the affidavit of attachment, the undertaking, and the warrant of attachment, be amended to read as follows: '* * * Joseph Gans, Plaintiff, vs. Washington W. Beasley, George M. Beasley, and Nat Beasley, Co-partners Doing Business under the Firm Name of W. W. Beasly & Sons, defendants.' And it is further ordered that the said affidavit and warrant of attachment be further amended so that the plaintiff's cause of action, as set out therein, shall read as follows." The court, in the same order, directed, in substance, that the body of the affidavit for attachment be so amended as to set out, in terms, that the note set out at length in said affidavit was executed by the defendants and delivered by them to the plaintiff, and that no part of the note had been paid.

The errors assigned in this court are voluminous, but may be condensed as follows: *First*, The court erred in denying defendants' motion to vacate the *ex parte* order of the District Court allowing the original summons and complaint to be amended. *Second*, The court erred in allowing a change of parties under an application to amend. *Third*, The court erred in allowing the title of the affidavit to be changed by adding new parties after a levy was made, and by allowing the body of the affidavit to be amended so as to make the same more specific as to the grounds of the action. *Fourth*, the court erred in not vacating the attachment on defendants' motion made for that purpose.

The assignments of error, considered collectively, present for solution very important questions of practice, none of which have before been considered by this court. The remedy by attachment, under the system of practice authorized by the statutes of this state, is a dependant remedy. It cannot exist independent of an action. Section 4993, Comp. Laws, provides that in certain

designated cases the plaintiff, "at the time of issuing the summons or at any time afterwards," may have the defendants' property attached, etc. There must first be an action, in which there is a plaintiff and a defendant; and a summons in the action, if not actually served, must have been "issued," before the attachment is allowed. In the case at bar a paper denominated a "summons," which was in form a regular summons, except as to the description of the defendants in its title, was issued, and delivered to the sheriff for service, before the attachment was allowed. Whether such paper was a summons which was merely irregular, and therefore amendable, or whether it was absolutely void, and hence not amendable, are the crucial questions, and decisive of this case. It is a well settled—in fact, a self evident—proposition that any process or proceeding in a civil action, which is amendable, cannot be absolutely void. Therefore the real question to be determined in this case is whether the paper issued and delivered to the sheriff for service as a summons, which is obviously irregular, was remediable by an amendment such as was allowed by the District Court. If amendable, the order appealed from must, in our judgment, be affirmed, as it is clear, we think, that if the order of the District Court allowing the summons to be rectified, as to its title, by an amendment setting out the full names of all of the defendants, together with their co-partnership name, was a proper and valid order, it will follow necessarily that the order allowing the complaint, affidavit, warrant, and undertaking to be amended, as to their titles, so as to correspond to the title in the amended summons, was also a proper order. In our opinion the order directing the amendment of the summons was properly made. True, the summons was very irregular, and the fact that the individual names of the defendants were unknown to the plaintiff when the action commenced does not excuse the blunder involved in describing the defendants by their firm name only. Section 4940, Comp. Laws, reads: "When the plaintiff shall be ignorant of the name of the defendant such defendant may be designated in any pleading or proceeding by any name;

and when his true name shall be discovered the pleading or proceeding may be amended accordingly." Section 4938, Id., reads: "The court may before or after judgment in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding by adding or striking out the name of any party or by correcting a mistake in the name of a party or a mistake in any other respect, or by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defense by conforming the pleading or proceeding to the facts proved." Under these statutes it would have been feasible for the plaintiff to insert fictitious names in the summons, and when the true names of the defendants were ascertained the summons could have been amended by inserting the true names in the title, in the place of those which were fictitious. Plaintiff did not, as he should have done, resort to this practice, but attempted to describe the defendants in their firm name alone, *i. e.* as "W. W. Beasley & Sons," by which name defendants had signed the note in suit. This irregularity was, however, not fatal. *Morse* v. *Barrows*, (Minn.) 33 N. W. 706. Under the sections of the statutes above set out, and others of kindred import, all of which are either literal or substantial copies from the Codes of the older states, the irregularity was, in our view, one to be corrected, in furtherance of justice, by an amendment of the summons which would more fully describe the persons sued. An attempt was made to describe the defendants in the original summons, but such description was imperfect, inasmuch as it gave only their firm name, and did not give the full Christian and sur names of the individual members of the firm, as good practice requires. Section 4938, *supra*, was originally § 173 of the Code of Civil Procedure of the State of New York. In Wait's Practice, (volume 1, p. 491,) that author, after quoting § 173 in full, proceeds as follows: "From the instances given, it will be seen that nearly every possible defect in the form of a summons has been made the subject of amendment, and that the only limit to the power to amend is that discretionary power

vested in the court for the protection of the rights of the adverse party." In volume 4, p. 650, of the same work, the following language is used: "The policy of the legislature and the tendency of the dicisions of the courts, are in favor of simplifying the practice in legal proceedings as much as possible, and of disregarding technicalities and matters of form; and especially so where it becomes necessary, for the furtherance of justice, to disregard mere technical errors. *Talcott* v. *Rosenberg*, 8 Abb. Pr. (N. S.) 287. And such liberal construction will be extended to an original process, and even upon jurisdictional questions."

It would seem, at first blush, that a plaintiff ought to be strictly required to sue in his own proper name; but it was held in New York in *Bank* v. *Magee*, 20 N. Y. 355, where "the prosecution of a suit by an individual banker in a name imputing a corporate character, under which he carried on business, is a merely formal error, amendable in the courts of original jurisdiction." One Charles Cook was the real party in interest, but brought the action in the name of the bank of Havana, which was an incorporated bank owned by Cook. No explanation was made in the summons or complaint. Judge Denio, speaking for the court, said: "I am of the opinion that when it appeared in the trial that the plaintiff's attorney has fallen into the mistake of stating the name which Mr. Cook has given to his bank, as the creditor of Markham, and as the plaintiff in the suit, instead of his proper name, a plain case was presented for an amendment, under § 173 of the Code. * * * The error was one which could be corrected before or after judgment, in furtherance of justice." Judge Comstock in the same case says: "Mr. Cook has simply misnamed himself. He has taken the name which he used in this particular business, and, quite irregularly, has introduced himself to the court by that name. This he should have not done. He ought to have given the surname and the Christian name given him in baptism, but I consider this a mere irregularity in procedure." See *Barber* v. *Smith*, 41 Mich. 138, 1 N. W. 992; *Cady* v. *Smith*, (Neb.) 12 N. W. 95. *Manufacturing Co.* v. *Vroman*,

35 Mich. 310, is a case in point. In that case the action was brought as directed by statute in suits against joint stock associations. The process was against "Wm. A. Tomlinson, as president, for the time being, of the Kimball & Austin Manufacturing Co., a company organized and existing under and by virtue of the laws of said state, and doing business at Kalamazoo, in the county aforesaid." The defendant was not a joint stock association, but was a corporation proper, named "Kimball & Austin Manufacturing Co.;" and Tomlinson, on whom the process was served, was its president. Plaintiff was allowed to amend by striking out the name and official character of Tomlinson, and the suit then proceeded against the corporation, by its corporate name. The statute of Michigan, as that of this state, allows an an amendment "correcting any mistake in the name of any party or person." Speaking for the court, *Campbell*, J., says: "The statute was not intended to allow changes in the parties actually supposed and intended to be brought before the court. It is only in the case of an undesigned misnomer, and where the interests of substantial justice will allow it, without a real change in the identity of the opposing litigants, that such amendments should be permitted. Where, however, no substantial rights are affected, and it is clear what persons are meant to be reached, the law permits the record to be recitified by affixing the true name to the misnamed party;" citing *Sherman* v. *Proprietors, etc.*, 11 Mass. 338, which case sanctions an amendment substituting another name "where the record did not show any identity of names in the parties sought to be pursued." See, also, *Crafts* v. *Sikes*, 64 Am. Dec. 62. In New York the same liberal rule obtains. Where defendant was sued as a corporation, and there was no such corporation, an amendment was allowed, bringing in individuals who were doing business in the same name as that given to the corporation. *Newton* v. *Manufacturing Co.*, 17 Abb. Pr. 318, note. The case of *New York, etc. Milk Pan Co.* v. *Remington's Agricultural Works*, 25 Hun. 475, although reversed in 89 N. Y. 22, is an instructive case in point, and one which collates the New

York cases. The action was brought against a corporation by its name; and the general term reversed an order, made at special term, denying the plaintiff's application to amend by striking out the name of the corporation, and inserting in its place, as defendants, the names of three persons. The court of appeals, in a per curiam opinion, referring to such an amendment, say: "Its effect is to continue the action against other and different parties than the one named, thus substituting a cause of action with new and other defendants. Such an amendment is not, we think, authorized by any provision of the Code, or any of the adjudged cases." The case, however is strong authority in favor of the right to amend where the change does not involve an exchange of parties. The dissenting judge at general term does not question the right to amend in such cases. See opinion in 25 Hun. *supra*. *Anglo-American Packing & Provision Co.* v. *Turner Casing Co.*, (citing numerous cases) 34 Kan. 340, 8 Pac. 403, strongly supports the right of amendment for which the plaintiff is contending in the case at bar, but we deem further citations unnecessary, as the cases already referred to amply sustain the right to amend, as to the names of parties, in all cases where the amendment does not operate to prejudice the parties, and does operate in furtherance of justice. But the right to amend must be qualified so as to forbid an amendment which affects an actual change of parties. This limitation is clearly established in the cases cited from Michigan and New York.

In the case at bar, as has been shown, defendants attempted to appear specially, and for "the purposes of the motion only." See grounds of motion, *supra*. Among other grounds enumerated in the motion is one stated as follows: "That the affidavit on which said writ is based is fatally defective, in this: that the grounds of the plaintiff's claim are not therein stated." It is apparent that this alleged ground for vacating the attachment has no connection with the other grounds which precede it in the motion. The preceding grounds relate to the defective title in the summons, affidavit, writ, and undertaking,

and are all connected more or less with the question of jurisdiction; but in the ground above quoted the defendants assail the affidavit upon its merits, and invoke the power of the District Court to determine the validity of the affidavit, defendants claiming that it is wanting in substance. Defendants say, "The grounds of plaintiff's claim are not stated." This we think operates as would a voluntary appearance by the defendants, and therefore, from the time the motion to vacate the attachment was made the defendants were in court. All defects in the original summons were cured by their general appearance, so far as the jurisdiction of the persons of the defendants is concerned. Whether such appearance would operate retrospectively to validate an attachment issued upon a void summons, we are not called upon to say, as we have held that the original summons in this case was not void, but was only irregular, and therefore amendable. As to the effect of a nominal special appearance where the defendant invokes the power of the court upon a question going to the merits, see *Curtis* v. *Jackson*, 23 Minn. 268, qualified in *Godfrey* v. *Valentine*, (Minn.) 40 N. W. 163, and *Yorke* v. *Yorke*, (N. D.) 55 N. W. 1095.

But our attention is directed by appellants' counsel to still another feature of the order appealed from. The trial court directed, in effect, that the affidavit and warrant of attachment be so amended in their body as to state, in express terms, that the note set out in the affidavit was executed and delivered by the defendants to the plaintiff, and that no part thereof had been paid. Counsel contends, and supports this contention by numerous authorities, that an affidavit for an attachment cannot be lawfully amended in matter of substance, and, further, that the amendment authorized by the order was an amendment of that character. We cannot so construe the amendment. It is true that it authorizes the express averment of certain facts; but a careful reading of the original affidavit will show that all of such facts are averred, by necessary implication, in the original affidavit, and hence their averment, in terms, by order of the

court, was superfluous, and added no new feature. We think the affidavit was sufficient when filed, and needed no amendment. The only allegations sought to be added by the court, were those setting out in terms, that defendants executed the note, and delivered it to the plaintiff, and that it was unpaid. But the original affidavit stated that there was an existing cause of action in plaintiff's favor, to the amount of $10,000 and interest, and that the ground of such action was the note set out at length, and which purported to be signed by the defendants, and was made payable to plaintiff on its face. We think that the statement that there was an existing cause of action against defendants, and in favor of the plaintiff, in the sum of $10,000 and interest, based upon the note set out, was tantamount to an averment, in terms, that the note which is made payable to the plaintiff is unpaid, and that the same was executed by defendants, and delivered by them to the plaintiff. We are not called upon, in this case, to define just what is meant by the statutory requirement that the "grounds" of the claim must be "specified." Comp. Laws, § 4995. It is certain that in specifying the grounds no greater particularity of statement is required than would be necessary in framing similar averments in a pleading. An averment of the delivery of a writing obligatory was not necessary at common law, nor has it become necessary under the Code. *Prindle* v. *Caruthers*, 15 N. Y. 425. Nor is it necessary to aver in a complaint that a note is unpaid. *Keteltas* v. *Myers*, 19 N. Y. 231. Payment is new matter by way of defense, and hence is to be averred as defensive matter. Bliss, Code Pl. 358. Our conclusion is that the order refusing to vacate the attachment must be affirmed. All concur.

(59 N. W. Rep. 714.)

CHARLES E. ROBY *vs.* BISMARCK NATIONAL BANK.

Opinion filed June 9, 1894.

Contract for Sale of Land—Lien of Vendor.

Where the purchase of real estate is evidenced by contract only, and the purchase price is not paid, and the vendor retains the legal title as security for the unpaid purchase price, he holds a lien upon the property by virtue of the contract, and not simply the vendor's lien that exists in equity where the vendor has parted with the legal title without payment.

Mortgage of Homestead for Unpaid Purchase Money is Good Although Not Signed by the Husband.

Where realty thus purchased is used as a homestead, and subsequently, at the request of the purchaser, the vendor executes and delivers to the wife of such purchaser a warranty deed to the land, and the wife, at the same time, and as a part of the same transaction, executes and delivers to the vendor a mortgage on the land, to secure the unpaid purchase money, such mortgage is valid, although not signed by the husband.

Mortgage Valid for Purchase Price Although Other Indebtedness Secured.

The fact that said mortgage also secures other indebtedness of the husband to the grantee in the mortgagee does not invalidate this mortgage so far as it secures the unpaid purchase money of the homestead.

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

Action by Charles E. Roby and others against the Bismarck National Bank and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

E. C. Rice, for appellants.

The mortgage in dispute was an invalid mortgage because not signed by the husband, and its record did not impart notice. *Higley* v. *Millard*, 45 Ia. 589. The fact that the vendor retains legal title as security for the unpaid purchase money will not operate to defeat the vendees claim of homestead in the property. *Stinson* v. *Richardson*, 44 Ia. 353; *Myrick* v. *Bill*, 37 N. W. Rep. 369, 5 Dak. 167. The mortgage was void. *Myrick* v. *Bill*, 5 Dak. 167; *Barton* v. *Drake*, 21 Minn. 299; *Conway* v. *Elgin*, 38 N. W. Rep. 370, 38 Minn. 469. A vendor of land who takes the vendee's

notes with security is presumed to have waived his vendors lien. *Kinney* v. *Ensiminger*, 10 So. Rep. 143.

Louis Hanitch and *F. V. Barnes*, for respondents.

The legal title retained by the vendors was a substantial security and in fact and in effect a mortgage to secure the payment of the notes given for the balance of the unpaid purchase price. Jones on Mortgages 217; and the assignment and transfer of the notes to the Weaver Lumber Co., carried with it the security. *Batesvilled Institute* v. *Kauffman*, 18 Wal. 151; *Payne* v. *Wilson*, 74 N. Y. 348; *Pattison* v. *Hull*, 9 Cow. 747, 13 Am. & Eng. Enc. L. 625; Comp. Laws, § § 4351, 3243; *Johnson* v. *Blodgett*, 5 Cow. 202; *Bolen* v. *Crosby*, 49 N. Y. 183; *Ladue* v. *R. R. Co.*, 13 Mich. 396; *Willis* v. *Farley*, 24 Cal. 497. The transfer of the legal title to Mrs. Mitchell and the execution and delivery of the mortgage by Mrs. Mitchell to the lumber company did not change the nature of the debt or destroy its superiority (to the extent of the purchase price involved) to the homestead right. *Pratt* v. *Topeka Bank*, 12 Kan. 570; *Greene* v. *Barnard*, 18 Kan. 522; *Carr* v. *Caldwell*, 10 Cal. 380; *Dillon* v. *Byrne*, 5 Cal. 455; *Swift* v. *Kraemer*, 13 Cal. 526; *Kraemer* v. *Revalk*, 8 Cal 75; *Austin* v. *Underwood*, 37 Ill. 441; *Chase* v. *Abbott*, 20 Ia. 154; *Keiser* v. *Lambeck*, 7 N. W. Rep. 519; *Jones* v. *Parker*, 51 Wis. 220. A mortgage for the purchase price was not intended to be invalidated by § 2451, Comp. Laws. *Riehl* v. *Bingenheimer*, 28 Wis. 84; *Ferguson* v. *Mason*, 60 Wis. 391. As against the vendor and his assignee the vendee does not acquire that title upon which the homestead right can attach until the purchase price is paid. *Farmer* v. *Simpson*, 6 Tex. 310; *Stone* v. *Darnly*, 20 Tex. 14; *Phelps* v. *Porter*, 40 Ga. 485; *New England J. Co.* v. *Merriam*, 2 Allen 271. The mortgage back and the giving the deed were parts of the same transaction. The mortgage was valid to the extent of the unpaid purchase price and the addition of the other indebtedness did not effect its validity. *Nichols* v. *Overacker*, 16 Kan. 54; *Sparger* v. *Compton*, 54 Ga. 355; *Barnes* v. *Gray*, 7 Ia. 25; *Christie* v. *Dyer*, 14

Ia. 438; *McCarty* v. *Brackenridge*, 20 S. W. Rep. 997; *Chopin* v. *Runte*, 44 N. W. Rep. 258.

BARTHOLOMEW, C. J. The plaintiffs and appellants brought this action to foreclose a mortgage upon certain realty in the City of Mandan. Thomas J. Mitchell and Sarah E. Mitchell, the grantors in said mortgage, and various other parties interested in said realty, including the Bismarck National Bank, were made defendants. The bank alone made defense. From the unquestioned findings of fact we learn that on and prior to July 8, 1881, the firm of C. S. Weaver & Co., owned the realty in question; that said firm was composed of C. S. Weaver and R. S. Munger, and the realty was held in the individual names of the said partners. On said July 8, 1881, said firm entered into an agreement with said Thomas J. Mitchell to sell to him the said premises for an agreed price, only a small portion of which was paid at the time, and the balance was evidenced by interest bearing notes, executed by Thomas J. Mitchell to C. S. Weaver & Co. To secure said notes, the legal title to said realty was retained by C. S. Weaver and R. S. Munger in trust for C. S. Weaver & Co. At the time of said purchase, Thomas J. Mitchell and Sarah E. Mitchell were husband and wife, and in October, following, they, with their children, moved into a house located on said premises, and so continued to occupy the same as their homestead until some time in the year 1888. That, in 1883, C. S. Weaver & Co., were succeeded by a corporation known as the "Weaver Lumber Company," to which all of the assets of the firm were duly transferred, including the said notes given by Thomas J. Mitchell as the purchase price for said realty. On December 4, 1884, the said Weaver Lumber Company, at the request of Thomas J. Mitchell, procured from C. S. Weaver, and R. S. Munger, a warranty deed for said premises, running to said Sarah E. Mitchell, which deed was duly delivered to the grantee; and at the same time, and as a part of the same transaction, the said Sarah E. Mitchell executed and delivered to said lumber company a mortgage on said premises, to secure a note then and there given by Thomas J.

and Sarah E. Mitchell to said lumber company, and which said note included the balance then due on the purchase money notes and certain other advances then made by the lumber company to Thomas J. Mitchell. This mortgage was signed by Sarah E. Mitchell only. Both the deed and the mortgage were duly recorded. In 1886 the lumber company foreclosed this mortgage by advertisement, and procured a sheriff's certificate of sale; and, being largely indebted to the defendant the Bismarck National Bank, the lumber company assigned said certificate to said bank as partial security for said indebtedness. On July 19th, 1888, the bank procured a sheriff's deed upon said certificate, and on the same day the Mitchells surrendered possession of the premises to the bank, and it has at all times since been in possession. In March, 1885, and after the mortgage to the lumber company was of record, Thomas J. and Sarah E. Mitchell executed and delivered to plaintiffs a mortgage upon the same homestead property, to secure a valid indebtedness, and the mortgage contained a covenant that the premises were free of all incumbrances except such as appeared of record. It was to foreclose this mortgage that this action was brought. On these facts the trial court held that the mortgage executed by the wife alone upon the homestead premises constituted a valid lien to the extent that such mortgage secured the purchase price for said premises, and no further, and gave plaintiffs and the Mitchells 90 days in which to redeem from this sale under said mortgage, by paying the balance of the purchase price, with accumulated interest, less the net rent received by the bank. No such redemption having been made within the time granted, on motion final decree was entered in favor of the defendant the Bismarck National Bank, in accordance with the announced conclusions of law, and from that decree this appeal is taken.

The appellants assign and argue but one error, which is thus stated by counsel. "The evidence and pleadings show said lot four [the premises in question] to have been a homestead, and the mortgage under which the bank claims was not jointly

executed by Sarah E. Mitchell and Thomas J. Mitchell, was void, and in it the bank had no equity as against plaintiff's claim." We do not think this assignment is good. It is true that the homestead rights will attach to land held under a contract of purchase. It attaches to the purchaser's equity in the land, whatever that may be. *Myrick* v. *Bill*, 5 Dak. 167, 37 N. W. 369, and cases cited. But there are certain burdens which adhere to the homestead as effectively as to nonhomestead property. Where a sale of land is evidenced by a contract only, and the purchase price has not been paid, and the vendor retains the legal title, the parties occupy substantially the position of mortgagor and mortgagee. The vendor has a lien for his purchase money by virtue of his contract, and a lien which the vendee cannot, by conveyance or otherwise, affect or impair, and which can be extinguished only by payment of the purchase money (see Jones, Liens, § 1107 *et seq.*, where the authorities are fully cited;) and necessarily this is not controlled by the use to which the property is applied. If used as a homestead, no one would contend that the vendor could be compelled to execute a deed without full payment, and look to the other property of the vendee for his purchase price, even in the absence of that statutory provision (§ 2453, Comp. Laws) making the homestead liable for any debt created for the purchase thereof. Such a vendor is not required to rely upon the technical vendor's lien, which is a creature of equity, and exists where the vendor has parted with the legal title, and may be destroyed at any time by a conveyance by the vendee. He has a more substantial and indestructible lien, created by contract, and of which all the world must take notice. Such was the lien held by C. S. Weaver & Co., upon the property in controversy after the contract of sale to Thomas J. Mitchell, in 1881, was made, and the notes for the purchase money received. On familiar principles, the subsequent transfer of all the assets of the firm of C. S. Weaver & Co., to the Weaver Lumber Company, including the purchase money notes, carried with it the security held by C. S. Weaver & Co., for the payment of such

notes. It is clear that down to December 4, 1884, the Weaver Lumber Company held a valid lien upon the property in controversy as security for the payment of the purchase money, good as against plaintiffs and all the world. On that date, the lumber company, at the request of Thomas J. Mitchell, caused to be delivered to Sarah E. Mithell, his wife, a warranty deed for the premises. At the same time, and as part of the same transaction, Sarah E. Mitchell executed and delivered to the Weaver Lumber Company a mortgage upon said premises, to secure a promissory note then and there executed by Thomas J. Mitchell and Sarah E. Mitchell, to said lumber company, and which note included the balance due on the purchase money notes and other indebtedness of Thomas J. Mitchell to the lumber company. It is claimed that, because this mortgage was not signed by Thomas J. Mitchell, it was absolutely void, and constituted no security, even as to the purchase money. The statute of Dakota Territory then in force reads as follows: "A conveyance or incumbrance by the owner of such homestead shall be of no validity unless the husband and wife, if the owner is married and both husband and wife are residents of the territory, concur in and sign the same joint instrument." The homestead estate is created for the benefit of the family. The section above quoted is in furtherance of the same purpose, and for the accomplishment of its object must have a liberal construction. Nothing must be permitted under that statute which would add a burden to the homestead or curtail its enjoyment. But the execution of the deed and mortgage were in law simultaneous acts. In not one instant of time prior to the execution of the mortgage was that property released from the contract lien for the unpaid purchase money. The execution of the deed and mortgage changed the form, but in no manner the substance. No additional burden was cast upon the homestead by holding the mortgage valid to the extent of the unpaid purchase money. The purpose of the homestead law was in no manner hindered. The giving of the mortgage was not

an incumbrance of the homestead. The incumbrance existed prior to the execution of the mortgage. There was never any homestead exemption as against that purchase money, not only by reason of the contractual relations, but also by reason of the express language of § 2453, which declares that the homestead may be sold for any debt created for the purchase price thereof. Under these circumstances, it has been repeatedly held, under statutes against alienation and incumbrance either identical with or substantially like ours, that a mortgage of the homestead to secure the purchase price money executed by the fee owner need not be signed by the husband or wife of such party. *Christy* v. *Dyer*, 14 Iowa, 438; *Hopper* v. *Parkinson*, 5 Nev. 233; *Amphlett* v. *Hibbard*, 29 Mich. 298; *Austin* v. *Underwood*, 37 Ill. 439; *Lasson* v. *Vance*, 8 Cal. 271; *Carr* v. *Caldwell*, 10 Cal. 380; *Nichols* v. *Overacker*, 16 Kan. 54; *Andrews* v. *Alcorn*, 13 Kan. 351. And, where such mortgage is given in part to secure indebtedness other than the purchase money, it is still held a valid lien to the extent of the purchase money, but void as to the residue. *Pratt* v. *Topeka Bank*, 12 Kan. 570, (as explained in *Greeno* v. *Barnard*, 18 Kan. 522;) *Dillon* v. *Byrne*, 5 Cal. 455. And see, also, *Swift* v. *Kraemer*, 13 Cal. 526.

The mortgage executed by Sarah E. Mitchell to the Weaver Lumber Company constituted a valid lien between the parties to the extent that it secured the purchase money of the mortgaged property. It was properly executed and of record, and appellants were bound to take notice of it. In the mortgage which they received the property was declared free of all incumbrances, "except such as now appear of record thereon." Their attention was thus expressly drawn to the record, and they were informed that their grantors considered the property already incumbered. They could not ignore the record. It is only where a duly executed and recorded conveyance is absoutely void that the record fails to give constructive notice, and in such case neither constructive nor actual notice could aid the void instrument. Appellants found of record an incumbrance which might or might

not be void. The record did not disclose. The possession of the Mitchells might indicate that it was void, but that possession was not conclusive against a prior grantee. It worked no estoppel upon him. The decisive facts rested in parol. Appellants had that notice which required them to investigate the facts. Had they done so, they would have learned that the prior mortgage was in part valid. Having failed to do so, they must bear the consequences. *Swift* v. *Kraemer*, *supra*, is exactly in point. The case of *Higley* v. *Millard*, 45 Iowa, 586, upon which appellants confidently rely, is clearly distinguishable. Under the Iowa statute, the homestead was not exempt from sale under execution for a debt that existed prior to the acquisition of the homestead. The husband undertook to mortgage the homestead to secure such a debt. The debt was no lien upon the homestead until reduced to judgment. Until that occurred, the homestead might be alienated free from any lien or liability for such claim. Hence the husband sought to throw upon the homestead an additional burden, which curtailed the homestead estate. This the court properly held was within the inhibition, and that the mortgage was absolutely void, and its record gave no constructive notice. The same principle runs through *Chopin* v. *Runte*, 75 Wis. 361, 44 N. W. 258. But those cases, for reasons already stated, are not in point here.

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

(59 N. W. Rep. 719.)

WILL S. SIGMUND *vs.* THE BANK OF MINOT.

Opinion filed June 9, 1894.

Judgment on Pleadings.

In moving for judgment upon the ground that the answer served is frivolous, the motion is based upon the pleadings, and need not be supported by proof of extrinsic facts.

Frivolous Answer—Insufficient Denial.

An answer is frivolous which contains no new matter, and which attempts to deny material allegations in the complaint only as follows: "Defendant says that it has not information sufficient to form a belief," etc. A denial in this form must negative both knowledge and information sufficient to form a belief. Comp. Laws, § 4914.

Penalty for Delay.

A penalty of 10 per cent. on the face of the judgment adjudged for delay in prosecuting the appeal. Comp. Laws, § 5187.

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

Action by Will S. Sigmund against the Bank of Minot. Judgment for plaintiff, and defendant appeals.

Affirmed.

A. S. Drake, for appellant.

Spalding & Phelps, for respondent.

WALLIN, J. The complaint in this action states, in substance, that the defendant, a banking corporation, issued and delivered its two certain certificates of deposit to one H. B. Belmer, each bearing date on March 10, 1892, and drawing interest from date at 8 per cent. per annum. Said certificates were payable to the order of said H. B. Belmer, and matured, respectively, in three and four months from date. The complaint further alleges, that, for valuable consideration, said H. B. Belmer assigned said certificates of deposit to plaintiff before the maturity thereof. Defendant answered the complaint, admitting the making of the certificates, and that the same were unpaid. The only defense attempted to be set out in the answer is stated as follows: "Defendant says that it has not information sufficient to form a

belief as to whether plaintiff ever purchased said certificates, or is now the owner of the same, or either thereof." Upon due notice served upon defendant's attorney, a motion was made in plaintiff's behalf for judgment as demanded in the complaint, and that defendant's answer to the complaint be "stricken out as frivolous." No affidavit was served or used upon the hearing of the motion. The motion was granted by the District Court, and from the judgment entered for plaintiff defendant appeals to this court. The errors assigned in this court are, briefly stated, as follows: *First*, That the notice of motion (for reasons not stated by counsel) should have been accompanied by an affidavit; *second*, that the answer interposed to the complaint was not "frivolous."

A motion to strike out a frivolous demurrer, answer, or reply is expressly authorized by the Code in this state in connection with a motion for judgment. Code Civ. Proc. § 5026. To be frivolous, a pleading must be so clearly and so palpably bad as to indicate bad faith upon the part of the pleader. Bliss, Code Pl. § 421; Maxw. Code Pl. p. 555, and note 2. From the nature of the motion, it must be determined from an inspection of the pleadings only, and hence the motion need not be aided by any proof of facts extraneous to the pleadings. *Perry* v. *Reynolds*, (Minn.) 42 N. W. 471. It follows that the first assignment of error must be overruled.

The second assignment of error must also be overruled, as the answer, in our judgment is clearly obnoxious as frivolous. The answer contains no new matter, and the sole question is whether the attempted denial, as set out in the answer, is sufficient to raise an issue of fact. The answer does not embody an absolute general or specific denial, nor a denial made upon information and belief, nor does the defendant deny knowledge or information sufficient to form a belief touching any fact alleged in the complaint. It follows that the answer fails to set out a denial of any character which is authorized by the Code. The Code permits an issue to be joined by an answer denying both knowledge and

information sufficient to form a belief as to any fact set out in a complaint, but does not authorize an issue to be joined by simply denying "information," or by denying "knowledge" sufficient to form a belief. Both knowledge and information must be denied. Code Civ. Proc. § 4914; Bliss Code Pl. 326; *State* v. *Common Council*, 15 Wis. 33; *Hastings* v. *Gwynn*, 12 Wis. 671. Under the authorities cited, the answer of this defendant raises no issue of fact, and is clearly frivolous. No issue being joined upon any material fact set out in the complaint, the motion of the plaintiff for judgment was properly granted. Defendant did not ask leave to amend its answer in the court below, and in this court defendant only seeks to show by argument and by citations not in point that the answer is legally sufficient. Neither the argument nor the cases cited sustain appellant's contention.

In removing the case from the District Court to this court, appellant has been dilatory. The appeal was perfected in January, 1893, but appellant's abstract and brief were not served until May, 1894. No attempt was made to excuse the delay. In view of the character of the answer, the appellant could not have reasonably supposed that the judgment entered below would be reversed by this court. Under the circumstances, we are fully justified in exercising the discretion vested in this court of awarding damages against appellant for the delay. Comp. Laws, § 5187, subd. 5. The judgment will be affirmed, and a penalty of 10 per cent. on the face of the judgment will be added in entering judgment in the District Court. All concur.

(59 N. W. Rep. 966.)

NOTE—A verified answer consisting of a general denial cannot be stricken out as sham. *Cupples Wooden Ware Co.* v. *Jensen*, (Dak.) 27 N. W. Rep. 206. Where an answer states a good defense imperfectly, the defect should be met by motion to make the pleading more definite and certain, and not by motion for judgment on the answer as frivolous. *Yerkes* v. *Crum*, 2 N. D. 72, 49 N. W. Rep. 422.

ROBERTS, THROP & CO. *vs.* A. H. LAUGHLIN, *et al.*

Opinion filed June 23, 1894.

Notes—Guaranty of Collection.

Three promissory notes payable to the plaintiffs were executed and delivered to plaintiffs by C. and S., and secured by chattel mortgage. Before the notes were delivered, the defendants indorsed upon each note a guaranty of collection, as follows: "For value received, we hereby guaranty the collection of the within note. Laughlin, Palmer & Co." *Held*, construing § 4280, Comp. Laws, that by this form of guaranty the defendants undertook only that the makers of the notes were solvent when the guaranty was entered into, and that the notes were "collectible by the usual legal proceedings, if taken with reasonable diligence."

Laches—Release of Guarantor.

After two of the notes were due, plaintiff took of C. (one of the original debtors,) and one P., other notes secured by a chattel mortgage. The new notes and mortgage were executed and delivered solely as collateral to the first series of notes. The first series was not paid or surrendered, nor was the time of payment thereof extended. No action was ever brought against C. and S. upon the original notes, nor was the first mortgage ever foreclosed. Suit was not commenced upon any of the collateral notes for a period of over three years after the maturity of the first original note, and more than two years after the maturity of the first collateral note. The mortgage given with the collateral paper was not foreclosed until long after action was brought on such paper. The action is upon the guaranty. Plaintiffs had the burden of showing, as a condition precedent to recovery, that they had prosecuted their legal remedies, including the remedy of foreclosure, with reasonable diligence to collect the claim of the original debtors. Upon the facts stated, *held*, that plaintiffs cannot recover. The laches of the plaintiffs in pursuing their legal remedies against the debtors operates to exonerate the guarantors.

Insolvency of Grantor will not Excuse Laches.

Conceding that it appeared that C. and S. were insolvent about one year after their first note matured, their insolvency would not excuse plaintiffs' laches in not foreclosing the first mortgage, nor their protracted delay in prosecuting their legal remedies upon the collateral securities.

Directing Verdict.

Upon such a state of uncontroverted facts, the trial court would have been justified in instructing the jury to find for the defendants, upon the grounds above stated, as to all the notes, and the instruction, therefore, to find for the defendants as to the first note, was not error.

Evidence Justified Verdict.

Evidence considered, and *held* that the verdict is justified by the evidence.

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

Action by Roberts, Throp & Co., a corporation against Andrew H. Laughlin and others. Judgment for defendants. Plaintiff appeals.

Affirmed.

Goodwin & Van Pelt, (*Newman, Spalding & Phelps*, of counsel,) for appellant.

P. H. Rourke, for respondents.

WALLIN, J. This action is upon a guaranty indorsed by the defendants upon three promissory notes, before said notes were delivered to the plaintiff by the makers thereof. The guaranty indorsed upon each note is as follows: "For value received, we hereby guaranty the collection of the within note. Laughlin, Palmer & Co." The notes were executed and delivered to the plaintiff by one G. W. Curtiss and one C. M. Stewart, and were given for the purchase price of a threshing outfit. The notes were secured by a chattel mortgage upon the threshing outfit, and upon two horses. So far as appears in this record, no action was ever instituted on either of the notes against the makers, or against either of them; and no attempt was ever made to foreclose said chattel mortgage. All the notes bore date upon the 27th day of August, 1883, and matured as follows: One, for $109.50, fell due December 1, 1884; one for $250, fell due December 1, 1883; and one, for $210 fell due December 1, 1885. The complaint alleges that said notes are wholly unpaid, except that $113.90 was paid January 10, 1885, on the note first coming due. The complaint also avers that the notes were not paid at maturity, and that plaintiff gave notice of the nonpayment to defendants, and demanded payment of defendants, which was refused, and "that at the time of the execution and delivery of said notes, and of said guaranty, said Curtiss and Stewart were, and ever since that time have been, insolvent; and in or about the month of January, 1885, said Stewart removed from Dakota Territory, leaving no property therein from which said obligations could be satisfied." The answer, besides a general denial, admits

the execution of the notes and guaranty as alleged in the complaint. The answer also alleges two affirmative defenses, which are in substance as follows: That on January 10, 1885, all of said notes were fully paid and discharged in the manner hereinafter stated: Said Stewart and Curtiss paid plaintiff $112 in money, and at the same time said Curtiss and one A. C. Poor executed and delivered to plaintiff their two joint and several promissory notes, as follows: Each note was dated January 10, 1885; one, for $347.73, matured on the 1st day of December, 1885, and the other note, for $233.83, matured December 1, 1886. The second affirmative defense is, in substance, that the plaintiff, in consideration of the payment of said $112, and the execution and delivery to plaintiff of the said two last mentioned notes, expressly agreed that said Stewart should be wholly released and discharged from liability on three original notes, and that said A. C. Poor, who had succeeded to Stewart's interest in the threshing outfit, should become responsible, instead of Stewart. At the trial the answer was amended so as to allege that the plaintiff, without the knowledge or consent of the defendants, extended the time of payment on the original notes, to a date certain.

There was a jury trial. Defendant offered no evidence. The undisputed testimony offered in plaintiff's behalf established the following state of facts: Plaintiff recovered judgment against Curtiss and Poor, on the collateral notes in an action instituted in August, 1887; execution issued in 1889 on this judgment, and was returned *nulla bona*. Plaintiff in 1888 foreclosed the chattel mortgage given to secure the collateral notes, and sold the separator, horse-power, and three mares. The net proceeds of the foreclosure were $55. One Angel, acting for the plaintiff, visited Marshal County, Dak. T., early in January, 1885, where Curtiss then resided, and where Stewart had lived before leaving the territory. Angel, by suitable inquiries, ascertained that Stewart left the territory in the fall of 1884, leaving no property behind him, and that Curtiss besides the property covered by the chattel mortgage had only one team, and had no property

out of which the two notes then due could be collected by legal process. Angel also learned that, prior to Stewart's departure, it had been arranged between Curtiss, Stewart, and one A. C. Poor that the latter should take Stewart's interest in the threshing outfit, and should in consideration thereof, assume Stewart's liability upon the notes given therefor. Under these circumstances, an arrangement was made as follows: A payment was made of $112 on the note which matured December 1, 1883, out of the funds of Stewart and Curtiss, and for the balance due on the original notes Curtiss and Poor executed and delivered to Angel their three several promissory notes, payable to plaintiff, and dated January 12, 1885. One, for $50, matured February 15, 1885; one, for $377.73, fell due December 1, 1885; and one, for $223.83, matured December 1, 1886. To secure these notes, a chattel mortgage was taken from Curtiss and Poor upon the separator and horse-power and upon four horses. The new notes and chattel mortgage were taken as additional security, and as collateral to the original notes; but there was no direct evidence of an extension of the time of payment upon the original notes, and such indirect evidence as tended to show an extension of time was stricken out by the court, without objection. The case having been rested, counsel for the defendants requested the trial court to instruct the jury to find a verdict for the defendants. The motion was granted as to the $250 note which fell due December 1, 1883, and denied as to the other two notes. An exception was taken by the plaintiff to the following instructions: "You are instructed, as a matter of law, that the note for $250, dated August 27, 1883, and due December 1, 1883, is not in this case; and the court withdraws that note from your consideration, the court, holding as a matter of law, that the plaintiff is not entitled to recover on the guaranty on the note, for the reason that they have not exercised that diligence in attempting to collect of the makers of the note that the law imposes upon them to entitle them to proceed against the guarantors." The court, no exception being taken thereto, further instructed the jury as

follows: "You are instructed that there is no evidence in this case that the notes given by Curtiss and Poor were given in satisfaction of the notes in question. The testimony is that they were given as collateral, and not in satisfaction. There is some testimony on that point, but I take the responsibility of deciding that question myself. I also take the responsibility of deciding one other question. You will find that, at the time the second notes were given, there was no agreement that the time of payment of the notes in this case was extended." The verdict was for the defendants on all the issues.

The only error of law assigned in this court which we deem is necessary to notice is the claim that it was error in the trial court to withdraw the note falling due December 1, 1883, from the consideration of the jury, and to instruct them to find for the defendants upon that note. Plaintiffs also except to the verdict as not justified by the evidence, and specify that the evidence shows that the original debtors were insolvent when the original notes matured, and continued so to be until the trial, and also that the evidence shows due diligence on plaintiff's part to collect the note from the original debtors. In passing upon the assignments of error, it becomes necessary to consider the nature and extent of the obligation assumed by the defendants by their guaranty of the "collection" of the notes in suit. For this purpose we may safely have recourse to certain provisions of the Civil Code. Section 4280, Comp. Laws, reads: "A guaranty to the effect that an obligation is good, or is collectible, imports that the debtor is solvent and that the demand is collectible by the usual legal proceedings, if taken with reasonable diligence." Section 4281 reads: "A guarantee such as is mentioned in the last section is not discharged by an omission to take proceedings upon the principal debt or upon any collateral security for its payment, if no part of the debt could have been collected thereby." Section 4282 reads: "In the cases mentioned in § 4280 the removal of the principal from the territory, having no property therein, from which the obligation might be satisfied, is

equivalent to the insolvency of the principal in its effects upon the rights and obligations of the guarantor." It is apparent that the obligation assumed by the defendants belongs to the class of the guaranties which is defined by § 4280. The defendants did not, therefore assume to pay the notes unconditionally or at all. Their undertaking was only that the signers of the note were solvent when the guaranty was made, and that the notes could be collected "by the usual legal proceedings, if taken with reasonable diligence."

Taking up the assignments of error in the order above set out, the first question to be settled is whether the evidence embodied in the record shows, with respect to the note withdrawn from the consideration of the jury, that any of the conditions ever existed which would render the defendants liable upon their undertaking of guaranty. It is not contended that there is any evidence tending in the least to show that the orginal debtors (Curtiss and Stewart,) or either of them, were insolvent at the time the guaranty was signed. The complaint, however, expressly charges "that at the time of the execution and delivery of said note, and of said guaranty, said Curtiss and Stewart were, and ever since that time have been, insolvent." The allegation of the insolvency of the original debtors at the time the guaranty was entered into not being sustained by evidence, it follows that the first condition of the defendants' liability never came into existence. It is equally clear from the record that the plaintiff has wholly failed to show by testimony that the original debtors were insolvent at the time the first note came due, or for nearly one year thereafter. No evidence was offered relating to the solvency or insolvency of either Curtiss or Stewart, other than that directed to a date nearly one year after the first note matured, viz. until the fall of 1884. It appears that Stewart left the territory in the fall of 1884, and left no property within the territory. But, conceding that Stewart (under § 4282, *supra*,) became insolvent in the fall of 1884, there is yet a total failure of proof showing that either Stewart or Curtiss was insolvent prior to that time. The consequence is

(inasmuch as the law always presumes solvency until there is a showing to the contrary) that, for the purposes of this case, we must assume that the original debtors were solvent at all times from the date of the notes and guaranty until the fall of 1884. The plaintiff had the burden of proof to show insolvency, or to show the existence of some condition upon which the liability of the guarantors depended. Failing to show that the debtors were insolvent at the maturity of the first note, and for nearly one year thereafter, the burden was then upon plaintiff to show that it endeavored to collect the note of the principal debtors by resort to the "usual legal remedies with reasonable diligence." There is no claim that plaintiff ever brought suit upon the original notes against Curtiss and Stewart, nor that it ever attempted to foreclose the chattel mortgage given to secure the original notes. Nor was suit or foreclosure proceedings commenced upon the collateral paper until more than three years had elapsed after the maturity of one of the notes. It therefore clearly appears that plaintiff did not, with ordinary diligence, resort to the usual legal proceedings to collect the first note from the original debtors. Nor does it appear that legal proceedings would have been fruitless, by reason of the insolvency of the original debtors, at the time when the guaranty was entered into, or when the first note matured, or for nearly one year thereafter. Upon the evidence adduced, we think the instruction directing the jury to find for the plaintiff upon the guaranty indorsed upon the note maturing December 1, 1883, was entirely proper. The facts not being in dispute, the question was one of law for the court. *Craig* v. *Parkis*, 40 N. Y. 181. It is held in New York, in this class of guaranties, that the creditor has the burden of showing that in due time he instituted an action against the debtor. Showing insolvency of the debtor was not accepted as an excuse for not bringing the action. But we think the better rule, as established by the decided weight of authority, is that the failure to bring suit is excused where it appears that a suit would be fruitless. See *Brackett* v. *Rich*, 23 Minn. 485, and authorities there collated.

The provisions of the Civil Code which are cited above certainly voice the later and more reasonable rule of law. Where the debt is secured by mortgage, an unreasonable delay in foreclosing the mortgage will be such laches upon the part of the creditor as will exonerate the guarantor. *McMurray* v. *Noyes*, 72 N. Y. 523; *Crane* v. *Wheeler*, (Minn.) 50 N. W. 1033; *Dewey* v. *Investment Co.*, Id. 1032. See Brandt, Sur. § § 98, 99.

The second assignment of error, *i. e.* that which asserts that the verdict was not justified by the evidence, must also, upon the grounds and authorities above stated, be overruled. The time of payment of the original series of notes not having been extended, it follows that the creditor (the plaintiff) at all times after December 1, 1883, was in a position to foreclose the mortgage given to secure the notes in suit. This was not done at any time. If it were conceded—and it is not—that an action brought against the debtors would have been fruitless by reason of the insolvency of the debtors, such fact does not excuse the laches involved in the nonforeclosure of the first mortgage. Neither is there any excuse offered in the evidence for the long delay which occurred in foreclosing the mortgage given to secure the collateral series of notes. Two of that series of notes matured in the year 1885, and no foreclosure was made until 1888. Plaintiff's evidence stood alone, and was clear and uncontroverted. It was of a character to demonstrate that the plaintiff had wholly failed to make out a case as against the guarantors. Upon such a state of facts, defendants' motion, made at the close of the evidence, to instruct the jury to find for the defendants upon all of the issues, might well have been granted in its entirety. The failure of the court to do so, however, was, as to the second and third notes, a ruling in plaintiff's favor. The evidence fully justified the verdict.

Finding no error in the record, the judgment is affirmed. All concur.

(59 N. W. Rep. 967.)

MICHAEL J. BARRETT *vs.* STUTSMAN COUNTY.

Opinion filed July 23, 1894.

Justice of the Peace—Action Against County.

Where a justice of the peace files his sworn report, containing an itemized account of his fees in criminal cases, with the board of county commissioners of the proper county, and such board fails to take any action thereon within a reasonable time, the justice may bring suit against the county for such fees, and he is not required to compel such board by mandamus to act upon such claim.

County Liable for Justice's Fees in Criminal Action.

No liability rests upon a county, as such, to pay the fees of a justice of the peace in criminal cases, unless such liability is created by statute; but it is not necessary that the statute should in direct terms require the county to pay such fees if it clearly and unmistakably appears from what has been enacted that such was the legislative intent.

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

Action by Michael J. Barrett against Stutsman County. Judgment for plaintiff, and defendant appeals.

Affirmed.

S. L. Glaspell, for appellant.

There is no statute law in this state providing that counties shall pay the costs of criminal cases in the courts of justices of the peace. To enable a justice to recover such costs from a county he must show a statute obliging the county to pay. *Board of Commissioners* v. *Houn*, 23 Kan. 257; *Becknell* v. *Amador Co.*, 30 Cal. 237; *Rawley* v. *Board of Commissioners*, 2 Blackf. 355; *United States* v. *Barker*, 2 Wheat 395; *Kitchell* v. *Madison Co.*, 4 Scam. 163; *Williams* v. *Northumberland Co.*, 20 At. Rep. 405; *Hendershott* v. *County*, 47 N. W. Rep. 810; *Preston* v. *Town*, 55 Wis. 202; *Noyer* v. *State*, 46 Wis. 250.

Edgar W. Camp and *Barrett & Marcy*, for respondent.

When services are required to be rendered for a county, the fees prescribed and no provision made by statute for their payment, the county is liable. *Bright* v. *Supervisors*, 18 Johns. 243;

Mogel v. *County*, 26 At. Rep. 227; *Doubleday* v. *Supervisors*, 2 Cowen 532. Cited as bearing upon the general liability of the county for kindred services. *Hawthorn* v. *Randolph Co.*, 31 N. E. Rep. 1124; *Codding* v. *Bradford Co.*, 9 At. Rep, 153; *Jamient* v. *Board*, 43 N. W. Rep. 910; *Miller* v. *Boone Co.*, 31 N. E. Rep. 1123; *Tucker & Slate* v. *Rochester*, 7 Wend. 256; *People* v. *Board*, 12 Wend. 256; *People* v. *Supervisors*, 45 N. Y. 199; *Crofrut* v. *Brandt*, 58 N. Y. 113; *People* v. *Supervisors*, 32 N. Y. 475; *Hawthorne* v. *Randolph Co.*, 30 N. E. Rep. 16; *County* v. *Decker*, 14 Pac. Rep. 123; Dillon Muc. Corp. § 938 and N. 3.

BARTHOLOMEW, C. J. The plaintiff was a duly elected and qualified justice of the peace for Stutsman County. On July 3, 1893, plaintiff, as such justice, filed with the board of county commissioners for said county, for audit and allowance, an itemized statement of his fees in criminal cases for the six months ending June 30, 1893. On September 18, 1893, said bill not having been allowed, and, so far as the record shows, no definite action having been taken thereon, he commenced this action against the county to recover the same. The county answered in general denial, and also pleaded the pendency of the claim before the county commissioners. There was a trial, verdict directed for plaintiff, new trial denied, judgment on the verdict, and defendant appeals.

We do not think the action was prematurely brought; or, to put it differently, we do not think plaintiff was required to resort to mandamus to compel the commissioners to act upon his claim, and then, if such action were unfavorable, bring suit against the county. The commissioners are but the financial agents of the county. It is convenient to present claims against the county to the board for allowance, but it is not a condition precedent to the right to bring suit on the claim. The allowance or disallowance of the claim by the board is not an adjudication. If allowed, and a warrant issued therefor, the county may subsequently defend against the warrant on the ground of *ultra vires*, fraud, or failure of consideration; and, if disallowed, the claimant may

bring suit on his claim. The commissioners are not a tribunal in the matter of allowing claims. They are simply the agents of one of the parties to the transaction out of which the claim arose. The county is a body corporate for civil purposes, and, as such, may sue and be sued. Comp. Laws, § 572. It was no doubt the duty of the agents of the county to act upon the claim presented by the plaintiff, but their failure to do so cannot be urged by their principal as a good plea in abatement. In *State* v. *County Judge*, 5 Iowa, 380, where the auditing body (county judge in that case) had failed to act upon a claim against the county, it was held that mandamus to compel action was not proper, because the party had a plain, speedy, and adequate remedy at law by a direct suit upon the claim. See also, *Gillett* v. *Lyon Co.*, 18 Kan. 410, and Dillon Mun. Corp. § 963, note.

In the trial below, the appellant insisted, by motion to exclude all evidence under the complaint, and, by motion for a directed verdict in its favor, that it was not liable in law for the payment of respondent's fees in criminal cases, or in any case, except where the county, as such, was a party in interest. To this one point its other assignments of error are all directed. The case does not present an instance where services are required by law of a public officer for which no fees are provided. In such instances it is generally held that no recovery can be had. Fees were unknown to the common law. They exist only by express statutory creation. A party accepting a public office takes it *cum onere*, and may resign if he finds it burdensome: but, while he holds the office, he must perform the duties prescribed by law, for the compensation fixed by law. But these principles cannot be made to apply to this case. Section 1420, Comp. Laws, fixes in detail the fees which justices of the peace are "entitled to charge and receive" in both civil and criminal cases. The difficulty lies in the fact that this law nowhere declares in terms by whom these fees shall be paid. In civil cases the justice may demand his fees in advance. He

holds the means for his protection in his own hands, and can look only to the parties to the action for his compensation. Not so in criminal cases. Punishment for crime or acquittal of criminal charges does not depend in this state upon the ability of the prosecuting witness, in the one case, or the accused, on the other, to advance the fees of the officers whom the law designates to issue the proper papers and investigate and determine charges. In these cases, payment of fees is a subsequent matter. True, upon conviction, costs are taxed against the defendant; and in certain cases, where the prosecution is malicious or without probable cause, the costs may be taxed against the prosecuting witness. But, in practical results, these provisions amount to but little, as generally the costs cannot be collected. Granting that these provisions sufficiently assured the payment of fees in these cases, there yet remains the large class of prosecutions properly brought, yet where no conviction results, entirely unprovided for, unless the state or proper county is liable for such fees. Certainly, the state is not liable. No statute can be found looking in that direction, saving in the exceptional circumstances hereafter noticed. True, all prosecutions run in the name of the state, but the county is the instrumentality provided by law for punishing all violations of criminal statutes which occur within its boundaries. These violations cannot be punished elsewhere. Counties are organized almost exclusively for the purpose of carrying out the policy of the state at large in the matters of political organization and civil administration, and especially for the general administration of justice. Dill. Mun. Corp. § 23. It has been the general, if not the universal, policy of the states of this Union to cast upon the counties the burden of criminal prosecutions. Law abiding communities are thus relieved of the burdens which are properly thrown upon their more lawless neighbors, and the citizens of each county are directly interested in diminishing crime. But, notwithstanding this practice is so prevalent that the source of the county's liability is seldom questioned by lawyer or layman, yet it is urged upon us in this case that this liability is

always founded upon statutory provisions, and this we think, is correct. *Preston* v. *Town of Koshkonong*, 55 Wis. 202, 12 N. W. 440, and *Bicknell* v. *Amador Co.*, 30 Cal. 237. No statute of this state can be found in terms requiring the county to pay the fees of justices of the peace in criminal cases. We do not think this necessary if the intention of the legislature that such fees should be so paid clearly and unmistakably appears from what has been enacted. *Hawthorn* v. *Board of Commissioner's*, (Ind. App.) 30 N. E. 16, 31 N. E. 1124; *Codding* v. *Bradford Co.*, (Pa. Sup.) 9 Atl. 153; *People* v. *Supervisors of New York*, 32 N. Y. 473.

When we turn to our statutes, we find that a justice of the peace is a county officer; that he is expressly authorized to charge and receive certain specified amounts for certain specified services. By § 6184, Comp. Laws, and sections following, justices of the peace are required to report under oath an itemized account of their fees in all criminal cases, and showing what, if anything, has been paid them, to the county commissioners of their respective counties at the regular quarterly meetings of said board. Why is this sworn report required? It is suggested that it is required to prevent extortion. Then, why limit it to criminal cases? Extortion may as readily be practiced in civil cases? If it be said that in civil cases the parties are liable for the costs, and self interest will prompt them to see that no improper costs are allowed, the ready answer is that if, as appellant claims, costs in criminal cases are only paid when chargeable to the prosecuting witness or the defendant, then such parties would be equally zealous in excluding extortionate charges. If costs in criminal proceedings, before justices of the peace, are not to be paid when the proceedings were properly commenced, but failed to terminate in convictions (and this would certainly include a moiety of all criminal proceedings in justice's court,) then the act of the legislature authorizing justices to "charge and receive" certain fees, without restriction as to cases, was to a large extent nugatory, and the subsequent act requiring justices to report under oath to the county commissioners an itemized account of

fees that could not under the law be paid by anybody is certainly incomprehensible. If they can never be paid, it is utterly immaterial whether they are extortionate or not. But, if we hold that such report is required for the purpose of enabling the board of county commissioners to audit and pay the fees of the justice, we thus give effect to the fee bill as the statute proclaims it, and find a proper and necessary demand for the verified report. This is the practical, and, as we understand, universal, construction that has been placed upon the statute from its first enactment. While custom may not make law as against a municipality, yet a construction so long given by every county in this jurisdiction, and involving in the aggregate so much money, and given, we must presume, with the full knowledge of so many subsequent legislatures, ought not to be changed by the courts without sufficient and forcible reasons. The legislature has not only acquiesced in this construction, but has, we think, placed the same construction upon the law. By § 15, Ch. 84, Laws Dak. T. 1881, (a statute enacted long subsequent to those we have been considering,) it was provided that, when unorganized counties were attached to organized counties for judicial purposes, the jurisdiction of justices of the peace in the organized counties should extend over the unorganized counties, but all costs and expenses in criminal prosecutions arising in such unorganized counties were to be audited and paid out of the territorial treasury when not collected from defendant. It would have been unjust to have placed the burden of such prosecution upon the organized county from which the warrant issued. It could not be placed upon the unorganized county, for the plain reason that the governmental instrumentalities for the collection of revenue for county purposes were entirely wanting in such counties. Hence the legislature directed that the costs of such prosecutions be paid by the territory. But it cannot be admitted that the legislature intended to provide for the fees of the justices in this limited class of cases, and leave such fees entirely unprovided for in the great mass of criminal business that should arise in the organized counties. It

simply construed existing statutes as covering all such cases. The consideration of these several statutes forces the conclusion upon us that when it declared by law what fees a justice of the peace might charge and receive in all cases, and when it required justices to make quarterly reports under oath showing an itemized statement of all their fees in criminal cases, and what amounts, if any, had been collected thereon, the legislature intended to place the liability for such unpaid fees upon the respective counties. It is not claimed in this case that there are any items in plaintiff's bill that should have been collected from the defendants in criminal cases who were convicted, or from prosecuting witnesses who had been adjudged to pay the costs; but to avoid misconception, it may be proper to add that we do not hold that, even in such cases, justices of the peace will be required to look only to such parties for their fees.

The judgment of the District Court is in all things affirmed. All concur.

(59 N. W. Rep. 964.)

ALEXANDER ANDERSON *vs.* FIRST NAT'L BANK OF GRAND FORKS.

Opinion filed June 23, 1894.

Principal and Agent—Accounting—Burden of Proof.

When one sues his agent for moneys received by the agent for his use, he has the burden of proof to show the amount received and not accounted for.

Burden on Agent—When.

In such cases the agent has the burden of accounting for all moneys which he admits he received.

Instructions to Agent—Evidence.

When one acts on instructions given after communications on the same subject have passed between him and his principal, all such communications are admissable in evidence to explain the instructions.

Ambiguous Instructions—Estoppel.

When one gives his agent ambiguous instructions, which the latter executes in good faith, according to a reasonable interpretation of them, the principal is estopped to say that he intended them to be construed otherwise.

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

Action by Alexander Anderson against the First National Bank of Grand Forks. Verdict for defendant, and plaintiff appeals. Reversed.

Phelps & Phelps, for appellant.

Burke Corbet, for respondent.

WALLIN, J. The facts necessary for a determination of this case may be stated as follows: On the 6th day of April, A. D. 1891, the plaintiff borrowed from the defendant, at Grand Forks, N. D., the sum of $2,000, and gave the defendant his promissory note therefor. As collateral security for the payment of the note, plaintiff delivered to the defendant seven promissory notes for $1,000 each, and assigned and delivered to defendant a certain mortgage upon real estate situated in Grand Forks County, which was given to secure the payment to plaintiff of the seven collateral notes. At the time of the sale hereinafter mentioned, there was an accumulation of interest on the collateral notes to

the amount of $630. The action is brought to recover an alleged balance claimed to be due from defendant to plaintiff on account of the proceeds of a sale of said collateral notes, which sale, plaintiff alleges, was made by defendant at plaintiff's request, and pursuant to plaintiff's instructions. Paragraph 5 of the complaint reads: "That on the third day of October, A. D. 1891, the defendant telegraphed to plaintiff, at Seattle, Washington, requesting plaintiff to telegraph to defendant his best offer for a sale of said seven promissory notes, by the defendant for the plaintiff, to a third person, who was not named in said telegram from defendant to plaintiff, and thereupon the plaintiff telegraphed to the defendant as follows: 'To First National Bank, Grand Forks, North Dakota: Will give discount of five hundred dollars. Alex. Anderson.'" Paragraph 6 of the complaint is as follows: "That the defendant received said telegram from the plaintiff, and thereupon the defendant sold the said seven promissory notes to a person unknown to the plaintiff, and received the proceeds of said sale, and on the 7th day of October, A. D. 1891, the defendant remitted to plaintiff the sum of four thousand three hundred ninety-seven and 48-100 ($4,397.48) dollars, part of the proceeds of said sale, and mailed to the plaintiff his promissory note to defendant for two thousand ($2,000) dollars, hereinbefore mentioned, and notified the plaintiff that defendant's commission for selling said seven promissory notes was the sum of thirty-five ($35) dollars; but the defendant has wholly failed to pay or remit to the plaintiff the balance due him, in the sum of six hundred and ninety-seven and 52-100 ($697.52) dollars, with interest thereon at the rate of seven per cent. per annum from and after the 7th day of October, 1891." Paragraph 7 of the complaint states in effect that, upon the receipt of the $2,000 note and the cash remitted, the plaintiff at once notified defendant, by letter, "that he would not accept said remittance and note as full payment of the proceeds of said sale, but that he should insist that defendant account to the plaintiff for, and remit to him, the balance due upon the full amount

owing to plaintiff upon said notes at the time of said sale, to-wit, the sum of seven thousand six hundred and thirty ($7,630) dollars, less the five hundred dollars discount which had been agreed to by plaintiff as aforesaid." The complaint also avers a demand for the alleged balance, and asks judgment for the same, with costs. Defendant, answering the complaint, "denies each and every allegation contained in said complaint that is not hereafter expressly admitted or qualified.' The answer expressly admits the first, fourth, and ninth paragraphs of the complaint, which are not material here, and raises an issue upon certain formal allegations of the complaint, not now in dispute. Defendant admits the existence and transfer to it of the collateral notes and mortgage. Paragraph 5 of the answer is as follows: "Defendant denies that it owes or is indebted to the plaintiff in any sum or amount whatever, and alleges that the aforesaid notes mentioned in said complaint were sold and disposed of, and the proceeds thereof were applied and appropriated, strictly in accordance with the request and direction of the plaintiff, and at his special instance and request." Defendant demands judgment of dismissal, with costs.

At the close of the testimony a request was made for an instruction to the jury to find for the plaintiff for the full amount claimed, and $35 additional. The request was denied, and plaintiff took an exception to the ruling. The defendant then moved the court to instruct the jury to find for the defendant upon the ground that the plaintiff "having accepted the fruits of the transaction, and not having returned or offered to return the same, he thereby ratified the transaction, and is now estopped to claim damages." This request was granted, and plaintiff took exception thereto, whereupon the jury returned a verdict for the defendant, and against the plaintiff. This exception is assigned as error in this court.

Under the issues joined, the plaintiff was not bound to show the mere fact of sale, because the answer admitted that the defendant made a sale of the collateral paper, and alleged that such sale

was made under plaintiff's instructions, and that it had fully accounted for the proceeds arising from the sale. But plaintiff, under his complaint, had the burden of showing what sum was realized upon the sale, because, until the total proceeds of the sale were shown, the court and jury would be unable to determine whether or not the proceeds had been accounted for by the defendant. The answer neither admitted nor alleged that the sale was made for any specified sum. Excluding testimony not now relevant, the testimony of the plaintiff is as follows:

"Alexander Anderson, being sworn, testified: '* * * On the 3rd day of October, 1891, I was the owner of the seven promissory notes, and on the said date I received a message purporting to have been sent to me by the defendant, relating to said notes. This message reads as follows: "Oct. 3d, 1891. Alexander Anderson, Seattle, Washington: Did you receive our letter, September fourteenth? Wire us your best offer, so we can advise the party who said he would hold his money until we heard from you. First National Bank."' The witness proceeds: 'On October 5th, 1891, I replied to this message by sending to defendant the following telegram: "Seattle, Washington, Oct. 5th, 1891. First National Bank, Grand Forks, North Dakota: Will give discount of five hundred dollars. Alex. Anderson."' Proceeding, Anderson testified: 'I received a reply to this telegram by letter from the defendant, inclosing a New York draft for four thousand three hundred and ninety-seven dollars and forty-eight cents, payable to myself; also, my note to the defendant for two thousand dollars, due December 14, 1891, with interest paid to its maturity, duly canceled. This is the same note mentioned in paragraph four in the complaint in this action. The letter last referred to read as follows, written by S. S. Titus, defendant's cashier: "'"Grand Forks, N. D., Oct. 7th, 1891. Mr. Alex. Anderson, Seattle, Wash.—Dear sir: Your wire Oct. 5th, to hand.

Discount	$ 500 00
½ per cent. commission for selling the paper	35 00
Release and record of $80 mortgage given Gates	2 00
Record assignment	1 50
1890 taxes you stipulated to pay	47 02
Attorney for examination abstract	5 00
Continuing abstract	4 50
Your note	2,000 00
Exchange on New York	7 50
Dft. for balance	4,397 48
	$7,000 00

"'"Returns for J. A. Willson notes. In my judgment this is a good trade for you. Yours, S. S. Titus, Cr."

"'I replied to this letter on October 13, 1891, by letter, which I sent to the defendant, reading as follows: "Seattle, Washington, Oct. 13th, 1891. First National Bank, Grand Forks, N. Dak.—Gentlemen: Your letter with inclosed draft for $4,397.48 and note of $2,000, is at hand, which I cannot accept. I wired you I would give a discount of five hundred dollars, and you made a discount of about $1,175. I did not agree to pay any other expenses. Those notes call for $7,000 and $630 interest. I shall expect balance of money by return mail. Yours respectfully, Alex. Anderson."

"'I have never received any further payment or remittance of any nature from the defendant, for the proceeds of the sale of those seven Willson notes mentioned in the complaint. The value of said notes on or about October 5, 1891, was seven thousand six hundred and thirty dollars. No portion of said notes has ever been paid to me by the signers of the same, nor in any other manner than by the remittance of the defendant, which I have mentioned. I have the letter of Sept. 14th, which is mentioned in the first telegram I have referred to. It is written by S. S. Titus, defendant's cashier, and reads as follows: "Grand Forks, N. D., Sept. 14th, 1891. Mr. Alex. Anderson, Seattle, Wash.—Dear Sir: We never make a trade in the way you mentioned; that is, pay a part, and later on send or pay more. We, if we make a trade with any one, always close it up at once.

Then it is complete, and out of the way. If I had a basis to work on, I might find some one who would take the paper. You offer it $350 discount. We offer you a trade at $1,000 discount. Now, if you will make it 700 or 800, and allow us a small commission, I will try and place the paper for you. You, as I wrote you, to make the title clear and straight, if anything should come up in the deal. The paper could be sold easier if it all run not to exceed five years. Capitalists kick on anything over five years. Money is close, and is going to continue. Wheat is going down every day. Looks as though 65 to 70 cts. will be the average price farmers will receive for this crop. If you care to have us go to work on these terms, you write or wire me. Yours, S. S. Titus, Cr."' (Plaintiff rests.")

An examination of the plaintiff's evidence will disclose that no testimony whatever was offered by the plaintiff to show what price was realized by defendant, as a matter of fact, for the collateral paper. True, plaintiff put in evidence defendant's letter of remittance, containing a draft and plaintiff's $2,000 note, and embracing also a detailed statement called "Returns for J. A. Willson's notes," which were the collateral notes. If it be conceded that the letter and its contents were competent evidence, as against defendant, to show the price obtained by the defendant for the collateral paper, it certainly does not tend to support the plaintiff's allegations as to the sum realized on the sale, nor does it tend to show that the alleged balance arising from the sale remained in defendant's possession, unaccounted for, or that there was a balance. If it shows anything as to the price obtained for the paper, it shows that the sum realized was the face of the notes, less $500 discount, or, in other words, that defendant realized just $6,500 for the paper, whereas the plaintiff claimed that defendant realized $7,130 net. The parts of defendant's evidence which are at all material are as follows: "S. S. Titus, was sworn in defendant's behalf and testified that he was cashier of defendant's bank during the period in question; that he had received letters, telegrams, etc., from the plaintiff; that the

witness had in his possession the first letter from plaintiff pertaining to the transaction." The following letter was then put in evidence." "Seattle, Washington, August 11th, 1891. Mr. S. S. Titus, Grand Forks, N. Dakota—Dear Sir: Any time you feel like buying these notes of mine, let me hear from you. Alex. Anderson." The letter referred to the notes in question. "I replied to the letter by a letter addressed to the plaintiff, which bears date August 17, 1891. It reads: "The offer to sell, coming from you, you have neglected to say what you will take for the paper. I notice it has a long time to run, the last note coming due in 1897. I presume the title is O. K. Have not had it examined by our attorney. Money is very close here, and is liable to remain so all over the country for some time to come,—certainly, until after the next presidential election; and even then, if the silver question is not settled, financial disturbances will follow. We may take the paper from you, if it can be had by us at a discount that will warrant us in accepting it, but, until we hear from you again, can give you no definite answer. You will have to make a very liberal offer before we will take even the time and go to the expense of looking it up. Yours truly, S. S. Titus, Cr." Witness continues: "To that letter I received a reply." The letter is put in evidence, and reads: "Seattle, Washington, Aug. 27th, 1891. S. S. Titus, Grand Forks, North Dakota—Dear Sir: Your letter of 17th is to hand, regarding notes. I consider these notes worth face value, being well secured on as good land and as well located as anything as you have in N. Dakota, bearing good rate of interest; but I think I can use the money here to advantage, and therefore, would be satisfied to give a discount of five per cent. on face. Yours respectfully, Alex. Anderson." To this letter, defendant replied by letter as follows: "Grand Forks, North Dakota, Sept. 3rd, 1891. Alexander Anderson, Seattle, Washington: August 31st we wired you. If accepted now, a party is here, so we can send you $4,000, together with your note; you to make title good if anything comes up. Answer by wire at once. As yet we have received

no reply, and come to the conclusion you do not wish to sell the paper. Money is very close here now, and is going to be all over the northwest, right along, no matter how large the crop is. Yours truly, S. S. Titus." Witness continues: "I also sent a telegram, and the letter just read refers to the telegram, confirms the telegram, and answers the letter of August 27, 1891." The telegram here referred to is put in evidence, and reads: "Grand Forks, August, 31st, 1891. To Alex. Anderson, Jackson and Pearl Street, Seattle, Washington: If accepted now, a party is here, so that we can send you $4,000, together with your note; you to make title good if anything comes up. Answer at once. First National Bank." The witness proceeded: "I received a reply to that letter and telegram, and have the original letter received by me in my possession." The letter was put in evidence, and reads: "Seattle, Washington, September 8th, 1891, Mr. S. S. Titus—Dear Sir: Yours of the 3rd ult. is at hand. I do not wish to sell notes at the figures you offer. If you send $4,000 and notes, balance some other time, all O. K. I wrote you saying I will give a discount of five per cent. on face of notes. Very respectfully, Alexander Anderson." "I replied to that letter by letter of September 14th, 1891. [See letter above.] I do not think we received any reply by mail to this letter of September 14th, 1891. The next correspondence that passed between myself and the plaintiff in this case was as follows: I wired him on October, 3, 1891, asking him if he had received our letter of September 14th,—the last letter we wrote." The telegram referred to bears date Oct. 3, 1891, and is put in evidence. It reads: "Alexander Anderson, Seattle Washington: Did you receive our letter September 14th? Wire us your best offer, so we can advise the party who said he would hold his money until we heard from you. First National Bank." To this telegram, plaintiff answered by wire, on October 5th, 1891: "Will give discount of five hundred dollars." The witness continued: "On October 7th, we closed up the deal for him on his basis. We wrote him a letter, and sent him his notes and a draft, and closed

up the entire transaction." The witness here refers to the defendant's letter of remittance dated October 7th, put in evidence by the plaintiff. Titus further testified to the effect that the draft sent to the plaintiff, amounting to $4,397.48, was paid to the plaintiff, and that the plaintiff never returned, or offered to return, any of the fruits of the transaction.

On examination of the defendant's testimony, it appears that it tends strongly to show that the bank disposed of the collateral paper for the sum of $6,500, or $500 less than the face of the notes, excluding interest. The correspondence having been put in evidence, Titus testified as follows: "On October 7th, we closed up the deal for him on his basis. We wrote him a letter, and sent him his notes and a draft, and closed up the entire transaction." The testimony of the witness Titus, in connection with the detailed statement contained in defendant's letter of remmittance,—both being uncontroverted,—show, at least *prima facie*, that the defendant did not, as plaintiff claims, receive, as a consideration for the sale of the collateral paper, any part of the $630 accumulated interest thereon, and that the total proceeds of the sale was only $6,500. In other words, the undisputed evidence not only fails to sustain the allegations of the complaint, but tends to disprove the most important allegations of the complaint *i. e.* those to the effect that the collateral paper was sold for its full value at the time of the sale, including interest, after deducting $500 from the total. But, while the evidence signally fails to establish the principal fact alleged in the complaint, it does clearly show that the defendant, assuming to act under the plaintiff's instructions to sell, did sell and dispose of the paper, and that the sum realized thereon was $6,500. This sum defendant was bound to pay over to the plaintiff, or legally account for. Under the complaint, plaintiff had a right to recover any balance remaining in defendant's hands arising from the sale, and not legally accounted for by the defendant before the action commenced. As has been seen, the defendant in its letter of remittance, debited the plaintiff, and deducted from the proceeds

of the sale, divers sums, as disbursements, viz. commission for selling the paper, recording fees, taxes, attorney's fees, exchange, etc. Without stopping to consider here whether or not the defendant was authorized by plaintiff to make such disbursements, and assuming, for defendant's benefit, that it was authorized to make necessary disbursements of the character stated, it would then be incumbent upon the defendant to show, in accounting for the admitted proceeds of the sale—*First*, That the disbursements were necessary; *second*, that they were reasonable in amount; *third*, that they were actually made. Assuming that defendant was entitled to a commission for selling the paper, the burden would fall upon the defendant to show that the commission actually charged, and deducted from the proceeds, was reasonable in amount. No evidence whatever was offered of this character. Nor has the plaintiff, by silence or by acquiescence in defendant's charges, estopped himself from denying the validity of the same. When the plaintiff received the defendant's letter embracing the account containing these items of disbursements and charges he at once repudiated the same, and promptly informed the defendant by letter that he would not acquiesce therein. See plaintiff's letter of October 13th. Defendant not having justified the debit items in question by testimony tending to show that they were proper in character and amounts, and were paid out in fact, the result is that the plaintiff, at the close of the evidence, was entitled to a verdict for the sum of such items, with interest thereon from the date of sale. Plaintiff's counsel, however, did not ask the trial court for an instruction directing a verdict for such items, but did ask for an instruction to the jury to return a verdict for the full amount of the plaintiff's claim. This instruction, for reasons before given, the plaintiff was not entitled to, and hence, plaintiff's exception upon this point must be overruled. But the trial court instructed the jury to find for the defendant, and against the plaintiff, and to this plaintiff excepted. It follows from what has been already stated that this instruction was prejudicial error. For this the verdict must be set aside, and a new trial granted.

Defendant's counsel contends in this court that inasmuch as each side, at the close of the testimony, requested an instruction to find a verdict for each, respectively, both were estopped from questioning the conclusions of fact reached by the trial court; citing *Kearney* v. *Mayor, etc.*, 92 N. Y. 621, and other New York cases. But we think that the authorities cited do not apply to the case under consideration. In this case there is no conflict in the evidence. At the close of the evidence the duty was devolved upon the trial court of applying the law to an uncontroverted state of facts. The learned trial court assumed to discharge this duty when it directed a verdict for the defendant. This direction in our opinion, was erroneous, and the plaintiff was clearly entitled to have the error reviewed and corrected in this court. The doctrine enunciated by the cases cited does not prevent the correction of errors of law occurring at the trial, to which an exception is saved. The defendant's counsel, as has been seen, requested an instruction to return a verdict in favor of the defendant, upon the ground that the plaintiff, having confessedly received and retained a part of the proceeds of the sale, was thereby estopped from suing for any alleged balance of such proceeds. The motion being granted, and nothing to the contrary appearing in the record, we must assume that the learned trial court adopted the theory of defendant's counsel, and applied the doctrine of estoppel to the facts adduced. We are clear that this was error. It is, of course, elementary, where a party repudiates a contract, and seeks to rescind the same, that he must restore to the other party any proceeds or fruits of the transaction which are in his possession or within his control, as a condition precedent to rescission. This well settled rule is voiced by the Code. Comp. Laws, § 3591. But in the case at bar there is no attempt to rescind a contract of sale, or any contract whatsoever. Had plaintiff sought to rescind the sale of the notes, it would perhaps have been necessary to seek the vendee, and tender back the proceeds of the sale, as a preliminary to an action to recover the notes or their value. But the plaintiff has no controversy with

the vendee of the notes, nor is he seeking to repudiate the contract whereby the notes were sold by the defendant while acting as the plaintiff's agent. His complaint is drawn upon the theory that there was a valid sale, and plaintiff seeks only to recover an alleged balance of the proceeds arising from a legally consummated sale. It would seem that neither argument nor authority would be needed to demonstrate that plaintiff was not estopped by the fact that he had received and retained a part only of what belonged to him. Such of the proceeds of the sale as were remitted by the defendant to the plaintiff were voluntarily sent, and defendent has never contended that such proceeds do not belong to the plaintiff. Where both sides agree that the proceeds of the sale, which were sent to the plaintiff by the defendant belonged of right to the plaintiff, it would certainly be a strange anomaly in the law if it were true that such proceeds must be returned to the defendant, as a condition precedent of bringing suit to recover an alleged balance of such proceeds not paid over. It is entirely clear that plaintiff was not estopped by retaining what belonged to him. The doctrine of estoppel does not apply. See Comp. Laws, § § 3455, 3486.

The evidence shows that the relation of the parties was that of principal and agent, and that the sale of the notes was made by the defendant while acting as agent for the plaintiff. The authority to sell is alleged in the complaint, and the fact of the sale is admitted by the answer; and the answer also avers, in effect, that the sale was made in strict conformity to plaintiff's instructions. At the trial, plaintiff's counsel labored strenuously to have the court exclude from the consideration of the jury all evidence bearing upon the vital matter of the instructions given by the plaintiff to defendant, save only the final dispatch, dated October 3, 1891. This dispatch reads: "Will give discount of five hundred dollars." The negotiation between the parties relative to the sale of the notes were all in the form of letters and telegraph dispatches, and these began in August, and terminated

in October, 1891. We are clear that the trial court was right in overruling the objections of plaintiff's counsel, and allowing the whole correspondence to be put in evidence. The real question in the case was as to the nature and effect of the instructions given by the plaintiff to the defendant as to selling the paper. All the correspondence put in evidence bears directly on that question, and it casts a strong light upon the chief point involved. It was entirely proper, therefore, and strictly within the established rules of evidence, to allow the correspondence to come into the case, in order to place the full instructions and the entire surroundings before the court and jury.

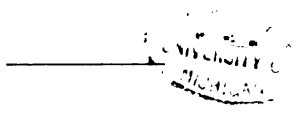
The ultimate question arising upon a construction of the whole correspondence is this: Did plaintiff's instructions to defendant, when fairly and honestly construed, authorize a sale of the paper at the price for which it was actually sold? While it is not absolutely necessary to a decision of the case,—as a new trial will be granted upon another ground,—we deem it our duty to briefly express our views upon the question above stated. Plaintiff wrote on August 11th, offering to sell the notes to defendant. To this defendant replied, promptly: "The offer to sell coming from you, you have neglected to say what you will take for the paper. You will have to make a very liberal offer before we will take even the time and go to the expense of looking it up." On August 27th plaintiff wrote defendant, stating that he "would give a discount of five per cent. on face." On August 31st the defendant wired plaintiff: "If accepted now, a party is here, so that we can send you $4,000, together with your notes; you to make title good if anything comes up. Answer at once." September 3d, defendant wrote, referring to its dispatch of August 31st, and stated: "As yet, we have received no reply, and come to the conclusion you do not wish to sell the paper." September 8th plaintiff wrote defendant, stating, "I wrote you, saying I will give a discount of five per cent. on face of notes." On September 14th, defendant wrote, stating: "If I had a basis to work on, I might find some one who would take the paper. Your offer is at $350

discount. Now, if you will make it 700 or 800, and allow us a small commission, I will try and place the paper for you." On October 3rd defendant wired plaintiff: Did you receive our letter September 14th? Wire us your best offer, so we can advise the party who said he would hold his money until we heard from you." October 5th plaintiff wired defendant, "Will give discount of five hundred dollars." On this correspondence it appears that defendant sold the paper for $6,500. This epitome of the correspondence brings out certain features conspicuously. It shows that the plaintiff wrote the defendant twice, stating he "would give a discount of five per cent. on face of notes." In what way these instructions were understood by the defendant was made clear by letters and dispatches from defendant to plaintiff, sent prior to plaintiff's final dispatch, of October 3d. Defendant wrote. "Your offer is at $350 discount." But the exact sum of $350 had not been mentioned by the plaintiff. His offer was to give five per cent. discount "from the face of the notes." But five per cent. on the $7,000—the face of the notes—is exactly $350. This demonstrates that the defendant understood the offer of plaintiff to mean tnat he would sell the paper for $350 less than the face value without interest. This is clear, because $350 is less than 5 per cent. upon the notes with interest added, and said sum is just 5 per cent. upon the face of the notes without interest. In the same letter defendant suggested that plaintiff make a much better offer, *i. e.* an offer to discount from the face $700 or $800. On August 31st defendant wired plaintiff, stating that they had an offer which would enable them to return plaintiff his notes and $4,000. On September 14th defendant wrote, referring to the dispatch, and finally the defendant, in its last telegram, referred to the letter of September 14th, and said, "Wire us your best offer, so we can advise the party who said he would hold his money until we heard from you." It appears that the party referred to had made an offer for the paper of a sum equivalent to $6,000. The plaintiff then wired, finally, "Will give discount of five hundred dollars." If sold at a discount of $500, excluding

interest, it would bring $6,500; and for this amount it appears, from the evidence, defendant sold the paper. Under the circumstances it seems to us that the defendant was warranted in construing the instructions last given as authority to sell at $6,500, which was only $150 better than the previous offer of $350 discount. But, if the case turned upon the point, it would be unnecessary to go to the full extent of holding that the plaintiff clearly and distinctly authorized the sale that was made. If plaintiff (the principal,) in giving his instructions to the defendant (the agent,) couched his instructions in ambiguous language, the plaintiff cannot hold the defendant responsible for the consequence, if defendant, in the exercise of reasonable prudence, while acting in good faith, put an interpretation upon the instructions not intended by the plaintiff. In such cases the principal, and not the agent, must suffer the loss. Mechem, Ag. §§ 314, 315, 484, *National Bank of Commerce* v. *Merchants' Nat. Bank*, 91 U. S. 92, opinion page 104; *Shelton* v. *Transportation Co.*, 59 N. Y. 258. "Language in a contract which is uncertain and ambiguous must be taken most strongly against the person using it, or who caused the ambiguity, to exist." *Barney* v. *Newcomb*, 9 Cush. 46; *Noonan* v. *Bradley*, 9 Wall. 394. "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the others." Comp. Laws, § 3556. Where it appears that the parties to a written contract have attached to certain words or expressions a particular meaning in one part of the contract, it must be presumed—nothing to the contrary appearing—that the same meaning was intended whenever like words or expressions are subsequently used. *Saunders* v. *Clark*, 29 Cal. 300, citing *People* v. *Utica Ins. Co.*, 15 Johns. 380. See Comp. Laws, § 3564. Plaintiff failed to show a sale in fact for the price alleged in the complaint, and consequently failed to establish the principal allegation of the complaint, to the effect that the balance sued for, as arising on the sale, had not been accounted for by the defendant. The complaint is not drawn on the theory that the defendant has

willfully violated its obligation as an agent by selling the notes for a less sum than the instructions permitted, and that the plaintiff had suffered damages thereby. If suit were brought upon the theory that the defendant had been guilty of a tort, the complaint would necessarily contain allegations showing the character of the tort, but the complaint contains no such allegations. If the plaintiff, at the trial, had moved to amend the complaint by setting out, in substance, that the defendant sold the notes wrongfully, and in violation of the plaintiff's instructions, and for a less sum than defendant was authorized by plaintiff to sell for (conceding, but not deciding, that such amendment might properly have been permitted,) we are of the opinion that the evidence offered at the trial failed to establish the fact of any tort on defendant's part. If the instructions of plaintiff did not clearly authorize a sale for $6,500, they were certainly ambiguous, and would admit of the interpretation which defendant put upon them. But upon the independant ground already stated the verdict will be set aside, and a new trial granted. All concur.

(59 N. W. Rep. 1029.)



BENJAMIN W. HOSMER *vs.* SHELDON SCHOOL DISTRICT NO. 2.

Opinion filed July 23rd, 1894.

School District—Teachers Certificate—Void Employment.

A contract duly executed between the proper officers of a school district and another person, by the terms of which said person is employed as a teacher in a public school in said district, is void where such person, at the time of making the contract, holds no certificate of authority to teach in the county where the district is located.

Certificate Will Not Relate Back.

The subsequent procurement of such certificate will not enable such person to recover against the district damages for the breach of such contract.

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

Action by Benjamin W. Hosmer against Sheldon School

District No. 2 of Ransom County. Judgment for plaintiff, and defendant appeals.

Reversed.

Ed. Pierce, (*R. J. Mitchell* and *Edward Engerud* of counsel,) for appellant.

The contract sued upon is void because respondent was not at the time it was made the holder of a certificate of qualification to teach. Chapter 62, Laws 1890, Ch. 56, Laws 1891. *Goose River Bank* v. *Willow Lake School Dist.* 1 N. D. 26; *Butler* v. *Haines*, 79 Ind. 579; *School Dist.* v. *Jennings*, 10 Ill. App. 643; *Jenness* v. *School Dist.* 12 Minn. 448; *Botkin* v. *Osborne*, 39 Ill. 101; *Jackson* v. *Hampden*, 20 Me. 37.

P. H. Rourke, for respondent.

Where the law deals with the hiring of the teacher it uses these words "No person shall be employed or permitted to teach." These words have reference solely to the time when the teacher enters upon the duties of teaching. *School Dist.* v. *Delman*, 22 Ohio, 124; *Holtz* v. *School Dist.* 27, Pac. Rep. 15; *Scott* v. *School Dist.* 46 Vt. 452; *Smith* v. *School Dist.* 37 N. W. Rep. 567.

BARTHOLOMEW, C. J. On August 7, 1891, Sheldon school district No. 2, the appellant herein, being at that time a duly organized school district in Ransom County, in this state, by its proper officers, and by written contract in due and legal form, hired Benjamin W. Hosmer, the respondent herein, to teach one of its schools for the period of 10 months, commencing September 1, 1891, for $60 per month, payable at the end of each month. At the time specified, respondent commenced teaching. On November 21st following he was discharged, for some reason that does not appear of record. After the full term of his employment had passed, he brought this action to recover the wages for the time during which he was not permitted to teach. At the trial below, appellant moved for judgment in its favor on the pleadings. The motion was denied, and, after a hearing on the merits

had before the court, respondent had judgment for amount of his claim, less certain sums which he had earned at other employment during the time. From this judgment the appeal is taken, and the only errors assigned relate to the denial of the motion for judgment on the pleadings. The basis for this contention is found in the following statement, which appears in the complaint: "That on the 7th day of August, 1891, at Ransom Co., in the state aforesaid, the plaintiff and defendant entered into a mutual written agreement that the plaintiff should serve the defendant as a school teacher in the public schools at the village of Sheldon, in said school district No. 2, in the County of Ransom, and state aforesaid, and that the plaintiff should and did employ the defendant as such for the term of 10 months from and after the first day of September, 1891, and pay him for such services $60.00 per month. The particulars of such written agreement more fully appear by the duplicate original contract, hereto annexed, marked 'Exhit A,' and made a part of this complaint. That on the first day of September, 1891, the plaintiff entered upon the service of the said defendant, under said agreement, and has ever since been, and was, during the entire life and continuance of said contract, ready and willing to continue such services. That the plaintiff was legally qualified to teach said school, having, at the time he entered into the employment of the defendant, a certificate of qualification, duly issued by the superintendent of schools of Barnes Co., N. D., on the 21st day of July, 1890, for the term of three years from and after said date. That the same was duly indorsed by the superintendent of Ransom Co., N. D., on the 29th day of August, 1891, and the formal entry thereof made on said certificate on the 4th day of September, 1891. That on or about the 21st day of November, 1891, the defendant wrongfully discharged the plaintiff, and refused to permit him to serve as aforesaid, though the plaintiff then and there offered to continue said services, and perform said agreement on his part, to the damage of the plaintiff in the sum of four hundred twenty dollars ($420.")

Section 75, Ch. 62, Laws 1890, as amended by § 15, Ch. 56, Laws 1891, reads as follows: "It [the school board] shall employ the teachers of the schools of the district, and may dismiss any teacher at any time for plain violation of contract, gross immorality or flagrant neglect of duty; provided, that no person shall be employed as teacher or permitted to teach in any public school who is not when so employed or permitted to teach the holder of a teacher's certificate valid in the county or district in which such school is situated; provided, further, that every contract for the employment of a teacher must be in writing, and such contract must be executed before such teacher begins to teach in such school. It shall grade the salaries of teachers for the district in accordance with the grades of certificates; and no teacher holding a certificate of a lower grade shall be paid a salary equal to or in excess of that paid to a teacher of higher grade in the same district."

Section 122, Ch. 62, Laws 1890, as amended by § 24, Ch. 56, Laws 1891, reads as follows: "No certificate or permission to teach shall be issued to any person under eighteen years of age; and no first grade certificate shall be issued to any person who is under twenty years of age, and who has not taught successfully twelve school months; and a third grade certificate shall not be issued more than twice to the same person. The certificates issued by a county superintendent shall be valid only in the county where issued; provided, that a first grade certificate may be renewed once without examination at the discretion of the county superintendent, upon payment of the proper fee for the institute fund, as provided in the case of examination; provided, further, that a first grade certificate shall be valid in any other county in the state when endorsed by the county superintendant of such county. No person shall be employed or permitted to teach in any of the public schools of the state, except those in cities organized for school purposes under special laws, who is not the holder of a lawful certificate of qualification or permit to teach. Any contract made in violation of this section shall be void."

It appears from the complaint that on August 7, 1891, when the written contract between respondent and appellant was entered into, respondent held a first grade certificate issued by the superintendent of Barnes County. This certificate would be valid in Ransom County when indorsed by the superintendent of schools for such county. Such indorsement was not made until September 4, 1891. The allegation is that it was made August 29, 1891, and the formal entry made on September 4th. But it was the formal entry that constituted the indorsement, and what preceded that was but a promise to indorse. Hence, neither at the time of entering into the contract, nor at the time of commencing to teach, did respondent hold a certificate valid in Ransom County. For that reason, appellant contends that the contract of employment dated August 7, 1891, was void, under said § 122, and that no action can be maintained thereon or for breach thereof. If the original contract was void when made, it could not be ratified. After the removal of the inhibition, a new and valid contract might be made relative to the same subject matter, but the void contract remains, and ever must remain, a nullity. Where the invalidity of the contract arises, as in this case, if this contract be invalid, from a prohibition, and not from any vice adhereing to to the subject matter of the contract, courts are inclined to be liberal in construing distinct acts in part performance of the contract, after the prohibition has been removed, as raising a new implied contract. See *Hotz* v. *School District*, (Colo. App.) 27 Pac. 15 and *Scott* v. *School District*, 46 Vt. 452. But there is no direct allegation in the complaint that respondent taught a day after he had his certificate indorsed, or that the appellant in any manner acted upon or recognized the void contract. There may be an inference in that direction, but it falls far short of an allegation that can support a recovery. The action is for breach of contract in not permitting respondent to teach. Hence he pleads the written contract, and relies exclusively thereon. Nor must we be understood as holding that recovery could be had on an implied contract for services actually

rendered, or offered to be rendered, after the proper certificate was received, when the original contract was void. See remarks of CORLISS, C. J., on this point, in *Goose River Bank* v. *Willow Lake School Tp.*, 1 N. D. 26, 44 N. W. 1002, and authorities then cited.

In the case just cited, the court said, in speaking of certain school warrants then involved: "They were issued to pay for services of a teacher who held no lawful certificate of qualification. No such person can be employed to teach. The statute so declares, and any contract made in violation of this provision is void by the express terms of the same act." This language was based upon the wording of the statute, and the authorities were not specially noticed, as the point was secondary in that case, and not seriously controverted. Since, in that case, the teacher had no certificate at the time of making the contract, or at the time of rendering the services, it may be, as counsel now suggests, that it was not absolutely necessary to make the statement as broad as it is in that case. But, upon further consideration of the statute, and a study of the decisions under similar statutes, we adhere to our former language to its full extent. We hold that any contract of employment as teacher in our public schools, saving the exceptions contained in the statute, where the person hired does not, at the time of making such contract, hold a certificate authorizing him to teach in the county where the school is located, is void. And being void, it cannot be ratified, nor can it receive vitality from the happening of a subsequent event. It "is so nugatory and ineffectual that nothing can cure it." Black, Law Dict.

The learned counsel for respondent is correct in stating that the evil against which the statute was directed consisted in having the public schools taught by unqualified persons. And there are cases supporting the contention that when the teacher held the proper certificate at the time the services were rendered, or offered to be rendered, the statute was sufficiently met; and the teacher entitled to recover under the contract. *Hotz* v. *School*

District, supra, is of that class. A recovery of damages for breach of the contract was allowed there, in a case very similar to this. But the difference in the statutes clearly distinguishes the cases. The Colorado statute prohibited the school district officers from employing a teacher who did not hold a proper certificate. There was no penalty fixed for the violation of the provision on the part of the officers, nor was the contract declared void. It was provided that the teacher should be entitled to no compensation during the time that he held no certificate, thus clearly implying that, for services rendered after he received the proper certificate, he would be entitled to compensation. But even then the court was not content with relying upon the statute, and also placed the case upon an implied contract. In *School District* v. *Dilman,* 22 Ohio St. 194, the court held that a statutory provision that "no person shall be employed as a teacher," etc., "unless he shall have first obtained a certificate," etc., meant, in effect, that no person should be engaged in teaching until he had obtained a certificate, and that a contract entered into before the party had obtained a certificate was valid, provided the certificate was obtained before the party engaged in the discharge of his duties as teacher. But it is entirely clear that our statute will not bear this construction. Engaging in the performance of the duties of a teacher neither constitutes nor consummates a contract. The only contract connected with the subject is the written agreement by which the proper school officers employ or hire the teacher. It is that contract, and no other, that the statute declares void under the circumstances stated. And this statute was proper and necessary, in order to prevent the employment of unqualified persons as teachers. If a completed contract is valid when made, it is difficult to understand how performance thereunder is to be prevented without incurring liability. If a completed contract is valid when made, it is not easy to perceive how it can become void, and the conditions remain unchanged. Statutes similar to ours, although perhaps none of them quite so strong, have been construed in accordance with our views in the following cases:

Butler v. *Haines*, 79 Ind. 575; *Jenness* v. *School District*, 12 Minn. 448 (Gil. 337;) *Ryan* v. *School District*, 27 Minn. 433, 8 N. W. 146; *Botkins* v. *Osborne*, 39 Ill. 101. The case from Indiana expressly holds that the subsequent procurement of a certificate, and continuing to teach thereafter, did not entitle the party to recover. The case in 12 Minn. is very strong. The contract was made on the 22d day of the month, the school to commence on the 24th of the same month. The applicant had no certificate when the contract was made, but received his certificate on the 24th, and actually taught the entire term. It was held that he could not recover. There is no legal hardship in these cases. An unqualified person cannot enter into a contract to teach in our public schools without being a party to the violation of a mandatory statute, the terms of which he is conclusively presumed to know.

The respondent in this case cannot recover upon his complaint. The judgment of the lower court is reversed, and that court is directed to sustain appellant's motion for judgment on the pleadings.

Reversed. All concur.

(59 N. W. Rep. 1035.)

HENRY W. K. CUTTER *et al vs.* JAMES R. POLLOCK *et al.*

Opinion filed July 23rd, 1894.

Preference by Insolvent Debtor.

An insolvent debtor may pay or secure one creditor in preference to another, except in cases where he executes an assignment for the benefit of his creditors.

Mortgage on Entire Stock Not An Assignment for Benefit of Creditors.

Such a debtor, in this case, executed three chattel mortgages on substantially all of his property, securing certain creditors to the exclusion of others. The mortgagees at once took possession, and commenced foreclosure of the mortgages. *Held*, even assuming that the debtor himself knew that the consequence of giving the mortgages would be to prevent his continuing his business, that such transactions did not constitute an assignment for the benefit of creditors, within the meaning of § 4660, Comp. Laws, rendering void all preferences contained in such an assignment. *Straw* v. *Jenks*, 43 N. W. 941, 6, Dak. 414, overruled.

Receiver—Fees—How Taxed as Costs.

When a receiver is appointed in an action, and continues to act as receiver down to the time of final judgment, the court should embody in its decision and final judgment all matters relating to the receiver's fees and expenses; how they should be paid,—whether out of the funds in his hands, or by the parties to the action; and whether, if paid out of the funds in the hands of the receiver belonging to one party, the other should not be compelled to made good this depletion of the fund in whole or in part. *Held* error for the court, without investigating and settling such matters, to direct that all of the receiver's fees and expenses should be taxed as costs against the unsuccessful party to the suit.

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

Action by Henry W. K. Cutter and others against James R. Pollock and others to declare certain property a trust fund to be distributed proportionately among all the creditors of James R. Pollock, who had executed chattel mortgages on such property to certain of his creditors. Pending the action a receiver was appointed. From a judgment for defendants, and directing the fees and expenses of the receiver, which were not settled by the court, to be taxed by the clerk as costs, and inserted in the judgment, plaintiffs appeal.

Reversed.

Newman, Spalding & Phelps, also *Bartlett & Lovell*, for appellant.

The record shows that at the time of making the chattel mortgages described in the findings of fact, the defendant Pollock had determined to quit his business and yield dominion of substantially all his estate for the benefit of the creditors mentioned in these mortgages and the court should have so found. Hayne on New Trials §§ 239, 240 and cases cited. *Gull River Lumber Co.* v. *School District*, 1 N. D. 509, (48 N. W. Rep. 427.) If at the time of the execution of the mortgages in question the defendant Pollock had the intention to quit business, and yield dominion over, and surrender substantially all his property for the benefit of the creditors named in the mortgages, then the transaction was an assignment and void under the statute. (Section 4660 Comp. Laws,) and the estate became *eo instanti* a trust fund to be administered in equity. *Straw* v. *Jenks*, 6 Dak. 414, 43 N. W. Rep. 941; *White* v. *Cotzhausen*, 129 U. S. 329, 9 S. C. Rep. 309; *Wyman* v. *Matthews*, 53 Fed. Rep. 678, and the holding in these cases has been followed substantially in *Marshall* v. *Livingston Nat. Bank*, 28 Pac. Rep. 312; *Richardson* v. *Mississippi Mills*, 11 S. W. Rep. 960; *Colyer* v. *Wood*, 4 So. Rep. 840; *State* v. *Dupuy*, 11 S. W. Rep. 964; *Wilkes* v. *Walker*, 23 S. C. 108; 53 Am. Rep. 706; *Meinhard* v. *Strickland*, 7 S. E. Rep. 838; *Farwell* v. *Cohen*, 28 N. E. Rep. 35; *Winner* v. *Hoyt*, 28 N. W. Rep. 380; *Bohns* v. *Carter*, 31 N. W. Rep. 381; *Clapp* v. *Ditman*, 21 Fed. Rep. 15; *Perry* v. *Corby*, 21 Fed. Rep. 737; *Martin* v. *Housman*, 14 Fed. Rep. 160; *Kellogg* v. *Richardson*, 19 Fed. Rep. 70; *Clapp* v. *Nordmeyer*, 25 Fed. Rep. 71; *Freund* v. *Yoegerman*, 26 Fed. Rep. 812.

The fees and expenses of the receiver are no part of the costs taxable by the clerk. Section 5189, Comp. Laws. The receiver must be paid out of the funds realized. *Radford* v. *Folsom*, 55 Ia. 598; *Jaffrey* v. *Raab*, 33 N. W. Rep. 337.

Pollock & Scott and *Chas. A. Pollock*, for respondent.

The case of *Straw* v. *Jenks* should have no binding force, more than would a decision of any court from a foreign state. The South Dakota court has refused to follow it. *Sandwich Mfg. Co.*

v. *Max*, 58 N. W. Rep. 14. If the intent of the debtor is merely to secure his debt to one or more of his creditors and the conveyance is not intended as an absolute disposition of his property, but he reserves to himself a right therein, the conveyance will be treated as a mortgage, even though the debtor is insolvent at the time and it (the mortgage) covers all his property and but a portion of his debts are secured by it. Cobby on Chat. Morts. 101; *Caldwells Bank* v. *Crittenden*, 66 Ia. 237, 23 N. W. Rep. 646; *Kohn* v. *Clement*, 58 Ia. 589, 12 N. W. Rep. 550. A party in failing circumstances may in good faith prefer creditors. Note to 26 Am. Dec. 584. The giving of a chattel mortgage to secure a bona fide debt is not considered an assignment as provided in § 4660 Comp. Laws, and is therefore not in conflict with the provisions prohibiting preferences. *Van Patten* v. *Thompson*, 34 N. W. Rep, 763; *Aulman* v. *Aulman*, 32 N. W. Rep. 240; *Kohn Bros.* v. *Clement*, 12 N. W. Rep. 550; *Ingram* v. *Osborne*, 35 N. W. Rep. 304; *Phillips* v. *Caldwell*, 1 Pac. Rep. 329; *Ford* v. *Nye*, 40 Kan. 655; *Cundet* v. *Lahiver*, 16 Kan. 527; *Waterman* v. *Silberger*, 2 S. W. Rep. 578.

The section of our statute refers to preferences attempted to be given in assignments made under the act. *Waterman* v. *Silberger*, 2 S. W. Rep. 578; *Gilbert* v. *McCorckle*, 11 N. E. Rep. 298; *Sticks* v. *Sadler*, 9 N. E. Rep. 905; *Magovern* v. *Richard*, 3 S. E. Rep. 340; *Campbell* v. *Colorado Coal Co.*, 10 Pac. Rep. 248; *Bank of Montreal* v. *Potts, Salt & Lumber Co.*, 51 N. W. Rep. 512; *Brown* v. *Grand Rapids Parlor Furniture Co.*, 58 Fed. Rep. 286; *Hushisher* v. *Higman*, 48 N. W. Rep. 573; *Weber* v. *Childs*, 51 N. W. Rep. 543; *Dana* v. *Stanford*, 10 Cal. 269; *Warner* v. *Littlefield*, 50 N. W. Rep. 721; The receivership was found improper and the expenses thereof properly taxed to plaintiff. The costs and expenses of unwarranted proceedings should be paid by the parties instituting such proceedings. High on Receivers § 796, p. 658; *Howe* v. *Jones*, 23 N. W. Rep. 378; *Lammon* v. *Giles*, 13 Pac. Rep. 417; *French* v. *Gifford*, 31 Ia. 428.

CORLISS, J. This case involves a question of statutory construction. The contention on the part of the plaintiffs and appellants is that the transaction to which we will refer constituted an assignment for the benefit of creditors containing preferences, and that therefore the transactions are without any other legal effect than to make the property to which they relate a trust fund to be distributed proportionately among all creditors of the owner of such property. The plaintiffs claiming to be creditors of James R. Pollock, commenced this action in equity to have the property referred to declared a trust fund, under the provisions of § 4660, Comp. Laws. That section provides as follows: "An insolvent debtor, may, in good faith, execute an assignment of property to one or more assignees, in trust towards the satisfaction of his creditors, in conformity to the provisions of this title; subject, however, to the provisions of this Code relative to trusts and to fraudulent transfers, and to the restrictions imposed by law upon assignments by special partnerships, by corporations or by other specified classes of persons; provided, moreover, that such assignment shall not be valid if it be upon, or contain any trust or condition by which any creditor is to receive a preference or priority over any other creditor; but in such case the property of the insolvent shall become a trust fund to be administered in equity, in the District Court, and shall inure to the benefit of all of the creditors in proportion to their respective claims or demands." Pollock was a merchant engaged in business at Casselton, in this state. October 2, 1889, he executed three chattel mortgages upon his stock of goods and his store fixtures to secure claims held against him by the defendants Straw, Ellsworth Manufacturing Company, Eveline Pollock, and the Cass County Bank. These mortgages were executed and delivered to these defendants, respectively, and were successively filed for record in the office of the reigister of deeds of Cass County, N. D., the same day. They were all executed as part of one transaction. The value of the mortgage property was $12,000. The debts so secured did not amount to $7,000. While it appears

from the record that Pollock owned at the time some other property, we will assume for the purposes of this case that these mortgages covered substantially all of his property not exempt from execution. Pollock appears to have been insolvent at this time. A few hours after these mortgages were given and delivered, the mortgagor turned over all the mortgaged property to the mortgagees, who at once proceeded to foreclose the mortgages by advertising the property for sale thereunder. Each contained a provision that the mortgagee might immediately take possession of the mortgaged property. While these foreclosure proceedings were being had, the plaintiff's instituted this action, and had a receiver appointed to take and hold possession of the mortgaged property or its proceeds pending the action. Judgment having been rendered against the plaintiffs, adjudging that the mortgages were valid liens upon the property, and that plaintiffs had no right or interest in the mortgaged property, the plaintiffs have appealed to this court from such judgment.

It is here urged that the facts of this case bring it within the decision of the territorial Supreme Court in *Straw* v. *Jenks*, 6 Dak. 414, 43 N. W. 941, and that that decision should be followed by this court. We are by no means satisfied that Pollock, when he executed these mortgages, had considered that he would no longer continue in business, and had decided to yield up dominion of his entire property. But we will again assume a state of facts as favorable to plaintiffs as the record will justify. We will take it for granted that Pollock intended to give these mortgagees a preference, knowing that the consequence of the execution of such mortgages, and the abandonment to the mortgagees of the possession of the mortgaged property, would be to force him to abandon his business. But it is very clear that he did not intend to surrender control over the mortgaged property, except so far as was necessary to accomplish the payment of the mortgagees named therein. The mortgages created mere liens. The legal title to the property remained in the mortgagor. After these

preferred creditors had been paid, the possession of the remaining property would revert to him; and at all times any of his creditors could have levied upon his interests in the mortgaged property, and sold it to pay such creditors' claim. To assert that a mortgagor who has created a mere lien on property (especially where, as in this case, the value of the property is largely in excess of the claims secured by the mortgage) has parted with all control over the property, is to ignore the character and legal effect of the instrument under which he has surrendered possession. Despite the mortgage, it is still his property. He may sell it. He may mortgage it. It may be seized for his debts. How such a transaction can be held to be an assignment for the benefit of creditors is inexplicable to us. An assignment for the benefit of creditors creates a trust, vesting the legal title in the assignee, and placing the property beyond the control of the assignor or the reach of any of his creditors, except as they have a right, under the assignment, to share in the distribution of the assigned estate. It is for this reason that assignments for the benefit of a portion of the assignor's creditors have been held void under the statute invalidating all transfers which delay creditors. In such a case the debtor would, if the transaction were valid, be able to place for a time his property beyond the reach of the creditors who have no rights under the assignment, because that portion of the assigned estate which would come back to him after the trust had been executed would, during the existence of the trust, be withheld from the reach of such creditors. But a mortgage creates no trust. It creates a mere lien. It is in no respect assimilated to an assignment for the benefit of creditors, and yet, by the express terms of the statute, it is in only such an assignment that the law condemns a preference. The commom law recognized the right of a debtor to secure or pay one creditor in preference to all others. The general rule is embodied in our statute. Section 4654, Comp. Laws, declares that "a debtor may pay one creditor in preference to another or may give one creditor security for the payment of his demand in preference to another.". Section 4660

takes a certain class of transactions out of this general rule. But we must not lose sight of the fact that preference is the rule in this jurisdiction, and that he who questions the right of a debtor to make a preference must lay his hand upon the law which takes away this right in a given case. The legislature has seen fit to draw the line at instruments which constitute assignments for the benefit of creditors. Such instruments must not contain preferences. If they do they are void, and the property becomes a trust fund for the equal benefit of all creditors. But this statute does not attempt to prevent the giving of security to one or any number of creditors in preference to others, and § 4654, in terms, allows this to be done. To hold that a chattel mortgage is an assignment for the benefit of creditors, that the creation of a mere lien is the creation of a trust, that retaining title to property is surrendering all control over it, displays an utter disregard of well settled legal distinctions. To extend the construction of the statute to embrace a transaction of the character disclosed by this record, under the specious pretext of following the spirit of the law, is downright unsurpation of legislative functions. To us the fallacy of the reasoning in the case of *Straw* v. *Jenks*, and in the other cases in which the rule there enunciated is laid down, is in the assumption that preference is the exception, and not the rule, whereas the general rule permits preference, and he who claims that a preference is illegal must bring the case within the particular exception embodied in § 4660. The statute does not declare that one who has decided to apply all his property in payment of his debts, as far as it will apply, must distribute it among his creditors ratably. This he must do if he executes a general assignment. But the law does not compel him to make a general assignment, and it does permit him to pay or secure any creditor in preference to another. Of course, this statute allowing preferences relates to insolvent debtors. When a debtor is solvent there can arise no question of preference. It is only when he is insolvent that the right to prefer is of any value to him, or to the creditor preferred. An insolvent debtor may therefore

pay one creditor in preference to others, although it takes every dollar of his property to make the payment. It is only when he executes an assignment for the benefit of all of his creditors that he cannot discriminate and favor. Then he must place all creditors on an equal footing. If he does not, the law and the courts will do it for him. The argument in *Straw* v. *Jenks*, and similar cases is that the object of the law will be defeated if the rule there enunciated is not adopted. This reasoning assumes that the object of the statute is something other than it is therein expressed to be. The purpose of the law, if the language in which that purpose is couched is to be our guide, is that the general rule permitting preferences shall be abrogated in a single class of cases, *i. e.* where a debtor executes such an assignment for the benefit of creditors as the act embraced in the title in which § 4660 is found refers to. An analysis of this act (§§ 4660, 4680, both inclusive) discloses a legislative intent therein to deal with assignments for the benefit of all the assignor's creditors. In such an instrument there shall be no preference. In every other transaction the debtor may prefer. The case of *Straw* v. *Jenks*, has been overruled by the South Dakota Supreme Court in an opinion whose logic, to our mind, is unanswerable. *Manufacturing Co.* v. *Max*, 58 N. W. 14. *Straw* v. *Jenks* merely followed *White* v. *Cotzhausen*, 129 U. S. 329, 9 Sup. Ct. 309. This case merely followed what the court regarded as the rule in Illinois, as laid down in *Preston* v. *Spaulding*, 120 Ill. 403, 10 N. E. 903. In a later case the Federal Supreme Court has ruled differently in a case arising in Missouri, following a different rule adopted in that state. *Union Bank of Chicago* v. *Kansas City Bank*, 136 U. S. 235, 10 Sup. Ct. 1013. In this case Mr. Justice Gray expressly declares that all the court intended to do in *White* v. *Cotzhausen*, was to construe the Illinois statute in accordance with what it understood to be the decision of the Supreme Court of that state. That the Federal Supreme Court, in *White* v. *Cotzhausen*, did not correctly interpret the decision of the Illinois Supreme Court in *Preston* v. *Spaulding*, is evident

from later decisions of that court. See *Farwell* v. *Nilsson*, 133 Ill. 45, 24 N. E. 74; *Weber* v. *Mick*, (Ill. Sup.) 23 N. E. 646. And see *Moore* v. *Meyer*, 47 Fed. 99; *Schroeder* v. *Walsh*, 120 Ill. 403, 11 N. E. 70. There is nothing in *Farwell* v. *Cohen*, (Ill. Sup.) 28 N. E. 35, opposed to the views expressed in *Farwell* v. *Nilsson*. In many of the cases there was in fact a general assignment for the benefit of creditors executed. When a debtor, with the purpose of executing such an assignment, makes transfers of property or gives security or pays money before executing the assignment, for the express purpose of evading the provisions against preferences,—when his purpose, known to the favored creditor, is to accomplish by independent instruments what could not be accomplished in the assignment itself,—and, thus deliberately attempting to evade the law, thereafter executes a general assignment for the benefit of all the rest of his creditors, it is possible that the instruments giving the preferences should be regarded as part of the assignment, and that, therefore, the preference should be held to be contained in the assignment itself, and consequently of no effect. But in such cases the transactions ought not to be too far apart, and certainly the preferred creditors should be proven to have had knowledge of the debtor's purpose to make an assignment at the time of giving the preferences. See, in this connection, *Manning* v. *Beck*, 129 N. Y. 1, 29 N. E. 90; *Banking Co.* v. *Fuller*, 110 Pa. St. 156, 1 Atl. 731.

We hold that these chattel mortgages did not constitute a general assignment for the benefit of creditors, and that the debtor had a perfect right to execute them to the creditors therein named, to secure his obligations to them. It therefore followed that the mortgaged property was not a trust fund in which all the creditors of defendant Pollock had an interest, but was his property, on which there were mortgage liens held by such of the defendants as were named in the three mortgages as mortgagees. As sustaining our conclusions, we cite *Manufacturing Co.* v. *Max*, (S. D.) 58 N. W. 14; *Hargadine* v. *Henderson*, 97 Mo. 375, 11 S. W. 218; *Union Bank of Chicago* v. *Kansas City*

Bank, 136 U. S. 235, 10 Sup. Ct. 1013; *May* v. *Tenny*, 148 U. S. 60, 13 Sup. Ct. 491; *Farwell* v. *Nilsson*, 133 Ill. 45, 24 N. E. 74; *Weber* v. *Mick*, (Ill. Sup.) 23 N. E. 646; *Schroeder* v. *Walsh*, 120 Ill. 403, 11 N. E. 70; *Tompkins* v. *Hunter*, (Sup.) 24 N. Y. Supp. 8; *Cross* v. *Carstens*, (Ohio) 31 N. E. 506; *Moore* v. *Meyer*, 47 Fed. 99; *Crow* v. *Beardsley*, 68 Mo. 435; *Gilbert* v. *McCorkle*, (Ind. Sup.) 11 N. E. 296; *Waterman* v. *Silberberg*, (Tex. Sup.) 2 S. W. 578; *Warner* v. *Littlefield*, (Mich.) 50 N. W. 721; *Sheldon* v. *Mann*, (Mich.) 48 N. W. 573. Other cases might be cited, but this question has been so often discussed, and the decisions so many times reviewed, that we feel that it would be a waste of time for us to travel again over the same ground. With the exception of *Straw* v. *Jenks*, *White* v. *Cotzhausen*, and a few other cases, all of the decisions which have struck down preferences have been in cases in which it appeared that an assignment for the benefit of creditors was in fact executed; and the court in those cases held that the instruments creating the preferences were so connected in point of time, and by the circumstances of the transactions, with the subsequent general assignment, that they were a part of it, and that, therefore, the preferences were, in contemplation of law, embodied in the assignment itself. Such, among others, were the cases of *Preston* v. *Spaulding*, 120 Ill. 208, 10 N. E. 903; *Berger* v. *Varrelmann*, 127 N. Y. 281, 27 N. E. 1065; *Clapp* v. *Nordmeyer*, 25 Fed. 71; *Burnham* v. *Haskins*, (Mich.) 44 N. W. 341.

The judgment of the District Court was therefore right, in so far as it adjudged that the mortgaged property or its proceeds, in the hands of the receiver, should be turned over to the defendants entitled thereto under such mortgages. But the judgment is attacked by this appeal in another particular. On motion of the plaintiffs, and against the opposition of the defendants, a receiver was appointed to take possession of the mortgaged property pending the litigation. In one of its conclusions of law the court held that the fees and expenses of the receiver, which were not settled by the court, should be taxed by the clerk of the court as costs in the case, and that the amount of such costs should be

inserted in the judgment. It does not expressly appear that this was done, but we think it is a fair inference that it was done, as the judgment against the plaintiffs is for nearly $5,000 costs, and we know that no such bill of costs could have been taxed against the plaintiffs unless the fees and expense of the receiver were embodied therein. This fact strengthens the natural inference that the rule of law laid down in the court's decision was followed by the clerk, at the instance of the defendants, in taxing the costs, and entering the amount thereof in the judgment. These items, we are clear, have no place in a bill of costs. If they belong there at all, it is only as disbursements, and such disbursements the statute does not authorize to be taxed against the unsuccessful party. Section 5189, Comp. Laws. It is obvious that the clerk is not the proper officer to settle the question of a receiver's compensation. That is a judicial question. Nor should it be left to him to determine what expenses are reasonable and proper. A receiver may be so extravagant in his expenditures that it would be highly unjust to allow him credit for all the moneys he has paid out. Had such state of facts existed in this case, the clerk nevertheless must have inserted all the items of disbursements in the bill of costs, provided he was satisfied that they had in fact been incurred. Again, we think it is not the proper practice for the court to determine, in advance of a hearing on the different items of a receiver's account, that all his disbursements should be paid by one party or the other to the litigation. An examination of his account in connection with surrounding circumstances might disclose the fact that some of the items ought to be paid by the successful party. They might embrace expenditures which the successful party would have been compelled to make himself, had it not been for the receivership, but which he was saved, by such receivership, the necessity of making himself. The proper practice, where a receiver has been appointed, is for the court, after it has reached its conclusion, to order the receiver to account, on notice to all parties interested; and upon such accounting all questions can be settled,

and the findings of fact and conclusions of law relating to such matters can be embodied in the decision of the court on the merits of the action. The final decree should settle what compensation the receiver is to have, what expenditures he shall be reimbursed for; how he shall be paid,—whether out of the funds in his hands, or by one of the parties to the action, or whether part of his fees and expenses shall not be paid out of such funds and the rest by one of the parties to the case, or whether such amount shall not be apportioned so that some of it shall be paid by one party, and the balance by the other. If the receiver is allowed to pay, and reimburse himself out of the moneys in his hands, the decree should provide whether the owner of such moneys shall be indemnified by the recovery of judgment against some other party to the case for this invasion of his property. Ordinarily, it would seem to us (but we do not decide the point) that the receiver should be protected by being permitted to look to the funds in his hands to save him against loss. This appears to have been done in this case. Such rule may, however, work great hardship in particular cases; and in some instances the receiver has, on this account, been compelled to look for indemnity to the party at whose instance he was appointed. See *Weston* v. *Watts*, 45 Hun. 219; *French* v. *Gifford*, 31 Iowa, 428; *Verplanck* v. *Insurance Co.*, 2 Paige, 438. Certainly, if the court, in such a case, allows him to pay himself out of the funds, it should compel the other party to the action to make good the loss thus occasioned to the successful litigant. It is impossible for a court to make an intelligible decree when property is in the hands of a receiver, and is to be disposed of by the decree, without settling in advance the rights of the receiver with respect to compensation and expenditures, and whether he shall be allowed to pay himself out of the funds in his hands. The decree should determine whether the whole fund, or only the balance after paying the receiver, should be turned over to the successful party. In this case the court has directed the receiver to pay over every dollar that he has received, without making any deduction for his fees

and expenses, and yet the defendants are allowed to tax up as costs against the plaintiffs the amount of such fees and expenses, on the theory that they have been paid by the defendants out of their property. The court seems to have proceeded on the theory that the receiver would retain the amount of his fees and disbursements without any authority from the court so to do, and without any investigation as to the reasonableness of his charges and expenditures, and that then the clerk should tax up against the plaintiffs, as costs, whatever amount appeared to have been thus retained by the receiver, out of the funds in his hands belonging to defendants. None of these things were settled by the decree. They were left to the decision of the clerk and the receiver himself. Under the system of practice prevailing at the time the case was decided, findings were required to be made in equity cases as well as in actions at law. This must be taken into consideration in establishing the proper practice in cases like the one before us on this appeal. There can be only one final judgment, and this should settle all matters involved in the litigation, as well the rights of the receiver and the rights and liabilities of the parties to the action growing out of the receivership as the rights of the parties to the litigation on the merits of the case independently of the receivership. This final judgment must rest upon findings of fact and conclusions of law, and these, therefore, should embrace all matters essential to a full determination of the rights of the receiver with respect to compensation and indemnity, and the rights and liabilities of the parties to the suit, growing out of the payment to the receiver of his fees and expenses, as well as all matters relating exclusively to the merits of the controversy. Until all questions touching the receivership are settled, it is impossible finally to determine the rights of the parties to the case. The scope of the judgment awarding the fund to the successful party cannot be prescribed by the court until it decides whether any of this fund shall be retained by the receiver for his compensation and expenditures. The exact judgment which the victorious litigant shall recover against the

defeated suitor cannot be ascertained until the court has determined whether, in the first instance, the fund belonging to the former shall be depleted by payment of the receiver's fees and expenses, and, if so, whether the unsuccessful party shall make it good to his antagonist in whole or in part.

We conclude that it was error for the court to render final judgment without passing upon the receiver's account, and settling all matters connected with the receivership. These questions should not have been left to the clerk. The judgment is reversed, and the District Court is directed to enter a new judgment after all matters connected with the receivership have been investigated and settled. But the case will not be re-opened for a new trial on the merits. The question of the right of the defendants to the funds in the hands of the receiver is settled, subject to such modification. The District Court, without re-opening questions touching the merits, will inquire into the amount of property and money in the hands of the receiver, or for which he is properly chargeable; will ascertain what compensation is proper, what disbursements actually made were necessary; will determine whether the receiver shall be paid and reimbursed out of the fund in his hands, and what proportion of his fees and expenses ought to be borne by the plaintiffs and defendants, respectively, or whether the plaintiffs ought ultimately, or in the first instance, to pay all of such fees and expenses. All these matters should be embodied in the findings and the final judgment. We do not wish to be regarded as holding that the decision of the District Court upon these various questions will be final. It is possible they may be subject to review. There is also an appeal from an order of the District Court made on appeal from the taxation by the clerk of the receiver's fees and expenses as costs, which order affirms such taxation. The order is reversed for the reasons already stated. All concur.

(59 N. W. Rep. 1062.)

FARGO GAS & COKE CO. *vs.* FARGO GAS & ELECTRIC CO.

Opinion filed July 23, 1894.

Sale—False Representations—Duty of Purchaser to Investigate.

Ordinarily, one who buys property has a right implicity to rely upon representations of the seller; and, if they were false and made with intent to deceive the purchaser, the seller will not be allowed to urge that the buyer, by investigation, could have discovered their falsity.

Deceit—Measure of Damages.

In an action to recover the unpaid portion of the purchase price of a gas and electric light plant sold by plaintiff to defendant, defendant set up, as a counterclaim, damages sustained by it because of the deceit of plaintiff in making the sale. The alleged false representations related to the physical condition of the plant, its wires, poles, gas mains, and fixtures, and also the amount of its earnings the year previous to the sale, and the prices charged customers for gas and electric light. *Held*, that defendant was under no obligation to investigate the truth of such representations, and that, therefore, it was error for the court to charge the jury that, if the means were at defendants hands to discover the truth or untruth of plaintiff's statements with respect to these matters, defendant must be presumed to have had knowledge of the actual facts, the only means at defendant's hands to discover the truth or falsity of the statements made being an investigation of such matters. *Held*, further, that, in actions for damages because of deceit in the sale of property, the measure of damages is the difference between what the property would have been worth if as represented and what it actually was worth at the time of sale.

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

Action by the Fargo Gas & Coke Company against the Fargo Gas & Electric Company to recover a balance due on the purchase price of a gas and electric plant sold by plaintiff to defendant. From a judgment for plaintiff, defendant appeals.

Reversed.

W. C. Resser, (*Seth Newman*, of counsel,) for appellant.

Every contracting party has an absolute right to rely upon the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as a basis of a mutual engagement and he is under no obligation to investigate and verify statements to the truth of which the other party to the contract with full means of knowledge, has deliberately pledge

his faith. *Meads* v. *Bunn*, 32 N. Y. 280; 1 Bigelow on Fraud, 30, 523, 524; *McClellan* v. *Scott*, 24 Wis. 81; *Schwenek* v. *Naylor*, 102 N. Y. 683; *Bank* v. *Burdick*, 87 N. Y. 40; *Schumaker* v. *Mather*, 133 N. Y. 590; *Fairchild* v. *McMahon*, 139 N. Y. 290; *Redding* v. *Wright*, 49 Minn. 322, 51 N. W. Rep. 1056; *Maxfield* v. *Schwartz*, 45 Minn. 150, 47 N. W. Rep. 448; *Aultman* v. *Olson*, 34 Minn. 450, 26 N. W. Rep. 451; *Linnehan* v. *Strong*, 107 Ill. 303; *Gardner* v. *Trenary*, 65 Ia. 646, 22 N. W. Rep. 912; *Webber* v. *Webber*, 47 Mich. 569, 11 N. W. Rep. 389; *David* v. *Park*, 103 Mass. 501; *Mallory* v. *Tod*, 19 Ind. 130; *Keller* v. *Insurance Co.*, 28 Ind. 170; *Jones* v. *Hathaway*, 77 Ind. 14; *Dodge* v. *Pope*, 93 Ind. 480; *West* v. *Wright*, 98 Ind. 335; *Upshaw* v. *DeBow*, 7 Bush. (Ky.) 442; *Griffiths* v. *Hawks*, 46 Tex. 217; *Redgrave* v. *Hurd*, 20 Ch. Div. 13; *Bonurant* v. *Crawford*, 22 Ia. 40; *Hale* v. *Philbrick*, 42 Ia. 481; *Caldwell* v. *Henry*, 76 Mo. 254; *McKee* v. *Eaton*, 26 Kan. 227; *Oswald* v. *McGeehee*, 28 Miss. 340.

Chas. A. Pollock, for respondent.

An incorrect ruling on the measure of damages cannot be assigned for error, when there has been a verdict in favor of the defendant on the merits. 2 Thompson on Trials, 1751; *Marely* v. *Shultz*, 29 N. Y. 346.

The decision in *Meads* v. *Bunn* is no authority for the position that mere falsity without fraud avoids a contract. The whole decision was predicated upon a series of facts not merely untrue but fraudulently so. *Marsh* v. *Faulker*, 40 N. Y. 562; *Long* v. *Warren*, 68 N. Y. 426; *Slaughter Adm'r* v. *Gerson*, 13 Wall. 383; *Poland* v. *Brownell*, 131 Mass. 138; *Dugan* v. *Cureton*, 31 Am. Dec. 727; *Foley* v. *Cowgill*, 32 Am. Dec. 49; *Moore* v. *Tuberville*, 5 Am. Dec. 642; 5 Lawson R. and R. 2355.

CORLISS, J. The plaintiff has recovered judgment for the balance of the purchase price of a gas and electric plant located in the City of Fargo, N. D., sold by plaintiff to the defendant. A portion of the consideration was paid, and, upon being sued for the unpaid portion of the purchase price, defendant set up as a

defense a partial failure of consideration from the nondelivery of some of the property purchased, and also a counterclaim for damages arising out of the alleged deceit of the plaintiff in making the sale. The view we take of the case renders a more particular reference to the defense of partial failure of consideration unnecessary. We will confine ourselves to the single question of fraud. The property purchased consisted of a gas plant, with mains and all the other classes of property which go to make up such a plant, and also an arc electric light plant, with poles, wires, and other fixtures distributed over different parts of the City of Fargo. These two plants were used by the plaintiff at the time of making the sale thereof to defendant, to light the public streets of the City of Fargo, its public buildings, stores, hotels, and dwelling houses, and had been so used for some time prior to such sale. The alleged fraudulent representations were of two classes,—one class relating to the physical condition of the plant, embracing statements as to the number of miles of wire, the number of poles, the gas mains, and as to the condition of the plant in other respects; and the other class related to the net earnings of the plant for the previous year, and the prices charged customers for gas and electric light. It appears that defendant relied chiefly upon the earning capacity of the plant in making the purchase, and was induced to believe that its net annual earnings would equal 10 per cent. of the purchase price ($85,300,) because of the statements of the plaintiff's officers that its net earings during the past year had been $8,913. There was evidence tending to show that this statement was false, and that it must have been known to be false by plaintiff's officers who negotiated the sale. Having in this brief manner set forth the general character of the property sold, and the general nature of the fraudulent representations upon which defendant's counterclaim for deceit was founded, we can now intelligently turn to what we regard as a fatal error in the case.

In the course of his charge to the jury, the learned trial judge instructed them as follows: "If the means were at the defendant's hands to discover the truth or untruth of the plaintiff's

statements with regard to the amount and character of the property, defendant must be presumed to have had a knowledge of the actual facts." This instruction must be considered in the light of the refusal of the court to charge the jury as follows, at the request of defendant's counsel: "If you find that, during the negotiations, statements were made by the plaintiff as to the earnings of the plant, the defendant had a right to rely upon these statements; and if they were so relied on, and were false, and the defendant suffered injury thereby, the defendant would be entitled to recover the damages which it suffered in consequence thereof." It is apparent from this refusal to charge, and from the charge as cited given, that the court told the jury that, as a matter of law, defendant did not have the right implicitly to rely upon the representations of the plaintiff touching the character of the plant, but must make inquiries concerning them, and must make investigation as to their truth or falsity. It is true that the word "investigate" is not used; but, when we consider the nature of the property and the character of the representations made, it is obvious that something more that a mere inspection of an object present before a purchaser was necessary in order to enable the purchaser in this case to "discover" the truth or falsity of plaintiff's statements. Such an instruction to a jury might be appropriate in an action in which fraud in the sale of a horse was set up, the seller having represented the horse to be perfectly sound, and it appearing that the horse stood before the purchaser at the time the representation was made, and that the only defect consisted in the absence of a leg, easily discernible by the ordinary use of eyesight. But in the case at bar the means of discovering the truth or untruth of these false statements were not at hand in the sense that they must have been employed before the seller could be held responsible for his fraudulent representations; and, when this language was used, the jury must have drawn the inference from the fact that this plant was in the same city, and could be investigated with respect to its condition and its earnings, and the prices charged customers for gas and electric light, and with

reference to the other features embraced in the statements made by plaintiff on the sale, that therefore the means were at hand, within the rule laid down by the court requiring the purchaser to discover at its peril the truth or falsity of the statements made. Such a rule of law would be unjust and intolerable. When parties deal at arm's length, the doctrine of *caveat emptor* applies; but the moment the vendor makes a false statement of fact, and its falsity is not palpable to the purchaser, he has an undoubted right implicity to rely upon it. That would, indeed, be a strange rule of law which, when the seller had successfully entrapped his victim by false statements, and was called to account in a court of justice for his deceit, would permit him to escape by urging the folly of his dupe for not suspecting that he the seller, was a knave. In the absence of such a suspicion, it is entirely reasonable for one to put faith in the deliberate representations of another. The jury must have understood that the means were at hand to discover the claim, because the defendant might have measured the wire, counted the poles, examined the gas mains, ascertained how much customers were paying for gas and electric light, and might have hired an expert to examine into the earnings and expenses of the plaintiff in running the plant, with a view to discovering whether a business man had told the truth. It should not have been left to the jury to determine whether the means were at hand to discover the falsity of the statements made, in view of the character of such statements and the nature of the property sold. The defendant as a matter of law, had a right to rely implicity upon the statements made by plaintiff touching the character of this plant. So long as defendant did not actually know the representations to be false, it was under no obligation to investigate to determine their truth or falsity. In *Mead* v. *Bunn*, 32 N. Y. 280, the court say: "Every contracting party has an absolute right to rely on the express statements of an existing fact, the truth of which is known to the opposite party and unknown to him, as a basis of mutual engagement, and he is under no obligation to investigate and verify statements, to

the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith." In *Redding* v. *Wright*, (Minn.) 51 N. W. 1056 (a case very much in point,) the court say: "If the representations were fraudulently made with the intent to induce the plaintiff to rely upon the fact being as represented, and to act upon the belief thus induced, the wrong-doer who succeeds in such a purpose is not to be shielded from responsibility by the plea that the defrauded party would have discovered the falsity of the representation if he had pursued such means of information as were available to him." While the rule has been in some cases stated in terms more favorable to plaintiff, yet no decision can be found which establishes a doctrine under which defendant would be bound, under the circumstances of this case, to make any investigation or inquiry touching the truth or falsity of the statements made in connection with the sale. There are many well considered cases which sustain our view that defendant had a right implicity to rely upon the representations made by plaintiff with respect to the character of the property to be purchased by defendant. In addition to the cases already cited, we refer to *Maxfield* v. *Schwartz*, 45 Minn. 150, 47 N. W. 448; *Gardner* v. *Trenary*, 65 Iowa, 646, 22 N. W. 912; *Schumaker* v. *Mather*, 133 N. Y. 590, 30 N. E. 755; *McClellan* v. *Scott*, 24 Wis. 81; *Caldwell* v. *Henry*, 76 Mo. 254; *Oswald* v. *McGehee*, 28 Miss. 340; *Cottrill* v. *Krum*, 100 Mo. 397, 13 S. W. 753; *Campbell* v. *Frankern*, 65 Ind. 591; Kerr, Fraud & M. 77, 80, 81; *Erickson* v. *Fisher*, (Minn.) 53 N. W. 638; *Alfred Shrimpton & Sons* v. *Philbrik*, (Minn.) 55 N. W. 551; *Barndt* v. *Frederick*, (Wis.) 47 N. W. 6; Bigelow, Fraud, 522, 528. We are aware that cases can be found which exact from the buyer more care in ascertaining the truth or falsity of representations than the decisions just cited. These cases appear to us to have been rightfully decided, in view of the facts. In determining what the courts in such cases intended to hold, the language of each opinion must be read, in the light of the facts of the particular case. The unmistakable drift is towards the just doctrine that the

wrongdoer cannot shield himself from liability by asking the law to condemn the credulity of his victim. The falsity of the statement may be apparent because the thing misrepresented is before the buyer, and the most casual look will suffice to discover the falsehood, no artifice being used to divert his attention; or the statement may carry its own refutation upon its face,—may be so absurd or monstrous that is palpably false, as a statement by a person carrying on a business known to the purchaser to be very small that the receipts of the business are a million dollars a year. In these and other similar cases the law will not allow a person to assert that he was deceived. But the general rule is, and, upon principal, must be, that the question is one of reliance by the buyer upon the false statement of the seller. Whether it was wise for him to rely upon it, whether he was prudent in so doing, whether he is not chargeable with negligence in a certain sense in not investigating,—these inquiries are, in general, immaterial, provided the purchaser has in fact been deceived. The circumstances under which fraud is accomplished are so varied, the nature of the property and the character of the misrepresentations are so widely different, in different cases, that it is unwise to attempt to enunciate with precision a general rule by which all cases shall be governed. It is better to decide the cases as they arise, keeping in view the general principle that courts will not readily listen to the plea that the defrauded party was too easily deceived. For this error in the charge, the judgment will be reversed, and a new trial granted.

We wish, however, before finally disposing of this case, to settle the rule of damages. The trial judge seems to have given the jury two different rules touching the measure of damages. While we are not prepared to say that we would reverse the case on this point alone, in view of the fact that defendant's counsel appears to have requested the court to charge the jury that what we regard as the improper rule was in fact the correct one, yet, to avoid a reversal on this ground in the future, we will now

decide what is the proper measure of damages in a case of this kind. The purchase price of the plant was $85,300. The court several times charged the jury that the measure of damages was the difference between this agreed price,—*i. e.* $85,300,—and what the plant was really worth at the time of the sale. In other parts of the charge the court told the jury that the damages that defendant was entitled to recover were the difference between what the plant would have been worth if as represented and what it actually was worth at the time of sale. It is obvious that these two rules cannot be reconciled. One gives to the party deceived the full benefit of his bargain. The other does not. We are clear that the best reason is with the doctrine that, where one is deceived and defrauded, he can recover as damages the difference between the value of what he would have obtained had the statement been true and the value of what he actually received. This represents his actual loss by reason of the fraud of the seller, on the theory that he does not rescind the contract. Of course, if he sees fit to rescind for fraud, he can only recover back what he has paid. But if he desires to stand by the agreement, as he has a perfect right to do, he can logically say to the wrongdoer: "If you had told me the truth, the property would have been worth so much. It is not worth so much, because it is not as you represented it. I demand that you make good the difference in money." While the decisions are at variance on this proposition, a host of cases can be cited to support the rule we establish in this state. *Page* v. *Wells*, 37 Mich. 415; *Williams* v. *McFadden*, 23 Fla. 143, 1 So. 618; *Nysewander* v. *Lowman*, 124 Ind. 584, 24 N. E. 355; *Noyes* v. *Blodgett*, 58 N. H. 502; *Stiles* v. *White*, 11 Metc. (Mass.) 356; *Lunn* v. *Shermer*, 93 N. C. 164; *Vail* v. *Reynolds*, 118 N. Y. 297, 23 N. E. 301; *Morse* v. *Hutchins*, 102 Mass. 439; *Doran* v. *Eaton*, (Minn.) 41 N. W. 244; *Woolman* v. *Wirtsbaugh*, (Neb.) 35 N. W. 216; *Drew* v. *Beall*, 62 Ill. 167; *Cox* v. *Gerkin*, 38 Ill. App. 340, 344; *Wynn* v. *Longley* 31 Ill. App. 616; *Krumm* v. *Beach*, 96 N. Y. 398, 400; *Whitney* v. *Allaire*, 1 N. Y. 305; *Horne* v. *Walton*, (Ill. Sup.) 7 N. E. 100; *Jackson* v. *Armstrong*, (Mich.) 14 N. W. 702; *Matlock* v.

Reppy, (Ark.) 14 S. W. 546; *Reggio* v. *Braggiotti*, 7 Cush. 166; *Woodward* v. *Thacher*, 21 Vt. 580; *Page* v. *Parker*, 43 N. H. 363; 3 Suth. Dam. pp. 389, 390, 392. Other decisions limit the recovery to the difference between the purchase price and the actual value of the property at the time of sale. See *Crater* v. *Binninger*, 33 N. J. Law, 513; *Atwater* v. *Whiteman*, 41 Fed. 427; *Glaspell* v. *Railroad Co.*, 43 Fed. 900; *High* v. *Berret*, (Pa. Sup.) 23 Atl. 1004; *Smith* v. *Bolles*, 132 U. S. 125, 130, 10 Sup. Ct. 39; *Reynolds* v. *Franklin*, (Minn.) 46 N. W. 139; *Redding* v. *Godwin*, Id. 563; *Alden* v. *Wright*, (Minn.) 49 N. W. 767; *Stickney* v. *Jourdan*, Id. 980. This doctrine places the wrongdoer in a better position than one who in good faith warrants the quality of property, and afterwards discovers that he was mistaken. One who is liable for breach of warranty is under the general rule bound to pay the difference between what the property would have been worth if as warranted and its actual value at the time of the sale. This is the rule in this state. Comp. Laws, § 4593. Certainly, one who willfully misrepresents the condition of the thing sold cannot justly lay claim to a rule of damages which will afford him more protection than one who is merely guilty of breach of contract. Mr. Justice Gray in *Moore* v. *Hutchins*, 102 Mass. 440, has strongly stated the ground upon which stands the rule we adopt. He says: "To allow the plaintiff only the difference between the real value of the property and the price which he was induced to pay for it would be to make any advantage lawfully secured to the innocent purchaser in the original bargain inure to the wrongdoer, and, in proportion that the original price was low, would afford a protection to the party who had broken, at the expense of the party who was willing to abide by the terms of the contract." The judgment of the District Court is reversed, and a new trial ordered. All concur.

(59 N. W. Rep. 1066.)

ENDERLIN STATE BANK *vs.* REUBEN P. JENNINGS.

Opinion filed August 14th, 1894.

District Judge—Powers—Review of Decision of Another District Judge.

In an action pending in one judicial district, a motion was made to set aside an attachment issued in the action, and was denied. Thereafter, the case having been transferred to another judicial district, the same motion was made, on the same facts, before another judge, who was the judge of such latter judicial district. No claim of surprise, or that new evidence had been discovered, was made on the second motion, nor was any reason assigned for the renewal of the first motion. The judge who denied the first motion did not grant defendant leave to renew it. The second motion was entertained and granted by the other judge. *Held* error, for the reason that one judge has no power to review, on the same facts, the decision of another judge, of co-ordinate jurisdiction.

Whether the judge who decided the original motion could have entertained such second motion on the same state of facts, not decided.

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

Action in attachment by the Enderlin State Bank against Reuben P. Jennings. From an order sustaining a motion to vacate the warrant of attachment, plaintiff appeals.

Reversed.

Ed. Pierce and *Edward Engerud*, for appellant.

The defendant voluntarily appeared in the District Court of Ransom County and sought the adjudication of the court upon plaintiffs right to the writ of attachment. The attachment was sustained and this adjudication was a bar to any further proceedings. 1 Herman on Estoppel, 472; *Austin* v. *Walker*, 61 Ia. 158, 16 N. W. Rep. 65; *Mayer* v. *Wick*, 15 Ohio St. 548; *Rogers* v. *Hoenig*, 46 Wis. 361; *Dwight* v. *St. John*, 25 N. Y. 203; *Grier* v. *Jones*, 54 Ga. 154; *Pierce* v. *Kneeland*, 9 Wis. 23; *Corwith* v. *Bank*, 11 Wis. 430; *Hill* v. *Hoover*, 9 Wis. 15; *Bank* v. *Uphan*, 14 Wis. 596; *Cothren* v. *Connaughton*, 24 Wis. 134; *Kabe* v. *Eagle*, 25 Wis. 108; *Peo.* v. *Center*, 61 Cal. 191; *Gregory* v. *Haines*, 21 Cal. 443; *McCullough* v. *Clark*, 41 Cal. 298; *Langdon* v. *Raeford*, 20 Ala. 532; *Gavin* v. *Graydon*, 41 Ind. 559; *Sanderson* v. *Daily*, 83 N. C. 67; *Mitchell* v. *Allen*, 12 Wend. 290; *Commissioners* v. *McIntosh*, 30 Kan. 234.

Ball & Watson, *G. K. Andrus* and *R. J. Mitchell*, for respondent.

The courts of the two states from which our practice has been so extensively borrowed, New York and California, hold that motions may be renewed upon the same grounds upon which they were originally made. That while it is better practice first to obtain leave to renew, yet this is not indispensable. *Harris* v. *Brown*, 93 N. Y. 390; *Riggs* v. *Pursell*, 74 N. Y. 370; *Belmont* v. *R. R.*, 52 Barb. 637; *White* v. *Monroe*, 33 Barb. 650. It is a discretionary matter and the court will be presumed to have exercised its discretion properly. *Hitchcock* v. *McElrath*, 69 Cal. 634; *Kenney* v. *Kelleber*, 63 Cal. 442; *Bowers* v. *Cherokee Bob*, 46 Cal. 280.

CORLISS, J. The order appealed from vacated a warrant of attachment. The order was made by the District Court of the Fifth Judicial District. The action was originally brought in the Fourth Judicial District. While it was there pending a motion was made before the District Court of that District to set aside the warrant of attachment which had been issued in the action. The ground upon which this warrant was issued was that defendant had assigned and disposed of his property with intent to hinder, delay, and defraud his creditors. After a final hearing the court denied the motion, and one of the grounds of the court's decision in denying the motion was that defendant had disposed of his property with intent to hinder, delay, and defraud his creditors. From this order no appeal was taken. Subsequently, the parties stipulated to change the place of trial to Barnes County, in the Fifth Judicial District. Upon this stipulation an order was made changing the place of trial to Barnes County, and thereafter another motion was made to set aside the same attachment. This motion was granted. Upon the hearing of it, plaintiff relied upon the previous order made by the court of the Fourth Judicial District, denying such motion, as a bar to the second motion. No counter affidavits on the merits of the motion were filed, but plaintiff relied solely upon the point that the question of vacating the attachment was *res judicata*. Upon the second

motion the affidavits used on behalf of defendant contained no new facts, nor was there any claim made on such motion that any facts existed, different from those which were urged on behalf of defendant on the previous motion as a reason for vacating the attachment. Not a single reason is disclosed, anywhere in the record, why another motion should have been made. There was no pretense that defendant would be able to offer any different proof in rebuttal, or that the case would, in any respect whatever, stand upon facts different from those already presented to the District Court of the Fourth Judicial District, and on which that court had decided that the attachment should be sustained.

The respondent urges that it is always discretionary with a court to hear the same motion on the same papers and evidence, and that such a discretion the appellate tribunal will not interfere with. The rule certainly at one time did prevail that the doctrine of *res judicata* did not apply to decisions upon motions. That rule has by no means been abrograted, in its full scope; but changes in procedure have wrought corresponding changes in this doctrine, and have taken certain motions out of the general rule. The reasons for the doctrine were that motions did not receive such grave consideration as regular trials of issues of fact, and that there was no right of review in a higher tribunal. *Simson* v. *Hart*, 14 Johns. 75. Neither of these reasons apply to many motions, under our systems of procedure. We will confine ourselves, however, to motions of the character of the one which culminated in the order appealed from. Whether an attachment shall stand or fall is a question entirely distinct from the merits of the action in which it was granted. That question cannot be tried in this state in connection with the trial of the case itself. It must be settled in a separate proceeding. That proceeding is a motion to discharge the attachment. It is in this way only that the court can ever decide whether an attachment shall be sustained or set aside. It would seem, on principle, that where there had been a full and fair hearing on this question, and a decision made, that decision should forever settle that question

between the parties, in the absence of some evidence to show that by reason of surprise, excusable neglect, or because of newly discovered evidence, it would be just to reopen the matter and grant a rehearing. That the defendant in this case had such a full and fair hearing on the first motion is apparent from the fact that he was allowed ample time after plaintiff's opposing affidavits were filed in which to prepare rebutting affidavits. Indeed, this is the statutory right of the defendant in all such cases. He is always allowed to sustain the motion by affidavits or other proof in rebuttal of the affidavits or other proof offered and submitted on the part of the plaintiff to oppose the motion. Comp. Laws, § 5011. There is no good reason why a defendant who has a right to so full a hearing on a motion should be allowed, when he is defeated, to renew the same motion, on the same facts, without presenting any proof to entitle him to a rehearing, unless the same judge grants the rehearing to correct some error in his former decision. Certainly, no reason for granting him such a privilege can be adduced, except for the purpose stated, when he has in fact been fully heard in support of his original motion. If any error of law has been made, he can have it reviewed by appeal. Laws 1891, Ch. 120, § 24. With respect to the facts decided, there is no reason, so far as the right to the relief sought for by the motion is concerned, why they should not be set at rest forever by the decision upon such a hearing, the same as facts are settled by the judgment of a court when such facts are found by a jury or the court upon the trial of the issues in an action. Of course, the decision on the motion to dissolve an attachment might not, in all cases, affect the decision of the same question of fact when involved in another action. But the question is *res judicata* in the sense that no other motion can be made on the same facts to accomplish the same purpose for which the first one was made; with the possible exception that the same judge may reopen the matter to correct any mistake made by him in deciding the motion. There is a class of cases which hold that the matters of fact so established are conclusive against

the defeated party in subsequent litigation of a different character. But these will be found to be cases where a person, after being defeated in his effort to accomplish his purpose by motion, —as to set aside a judgment for want of service of process,— resorts to an action to secure the same result. The general rule may be stated in the following terms: Where there is an opportunity for a full and fair hearing on a motion, and a right of review in an appellate tribunal, the decision of that motion is *res judicata* whenever, on the same facts, the defeated party, by motion or otherwise, seeks to secure the object for which he made the motion, subject to the possible exception that, where the same judge entertains a new motion on the the same facts, it will be presumed that his object was to rehear the case to correct any error he may have made. Under such a doctrine the former order would not be a bar to a second motion on the same facts, when heard before the same judge. See, on the general question of *res judicata* with respect to decisions on motions, the following cases: *Dwight* v. *St. John*, 25 N. Y. 203; *Grier* v. *Jones*, 54 Ga. 154; *Weber* v. *Tschetter*, (S. D.) 46 N. W. 201; *Commissioners* v. *McIntosh*, 30 Kan. 234, 1 Pac. 572; *Mabry* v. *Henry*, 83 N. C. 298; *Burner* v. *Hevener*, 34 W. Va. 774, 12 S. E. 861; *Kabe* v. *The Eagle*, 25 Wis. 108; *Cothren* v. *Connaughton*, 24 Wis. 134; *Pierce* v. *Kneeland*, 9 Wis. 23; *Austin* v. *Walker*, 61 Iowa, 158, 16 N. W. 655; *Sanderson* v. *Daily*, 83 N. C. 67; *Kaufman* v. *Schneider*, 35 Ill. App. 256, 262; *Hawk* v. *Evans*, (Iowa,) 41 N. W. 368; Frauenthal's Appeal, 100 Pa. St. 290; *Bank* v. *Upman*, 14 Wis. 596; *Claggett* v. *Simes*, 25 N. H. 402; *Spitley* v. *Frost*, 15 Fed. 299; *Trescott* v. *Lewis*, 12 La. Ann. 197; *Bank* v. *Hansee*, 15 Abb. N. C. 488. See, also, 1 Herm. Estop. § 472; Freem. Judgm. § § 325, 326; 2 Black, Judgm. § § 691, 692.

Indeed, an examination of the cases will disclose the fact that those decisions which hold the former order no bar proceed upon the ground that the matter ought, under the circumstances presented, to be reheard, just as an issue of fact is retried when a new trial is granted. In no case has any court permitted a

motion to be renewed, except on the theory that the case was a proper one for a rehearing of the original motion. Whenever such a rehearing has been refused, the doctrine of *res judicata* has been applied. This doctrine, as so applied to motions, has been extended by the later cases so that the decision of a motion is in many cases as much *res judicata* when the same question is again in controversy as though the same matter had been settled by a verdict followed by judgment. The form which the decision assumes is unimportant. The material inquiries are: Has there been a full and fair investigation? Has the defeated suitor a right to review the decision in a higher court? When these questions can be answered in the affirmative, some of the cases hold that the decision of the motion not only bars another similar motion (unless, of course, a rehearing is properly granted,) but also settles the general manner in controversy on the motion, whenever it again arises in any form between the same parties or their privies. Much confusion would have been saved, had an obvious distinction been pointed out in the cases between using an order as a bar to a second motion for the same purpose, and a judgment as a bar to a second action for the same purpose. When the former judgment is interposed, it cannot be urged in opposition to its conclusive effect that there ought to be a rehearing of the case, for the simple reason that that question must be settled by a specific motion for a new trial in the original action. Until that is done, it conclusively appears that there ought not to be a retrial of the case. But a second motion has always a twofold character. It is, first of all, a direct attack upon the previous decision, and the order embodying the same. It is in the nature of an applicatian for a rehearing of the same question. In the second place, it is an application for a determination on the merits of the matters embraced in the new motion. Sometimes, when a motion is denied, it is denied without prejudice to the right of the party defeated to review it on making additional proof. When the order contains no such provision, it is customary for the unsuccessful suitor to apply for leave to

renew the motion. If this leave is granted, the old order is set aside, in legal effect if not in terms, and the rights of the parties depend upon the decision of the court on the new hearing. *Harris* v. *Brown*, 93 N. Y. 390. In such a case there is no former decision or order to operate as a bar. The court, in furtherance of justice, has annulled it, and granted a rehearing of the matter embraced in the original and also the renewed motion. But previous leave to renew a motion is not indispensable. The new motion may embrace both features. The court, in such cases, is asked to decide, first of all, whether a rehearing is proper; and then, in case it so adjudges, it is further requested to take up the motion on the merits, and decide it in the light of the evidence then offered. It does not even seem necessary that the moving papers should indicate that the defeated litigant seeks to have the old order set aside. Nor does it appear to be imperative that the court entertaining the several motions should, in terms, decide that the matter should be reopened, and the former order abrogated. By entertaining the second motion despite the fact of a former decision of the same matter on a previous motion, the court, in legal effect, does grant a rehearing; and therefore the former order constitutes no bar, provided, of course, the court was justified in granting a rehearing. *Harris* v. *Brown*, 93 N. Y. 390; *Kenney* v. *Kelleher*, 63 Cal. 442; *Riggs* v. *Pursell*, 74 N. Y. 370. The whole question, in a case like this, therefore, turns upon the inquiry whether a proper case was presented to the court for granting a rehearing,—a new trial of the matters embraced in the decision of the first motion. If not, then the court was wrong in setting aside the original order, and that order is a bar to a further investigation of the matter.

This brings us to the point whether one judge has unlimited discretion in granting rehearings of motions decided by another judge. It is only upon the theory of such unrestricted discretion that the order appealed from can be sustained. This order, in legal effect, set aside the previous order denying the motion to vacate the attachment, and granted a rehearing of the motion,

and then set aside the very attachment which the former order had sustained. No reason was assigned in the moving papers why the matter should be tried anew. There was no claim of surprise, or of unfair advantage taken by the plaintiff; no pretense that any new evidence had been discovered. In fact, no reference to the prior motion was made in the moving papers. The defendant proceeded as if no motion had been made. The court, by hearing and granting the motion after plaintiff's objection on the ground that the same motion had been decided before, proceeded as though a motion could be heard by a different judge as often as the defeated moving party should see fit to renew it on precisely the same facts. Before the motion was submitted to the court on the merits, the plaintiff duly objected to the hearing of the same for the reason that such a motion had already been decided on the same facts. We must, therefore, to sustain the order, hold that Judge Rose was, under such circumstances, justified in setting aside the former order made by Judge Lauder, and in entertaining a new motion on the same facts. We do not believe that such is the law. It certainly ought not to be the law. We can find no case in which it has been held that after a suitor has been fully heard on a motion, and has a right to appeal from the order denying his motion, he can renew the same motion, on the same facts, before any other judge having jurisdiction of the case. The practice in such cases, where the motion is before another judge, should, by analogy, be governed by the rules of law which regulate the granting of new trials on the ground of newly discovered evidence, or for suprise or excusable neglect. A person making a motion is under the same obligation to exercise diligence in securing his evidence and in presenting his law as one who tries a issue of fact before a jury. He cannot bring forward his case in fragments. He must produce all the evidence he has, or might have obtained by the exercise of due diligence. "The same degree of diligence will be required of a party in sustaining his motion as would be sufficient to free him from the imputation of laches if he were engaged in the trial of a case. If he makes his

application, and, from his own neglect, supports it by insufficient materials, and the rule is, on that ground, discharged, he cannot be afterwards allowed to supply the deficiency and renew the application." Freem. Judgm. § 326. See, also, *Ford* v. *Doyle*, 44 Cal. 635; *Bank* v. *Hansee*, 15 Abb. N. C. 488; 2 Black, Judgm. § 692, *Ray* v *Connor*, 3 Edw. Ch. 478; *Lovell* v. *Martin*, 12 Abb. Pr. 178; *Pattison* v. *Bacon*, 21 How. Pr. 478; *Allen* v. *Gibbs*, 12 Wend. 202; *Bascom* v. *Feazler*, 2 How. Pr. 16; *Witmark* v. *Herman*, 44 N. Y. Sup. Ct. 144; *Mills* v. *Thursby*, 11 How. Pr. 114; *Fenton* v. *Bank*, Clarke, Ch. 360; *Schlemmer* v. *Myerstein*. 19 How. Pr. 412. In *Adams* v. *Lockwood*, (Kan.) 2 Pac. 626, the court said: "A party has no right to trouble the court, or annoy the opposite party, by successive motions seeking the same relief, even though he bases them upon different grounds. He must include everything in the first motion, and can only file a second motion upon leave of the court, which will rarely be granted, and then only when justice seems manifestly to require it." It is true that the granting of the privilege of renewing a motion rests largely in the discretion of the court to which the application is made. There are cases in which courts have asserted or intimated that the discretion of the court is not subject to review. *White* v. *Munroe*, 33 Barb. 650; *Kenney* v. *Kelleher*, 63 Cal. 442; *Wentworth* v. *Wentworth*, 51 How. Pr. 289; *Smith* v. *Spalding*, 30 How. Pr. 339; *Riggs* v. *Pursell*, 74 N. Y. 370; *People* v. *Eddy*, 3 Lans. 80.

We are not prepared to say that Judge Lauder, himself, would not have had power to allow the motion to be reheard on the original papers, or to permit it to be reviewed upon new motion papers, the same in substance as those used on the original hearing. It is possible (but we do not decide the question) that such power resides in the District Court, with respect to motions it has decided, provided the application for a rehearing is seasonably made. The result of this doctrine would be that the judge who had decided a motion could, in his discretion, rehear it on the same facts. But this is widely different from the rehearing of the same motion on the same facts by another judge. A rehearing

is granted by the same judge who decided a matter, to examine the case again, that he may correct any error he may have made. But to permit another judge, of only co-ordinate jurisdiction, to review the decision on the same facts, is to vest him with appellate jurisdiction over a judge having equal powers. So long as the judge who decided the matter has jurisdiction to correct his own error, no other judge, of only equal authority, can review it. If reviewed at all, by any judicial authority other than himself, it must be by a court having appellate jurisdiction. When the judge who decides the motion has, for any reason, lost his power to rehear and correct his own decision, the only remedy left to the suitor is by appeal. The errors of one judge or court are never corrected by another judge or court by a rehearing, but only by an appeal. Of course, granting a new trial of the questions embraced in the motion on newly discovered evidence is an entirely different matter. We see no reason why that may not be done by another judge having jurisdiction of the case. But no such question was before Judge Rose. He merely reviewed and set aside the decision of Judge Lauder on the same facts.

It is here urged that on the first motion the defendant failed to deny the allegations that he had "disposed" of his property with fraudulent intent, and that, therefore, the new motion presented a different question, because in the moving affidavits on the new motion this averment was controverted. There is nothing in this point. It is apparent, from the fact that Judge Lauder went fully into the whole matter, that he did not decide the motion on the ground that one of the allegations of the affidavit on which the attachment was granted was not put in issue. Had this point been raised, it would have defeated the motion before him on the defendant's own moving papers. But he did in fact entertain the motion, and compelled the plaintiff to introduce his evidence as though the whole matter was in issue, and thereafter the defendant produced evidence in rebuttal; and, so far as we know (these additional affidavits not being before us,) such affidavits fully went into all the matters touching any disposition of his property,

whether by sale, transfer, gift, or otherwise. Another sufficient answer to this point is that a moving party must include everything in his first motion, and that if he does not he must offer some excuse for not doing so, or he will not be allowed to renew the motion on that ground. There is no pretense of any excuse for failing to deny the allegation of disposition of property, nor was there anything before Judge Rose to show that this omission had at all affected the rights of the defendant on the first motion. We are clear that it did not. Of course, these considerations might not lead us to reverse the decision of the judge entertaining the same motion on precisely the same facts, where the judge who does this is the same judge who heard the original motion. In such a case it is possible that we would assume, in support of the order, that the judge, by this procedure, was seeking to review his own decisions, to correct any possible error. But this possible rule of practically unlimited discretion does not apply where another judge entertains the second motion. He cannot review the case on the same papers. To justify his action, there must be something new disclosed before him, and we think he is bound substantially to follow the rules which regulate the granting of new trials. Such rules ought to govern the actions of the judge when he is the same judge who heard the original motion, and, if he is convinced that his decision ought not to be reviewed by him on the same facts, he ought to require of the moving party the same diligence as the law demands of one who moves for a new trial of the merits of a case when the defeated suitor asks for a new hearing before him of a motion on additional facts. See *Hill* v. *Hoover*, 9 Wis. 15; *Pierce* v. *Kneeland*, Id. 24; *Willett* v. *Fayerweather*, 1 Barb. 72; *Lovell* v. *Martin*, 12 Abb. Pr. 178; *Pattison* v. *Bacon*, 21 How. Pr. 478; *Adams* v. *Lockwood*, 30 Kan. 373, 2 Pac. 626; *Witmark* v. *Herman*, 44 N. Y. Sup. Ct. 144. But ordinarily we will be unable to compel the observance of these rules in such a case, if the correct doctrine is that the judge who decides a motion has jurisdiction to entertain a second motion for the same purpose on the same facts, or, what in effect is the same, to

rehear the first one. We would have to assume, nothing to the contrary appearing, that he had entertained a new motion, or reheard the old one, merely to review and correct his previous decision.

The order of the District Court is reversed. All concur.

(59 N. W. Rep. 1058.)

WILLIAM M. VAIL *vs.* TOWN OF AMENIA.

Opinion filed August 13th, 1894.

Bridges—Defects—Liability of Townships.

While the duty to repair and maintain highways and bridges may in this state devolve upon civil townships, and while such townships may, within certain limits, be empowered to raise revenue for such purpose, yet, in the performance of such duty, the township acts as the instrumentality of the state, and, in the absence of any statute fixing liability, the township shares with the state that immunity from liability for the acts or negligence of its officers which the state enjoys.

Organization on Petition does not Create Liability.

The fact that in this state civil townships are organized only on petition of a majority of the resident voters therein does not change the rule of nonliability.

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

Action by William M. Vail against the town of Amenia to recover damages for personal injuries. From a judgment for defendant, plaintiff appeals.

Affirmed.

Benton & Amidon, for appellant.

The township was by express provision of law bound to maintain and repair the bridges upon its public highways and was vested with power to raise money for that purpose. The power to borrow money is as adequate for the purpose as the power to levy taxes. *Hover* v. *Barkhoof*, 44 N. Y. 113.

Towns and counties have been held to be mere political divisions of the state. *Lorillard* v. *Monroe*, 11 N. Y. 392; *West* v.

Brockport, 16 N. Y. 161; *People* v. *Town Auditors*, 74 N. Y. 310; *People* v. *Town Auditors*, 75 N. Y. 316; *Rochester* v. *Town of Rush*, 80 N. Y. 302; 1 Thompson Neg. 621, and not liable for negligence or in actions for tort. *Hill* v. *Boston*, 122 Mass. 349; *Hover* v. *Barkhoof*, 44 N. Y. 113; 2 Thompson Neg. 819; *Russell* v. *Devon*, 2 T. R. 667; *Bartlett* v. *Crozier*, 17 Johns. 439; *Riddle* v. *The Proprietors*, 7 Mass. 169; *Mower* v. *Lester*, 9 Mass. 247; and a distinction has been drawn between townships and counties on the one hand, and cities upon the other, in that, private advantages have been conferred upon cities by special charter upon the agreement to perform certain duties. But the leading courts of this country have refused to recognize the distinction. *Hill* v. *Boston*, 122 Mass. 344; *Prey* v. *Mayor*, 32 N. J. L. 394; *Tranter* v. *Sacramento*, 61 Cal. 271; *Detroit* v. *Blackeby*, 21 Mich. 84, holding cities exempt from liability as well as counties and towns.

On the other hand the following states having no statutes expressly imposing the liability, deny the distinction, and hold counties and towns liable the same as cities. *Dean* v. *New Millford*, 5 Watts & S. 545; *Raphs* v. *Monroe*, 68 Pa. 404; *Newlin* v. *Davis*, 77 Pa. 317; *Mahoney* v. *Scholly*, 84 Pa. 136; *Rigony* v. *Schuykill Co.*, 103 Pa. 202; *Hover* v. *Barkhoof*, 44 N. Y. 113; *Calvert Co.* v. *Gibson*, 36 Md. 229; *Anne Arundel Co.* v. *Duckett*, 20 Md. 468; *Hartford* v. *Hamilton Co.*, 60 Md. 340; *House* v. *Commissioners*, 60 Ind. 580; *Knox Co.* v. *Montgomery*, 109 Ind. 69; *Abbett* v. *Johnson Co.*, 114 Ind. 61, 9 N. E. Rep. 590; *Wilson* v. *Jefferson Co.*, 13 Ia. 181; *Huston* v. *Iowa Co.*, 43 Ia. 456; *Yordy* v. *Marshall Co.*, 45 N. W. Rep. 1042. The Supreme Court of North Dakota, has already held cities liable for negligence. *Ludlow* v. *City of Fargo*, 3 N. D. 485, 57 N. W. Rep. 506, and upon the authority of the courts of Massachusetts, New York and Pennsylvania holding that there is no distinction between cities and townships as to the nature of the duties performed or the liability for negligence in their performance, must hold townships subject to the same liabilities as cities.

Seth Newman, for respondent.

The duties imposed upon the supervisors of highways are purely statutory and in the performance of such duties none of these officers are under the control or direction of the town. Their duties are in the nature of public or governmental functions imposed for convenience upon the town officers. These officers are the agents of the town only in the sense, that the powers of the town can only be exercised through them, because the public can only act through its officers, and not in the sense that the town is liable for their neglect. *Dosdal* v. *County Commissioners*, 14 N. W. Rep. 458, 30 Minn. 96; *Reardon* v. *St. Louis Co.*, 36 Mo. 562; *Hoffman* v. *San Joaquine Co.*, 21 Cal. 527; *Union Tp.* v. *Berryman*, 28 N. E. Rep. 774. Highway officers under statutes similar to our own, have been held not to be the agents of the town, so as to subject the town to liability for their acts. *Waltham* v. *Kemper*, 55 Ill. 346; *Russell* v. *Steuben*, 57 Ill. 35; *Morey* v. *Town of Newfane*, 8 Barb. 645; *Town* v. *Plank Road Co.*, 22 Barb. 645; *Town* v. *Loucks*, 21 Barb. 578; *Town* v. *Plank Road Co.*, 27 Barb. 543; *Gailor* v. *Herrick*, 42 Barb. 79; *People* v. *Town Auditors*, 75 N. Y. 316. The corporate authority of towns under our statute is in the electors alone and not in the supervisors. *Kankakee* v. *Kankakee R. R. Co.*, 115 Ill. 88. The statutes imposes duty of keeping highway in repair upon the town officers designated therein, it imposes no duty upon the town. *Haynes* v. *City of Lockport*, 50 N. Y. 236. Townships are not liable except by express statutory enactment specifically imposing the liability. *Hill* v. *Boston*, 23 Am. Rep. 332; *Bartlett* v. *Crozier*, 8 Am. Dec. 428; *Winbigler* v. *Los Angelos*, 45 Cal. 427; *Crowell* v. *Sonoma Co.*, 25 Cal. 313; *Hoffman* v. *San Joaquin Co.*, 21 Cal. 427; *Barnett* v. *Contra Costa Co.*, 67 Cal. 77; *Downing* v. *Mason Co.*, 12 Am. St. Rep. 473; *Browning* v. *Springfield*, 63 Am. Dec. 345; *Wood* v. *Tipton Co.*, 32 Am. Rep. 561; *White* v. *Commissioners*, 47 Am. Rep. 535; *City of Detroit* v. *Blakeby*, 4 Am. Rep. 450; *McCutcheon* v. *Homer*, 38 Am. Rep. 212; *Clark* v. *Lincoln Co.*, 20 Pac. Rep. 276; *Kincaid* v. *Hardin*, 36 Am. Rep. 276; Cooley's Const. Lim. 247;

Dodsall v. *County*, 30 Minn. 96; *Union Civil Tp.* v. *Berryman*, 28 N. E. Rep. 774; *Towle* v. *Com. Council*, 3 Peters 403; *Hamilton Co.* v. *Mighels*, 7 Ohio St. 110; *Weet* v. *Trustees*, 16 N. Y. 161; *Askew* v. *Hale Co.*, 54 Ala. 639; *Weighton* v. *Washington*, 1 Black 39; *Hedges* v. *Hamilton*, 6 Ill. 567; *Sherburne* v. *Yuba Co.*, 21 Cal. 113; *Reed* v. *Belfast*, 20 Me. 246; *Bigelow* v. *Randolph*, 14 Gray 541; *Mower* v. *Leicester*, 9 Mass. 247; *Commissioners* v. *Martin*, 4 Mich. 557; *Larkin* v. *Saginaw*, 11 Mich. 88; *Brabham* v. *Hands Co.*, 28 Am. Rep. 382; *Sandford* v. *Franklin Co.*, 6 Mo. App. 39; *Hyde* v. *Town*, 27 Vt. 443; *Makinnon* v. *Pierson*, 25 Eng. Law and Eq. 457; *Governor* v. *Justices*, 19 Ga. 97; *White* v. *County*, 58 Ill. 297; *Eikenberg* v. *Town*, 22 Kan. 556; *Town* v. *Kemper*, 55 Ill. 346; *Russell* v. *Steuben*, 57 Ill. 35; *Reardon* v. *St. Louis Co.*, 36 Mo. 555; *Ball* v. *Winchester*, 32 N. H. 435; *Eastman* v. *Meredith*, 36 N. H. 284; *Sussex* v. *Straden*, 18 N. J. L. 108; *Treadwell* v. *Commissioners*, 11 Ohio St. 183; *Conrad* v. *Ithaca*, 16 N. Y. 158; *Lohn* v. *Henry Co.*, 26 Ia. 264; *Altnow* v. *Town*, 30 Minn. 186; *Garlinghouse* v. *Jacobs*, 29 N. Y. 297.

BARTHOLOMEW, C. J. William M. Vail, the appellant herein, sued the town of Amenia for damages for personal injuries. The complaint charges the corporate capacity of the respondent, and alleges the existence of a certain highway within said town, which was laid out, established, and maintained by respondent, and which was a graded and much used highway; alleges the existence of a bridge in said highway as a part thereof, which said bridge was constructed by respondent, and was under its exclusive charge and control; that said bridge was suffered and allowed to become unsafe and dangerous, and that its condition was known to respondent for months prior to the injury to appellant; that appellant was passing along and over said highway with a traction engine, and said bridge, by reason of its dangerous and rotten condition, broke while appellant was so crossing it, and without fault or negligence on his part, and appellant and the engine were thrown into the coulee below, and the injury received upon which the action is based.

A general demurrer to the complaint was sustained, and the appeal involves no other question. The learned counsel for the appellant admit that the decision of this appeal must turn upon the answers to be given to two questions, which are thus stated by counsel: (1) "Was it the legal duty of the township of Amenia to repair bridges in its public highways, and had it power, under the statute, to raise money, by taxation or otherwise, for that purpose?" (2) "There being no statute in this state expressly making civil townships liable in this class of actions, has the plaintiff any right of action against the defendant?"

It is apparent that an affirmative answer cannot be given to the second question unless the first be also answered in the affirmative, but the first may be answered in the affirmative, and the second still receive a negative reply. In the view we take of this case, it will not be expedient for us at this time to discuss the first question. Its answer involves the construction of numerous statutory provisions which are not clear. It will prove more satisfactory to avoid such construction until it becomes necessary to the decision of a case.

It had long been held that at common law, as against *quasi* municipal corporations, such as counties, towns, and school districts, there existed no liability in cases of this character. *Brown* v. *Fairhaven*, 47 Vt. 386; *Reardon* v. *St. Louis Co.*, 36 Mo. 555; *Com.* v. *City of Newburyport*, 103 Mass. 129; *Leoni* v. *Taylor*, 20 Mich. 148; *Hollenbeck* v. *Winnebago Co.*, 95 Ill. 148; *Union Civil Tp.* v. *Berryman*, (Ind. App.) 28 N. E. 774; *Fowle* v. *Common Council*, 3 Pet. 403; *Reed* v. *Belfast*, 20 Me. 246; *Eikenberry* v. *Bazaar Tp.*, 22 Kan. 556; *Treadwell* v. *County Commissioners*, 11 Ohio St. 183; *Garlinghouse* v. *Jacobs*, 29 N. Y. 297; *Templeton* v. *Linn Co.*, 22 Or. 313, 29 Pac. 795; *Clark* v. *Adair Co.*, 79 Mo. 536; *Watkins* v. *County Court*, 30 W. Va. 657, 5 S. E. 654; *Fry* v. *Albemarle Co.*, 86 Va. 195, 9 S. E. 1004; *Granger* v. *Pulaski Co.*, 26 Ark. 37. It is also equally well established that, as against municipal corporations proper, the common law raised an implied obligation which made the municipality liable in this class of cases.

See *Ludlow* v. *City of Fargo*, (3 N. D. 485) 57 N. W. 506, and cases there cited. The difficulty and doubt in which the case is involved arise from the fact that this distinction has not always been recognized, and that courts and text writers in recent years have endeavored to break away from these decisions, on the ground that, the reason for the distinction having ceased, the distinction itself should cease. It has been held in some jurisdictions that there was no implied liability, even against municipal corporations proper, unless the municipality received some express benefit by the terms of its charter, or received some profit or emoluments growing out of the object that was the cause of the injury. *Hill* v. *Boston*, 122 Mass. 344; *Freeholders* v. *Strader*, 18 N. J. Law, 108; *Pray* v. *Mayor, etc.*, 32 N. J. Law, 397; *Winbigler* v. *City of Los Angeles*, 45 Cal. 36; *Young* v. *City Council of Charleston*, 20 S. C. 116. These cases refuse to recognize any distinction upon this point between *quasi* corporations, such as counties and towns, and municipal corporations proper; and, accepting the law as settled, that no liability rests upon *quasi* corporations, they refuse to admit any liability against chartered cities. Texas announced the same doctrine in *City of Navasota* v. *Pearce*, 46 Tex. 527; but in the subsequent case of *City of Galveston* v. *Posnainsky*, 62 Tex. 118, where the whole subject is ably discussed and the authorities collated at much length, that court clearly recognizes and enforces the distinction, and holds the city liable. The Supreme Court of Pennsylvania, following the precedent established in *Dean* v. *New Melford Tp.*, 5 Watts & S. 545, hold townships and counties liable in this class of cases, for the same reasons and under the same circumstances that cities are held liable. The same is true in Maryland, the leading case in that state being *Commissioners* v. *Duckett*, 20 Md. 468; and in Iowa the proposition is sustained by the cases which follow *Wilson* v. *Jefferson Co.*, 13 Iowa, 181; and in Indiana, following *House* v. *Board*, 60 Ind. 580. We do not agree with counsel that the case of *Hover* v. *Barkhoof*, 44 N. Y. 113, commits the court of appeals of New York to this proposition. In that case the

commissioners of highways were held liable; but in the subsequent case of *People* v. *Town Auditors*, 74 N. Y. 310, wherein the principle of *Hover* v. *Barkhoof* is approved, it is distinctly stated that these commissioners of highways "are independent public officers, exercising public powers, and charged with public duties, specially prescribed by law;" and, after specifying their duties and powers, the court adds: "These circumstances do not, however, make highway officers the agents of the town, so as to subject the town to liability for their acts." It must be admitted that the decisions of eminent courts refuse to recognize any distinction between municipal corporations proper and *quasi* municipal corporations touching their liability for the acts of negligence of their respective officers in matters pertaining to streets, highways, and bridges. Among the text books we find the distinction condemned by Jones on Negligence of Muncicipal Corporations (§ 59 *et seq.*) and Thompson on Negligence (p. 619.) Should this court disregard the distinction, respondent's liability would follow, because, speaking of municipal corporations proper, we said in *Ludlow* v. *Fargo*, *supra*, "that the doctrine of implied liability has the support of a decided preponderance of authority, and we think also the better reason." But we deem the distinction too well established to be disregarded by us except by legislative direction. What may have been the original foundation for this proposition is not a matter of great concern now. It may be true, and we think is true, that the case of *Russell* v. *Men of Devon*, 2 Term R. 667, so often cited as the source of the doctrine of nonliability of *quasi* municipal corporations for injuries resulting from defective bridges or highways, never was intended to be authoritative further than that the inhabitants of a certain territory designated as a county, but not incorporated, and having no corporate purse, could not be held liable for such injuries, and that the case is not an authority for nonliability of counties in this country, where counties are incorporated and have a corporate purse. But the distinction was clearly made in *Riddle* v. *Proprietors*, 7 Mass. 169, decided more than 80 years

ago, and has been asserted in the following cases: *Mower* v. *Leicester*, 9 Mass. 247; *Beardsley* v. *Smith*, 16 Conn. 368; *Eastman* v. *Meredith*, 36 N. H. 284; *Ball* v. *Town of Winchester*, 32 N. H. 435; *White* v. *Commissioners*, 90 N. C. 437; *Brabham* v. *Supervisors*, 54 Miss. 363; *Hyde* v. *Town of Jamaica*, 27 Vt. 443; *Town of Waltham* v. *Kemper*, 55 Ill. 346; *Altnow* v. *Town of Sibley*, 30 Minn. 186, 14 N. W. 877; *Dosdall* v. *Olmsted Co.*, 30 Minn. 96, 14 N. W. 458; *Browning* v. *City of Springfield*, 17 Ill. 143; *Clark* v. *Lincoln Co.*, (Wash. T.) 20 Pac. 576; *Barnes* v. *District of Columbia*, 91 U. S. 540. These citations might be extended to great lengths, but most of the cases are cited in the authorities given, and we call attention to the extended and valuable note to *Browning* v. *Springfield*, as reported in 63 Am. Dec. 345.

But, while it is admitted that we have no statute fixing liability in cases of this character upon townships, yet it is urged upon us with much force of logic that the legislature has abolished the distinction of which we have spoken in this state, and that the authorities cited are not applicable here. Judge Dillon says: "And specially have the courts been much perplexed respecting the principle upon which to rest the distinction, so generally taken, by which what is termed a '*quasi* corporation' though possessing full corporate capacity and a corporate purse, is not impliedly liable for misfeasance or neglect of public duty on the part of its officers and agents, while for the same or a similar wrong there is such a liability resting on municipal or chartered corporations." Dill. Mun. Corp. (4th Ed.) § 966. In *Commissioners* v. *Mighels*, 7 Ohio St. 110, the court said, at page 119: "As before remarked, municipal corporations proper are called into existence either at the direct solicitation or by the free consent of the people who compose them. Counties are local subdivisions of a state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former organization is asked for, or at least

assented to, by the people it embraces, while the latter is superimposed by a sovereign and paramount authority." The court was there speaking of counties, but counties and towns do not in general differ in the particulars mentioned. The court was also seeking for a basis upon which to rest the distinction between *quasi* and chartered municipal corporations. This language of the learned Supreme Court of Ohio has been frequently quoted with approval, as cases already cited will show. Judge Dillon also says (§ 961:) "In considering the subject of the implied liability (by which we mean a liability where there is no express statute creating or declaring it) of municipal corporations to civil actions for misconduct or neglect on their part, or on the part of their officers, in respect to corporate duties, resulting in injuries to individuals, it is essential to bear in mind the distinction pointed out in a former chapter, and to be noticed again hereafter, between municipal corporations proper, such as towns and cities, specially chartered or voluntarily organizing under general acts, and involuntary *quasi* corporations, such as townships, school districts, and counties (as these several organizations exist in most of the states.") But we think he uses the terms "voluntary" and "involuntary" simply as descriptive of the different organizations, and not as the ground for any difference in liability, because he immediately adds: "The decisions of the courts in this country are almost uniform in holding the former class of corporations to a much more extended liability than the latter, even where the latter are invested with corporate capacity and with the power of taxation, but respecting the grounds for this difference there is a considerable diversity of opinion." But so often have courts adverted to the difference between voluntary and involuntary organizations that learned counsel reach the conclusion that this circumstance marks the basis for the difference in liability. In this state, counties and townships are not arbitrarily formed and set in motion by the state, as in many of the older states. They are, to a large extent at least, voluntary organizations. It is true the state designates certain territory as a county; but that

gives no power to exercise any corporate functions whatever. Until the people residing within the designated territory petition the executive for organization, and the executive organizes the county as provided by statute, it has no corporate existence. See § § 510 to 535 and 572, Comp. Laws. So, also, Ch. 112, Laws Dak. T. 1883, provided for the organization and government of civil townships. The provisions of that statute are dispersed in proper connection in the compilation of 1887, and the matter will be more readily understood by referring to the session laws. It is provided generally that a majority of the legal voters residing in any congressional township containing 25 or more voters may petition the board of county commissioners to be organized as a civil township, and thereupon the county commissioners take the proper steps under the statute to create such civil township. There is no other method in this state of organizing civil townships. Since with us townships are voluntary organizations, it follows that, if that fact fixes the liability in this class of cases, then the demurrer was improperly sustained; but, upon full consideration, we are all of opinion that the method of organization never should be decisive of this question. It may with propriety be used as an argument for or against liability when coupled with other and more persuasive circumstances, but it can never be controlling. It is the nature of the entity, and not the method of its creation, that must control. We must look to its purposes, powers, privileges, and duties. These are fixed by the legislature. An examination of the statute will show that these purposes, powers, privileges, and duties are practically identical with those possessed by townships where the organization is superimposed by paramount authority; and, if the creatures are identical, the methods of creation become of but little importance, and furnish no sufficient reason for imposing different responsibilities. True, these responsibilities may be assumed or not in this state, at the will of the voters; but by what logic can it be said that, by voluntarily assuming the responsibilities ordinarily imposed upon similar organizations under similar circumstances, townships in

this state become liable in a class of cases where liability is unknown in other states? Voluntary organization cannot change established principles, and cannot make what would otherwise be a *quasi* corporation a full municipal corporation. The difference between the two inheres in the purposes of their organization, and this difference is well expressed in *Commissioners* v. *Mighels*, *supra*, where it is said: "A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people. A county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization, and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy." In *Beach* v. *Leahy*, 11 Kan. 29, it is said: "They [*quasi* corporations] possess some corporate functions and attributes, but they are primarily political subdivisions, agencies in the administration of civil government, and their corporate functions are granted to enable them more readily to perform their public duties." The care of highways and bridges devolves primarily upon the state. It is a governmental function, but for negligence in its performance the state is not liable, because the government is not liable to the individual unless made so by statutory or constitutional enactment. Upon the organization of the county, it becomes the instrument or agency through which the state performs that duty, and in the performance of that duty it acts simply as an agent, and incurs no liability beyond that of its principal. When the township is organized, it, in turn, becomes the instrumentality of the state for the performance of that function, and in its performance it shares the immunity from liability which the state enjoys. *Barnett* v. *Contra Costa Co.*, 67 Cal. 77, 7 Pac. 177; *Sherbourne* v. *Yuba Co.*,

21 Cal. 113; *Downing* v. *Mason Co.*, (Ky.) 8 S. W. 264; *White* v. *Commissioners, supra; Wood* v. *Tipton Co.*, 32 Am. Rep. 561; *Hyde* v. *Town of Jamaica, supra.* The principles announced in these cases have the support of a decided preponderance of authority. It may readily be conceded that there are cases on the other side. We should hesitate to follow them were they more numerous and more pronounced.

In this new state the townships are but sparsely settled, by an agricultural community, drawn hither by the liberal public land laws of the United States. These citizens are in the midst of the struggle to establish homes for themselves and their children. One judgment against the town in a case of the character and seriousness disclosed in the complaint in this case would involve the town in financial distress from which it could not be extricated for years, and would greatly retard its further settlement and progress. That to deny relief is a hardship upon appellant may be true, but this is a fitting instance where the individual should suffer rather than the public, unless the legislature, with proper safeguards, otherwise provide. In closing we wish to call attention to the dual character of these *quasi* municipal corporations. Their purposes, powers, and duties are not exclusively those of a governmental instrumentality, and such as pertain to the entire state. They possess certain functions strictly corporate in their character. With the liability arising from the exercise of those functions we having nothing to do now. This case holds only that while the duty may rest upon the township to maintain and repair the public highways and the bridges therein, and while the township within certain limits, may be empowered to raise revenue for that purpose, yet in the performance of that duty the township is the instrument of the state, and is not liable for the acts or negligence of its officers. We cite, further, the just published case of *Bailey* v. *Lawrence Co.*, (S. D.) 59 N. W. 219, where many of the points urged upon us are discussed and like conclusions reached.

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

(59 N. W. Rep. 1092.)

DAVID DOWS, JR. & CO. *vs.* SAMUEL L. GLASPEL.

Opinion filed August 3rd, 1894.

Gambling in Wheat—Commissions and Advances—Recovery by Agents.

Evidence examined and *held* to support finding that plaintiffs knew that defendant's purpose was to gamble in wheat, and that they acted as his agents in furtherance of such purpose. In such a case the agent cannot recover his commissions or the advances made by him on behalf of his principal. Whether, in making purchases or sales, the agent in such a case enters into legal contracts is immaterial. If he does, he exceeds his power, and cannot recover his advances. If he does not, if the other party to the purchase or sale merely intends to gamble as well as the agent's principal, then the transaction is illegal on both sides, and the agent who brought it about cannot recover his advances or his commissions. The agent in such a case cannot recover if he brings about a sale which on one side is untainted with the gambling intent, for such a deal he had no power to make; and he cannot recover when he loses money in bringing about a deal which is illegal on both sides.

Money Advanced as Margins Cannot be Recovered Back.

Defendant sought to recover as a counterclaim moneys he had paid plaintiffs as margins in these gambling transactions. *Held*, that he could not recover at common law, and that, although the liability of plaintiffs to refund such moneys was governed by the statute of Minnesota, where all the transactions were held, yet that that statute was not broad enough to permit a recovery.

Evidence Competent for Single Purpose—Presumption.

When evidence which is competent to establish a fact is admitted, the court on appeal will not assume that the trial court considered the evidence in finding another fact which it was not legally competent to prove, when the latter fact is fully supported by other evidence.

Costs to Defendant.

Unless the plaintiff is entitled to costs, the defendant recovers costs as a matter of course in the District Court. Nor is his right affected by the fact that he set up a counterclaim which he failed to sustain.

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

Action by David Dows, Jr., and George B. Cooksey, copartners as David Dows, Jr., & Co., against Samuel L. Glaspel, to recover commissions and advances made by plaintiffs on account of the sale and purchase of wheat by them as defendant's agents, in which defendant set up a counterclaim. From a judgment for defendant in the main case, and against defendant on his counterclaim, and also disallowing costs to defendant, both parties appeal.

Modified as to costs, and affirmed.

Ball & Watson, and *White & Hewitt*, for appellant.

Speculation is a litigimate branch of the commerce of today and speculations in options and futures is legal excepting in the few states where it is prohibited by statute. *Smith* v. *Bonvier*, 70 Pa. St. 325; *Kirkpatrick* v. *Bonsall*, 72 Pa. St. 155; *State* v. *Miltenberger*, 13 Mo. App. 503; *Hatch* v. *Douglas*, 48 Conn. 116; *Clark* v. *Foss*, 7 Biss. 540. An option contract is one in which there is merely an option given as to the day within a given month, upon which delivery may be made or required. Dewey on Contracts for Future Delivery, 26; Ray on Contractual Limitations, 45. When the contract is bona fide in its inception and contemplates an actual delivery, the manner of its subsequent settlement whether by the payment of differences or otherwise cannot invalidate it. *Melchert* v. *W. U. Tel. Co.*, 11 Fed. Rep. 193; *Williams* v. *Tiedman*, 6 Mo. App. 269; *Sawyer* v. *Taggart*, 14 Bush. 727. Brokers on the Board of Trade acting as agents for customers have an implied authority to follow the rules and usages of the board. Dewey 147; Ray 47; *Horton* v. *Morgan*, 19 N. Y. 170, 75 Am. Dec. 311 and note; *Kingsbury* v. *Kirwin*, 77 N. Y. 612; *Rosenstock* v. *Tormey*, 3 Am. Rep. 125; *Bibb* v. *Allen*, 149 U. S. 481; 23 Am. and Eng. Enc. Law, 733, note 1.

The burden rests upon the defendant to show the alleged illegal character of the transaction. *Bigelow* v. *Benedict*, 70 U. S. 202; *Story* v. *Solomon*, 71 U. S. 420; *Irwin* v. *Williar*, 110 U. S. 499; *Ramsey* v. *Berry*, 65 Me. 570; *Whitesides* v. *Hunt*, 97 Ind 191. The defendant must show that the intention to gamble in prices was mutual. Dewey 50; *Edwards* v. *Hoffinghoff*, 38 Fed. Rep. 644; *Pixley* v. *Boynton*, 79 Ill. 351; *Murray* v. *Ocheltree*, 13 N. W. Rep. 411; *Connor* v. *Robertson*, 55 Am. Rep. 525; *Union Bank* v. *Carr*, 15 Fed. Rep. 438. That the defendant intended to resell before the delivery of the wheat to him is not evidence of intent to wager. *Sawyer* v. *Taggart*, 14 Bush. 727. *Gregory* v. *Wendell*, 39 Mich. 337. The plaintiffs are entitled to recover, even though the transactions were wagers since they were mere agents or

bankers of the defendant. They are not *in pari delicto*. *Conner* v. *Robertson*, 55 Am. Rep. 527; *Wilkinson* v. *Tousley*, 16 Minn. 299; *Lehman* v. *Strassberger*, 2 Woods 554; *Durant* v. *Barthe*, 98 Mass. 168; *Planters Bank* v. *Union Bank*, 16 Wall. 500; *Warren* v. *Hewitt*, 45 Ga. 501; *Clark* v. *Foss*, 7 Biss. 540. Where the courts hold wagering contracts invalid, they refuse to assist a party seeking to recover money already paid on such wager. *Kahn* v. *Walton*, 20 N. E. Rep. 210; *Higgins* v. *McCrea*, 116 U. S. 671; *White* v. *Barber*, 123 U. S. 392.

Edward W. Camp and *S. L. Glaspel*, for respondent.

To uphold a written contract for the sale and delivery of grain at a future day, for a price certain, it must affirmatively appear that it was made with an actual view to the delivery and receipt of the grain and not as a cover for a gambling transaction. *Barnard* v. *Backhaus*, 52 Wis. 593. Contracts made in pursuance of the customs of the Board of Trade are from the known character of the latter presumptively without bona fide intention. *Beveridge* v. *Hewitt*, 8 Bradw. 483. "Dealing in futures" has acquired the signification of a mere speculation upon chances. *Fortenburg* v. *State*, 1 S. W. Rep. 58; *Tantum* v. *Arnold*, 6 At. Rep. 316; *Mutual Life Ins. Co.* v. *Watson*, 30 Fed. Rep. 653; *Cobb* v. *Prell*, 15 Fed. Rep. 774; *Sprague* v. *Warren*, 41 N. W. Rep. 1113; *Melchert* v. *Am. U. Tel. Co.*, 11 Fed. Rep. 193; *Edwards* v. *Hoffinghoff*, 38 Fed. Rep. 639; *Whitesides* v. *Hunt*, 49 Am. Rep. 441; *Mohr* v. *Miesen*, 49 N. W. Rep. 862. If under the guise of a contract for the future delivery of grain, the real intent is merely to speculate in the rise or fall of prices and the goods are not to be delivered, but one party is to pay the other the difference between the contract price and the market price of the goods at the date fixed for executing the contracts. Then the whole transaction constitutes a wager and is null and void. *Irwin* v. *Williar*, 110 U. S. 499; *Embrey* v. *Jemison*, 131 U. S. 336. The fact that no wheat was offered or demanded, shows that neither party expected the delivery of any wheat, but that they expected to

settle the contract on the basis of differences. *Lyon* v. *Culbertson*, 83 Ill. 33, (25 Am. Rep. 353;) *Washer* v. *Bond*, 19 Pac. Rep. 323; *Myers* v. *Tobias*, 16 At. Rep. 641; *Sprague* v. *Warren*, 41 N. W. Rep. 1113; *Watte* v. *Wikersham*, 43 N. W. Rep. 259; *Crawford* v. *Spencer*, 4 S. W. Rep. 713. Even if the plaintiffs acted as agents and paid defendants losses, yet knowing as they did, that the losses were incurred at gaming, they could not recover. *Farvia* v. *Gabell*, 89 Pa. St. 89; *Exrs* v. *Thomas*, 97 Pa. St. 278. Under statutes similar to that of Minnesota (the place of these contracts) money lost on option deals is recoverable. *Lester* v. *Buel*, 30 N. E. Rep. 821; *Dunn* v. *Bell*, 4 S. W. Rep. 41; *Pearce* v. *Foot*, 113 Ill. 228; *Lyons* v. *Hodgen*, 13 S. W. Rep. 1076; *Perry* v. *Gross*, 41 N. W. Rep. 799; *Lucas* v. *Cavanaugh*, 21 N. E. Rep. 306; *Copley* v. *Doran*, 1 N. Y. Supp. 888; *Peck* v. *Doran*, 10 N. Y. Supp. 401; *Watts* v. *Lynch*, 5 At. Rep. 458; *Grew* v. *Exchange*, 4 S. W. Rep. 38; *Kennedy* v. *Stout*, 26 Ill. App. 133; *Elder* v. *Talcott*, 43 Ill. App. 439. The defendant was entitled to recover his costs. *Thayer* v. *Holland*, 63 How. Pr. 179; *Griffin* v. *Brown*, 35 How. Pr. 372.

CORLISS, J. The plaintiffs are seeking to recover judgment against defendant for their commissions and for advances made by them on account of the sale and purchase of wheat by them as agents for defendant. Thus far they have been unsuccessful. The case was tried before the court, and judgment was rendered in favor of the defendant. The findings of the court amply sustain the judgment. But it is here urged that the evidence does not justify certain of the findings. The defense relied on was that the transactions in which the plaintiffs claim to have paid out moneys for the defendant were mere wagers on the price of wheat, and that the plaintiffs knew that the sole purpose of defendant was to gamble in wheat options, and not to enter into bona fide wheat contracts in which wheat was to be delivered to or by him thereunder. The plaintiffs were commission merchants in the City of Duluth, Minn., and were members of the Duluth Board of Trade. The defendant was and is an attorney in full

practice, residing and carrying on his professional business at Jamestown, N. D. In September, 1885, the defendant commenced shipping wheat to plaintiffs, to be sold by them for him in Duluth. These shipments continued for a time, and finally on October 30, 1885, the defendant sent to the plaintiffs the following telegram: "Buy ten May, ninety-eight or better, account of myself, and same account of J. E. Shoenberg." It is undisputed that this telegram was an order for the plaintiffs, as agents of defendants, to buy for him on the Duluth Board of Trade 10,000 bushels of wheat to be delivered in May, 1886, at not exceeding 98 cents a bushel. Thereafter defendant continued to send similar orders to the plaintiffs until the following June, when the plaintiffs closed him out, he having failed to keep good his margins. From time to time the various purchases made by plaintiffs for defendant were closed out on his orders. They were invariably closed out by the plaintiffs selling, under his directions, for future delivery, the same amount of wheat he had purchased. The first transactions resulted in a small profit to defendant, but, after purchasing 50,000 bushels of wheat for May delivery, the price fell rapidly, and when this purchase was closed out the following June the loss resulting from the transaction over and above moneys received by plaintiffs from defendant for margins was over $7,000. Plaintiff's claim that they were compelled to pay out on behalf of defendant in these transactions all the moneys for which they sue except their commissions, and they also seek to recover such commissions in addition to their alleged advances. The trial court found that all the transactions stated in the complaint as purchases and sales of wheat (except the sales of actual wheat shipped to plaintiffs by defendant for sale) were wagering transactions, in which no wheat was to be delivered or received by the parties thereto, and that the defendant employed the plaintiffs to make purchases and sales of wheat for future delivery in the City of Duluth, Minn., with the mutual understanding and agreement that no wheat was to be delivered or received by either party, and that such transactions were to be

mere wagers upon the rise and fall of the market price at Duluth; that all such purchases and sales were made pursuant to such mutual understanding; that all of such transactions were to be settled at a future time by the payment of differences, viz. the difference between the contract or purchase price and the market price on the day of settlement, and that neither party to the transaction should be required to deliver or receive any wheat; that all of such transactions involved simply gains or losses dependent upon the future rise or fall of the market price, and that no wheat was demanded, tendered, delivered, or received in any of the transactions. In the first place, we hold that the rights of the parties to this action are to be governed by the laws of Minnesota. The agents resided there, and the purchases and sales were all made there, and the defendant employed the plaintiffs as his agents for the express purpose of having such sales and purchases made there. No proof as to the laws of Minnesota, so far as this question is concerned, was made. Nor is there any finding on this point. We must therefore, presume the common law prevails there with respect to the questions of law which this case presents. We recognize the legal right of every one to speculate in every commodity which he does not own, and for which, as a commodity, he has no use. He may enter into a contract to buy or sell anything of value for the sole purpose of speculating,—with no other object in view than that of making profit out of the transaction; but he must in good faith bind himself to deliver or receive the thing sold or purchased. It is true that the undisclosed purpose of one of the parties to a contract not to deliver or receive the article contracted for will not affect the other party, who, relying on a contract calling for delivery, intends in good faith that the contract shall be carried out in all of its particulars. But when neither party intends that the property shall be delivered, where they both intend that the difference between the purchase price and the market value at the time specified shall be paid to the one who wins, then the transaction is a mere wager, and is void at common law in this country. See

cases cited in note to *Crawford* v. *Spencer*, 1 Am. St. Rep. at p. 759, 4 S. W. 713, and 92 Mo. 498. We must, therefore, presume that such a contract would be void in Minnesota.

This action, however, is not upon the several contracts of purchase and sale. It is brought to recover the advances and commissions of the agents who negotiated them. But the rule which prevents recovery upon a mere wagering contract applies with equal force to the agent who brings the parties together with knowledge that their purpose is not to enter into a legitimate agreement, but to gamble over the ever shifting price of the commodity to which their dealings relate. In this case it is expressly found that the plaintiffs knew that the purpose of the defendant was to gamble, and that he employed them in furtherance of that purpose, and that all the transactions in which the plaintiffs acted as agents for defendant were mere wagers on the price of wheat. That the agent cannot, under such circumstances, recover his commissions, or the advances made by him on behalf of his principal, is well settled. Having knowingly participated in an illegal transaction, the law will leave him without remedy in case of loss. *Crawford* v. *Spencer*, 92 Mo. 498, 4 S. W. 713; *Irwin* v. *Williar*, 110 U. S. 499, 4 Sup. Ct. 160; *Phelps* v. *Holderness*, (Ark.) 19 S. W. 921; *Embrey* v. *Jemison*, 131 U. S. 336-345, 9 Sup. Ct. 776. The findings are broad enough to embrace the fact that the persons with whom plaintiffs dealt in making purchases and sales for defendant had no thought of making or calling for delivery of the wheat, and we feel clear that the evidence fully sustains such a finding. But we are not compelled to rest our decision on this branch of the case upon this finding and the sufficiency of the evidence to sustain it. The intention of the other party to these transactions is immaterial. It is sufficient if the defendant's purpose was to gamble, and the plaintiffs knew of it when they went upon the Board of Trade to make such purchases or sales for the defendant. Being employed by the defendant to secure for him upon the Board of Trade mere

wagers upon the price of wheat, they would have no authority to enter into legal contracts on his behalf; and, if they should do so, and sustain losses, they could not recover such losses from him, because their acts resulting in such losses would be unauthorized. Moreover, having been instructed to make mere wagers on behalf of defendant, the law will presume, as against the agents in a case in which the other party to the transaction is not interested, that they obeyed such instructions, and that, therefore, they did not enter into legal contracts with others, binding the parties to deliver and receive the wheat agreed to be bought. There is no direct evidence as to the intention of the other parties to the several purchases and sales. The transactions on both sides appear to have been precisely alike, and it is a fair inference that the transactions which defendant intended should be mere wagers, which the plaintiffs, with knowledge of such intention, entered into on behalf of defendant, and which were in the form in which gambling in all kinds of commodities is carried on, were in fact intended by all parties thereto—principals and agents on both sides—to be mere bets with reference to the future price of wheat. That the intention of the other party to the contract is immaterial when the agent who is seeking to recover commissions and advances knows of the purpose of his principal to gamble, and loses the money for which he seeks judgment in furthering that purpose, is a well established doctrine. *Phelps* v. *Holderness*, (Ark.) 19 S. W. 921; *McCormick* v. *Nichols*, 19 Ill. App. 334, 337; *Beveridge* v. *Hewitt*, 8 Ill. App. 467, 482, 483; *Miles* v. *Andrews*, 40 Ill. App. 155, 163, 164; *Coffman* v. *Young*, 20 Ill. App. 82. In *Embrey* v. *Jemison*, 131 U. S. 336, 9 Sup. Ct. 776, the defendent in an action brought upon notes given in settlement of a claim of his agents for losses growing out of the purchase and sale of cotton for defendant set up as a defense that neither he nor his agents intended that actual cotton should ever be delivered. There was no averment that the other party to the transaction entertained the same purpose in making the contracts out of which the losses grew. And yet the court held that the answer

stated a good defense. See pages 338, 349, 131 U. S., and page 776, 9 Sup. Ct.

We come now to the question of the evidence to support the findings that the plaintiffs knew that the purpose of the defendant was to gamble, and that the losses for which they sue were suffered by them in furthering such illegal purpose. At the outset, we conclude that plaintiffs are right in the contention that the burden is on the defendant to establish by competent evidence the illegality of these transactions, and the participation of the plaintiffs in the unlawful purpose of the defendant. We might also safely assume that the sales and purchases made by plaintiffs on behalf of defendant were in form legal contracts, calling for the delivery of wheat specified therein. It is significant, however, that, while the witnesses on behalf of plaintiffs testify to actual sales, they do not pretend to state the terms of the contracts, nor was any written contract of sale introduced in evidence. Without at least a written memorandum of these sales, they would not have been valid, and it is difficult to understand why these contracts were not reduced to writing if they were intended to embody the terms of a bona fide sale. It was the duty of the plaintiffs, as agents for defendant, to secure for him a contract he could enforce if they were making bona fide sales and purchases for him. The silence of the record in this respect is strong evidence that these alleged agreements were not in writing. Nay, there is positive evidence that they were not reduced to writing. One of the plaintiffs testified that formal contracts were not drawn up, but that there was always a full understanding as to the nature of the transactions. But, however perfect the likeness of a gambling transaction to the form and features of a legitimate sale, the legality of the dealings between the parties must rest ultimately upon their honest intention. Illegality is seldom guilty of the consummate folly of flaunting its defiance of law in the face of public sentiment—of furnishing itself the evidence of its violation of law. To escape the penalties of breaking the law, it will always put on the "suits and trappings" of honest

transactions. Mere wagering contracts invariably wear the garb of bona fide sales. This is common knowledge. Myriads of gambling operations are daily arranged by two interested brokers, who fatten on the folly of their dupes, in the decent and decorous habiliments of lawful business transactions. The *naivete* of a tribunal which in such cases should unquestioningly take the semblance for the substance would, indeed, be pitiable, if it did not excite derision and contempt. The courts have always sought to pierce the disguise, and ascertain the real intention of the parties. *Whitesides* v. *Hunt*, 97 Ind. 191; *Melchert* v. *Telegraph Co.*, 11 Fed. 193; *Edwards* v. *Hoeffinghoff*, 38 Fed. 639; *Embrey* v. *Jemison*, 131 U. S. 336, 344, 9 Sup. Ct. 776; *Irwin* v. *Williar*, 110 U. S. 499, 4 Sup. Ct. 160; *Mohr* v. *Miesen*, (Minn.) 49 N. W. 862. Said the court in *Melchert* v. *Telegraph Co.*, 11 Fed. 193: "In seeking to ascertain the intentions of parties to such transactions as the one under consideration, it is evident that it will not do to place any great stress upon the mere terms of the contract, or upon their own declarations, whether under oath or not. Parties under such contracts will always seek to give them the form and semblance of legality, and all our experience admonishes us to receive with extreme caution, if not absolute distrust, what parties charged with transactions apparently illegal say respecting the innocency of their own intentions." In *Edwards* v. *Hoeffinghoff*, 38 Fed. 639, Judge Sage says: "No matter what the form of the contract, no matter how many colorings of reality and genuine dealing are thrown about the transaction, if, piercing all these disguises, the court or jury see that all these forms are mere shams, and that there was in fact no actual dealing in the article itself, but that forms were adopted as a mere semblance to deceive and evade the law, it is the duty of the court and jury to tear away the disguise, and treat the transaction as it is." In *Embrey* v. *Jemison*, 131 U. S. 344, 9 Sup. Ct. 776, the court said of the transaction there before it: "If this be not a wagering contract under the guise of a contract of sale, it would be difficult to imagine one that would be of that character. The mere form

of the transaction is of little consequence. If it were, the statute against wagers could easily be evaded." What, then, were the intentions of defendant? Was his purpose merely to gamble? Did plaintiffs have knowledge of such purpose? Did they aid him in carrying it out? Were these losses incurred by them in so doing? The evidence fully sustains the finding of the court with respect to the intention of the defendant. He testified that his sole object was to make wagers on the price of wheat. The character of the transactions, and the evidence of all the parties, fully corroborate his statement.

The only remaining question is whether the plaintiffs were aware of defendant's purpose when they went upon the Board of Trade to make for him the several purchases and sales out of which these losses grew. If they did, it is an inevitable inference that they participated in his gambling project, and actually aided him therein. We are clear that the circumstances surrounding these transactions fully sustain the finding of such knowledge and participation. The order to purchase wheat came to plaintiffs in the form in which mere orders to gamble in the price of wheat are sent by speculators to brokers. It is a well known fact that a large percentage of such transactions are only wagering operations. No one knew this better than the plaintiffs when they received the defendant's different orders to buy and sell. At no time during all these transactions was there a suggestion from either plaintiffs or defendant that a bushel of this wheat was to be delivered to or by the defendant. He was never informed of the names of the different brokers of whom these purchases or to whom these sales were made. He never knew who were the principals back of such brokers with whom he had entered into contracts calling for the delivery, on plaintiffs' theory, of thousands of bushels of wheat. His indifference to this matter of delivery all through these transactions was certainly suggestive to plaintiffs, who were familiar with such indifference, and the reasons for it, though having witnessed it in a multitude of similar transactions. From the very beginning the defendant

pursued the course of closing out these purchases long before the day of delivery had arrived; in some cases ordering sold, within a few days after the purchase, all or a portion of the wheat purchased for May delivery. What did this indicate to the mind of the plaintiffs, if it did not tend to show them that defendant was merely gambling in options? The defendant was a lawyer, as plaintiffs well knew. Why was he buying thousands of bushels of wheat for future delivery, and then closing out the transaction in a short time? It is also singular that the defendant should take no pains to inquire as to the responsibility of the persons of whom the plaintiffs had purchased wheat for him for May delivery, if the transactions were ordinary business transactions, and not the usual wagering deals upon the Board of Trade. The purchaser in an honest business sale naturally wishes to know something of the pecuniary responsibility and of the character of the man who has agreed to deliver property to him at a certain time for a specified price. If the vendor will not perform his contract, and cannot be made to pay damages for breach of it, the contract is of no value to the purchaser. How could the plaintiffs expect that the defendant would regard a bona fide purchase by him closed out, and himself released from all further liability on the contract by ordering a new contract to be made with another person,—a contract of sale,—thus increasing, rather than extinguishing, his liability, if the two transactions were bona fide sales? The natural mode of wiping out an obligation is to reach the party who holds it, and agree with him as to the terms on which he will release the other party who desires to be discharged. Yet the plaintiffs knew that the defendant was willing to pursue a widely different course, and close out his purchase at a profit, by obligating himself to sell more wheat to another without securing release from the contract of purchase which he desired to wipe out. It is only on the theory that these transactions were understood by the defendant to be mere wagers on the price of wheat that they can be accounted for when we consider the object of the defendant in entering into them,—*i. e.* to close

out his pretended purchases at a profit. Where the purchase and the sale are legimate transactions, one cannot count in advance on a profit, although he has contracted to settle at a higher price than he has agreed to pay for the same commodity. The one who has agreed to pay him the higher price may refuse to perform the contract, and may be without financial responsibility. Indeed, the dealer may, in such case, find, when the time for delivery arrives, that he has actually lost, as the market price of the commodity may then be lower than the price he has agreed to pay for it, and the irresponsible purchaser in the other contract may refuse to carry out his agreement. Defendant's belief, which his communications and conduct made manifest to the plaintiffs, that both transactions, the purchase and the sale, were at an end, and that he had won or lost, as the case might be, must have furnished to the plaintiffs very cogent evidence that defendant did not regard these dealings as litigimate purchases and sales, but only in the light of wagers on the market price of wheat. Plaintiffs knew that defendant had no use for the wheat he ordered purchased, and they took no pains to ascertain whether he had sufficient financial ability to pay for the large purchases he made from time to time on the theory that he intended to receive and pay for the wheat. Defendant never furnished any money to make the different purchases with, nor was he ever called on by the plaintiffs to furnish them with money for that purpose. He merely sent them funds from time to time to keep good his margins as he bought and then sold. It is true that plaintiffs insist that the sales were genuine, and that they did not know of defendant's purpose to gamble. But courts are not bound by the testimony of interested parties, but may look to the surrounding circumstance, to ascertain the true character of the transactions. Some of the correspondence between the parties furnishes strong evidence that plaintiffs knew that defendant's sole purpose was to gamble. On February 5, 1886, defendant wrote to plaintiffs a letter, in which the following sentence appears: "I now see that you have my actual wheat account mixed with my option

account." In this letter he distinctly notifies plaintiffs that his option account is not an account involving the purchase and sale of "actual wheat." The two expressions are used to distinguish the two classes of transactions; one relates to actual wheat, the other not. He speaks of the account of the fictitious wheat transactions as the "option account." Fictitious wheat transactions they must be if they do not relate to actual wheat. On the 15th day of December, 1885, defendant wrote plaintiffs as follows: "When you can buy 20 May at 95 cents, take it. I have 5,000 wheat in granary. Do you handle wheat in Minneapolis? By the way, I want you to handle options for me at one-eighth." On the 4th day of December, 1885, plaintiffs wrote to defendant a letter, in which they said: "Our market opened at 98⅛ for May, developed strength througout the day, and closed at one dollar bid. We are very glad you had the pluck to hold on, and believe that wheat is a purchase on all good breaks. Still, if you get a fair profit, we would advise you to close it out, taking chances of getting it back at cheaper figures. We have had a very good advance, and any further bulge will doubtless be followed by some reaction." In this letter plaintiffs themselves advise this man, who, according to their theory, had bought actual wheat, to close it out, and buy it back cheaper. In other words, they plainly tell him that the delivery of the wheat is not what any one is thinking of. They advise him to close up the old bet as soon as he can secure a fair profit, and then make another bet when wheat has again fallen in price.

Our attention has been called to one of the rules of the Duluth Board of Trade, and to the testimony that it was in force when these transactions were had, and that they were entered into by plaintiffs with reference to such rule. It declares as follows: "In all cases of sale of produce, the party or parties selling shall deliver the property sold at the time specified, unless the purchaser shall consent to accept or pay the difference in cash, when so requested to do by the seller. In all cases, however, the buyer shall have the right to demand the property, if he so

elects." This rule confirms our views that these transactions were known by plaintiffs to be mere wagering deals. In this very rule the purchaser is given the option to accept or pay the difference in price when the seller so requests him to do. In other words, the rule provides that the parties may agree to do what every layman knows they can agree to do without any such rule. Why mention this right to agree to settle by paying differences when it is a right which exists independently of any rule? The reason is obvious, when the almost universal practice is considered. When brokers, by their rules, inform their speculating customers that no delivery is necessary if the parties agree to dispense with it, and this is followed by the almost uniform practice of settling by paying differences, we are constrained to believe that no delivery was intended from the very outset of any of these transactions, and that the brokers were well aware of it. With the obvious purpose of covering up the gambling character of these operations, they establish a rule that there shall be a delivery, unless both parties agree to dispense with it; knowing that both parties will always so agree. It is significant, too, that this rule applies only to actual sales. This still leaves the question open whether the parties intended an actual sale or were merely wagering on the price of the commodity ostensibly bought and sold. This rule does not apply at all if the deal is a mere wager. It does not declare that every transaction on the Board of Trade shall be a bona fide sale, but merely provides that, if it is a sale, the parties must deliver, unless they agree to settle by paying differences. Moreover, it does not appear when the consent may be given to settle in this way,—whether after the transaction is consummated, or at the time the deal is made. If at the time the deal is made, then this understanding of itself renders the operation a mere wager, for it is an understanding from the very beginning that there shall be no delivery. But the real purpose of the parties to gamble, when it is once found to exist, cannot successfully escape the condemnation of the law, whether the false appearance of an honest sale is put on by rules of

boards of trade or by the devices of executing legal contracts in form. It has been frequently held that circumstances similar to those which surround these transactions amply sustain a finding that the dealings between the parties were mere wagers, when the circumstances were no more convincing than in this case. *Mohr* v. *Miesen*, (Minn.) 49 N. W. 862; *Phelps* v. *Holderness*, (Ark.) 19 S. W. 921; *Cobb* v. *Prell*, 15 Fed. 774; *Crawford* v. *Spencer*, 92 Mo. 498, 4 S. W. 913; *Miles* v. *Andrews*, 40 Ill. App. 155; *Beveridge* v. *Hewitt*, 8 Ill. App. 482; *Colderwood* v. *McCrea*, 11 Ill. App. 546; *Watte* v. *Wickersham*, (Neb.) 43 N. W. 259; *Sprague* v. *Warren*, (Neb.) 41 N. W. 1113. We would expect the plaintiffs to give to these gambling transactions the appearance of honest sales, and to insist in their testimony that they were what they appeared to be. But, although the hands may seem to be the hands of Esau, the voice is unmistakably the voice of Jacob.

One of the errors assigned relates to the admission of the testimony of the defendant with reference to statements made to him by one Nichols, the agent of the plaintiffs, touching the character of the business he urged defendant to carry on with plaintiffs. In substance, the defendant testified that this agent informed him that these transactions which the agent induced him to enter into with plaintiffs would be mere wagers on the price of wheat; that in them no wheat would be delivered by either party to the different deals. Plaintiffs here contend that the reception of this evidence was error, because the agent, Nichols, had no authority to represent them, except in the matter of securing shipments of actual wheat, to be sold by plaintiffs for the shippers, as their agents in Duluth. There is no attempt in this case to enforce against plaintiffs any liability because of any contract made by this agent on their behalf; but it is claimed that the case shows that Nichols had no authority to act for them except in legitimate transactions, and that, therefore, any knowledge he may have acquired that the defendant intended to gamble would not affect them; and hence it is contended that it was prejudicial error to receive this evidence, as the court may have considered it as

evidence of knowledge on the part of plaintiffs of defendant's illegal purpose. But this evidence was admissable for the purpose of strengthing defendant's testimony that his sole purpose was to gamble; to show that he had ground for believing that he was only gambling, and that he so understood the subsequent transactions. Its value for this purpose would not depend upon the authority of the agent, but upon the mere fact that such agent had put into defendant's mind the thought of engaging in such gambling transactions. As it was admissable for this purpose, it was not error to receive it. We cannot assume that the court considered it as proving another fact which it had no legal tendency to prove. On the contrary, it is a fair presumption that the court, after having lawfully received the evidence to establish one fact, regarded it as incompetent to prove another fact, which could not legally be established in that way. Especially must this be the presumption when it appears, as is done in this case, that the latter fact is almost conclusively established by other evidence.

We come now to the second branch of the case. Defendant set forth in his answer as a counterclaim that he had paid to plaintiff's certain sums of money as margins in these gambling transactions, and asked that judgment for this money be rendered against the plaintiffs in his favor. It is undisputed that defendant did in fact pay to the plaintiffs as margins the sum of $4,259.68. The right to recover back this money, it is conceded by defendant's counsel, rests upon the Minnesota statute. It seems to be agreed between counsel for the plaintiffs and defendant that there is no common law liability to refund such money, and that the rights of the parties are governed by the laws of Minnesota, where the transactions were carried on, and not by the laws of this state. The statute of Minnesota relied on by defendant provides that: "Whoever by playing at cards, dice or other game, or by betting on the hands or sides of such as are gambling, loses to any person so playing or betting any sums of money or any goods whatever and pays or delivers the same or

any part thereof to the winner, the person so losing, and paying and delivering the same, may sue for and recover such money by a civil action before any court having competent jurisdiction." Gen. St. Ch. 99 § 13. Without attempting, in this opinion, an analysis of the statute, we are entirely free from doubt in our view that it does not relate to moneys lost in dealing in options. Under similar statutes the courts have uniformly held against the liability of the person receiving the margins to refund them. *Sondheim* v. *Gilbert*, 117 Ind. 71, 18 N. E. 687; *Shaw* v. *Clark*, 49 Mich. 384, 13 N. W. 786; *Bank* v. *Harrison*, 10 Fed. 243. The cases cited by defendant's counsel arose under very different statutes, and for that reason they are not in point. We therefore hold that the statute gives defendant no right to recover the moneys paid to plaintiffs for margins. That there is no liability independently of statute is not open to discussion. The law leaves both parties where it finds them. *Higgins* v. *McCrea*, 116 U. S. 671, 6 Sup. Ct. 557; *White* v. *Barber*, 123 U. S. 392, 8 Sup. Ct. 221; *Kahn* v. *Walton*, (Ohio Sup.) 20 N. E. 210.

The trial court erred, however, in refusing costs to defendant. Plaintiffs, having failed to establish their cause of action, were not entitled to costs; and in all cases in which the plaintiff is not entitled to costs the defendant recovers costs as a matter of course. His rights do not depend upon his sustaining a counterclaim which he may have interposed. It depends solely upon his preventing a recovery of costs by the plaintiff. Had defendant set up no counterclaim, there would have been no doubt about his right to costs. He is in no worse position because he did interpose a counterclaim, and failed to sustain it *Ury* v. *Wilde*, (Super. N. Y.) 3 N. Y Supp. 791.

On plaintiffs' appeal, the judgment, so far as it dismisses the action, is affirmed. On defendant's appeal, the judgment is modified by allowing to defendant his costs in the District Court.

As so modified, the judgment is in all respects affirmed. All concur.

(60 N. W. Rep. 60.)

DAELEY BROS. *vs.* MINNEAPOLIS & NORTHERN ELEVATOR CO.

Opinion filed August 18th, 1894.

Harmless Error.

Errors assigned upon immaterial matters will not be reviewed.

Erroneous Instructions—When Harmless.

An error in the charge of the court to the jury which in no manner injured appellant is no ground for reversal.

Refusal to Give Proper Instructions.

It is not error to refuse to give to the jury instructions requested that are correct in law, and applicable to the case, where the charge already given fairly and properly covers every point presented in the rejected instructions.

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

Action by John Daeley and Richard Daeley, copartners as Daeley Bros., against the Minneapolis and Northern Elevator Company, commenced in a Justice's Court, and taken on appeal by defendant to the District Court. From a judgment for plaintiff's, defendant appeals.

Affirmed.

John M. Cochrane, for appellant.

J. F. O'Brien, for respondents.

BARTHOLOMEW, C. J. This case originated in Justice's Court, and has been stubbornly contested by the defendant in all its stages to this court. It reaches here with more than 50 errors assigned. Much matter seems to have been litigated that had no possible bearing upon the case. Most of the errors assigned pertain to such matters, and will not be further noticed. The one decisive issue in the case was exceedingly simple. In March, 1892, respondents delivered to appellant, at one of its elevators, a certain quantity of wheat. This wheat was graded by appellant's agent as No. 2 Northern, and the usual wheat checks issued to respondents therefor. By the terms of this check, appellant agreed to deliver to respondents, on demand, the same quantity of wheat of

like grade. Some months later, respondents demanded the wheat. The whole controversy arose over the quality of one car load of wheat returned to the respondents. They claimed that it was one grade inferior, and was in fact No. 3 Northern. This was denied. Respondents, at the trial, sought to establish the grade of the wheat through a sample which one of the respondents testified he took from the top and about the center of the car after it was loaded. He also testified that the first 200 bushels were loaded in the east end of the car, and contained much more dirt than the balance of the car. The tendency of this testimony was to show that the sample thus taken was at least a fair sample of the entire car load. It was abundantly shown, and not disputed, that this sample was No. 3 Northern. For appellant, its agent testified that a sample taken from the top and center of a loaded car of wheat would not be a fair sample, as the wheat being heavier than the dirt would have a tendency to leave the dirt at the top. He also testified, as did another employe of the appellant, that, from inspection of the wheat at the time it was loaded, he judged it to be No. 2 Northern. This was all the testimony on the point, and it was enough to go to the jury; and, in answer to a special interrogatory, the jury found the grade of the wheat in that car was No. 3 Northern, and they returned a general verdict for the respondents for the difference in value between this car load of No. 3 Northern and the same quantity of No. 2 Northern. The court's instructions to the jury eliminated the nonessential matters from the case, and submitted only these points: *First.* What was the grade of the wheat delivered by respondents to appellant? *Second.* What was the grade of the wheat in this car in controversy? *Third.* If there was a difference in the grades, what was the difference in value?

It is urged that it is error to submit the first proposition to the jury. Technically that is correct. The wheat ticket issued by appellant to respondents called for No. 2 Northern, and that ticket was the contract between the parties, and there was no claim that it did not correctly state the grade; hence the court

should have told the jury that the respondents delivered No. 2 Northern. But, in answer to the special interrogatory, the jury so declared; hence no possible injury resulted to the appellant. Nor do we find merit in any of the assignments of error based upon the charge as given. Appellant's counsel presented carefully prepared instructions, enunciating correct legal principles and generally applicable to the case. These the court refused to give. A careful reading of the charge as given shows that the court had fairly and properly covered every material point presented by the instructions refused; hence, under a familiar rule, the court was warranted in refusing them. We think justice was done in this case, and there is no error that calls for a reversal.

The judgment is affirmed. All concur.

(60 N. W. Rep. 59.)

MINNIE RIEGI *vs.* H. W. PHELPS, *et al.*

Opinion filed July 23rd, 1894.

Attorney and Client—Fraudulent Concealment.

Defendants, having collected $369 for plaintiff on a note owned by her, telegraphed her local attorneys to ascertain whether she would take $100 and they $25, without disclosing how much had been collected, or that any collection had been made at all. Plaintiff and her local attorneys accepted the offer to pay the $125, in ignorance of the fact that the collection had been made, and the money was paid them by the defendants. Discovering the facts, this suit was brought to recover the balance, less a reasonable fee for collection. *Held*, that the action could be maintained; that defendants were guilty of a fraud in entrapping plaintiff into the acceptance of $100 by concealing from her the fact that they had already collected $369.

Good Faith Requires Full Disclosure of Facts.

An attorney or agent who has made a collection owes to his client or principal the duty of a full disclosure of all the facts, in settling with the client or principal. Any concealment of a material fact is fraudulent.

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

Action by Minnie Riegi against H. W. Phelps and J. D. Phelps to recover a balance collected by defendants, as attorneys, on a note placed in their hands for collection. From a judgment for plaintiff, defendants appeal.

Affirmed.

Phelps & Phelps, upon the brief, (*John M. Cochrane*, on oral argument,) for appellant.

A mere agent of an agent is not responsible as such to the principal of the latter. Section 3790, Comp. Laws. Where a creditor places a claim for collection in the hands of a law and collection agency, who send it to a local attorney, there is no relation of attorney and client between the creditor and the local attorney. *Hoover* v. *Greenbaum*, 61 N. Y. 305. A sub-agent is exclusively accountable to his immediate principal and can look for his compensation only to his immediate employer as well. 1 Am. and Eng. Enc. Law, 395; Story on Agency, § 387. *Montgomery*

Co. Bank v. *Albany City Bank*, 7 N. Y. 459. No fraud is pleaded in the complaint, there is no allegation that the plaintiff was misled, or that she relied on any act or omission of the defendants. The issues made by the pleadings must control in determining the case. *Prairie School Tp.* v. *Haseleu*, 55 N. W. Rep. 938, 3 N. D. 328.

Sauter & Fraine, for respondent.

The sub-agent, lawfully appointed, represents the principal in a like manner with the original agent, § 4005 Comp. Laws. Where a sub-agent is employed by an agent to receive money for the principal, the principal may treat the sub-agent as his agent and sue him for the money received. *Miller* v. *Farmers Bank*, 30 Md. 392; *Wicks* v. *Hatch*, 62 N. Y. 535. *Strong* v. *Stewart*, 9 Heisk. 137. An attorney employed by the agent for his principal is the principal's attorney and not the agents. *Porter* v. *Peckham*, 44 Cal. 204. The power of substitution is impliedly given to an agent, when the object of the agency is of such a character that it cannot be attained without a substitution; as where a draft payable at a distant place was left with the bank for collection. *Planters Bk.* v. *First Nat. Bk.* 75 N. Car. 534; *Bank* v. *McGilvray*, 64 Am. Dec. 92; *Fabens* v. *Bank*, 34 Am. Dec. 59; *Bank* v. *Trip*, 1 Peters U. S. 25. Or where the well known custom of trade is so understood by the parties. *Bodine* v. *Ins., Co.* 51 N. Y. 117; *Van Schoick* v. *Ins. Co.*, 68 N. Y. 434; *University* v. *Denny*, 47 Vt. 13; *Grady* v. *Ins. Co.*, 60 Mo. 116. An attorney who bargains with his client on a matter of advantage to himself, is bound to show that the transaction is fair and equitable, and that the client was fully informed of his rights and interests in the subject matter of the transaction, and the nature and effect of the transaction itself, and was so placed as to be able to deal with the attorney at arms length. *Kisling* v. *Shaw*, 91 Am. Dec. 644; *Roberts* v. *Armstrong*, 89 Am. Dec. 624; *Cotton* v. *Sharpstein*, 80 Am. Dec. 774; *Thomas* v. *Turner*, 12 S. E. Rep. 149. Weeks on Attorneys, § § 79 and 262. Where an attorney received a note for $250 for collection, and

after ascertaining that it would be paid in full, agreed with his client to pay $75 of any amount collected and retain the balance for a fee; in assumpsit for money had and received, the burden of proof is on the attorney to show that the contract was fair and equitable. *Burnham* v. *Hasleton*, 20 At. Rep. 80; *Michould* v. *Girod*, 4 How. 554. The strongest justification and argument found to sustain the action of defendants, is in Part 1, King Henry IV, Act 1, Scene 2.

> *Prince Henry*:—"I see a good amendment of life in thee, from praying to purse taking.
> *Fal.*—Why, Hal, 'tis my vocation, Hal;
> 'Tis no sin for a man to labor in his vocation."

CORLISS, J. This case presents the betrayal of a trust reposed in an attorney. The plaintiff was the owner of a note for $235, on which was due the principal and about 13 years' interest. It was executed by her brother. She lived in Rochester, Minn. After the execution of this note her brother removed to the territory of Dakota to live. In August, 1892, she placed the note in the hands of Bear & Granger, attorneys at Rochester, Minn., with instructions to them to collect it for her. At this time she knew that her brother was living in the State of North Dakota. This note was sent by Bear & Granger to the defendants, who were attorneys practicing law at Grafton and Minto, in this state, with directions for them to collect the amount due on it. Upon being notified by defendants that they had this note for collection, the maker of it (plaintiff's brother) came to the office of the defendants in Grafton, and in a short time paid them $369 in settlement, certain claims of the brother against his sister being deducted from the amount of the note in the adjustment of the matter. After this money had been paid, the note delivered, and the whole matter closed, so far as the brother was concerned, defendants (or rather defendant H. W. Phelps, on behalf of defendants) sent Bear & Granger the following telegram: "Will client take one hundred dollars net for Folske note, and you twenty-five? He claims forty paid and board account of eighty-five. Answer." Bear & Granger wired acceptance of this offer,

and defendant paid them the amount stated in the telegram, *i. e.* $125. Plaintiff, having discovered how much had been collected, brought this action to recover the balance, less a reasonable collection fee.

Why was this telegram sent by the defendants? Certainly not that the defendants might, by the answer to it, receive definate instructions as to the terms on which they should settle, for they had already settled. The only possible explanation of their object in sending it is that they desired to entrap the owner of the note into consenting to receive only a small part of her property, and thus fraudulently secure an enormous collection fee by concealing from the attorneys in Rochester, Minn., and the owner of the note, the true state of facts. It is insisted that the charge made by the defendants for the collection is reasonable, as the note was outlawed. If defendants thought so, why did they studiously suppress the truth? Why did they not disclose the amount paid, and remit the balance, claiming that they were entitled to retain $244 out of a collection of $369, or nearly 70 per cent. of it? They knew that such a claim was monstrous, and they covered up the truth, hoping to be able to retain this amount by a deceit which might never be discovered. It is difficult to write dispassionately in such a case as this. There is nothing in defendants' claim that they were not acting as attorneys for the plaintiff. They knew from the talk with her brother that she was the owner of the note. Their telegram to Bear & Granger discloses the fact that they knew that that firm did not own the note, but had sent it forward for a client for collection. They say in their telegram, "Will client take $100, and you twenty-five." It is said that the relation of attorney and client did not exist, because they did not know her name. This is a sample of the points which are here urged to secure a reversal of this righteous verdict, in the face of the undisputed facts which have been already set forth in this opinion. The telegram not only suppressed the true facts; it also contained an implied representation that the best the defendants could do was to obtain for plaintiff

and her attorneys in Rochester, Minn., $125, after securing a reasonable fee for themselves. It was this idea that the telegram conveyed to the minds of the plaintiff and her attorneys there, and it was the intention of the defendants that just such an impression should be derived by the client and her local attorneys from the message. On no other theory can the conduct of the defendants in sending the dispatch be accounted for, and it is obvious that any client who had confidence in an attorney making such a communication under such circumstances would assume that the attorney meant to retain only a reasonable fee for his services, and could obtain only the sum specified in addition to such reasonable fee. Whether Bear & Granger were authorized to employ the defendants is unimportant. With full knowledge of the fact of such employment, she ratified their acts in this respect. When the telegram was received from the defendants, Bear & Granger read it to her. This telegram disclosed the fact that other attorneys were acting for her in the matter, and Mr. Granger, one of her attorneys at Rochester, testified that before that time he had told plaintiff that he had sent the note to a firm of lawyers at Grafton, N. D., for collection. At no time did the object to the employment of defendants. On the contrary, she acquiesed in and fully ratified their employment by her attorneys, Bear & Granger. Whether the defendants were acting strictly as attorneys for plaintiff, or only as her collection agents, is entirely immaterial. As her agents they owed her the duty of absolute fealty to her interests in the matter. They were under obligations to disclose to her, or to those acting for her, who had employed them, all facts affecting her rights. They were bound to apprise her of the amount which had been collected before securing her assent to accept from them any sum in settlement of the note. To inveigle her into consenting to receive only 30 per cent. of the amount collected, by a suppression of the facts, was not only a betrayal of trust, but, under the circumstances, amounted to a positive fraud. We have cited no decisions, as the principles which govern the case are elementary. We refer,

however, to *Burnham* v. *Hesleton* (Me.) 20 At. 80, as being very much in point.

Many of the errors assigned are unworthy of notice, and, in view of the admitted facts, none of the alleged errors could possibly have been prejudicial, even assuming them to be errors in the case. The court did not err in withdrawing everything from the jury, except the single question as to the amount of reasonable compensation for making the collection. That amount was fixed by the verdict of the jury. This was all that defendants were entitled to retain out of the balance in their hands.

The judgment of the district court is therefore affirmed. All concur.

(60 N. W. Rep. 402.)

(We are requested by the defendant H. W. Phelps to state, and such appears to be the fact, that his brother J. D. Phelps, never had any connection with the transactions referred to in the opinion, and was in no manner interested therein; the business conducted by him (H. W. Phelps) at Grafton being his individual, and not the partnership, business.)

NOTE—An attorney can as against his client acquire no beneficial interest in or title to the subject matter of the litigation antagonistic to the title or interest of his client. *Yerkes* v. *Crum*, 2 N. D. 72. But he may obtain a lien upon moneys due his client, in the hands of the adverse party. *Clark* v. *Sullivan*, 3 N. D. 280, and this lien extends to and embraces any judgment rendered in an action to recover such moneys, also to appeal undertaking and the cause of action thereon. *Clark* v. *Sullivan*, 3 N. D. 280. An attorney cannot without the consent of his client be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment, but this privilege will not extend to communications made concerning a deed of conveyance drawn by an attorney when he acted as a mere scrivener. *O'Neill* v. *Murry*, 6 Dak. 107.

TERENCE MARTIN *vs.* EVAN S. TYLER, *et al.*

Opinion filed September 11th, 1894.

Drainage Statute—Subject Expressed in Title.

A statute was entitled "An act to provide for establishing, constructing and maintaining drains in this state." Laws 1893, Ch. 55. It provided, *inter alia*, for the appointment of a drain commission, and vested in it the powers of the act. It provided for levying special assessments to pay for the cost of constructing drains. It provided for the issuance of county bonds to meet such expenses, and for the creation of a sinking fund to pay such bonds. *Held* not vulnerable to the constitutional objection that the bill embraced more than one subject, or that the subject was not expressed in the title.

Drainage is not a Fiscal Affair of County.

Creating such drain commission, and vesting in it the powers of the act, did not violate § 172 of the constitution, which declares that the "fiscal affairs" of the county shall be transacted by a board of county commissioners.

Private Property for Public Use—Compensation.

Under § 14, Art. 1, of the constitution of North Dakota, which reads: "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation, other than municipal, until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived,"—*held:* That private property cannot be taken for public use for right-of-way without just compensation in money being first made to, or paid into court for, the owner, even though it is sought to be taken by a municipal corporation.

Warrant for Damages is not Constitutional Payment.

Further, payment by an order drawn by the drain commissioners upon the drainage fund, which order the statute declares "shall be deemed a sufficient security for the amount thereof," was not such payment as the constitution required.

Eminent Domain—Statute Void.

Further, that since the statute failed to provide compensation, as required by the constitution, the power of eminent domain could not be exercised under the statute; and, shorn of the provisions relating to the exercise of the right of eminent domain, the statute becomes so incomplete and ineffectual that we cannot presume that the legislature would have passed it as thus emasculated; hence the entire statute would fail.

Compensation How Paid.

Further, that a provision in the statute that the warrant for damages, in case the owner was unknown, should be deposited with the county auditor for his use, was a violation of the constitutional provision that required compensation to be paid into court.

Assessment By Jury Denied.

Further, that, when a municipal corporation sought to take plaintiff's property for public use, he was not entitled to have the compensation ascertained by a jury.

Loan of Credit of the County to Corporations.

The drainage statute provides that the cost of the drain shall be apportioned by the drain commissioners between the cities and townships and property benefited by the drain, and provides, further, that such cost, so apportioned, shall be entered upon the tax list, and collected in one year; but the county commissioners may issue bonds of the county, running not more than 20 years, in sufficient amount to cover costs of drains in such county, the proceeds of the bonds to go direct to the drain fund, to pay the costs of such drains. In that event the assessment must be divided into as many parts as the bonds have years to run, and one part only be collected in each year, the collections so made to constitute a sinking fund to reimburse the county for the principal and interest paid on such bonds. *Held*, that such transaction constitutes a loan of the credit of the county to the corporations and individuals primarily and ultimately liable, and, as such, is a violation of § 185 of the constitution, and the law is to that extent void.

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

Three actions by Terence Martin—one against Evan S. Tyler and others, as drainage commissioners of Cass County, N. D.; one against George Nichols, as treasurer of such county, and another; and the other against H. L. Stafford and others, county commissioners of such county—for injunctions. From a judgment in each case overruling a demurrer to the answer, plaintiff appeals.

Reversed.

Miller & Resser and *Newman, Spalding & Phelps*, for appellant.

The act Ch. 55, Laws 1893, is in conflict with § 61 of the constitution. *State* v. *Smith*, 35 Minn. 257; *Tingue* v. *Port Chester*, 101 N. Y. 294; *State* v. *Nomland*, 3 N. D. 427, 57 N. W. Rep. 85. It is also urged that the act conflicts with § § 170, 171, 172, 14, 185 and 176 of the state constitution.

Robert M. Pollock, (*Chas. A. Pollock*, of counsel,) for respondent.

The drainage act is not in conflict with § 61, constitution. The title is comprehensive. It provides for the establishing, constructing and maintaining drains etc., and the act creates the means and instrumentalities required for its own accomplishment. *State* v. *Woodmansee*, 1 N. D. 246; *State* v. *Haas*, 2 N. D. 202; *State* v. *Nomland*, 3 N. D. 427. Nor is the act in conflict with §§ 170, 171 and 172 of the constitution. The duties prescribed by the constitution as belonging to the board of county commissioners are not those which are required of the drain commissioners. The appointment of drain commissioners falls within the police power. *State* v. *Stewart*, 43 N. W. Rep. 947; *Dailey* v. *City of St. Paul*, 7 Minn. 311, (390;) *Bryant* v. *Robbins*, 35 N. W. Rep. 545. The act is not in conflict with § 14 constitution. This section does not require money to be paid. When property is taken by the state or by a municipal corporation by state authority it is not essential to the validity of the act for the exercise of the right of eminent domain that it should provide for making compensation before the actual appropriation. It is sufficient if provision is made by law by which the party can obtain compensation and that an impartial tribunal is provided for assessing it. Cooley Const. Law, 694; *Rogers* v. *Bradshaw*, 29 Johns 735; *Bloodgood* v. *The M. & H. R. Co.*, 18 Wend. 9; In Matter of Petition of U. S. etc., 95 N. Y. 237. If there is anything in the act from which the court can spell out an intention that just compensation shall be made and by whom it shall be made, and there is a mode given for ascertaining the amount, it must give a construction to the act that will sustain it. *Woodruff* v. *Town of Glendale*, 1 N. W. Rep. 581. None but owners can raise objection when property is taken by the state without just compensation. *Waterloo Woolen Co.* v. *Shanahan*, 128 N. Y. 345, 28 N. E. Rep. 358. It is the right of the public to the use that constitutes the public use. 22 Am. Dec. 690, note. Section 176 constitution relates to general taxes levied to defray the expenses of the government and does not prohibit the levy of assessments

for local improvements. *Hager* v. *Supervisors*, 47 Cal. 234; 1 Desty Taxation 5; *People* v. *Lynch*, 51 Cal. 20; *Dean* v. *Davis*, 51 Cal. 410; *Town of Macon* v. *Patty*, 34 Am. Rep. 453; *Williams* v. *Mayor*, 2 Mich. 260.

BARTHOLOMEW, C. J. Theses cases have been submitted together. They are brought by the same plaintiff against different defendants, but to accomplish one purpose, and that purpose is to relieve plaintiff from the payment of a certain assessment laid upon his land, under the drainage law hereafter mentioned. The first action is against the drain commissioners of Cass County, and asks that they be perpetually enjoined from constructing a certain drain in said county, which they had caused to be established and partially constructed, and had assessed a certain per cent. of the cost of said drain against the property of plaintiff, which said commissioners declared to be benefitted by the construction of such drain. The second action is against the treasurer of said county and the holder of a certain warrant issued by the drain commissioners in payment of damages sustained by the construction of said drain. An injunction is sought perpetually restraining the payment of such warrant. The third case is against the county commissioners of said county, and seeks to enjoin them from issuing bonds of said county to pay for the construction of the drain in question and other similar drains, which it was alleged they were about to do. The answers in the several cases alleged, in substance, strict compliance with the provisions of Ch. 55, Laws 1893. A general demurrer to the answers was overruled, and the plaintiff appeals.

The case turns exclusively upon the question of the constitutionality of said Ch. 55. The act is a general drainage law, and is largely copied from the Michigan drainage laws. From a financial standpoint, it is one of the most important statutes ever enacted in the state. Thousands of dollars have already been expended under the law, and the drains now in process of construction and in contemplation throughout the state will, if completed, cost many thousands more. It is of importance to

the taxpayers that the validity or invalidity of the law be definitely settled and at once. Many objections are urged against the law, and we deem it our duty to notice each of them. The statute is too long for reproduction here, but a synopsis of it, with quotations of portions, is absolutely necessary to an understanding of the rulings that we are required to make.

The act is entitled "An act to provide for the establishing, constructing and maintaining drains in this state." The first part of § 1 reads: "Water courses, ditches and drains for the drainage of swamps, marshes and other low lands may be established, constructed and maintained in the several counties and townships of this state whenever the same shall be conducive to the public health, convenience or welfare, under the provisions of the act." The balance of the section defines a drain. Section 2 provides for the appointment by the county commissioners of three drain commissioners in each county, fixing their term of office at two years, and providing for their removal and for filling vacancies. Section 3 provides for their oath and official bond. Section 4 relates to drains in more than one county, and need not be further noticed here. Section 5 provides for the application by five or more freeholders, residing within proper limits, to the drain commissioners, for the establishment of a drain, and for an inspection of the ground by the said commissioners, and, if they so order, a preliminary survey by a competent surveyor, and for maps, with plans, specifications, and estimates, to be filed by said surveyor with the county auditor. Section 6 make applicants liable for costs when drain not necessary, but, if commissioners determine drain to be necessary, they shall proceed to establish the same. Section 7 reads as follows: "If, within twenty days after such determination, all of the persons on whose lands the proposed drain is to be placed shall not have executed a release of right-of-way and all damages on account thereof, the board of county drain commissioners shall appoint a time and place of hearing upon the application, which shall not be less than ten nor more than twenty days thereafter, and shall immediately

make application to the District Court of the county to ascertain the necessity for such drain and for taking private property for the use and benefit of the public for the purpose thereof, and the just compensation to be made therefor. Such application shall be made in writing, and shall describe the drain and the route and dimensions thereof, according to the survey, and shall state the facts which constitute the public necessity therefor and shall also state the time and place of hearing upon the application for such drain. The court to whom such application is made shall at once appoint a time for hearing and considering the same, and shall issue a citation to all persons whose lands are traversed by such drain to appear at the time appointed and be heard with respect to such application, if they desire to do so, which citation shall be annexed to a copy of the commissioners' application to the court and served in like manner with other process of the said court." Section 8 provides for personal service of citation upon owner or occupant of lands traversed by the drain, and service by posting in exceptional cases. Section 9 provides for the hearing in court upon the application, and requires the jury to determine—*First*, "whether such ditch will be conducive to the public health, convenience or welfare;" *second*, "whether the route thereof is practicable;" *third*, "amount of damage allowed to any person or persons or corporations." The section then proceeds: "And the court shall enter the proper judgment thereon. The damages allowed shall be irrespective of the benefits which the particular parcel of land will receive by the construction of such ditch, but such land shall be assessed for such benefits. The costs of all such proceedings shall be paid out of the fund raised for the purpose of constructing such ditch if the construction of the same be ordered. If no ditch is established such costs shall be paid by the county. Any party aggrieved may appeal from the judgment of the District Court as in civil cases, and upon such appeal costs may be awarded in the discretion of the court." Section 10 reads: "An order drawn by the board of county drain commissioners on the treasurer of the proper county for the

amount of any damages awarded from the location and construction of the said drain and tendered to the person entitled to such damages shall be deemed a sufficient security for the amount thereof. If the owner of any lands upon which any damages may be awarded be unknown, and such lands be not occupied, an order for the amount therefor shall be drawn, payable to the owner of the description of land upon which such damages were awarded, describing such lands by their legal subdivision in such order, which order shall be delivered to the county auditor to be held by such auditor, to be delivered to the owner of such lands when called for, or otherwise lawfully demanded, and the same shall thereby be deemed lawfully tendered to the owner of the lands; *provided*, the amount chargeable against such lands on account of the cost of construction of the drain, if less than the damages, shall apply in payment of the damages, and if equal to or more than such damages, the same shall apply to the full amount thereof, and for the purpose of accuracy in keeping the account the board of county drain commissioners shall furnish to the county treasurer, or other officer having the collection of the drain tax, a memorandum of the amount of the damages, and such treasurer or other officer shall credit the amount thereof upon the tax when he receives the tax roll, or so much thereof as may be equal to the tax, and such memorandum shall be a voucher for so much money as paid by such treasurer, and shall be allowed him on settlement." Section 11 reads: "Upon the release of the right-of-way the board of county drain commissioners shall make their order establishing the drain, and they shall give the same a name by which it shall be recorded and indexed; they shall also assess the per cent. of the costs of construction and maintenance of such drain which any township, city or village shall be liable to pay by reason of the benefit of such drain to the public health, or as to the means of improving any public highway, and they shall assess the benefits to accrue to the roadbed of any railroad or turnpike by reason of the construction of such drain, and they shall assess proportionately

the benefits to accrue, either directly or indirectly, to any piece or parcel of land by reason of the construction of such drain, whether such lands be immediately drained by the said ditch, or whether they can be drained only after the construction of other and connecting ditches, but such assessment shall be subject to review by the commissioners upon the request of parties in interest, at or before the time of letting the contracts for the construction of such drain." Section 12 provides that commissioners shall make full returns, after drain is established, to county auditor; and the auditor shall make and preserve a record thereof. Section 13 provides for letting contracts for the construction of the drain. Section 14 provides for a hearing upon the rate of assessments and the letting of the contracts. Section 15 reads: "Upon the letting of such contracts the commissioners shall make a computation of the cost of such drain, which shall include all the expense of locating and establishing the same, including the drain commissioners' fees, cost of survey, and fees and expenses of the special commissioners, advertising and all other expenses, the amount of damages awarded by the special commissioners and the amount of contracts, and in case contracts shall not have been let for the construction of the whole of such drain, the board of county drain commissioners shall estimate the cost of the unlet portion, predicating their estimate so far as may be upon the cost of those portions that have been let. They shall add the whole in a gross sum, and shall add thereto ten per cent. to cover contingent expenses, delinquencies and any extra charges that may accrue, and the sum thus ascertained shall be the cost of construction of such drain." Section 16 reads: "The board of county drain commissioners shall apportion to each township, city or village benefitted by such drain from sanitary or other considerations, the amount chargeable against such municipality on account of the construction of such drain, according to the per cent. which by Section 12 [11] of this act, they are required to fix and determine, and they shall apportion the balance of the cost of

construction upon the lands to be benefited by such drain, and assess the amount to be paid on each description of land in proportion to the benefits it receives from such drain. They shall make a list showing such apportionment and assessment and shall serve a copy thereof upon the clerk of each township or upon the clerk of any city or village against which any sum is assessable or in which any lands are situated that are assessable under such apportionment, and the amount assessable upon any such township, city or village shall be levied as part of the township tax for the year, and the amount assessable upon any description of land shall be assessed and levied against such land by the assessing officer as drain taxes, naming the particular drain for the construction of which the same is assessed. Within two days after the service of such notice as aforesaid, the board of county drain commissioners shall appoint a time and place of such apportionment and assessment and shall give notice thereof by a notice which with such apportionment list, must be published once in each of two consecutive weeks in a newspaper of general circulation printed and published in said county, and on the day mentioned in such notice such commissioners shall meet and hear all complaints on such apportionment and assessment and correct and confirm the same, and the said list shall thereupon be filed in the office of the county auditor in which such lands, cities, towns and townships are located, and shall constitute the assessment roll of such drain. Said commissioners may adjourn from day to day and if a quorum be not present less than a quorum may adjourn each meeting." Section 17 reads: "In case of drains established by the board of county drain commissioners, the drain taxes, when collected, and all moneys received on account of state lands shall be returned to the county treasurer, and all moneys so collected or returned shall be credited to the drain fund to which they belong, and such county treasurer shall be the treasurer of such drain fund. Orders drawn by the drain commissioners in payment for the construction of any drain shall be payable from the proper drain fund and shall be receivable for

the taxes levied for the construction of such drain by the county treasurer or by the state treasurer, as the case may be." Upon that portion of the statute from Sections 18 to 37, inclusive, no point is raised. Section 38 reads: "The board of county commissioners of each county wherein such ditch or ditches are proposed to be located and established are hereby authorized to issue the bonds of said county, in such sums as may be necessary for the purpose of defraying the expenses incurred or to be incurred in locating, constructing and establishing the same, said word 'expenses' to be construed to mean and cover every item of cost of said ditch, from its inception to its completion, and the said counties to be reimbursed as hereinbefore provided. Said bonds shall bear interest at a rate not exceeding 7 per cent. and shall be payable not exceeding twenty years from the date thereof, and the said commissioners shall provide a sinking fund for the payment of said bonds at maturity and for the payment of the annual interest on the same. The bonds issued under the provisions of this act shall be signed by the chairman of the board of county commissioners of said county, and countersigned by the county auditor, who shall keep a record of the bonds issued under the provisions of this act. The said board shall have the power to negotiate said bonds as they shall deem best for the interest of said county; provided, that they shall not negotiate the same at less than par value. All such bonds shall contain a recital that the same are issued in accordance with the provisions and pursuant to the authority of this act. Whenever such bonds shall be issued the tax and assessment hereinbefore provided for shall not be collected all in one year, but shall be divided into as many parts as such bonds have years to run, and one of such parts shall be extended upon the tax roll by the county auditor against the proper parcel of land in each and every year and collected in such year, and such fund shall constitute the sinking fund provided by this section, and the board of county commissioners shall in each year, at the time of levying the taxes, levy a tax sufficient to pay the annual interest on said

bonds." Section 39 provides for the repeal of certain specified acts and all other acts inconsistent with the provisions of this act.

In passing upon the constitutionality of any statute, there are certain elementary principles of which courts must ever be mindful. These principles render that certain which otherwise might be uncertain; that simple which otherwise might be complex; that safe which otherwise might be dangerous. We must remember that legislative power is primarily plenary, and that constitutions are not grants of, but restrictions upon, that power. Hence he who would challenge a legislative enactment must be able to specify the particular constitutional provision that deprived the legislature of the power to pass the enactment. We must remember that it is the duty of courts to reconcile statutes with the constitution when that can be done without doing violence of either, and in all cases of doubt, the doubt must be resolved in favor of the constitutionality of the statute. Thus much deference the judicial department of government owes to the legislative. But we must remember, also, that the constitution is the shield which the state, in its sovereign capacity, has provided for the protection of private rights. This protection is necessary. Every period in civilized history, however remote or however recent, but emphasizes the fact that unrestrained legislation is inimical to individual rights. Having provided the shield, the state has created its courts, and charged them with the special duty of seeing that every legislative blow improperly aimed at the life, liberty, happiness, or property of the individual falls harmlessly upon that shield. The court that fails in this duty fails in the purposes of its creation, and should be barred from further participation in governmental affairs. With these general guides, let us examine this statute.

It is first urged against this statute that it violates Section 61 of the constitution of North Dakota, which reads: "No bill shall embrace more than one subject, which shall be expressed in its title, but a bill which violates this provision shall be invalidated thereby only as to so much thereof as shall not be so

expressed." It is claimed that this provision is violated (1) in the creation of a special drainage commission, and vesting in it the powers of the act; (2) in the levying of special assessments to pay the costs of constructing drains; (3) in providing for the issuing of bonds and a sinking fund to pay the same; and (4) in the repealing provisions of Section 39. This constitutional provision has been passed upon by this court in *State* v. *Woodmansee*, 1 N. D. 246, 46 N. W. 970; *State* v. *Haas*, 2 N. D., 202, 50 N. W. 254; *State* v. *Nomland*, 3 N. D., 57 N. W. 85. We do not wish at this time to add anything to what was said in those cases upon this point, but, applying the principles as there announced, it is clear to us that this objection cannot be sustained. The title to the act in question is very broad: "An act to provide for the establishing, constructing and maintaining drains in this state." It covers the entire subject. Whatever means and instrumentalities are necessary or usual and proper for effectuating the purposes of the act may be provided in the act. The objections go only to the means and instrumentalities. Upon the provision relating to the issuance of bonds, counsel cite us to the cases of *Mayor* v. *Ray*, 19 Wall. 468; *Claiborne Co.* v. *Brooks*, 111 U. S. 400, 4 Sup. Ct. 489; and *Merrill* v. *Monticello*, 138 U. S. 673, 11 Sup. Ct. 441. These cases hold that authority to a municipality to make improvements or incur indebtedness does not carry with it, by implication, the power to issue negotiable paper. This proposition may be granted. The question here is different. It is not what power passes by implication, but what power may be expressly granted under a title authorizing internal improvements. We think authority to pay for such improvements in some manner other than the ordinary taxation, particularly when, as in this case, the limit of ordinary taxation might be totally inadequate to meet the expense, is entirely germane to the title, and the issuance of bonds is perhaps the most common means known to the law for meeting such expenses. It is claimed that the repeals contained in the thirty-ninth section of the act violate

this constitutional provision, under the rulings in *State* v. *Smith*, 35 Minn. 257, 28 N. W. 241, and *Tingue* v. *Village of Port Chester*, 101 N. Y. 294, 4 N. E. 625. The cases are not applicable. In the Minnesota case the act was entitled "An act to amend Chapter 1 of the General Laws of 1878, to provide for the assessment and collection of taxes, being Chapter 11, General Statutes of 1878." This title was restrictive, and, by its terms, confined to an amendment of Chapter 1 of the General Laws of 1878; yet the legislature, under that title, proceeded to repeal another statute which the court held might coexist with the amendment. The principle of the case from New York is very similar. But here we have a new enactment,—a statute complete in itself, and requiring in its operation no aid from other provisions. Being the latest expression of the legislative will, it might, by implication, repeal all inconsistent statutes. But repeals by implication are not favored in law; hence it was highly proper that inconsistent statutes be repealed in express terms. It was the proper means of placing the new enactment in successful operation.

The second objection urged against the statute is that it violates Section 172 of the constitution, which declares that the fiscal affairs of the country shall be transacted by a board of county commissioners. If we carefully consider Sections 170, 171, and 172 of our state constitution, we are forced to the conclusion that the words "fiscal concerns," "fiscal affairs," and "affairs," and "government" are used interchangeably. Section 170 authorizes the legislature to provide by general law for township organizations under which any county may organize; and, when such organization is adopted in any county, "so much of this constitution as provides for the management of the 'fiscal concerns' of said county by the board of county commissioners may be dispensed with by a majority vote of the people voting at any general election, and the 'affairs' of said county may be transacted by the chairman of the several township boards of said county." But it cannot be claimed for a moment that the duties of the township chairman, when in charge of the "affairs" of the county,

would differ in any manner from the duties of the commissioners when in charge of the "fiscal concerns" of the county. Section 171 reads: "In any county that shall have adopted a system of government by the chairmen of the several township boards, the question of continuing the same may be submitted to the electors of such county at a general election in such a manner as may be provided by law, and if a majority of all the votes cast upon such question shall be against said system of government, then such system shall cease in said county and the affairs of said county then be transacted by a board of county commissioners as is now provided by the laws of the Territory of Dakota." Here the conduct of the county business by the township chairmen is called a "system of government," and it is provided in what manner this system shall cease; "and the affairs of the county shall then be transacted by a board of county commissioners as is now provided by the laws of the Territory of Dakota." But the board of county commissioners provided for by the territorial laws was identical with the board provided for by the next section of the constitution, and the duties of that board were specifically fixed by the statute Section 592, Compiled Laws. This statute is continued in force by Section 2 of schedule to constitution. These duties are such as are common to all the counties in the state; such as they ordinarily and usually perform as a part of their perminent functions. Section 172 of the constitution then provides that, until the change is made to the township system, the "fiscal affairs" of the county shall be transacted by a board of county commissioners, consisting of not less than three or more than five members. We fully agree with the learned counsel for appellant that the words "fiscal affairs," as here used are not limited to matters pertaining solely to public revenue, as they doubtless are in some connections. They mean rather the business transactions of the county,—the performance of such duties as the law has defined and placed upon county commissioners, or such as uniformly pertain to that office. In *Bryant* v. *Robbins*, 70 Wis. 258, 35 N. W. 545, Chief Justice Cole for the full

court, said: "It may admit of doubt, as argued by the counsel of the appellants, whether the power to construct drains, etc., given to town and county officers under the general law, is, strictly speaking, a part of the 'system of government' belonging to those politicial corporations, within the meaning of the constitution. It is rather a special authority, conferred for a special purpose, calculated to promote the public health and welfare. The powers and duties of county and town officers are those which they ordinarily and usually exercise as a part of the regular and permanent administration of the town and county governments. It is a significant fact in this discussion that no drainage law was enacted for several years after the adoption of the constitution, nor was any such power as is now conferred given to town and county officers to execute such work. There is therefore strong reason for saying that the power to construct drains is in no proper sense a part of the usual powers belonging to town and county goverments, but is a special authority, given for a particular purpose, and which may be conferred upon any persons or body upon which the legislature may see fit to confer it." Surely, this language is applicable to this case. It will not be contended for a moment that, under their general powers, the county commissioners could engage in the work of constructing drains; that they could for that purpose exercise the power of eminent domain,—assess benefits and institute proceedings to ascertain damages. This was a special purpose, and its accomplishment required special legislative authority, which might be placed where the legislature saw proper. See, also, *Sheboygan Co.* v. *Parker*, 3 Wall. 93.

Section 14, Art. 1, of our constitution reads as follows: "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation, other than municipal, until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any

improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived." It is very forcibly pressed upon us by learned counsel that the drainage act violates this provision, in the following particulars: (*a*) Because Section 10 of the act provides that damages may be paid by warrants drawn by the drain commissioners upon the drainage fund, while there might be no money in that fund until the drain was established, the benefits assessed, the tax levied and collected; hence the property would be taken without just compensation being first made, and without payment in money. (*b*) Said Section 10 also provides that such warrants may be delivered to the county auditor for unknown owners, while the constitution requires the compensation to be made to or paid into court for the owner. (*c*) Because the compensation is not ascertained by a jury. Under Section 9, the jury determines the "amount of damages allowed to any person," but the damages allowed shall be "irrespective of benefits." The benefits are assessed by drain commissioners. The "just compensation" is the amount of damage, if any, remaining after benefits have been deducted. This balance the jury is not permitted to find. Section 14, of the constitution of North Dakota was copied literally from Section 14, Art. 1, of the constitution of California adopted in 1879. The California constitution of 1849 simply reads: "Nor shall private property be taken for public use without just compensation." Section 8, Art. 1. Under the old constitution, it was held that taking private property for public use without making compensation at the time, or, in case of a municipal corporation, providing a fund certain from which payment should be made upon the termination of condemnation proceedings, was a violation of the constitutional provision (*McCann* v. *Sierra Co.*, 7 Cal. 121; *Colton* v. *Rossi*, 9 Cal. 595; *Johnson* v. *Alameda Co.*, 14 Cal. 106); and that property was "taken," within the meaning of the provision, when it passed from the possession and control of the owner, and not when the title ultimately passed to the corporation (*Davis* v. *Railroad Co.*, 47 Cal. 517, overruling *Fox* v. *Railroad Co.*, 31 Cal.

538; and *Sanborn* v. *Belden*, 51 Cal. 266). In this latter case it is purposely left undecided whether or not precedent payment or tender of payment must not be made even when the property is taken by a municipal corporation. These decisions were all rendered prior to the adoption of the constitution of 1879, and and enable us the better to understand what was sought to be accomplished by the new provisions upon that subject introduced into that instrument. Section 14, of our constitution divides naturally into two parts. The first reads: "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner." As originally reported by the judiciary committee of the California constitutional convention of 1879, the section contained nothing more. See Constitutional Debates, 346. At that time the provision as thus introduced existed substantially in the constitutions of a large number of the states. See note on pages 659, 697, Cooley, Const. Lim. (5th Ed). The term "just compensation" had already been defined in California to be that compensation which was based upon damages sustained and benefits received. *Railroad Co.* v. *Caldwell*, 31 Cal. 368; *Railroad Co* v. *Armstrong*, 46 Cal. 85; and to the same purport are *Nichols* v. *City of Bridgeport*, 23 Conn. 189; *Trinity College* v. *City of Hartford*, 32 Conn. 452; *State* v. *Graves*, 19 Md. 351; *Page* v. *Railway Co.*, 70 Ill. 324; *Harlow* v. *Railroad Co.*, 41 Mich. 336, 2 N. W. 48. These cases make it reasonably certain that the words "just compensation," as used in the California constitution, and later in our own constitution, mean the excess of damages sustained over benefits received. For cases that reject this defination of "just compensation," see *Carpenter* v. *Jennings*, 77 Ill. 250; *Isom* v. *Railroad Co.*, 36 Miss. 300; *Penrice* v. *Wallis*, 37 Miss. 172; *Robbins* v. *Railroad Co.*, 6 Wis. 636.

Under constitutional provisions declaring that private property shall not be taken for public use without just compensation, and silent as to the time of payment, it has generally, if not universally, been held, when property was thus taken by a private corporation, that payment must precede the taking; but, where

the property was taken directly by the state or a municipality of the state, it has generally been held a sufficient compliance with the provision if the compensation was definitely ascertained, and made a charge upon a municipal fund for which the credit of the municipality was pledged. *Rogers* v. *Bradshaw*, 20 Johns. 744; *Bloodgood* v. *Railroad Co.*, 18 Wend. 9; *Chapman* v. *Gates*, 54 N. Y. 132; *Brock* v. *Hishen*, 40 Wis. 674; *Long* v. *Fuller*, 68 Pa. St. 170; *Orr* v. *Quimby*, 54 N. H. 590. The same ruling has been made in Minnesota and Michigan, where the constitution requires the compensation to be first paid or secured. See *State* v. *Messenger*, 27 Minn. 119, 6 N. W. 457; *State* v. *Bruggerman*, 31 Minn. 493, 18 N. W. 454; *People* v. *Michigan S. R. Co.*, 3 Mich. 496. But we are cited to no case (and, if such a case existed, we are sure the tireless industry of counsel would have found it) arising in those states having the constitutional provision as thus reported to the constitutional convention of California, and as found in the first part of Section 14 of the constitution of this state, where it has been held that the state or any municipality acting for the state could take private property for public use unless just compensation therefore accompanied or preceded the taking. The point does not seem to have arisen. Indeed, the language is so plain and express that judicial construction would be superfluous. It has sometimes been asserted broadly that private property could not be so taken, as in the Mississippi cases *supra*. In New Jersey, where practically the same provision is found, but limited to individuals or private corporations, the chancellor, in discussing the meaning of the word "first," in *Redman* v. *Railroad Co.*, 33 N. J. Eq. 165, said: "Its meaning, to my mind, is perfectly obvious; indeed, it is its own expositor. When this is the case, reasoning and illustration have no office. The provision under consideration plainly ordains that compensation shall precede appropriation; and, if the legislature in this enactment have not observed this direction, they have transcended their power." The fact that the provision is, in this state, unlimited in its application, cannot change the clear meaning of the words used. It becomes

clear, then, that, under the provision as originally reported to the California constitutional convention, the owner of private property, when the same was taken for public use, could in no case damand more than "just compensation,"—*i. e.* such compensation as represented the excess of damages sustained over benefits received; but in all cases such just compensation should be paid to or paid into court for, the owner, before the property could be taken.

We may now proceed to analize the amendment which was offered and adopted, and which constitutes the balance of Section 14 of the constitution of this state, and reads: "And no right-of-way shall be appropriated to the use of any corporation, other than municipal, until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived." We notice that this provision relates to the appropriation of right-of-way. If private property be taken for any other public use, it falls within the first provision in this section. This right-of-way must be appropriated to the use of a corporation "other than municipal." If a municipal corporation appropriate a right-of-way, it still falls within the first provision. For this right-of-way, thus appropriated by a corporation other than municipal, full compensation must be made in money; that is, a compensation "irrespective of any benefits." Strictly speaking, full compensation is required in every case; but, except in cases of the appropriation of a right-of-way by a corporation other than municipal, this full compensation may be paid in benefits received to the extent of such benefits, leaving the balance only, or the just compensation, to be otherwise paid. From the fact that the constitution directs that, for right-of-way appropriated to the use of a private corporation, full compensation shall be paid in money, learned counsel argue that, for right-of-way appropriated to the use of a municipal corporation, just compensation need not be paid in money, but may be

paid in warrants; and it is claimed that this is a recognition of the fact that municipalities habitually pay by warrant. To this we cannot assent. The word "money" is used to exclude benefits. Just compensation, when ascertained, must always be paid in money. Money is the measure of compensation. Compensation represents the money value of property taken or damaged. Just compensation can be made in no other medium. Dill. Mun. Corp. (4th Ed.) § 612; Cooley, Const. Lim. 963; *Butler* v. *Commissioners*, 39 N. J. Law, 665; *Com.* v. *Peters*, 2 Mass. 125; *Railroad Co.* v. *Halstead*, 7 W. Va. 301; *Vanhorne's Lessees* v. *Dorrance*, 2 Dall. (Pa.) 304; Mills. Em. Dom. § 135. Further, the statute does not treat the warrant as payment. It says the order "shall be deemed a sufficient security for the amount thereof." Security negatives payment. It is that which is given to insure payment at some future time. The manner in which this provision found its way into our statutes is entirely clear. It was the result of a literal copy of the Michigan drainage act. But in Michigan the constitution requires the compensation to be paid or secured. Our constitution requires payment. Security is wholly inadmissible. It is clear to us that there is no such provision for compensation contained in said Chapter 55, as our constitution imperatively requires; hence the act will not warrant the exercise of the power of eminent domain. *Thacher* v. *Dartmouth Bridge*, 18 Pick. 501; *Boston & L. R. Co.* v. *Salem & L. R. Co.*, 2 Gray, 1-37; *Petition of Mount Washington Road*, 35 N. H. 134; *Eastman* v. *Manufacturing Co.*, 44 N. H. 143-160; *Weaver* v. *Boom Co.*, 30 Minn. 477, 16 N. W. 269; *Watkins* v. *Walker Co.*, 18 Tex. 586; *Foster* v. *Bank*, 57 Vt. 128.

We here meet another question that is not without difficulty in this case. It is this: Granting that the power of eminent domain cannot be exercised under this statute, and that the provisions upon that subject are unconstitutional and void, must the whole statute for that reason fail? If there were no attempt in this statute to provide for compensation, then the law would conclude that it was not the legislative intent to exercise the power of eminent domain, but that the right-of-way was to be acquired by

private contract. Mills, Em. Dom. § 128, and cases cited. But we cannot so treat this statute. There was a clearly expressed intent to provide for compensation, but therein the law was unconstitutional; and whether or not the law can stand with such portions eliminated depends, nakedly stated, upon whether or not there remains a complete enactment capable of enforcement, and one that it may reasonable be presumed the legislature would have passed shorn of its unconstitutional features. It is our duty to sustain statutes in their entirety when possible, and to that end we must indulge all reasonable presumptions in favor of their constitutionality. But, when a statute has been once emasculated, these presumptions no longer obtain in support of the remainder. It should then be manifestly clear that the remaining portion can stand by itself, and that the legislature did not intend that such portion should be controlled and modified in its construction and effect by the rejected part. See note to page 213, Cooley, Const. Lim. (5th Ed.). In many cases where provisions for compensation in statutes authorizing the exercise of the power of eminent domain have been held unconstitutional, the entire statute has been treated as void. *Eastman* v. *Manufacturing Co.*, *supra*; *People* v. *Leow*, 39 Hun. 490; *Bloodgood* v. *Railroad Co.*, 18 Wend. 9; *Thacher* v. *Dartmouth Bridge*, 18 Pick. 501; *Watkins* v. *Walker Co.*, 18 Tex. 585; *Weaver* v. *Boom Co.*, 30 Minn. 477, 16 N. W. 269. While this holding is not entirely uniform (See Lewis, Em. Dom. § 452), and while, perhaps, a uniform rule would not be desirable in all cases where the exercise of this power of eminent domain fails, yet we are convinced that in this case the entire statute should be held void. When we eliminate from the statute the power of eminent domain, we take out, bodily, Sections 7, 8 and 9, and various clauses in other sections. We have left only a weak, inefficient statute, incapable of enforcement. Enforcement carries with it the idea of execution without consent. That which is done by consent, and can only be done by consent, is not enforced. With the right to exercise the power of eminent domain gone, it might be possible to construct a drain under the

statute if every land owner through or along whose land it was sought to establish the drain would voluntarily release the right-of-way and damages; but it is inconceivable that the legislature would have placed upon the statute book an important and far-reaching statute dependent for its effectiveness upon the whim of any one man whose land might be needed for right-of-way. We cannot in support of a fragmentary statute, indulge a presumption so unreasonable, and must therefore hold the entire statute nugatory. The provision which requires the warrant for damages, where the owner is unknown, to be deposited with the county auditor, is a clear violation of the provision of the constitution which requires the compensation to be made to or paid into court for the owner. It need only be stated to be understood, and renders the statute, to that extent at least, void. *National Docks, etc., Ry. Co.* v. *United New Jersey Railroad & Canal Co.* (N. J. Ch.) 28 Atl. 673.

We do not think that the manner in which compensation is ascertained under the statute is any violation of Section 14 of the constitution. It is true that the ascertainment of just compensation is a judicial proceeding, but a party has no inherent right to have such compensation fixed by jury. This has been repeatedly held. *Kohl* v. *U. S.*, 91 U. S. 375; *U. S.* v. *Jones*, 109 U. S. 513, 3 Sup. Ct. 346; *Manufacturing Co.* v. *Garland*, 25 Fed. 521; *Ames* v. *Railroad Co.*, 21 Minn. 241; *People* v. *Smith*, 21 N. Y. 595. The original provision in said Section 14 of the constitution, as reported to the California convention, contained no reference to a jury. That was added in an amendment which created an exceptional class of cases, and, in the connection in which it was placed, we think it applied only to such exceptional cases. The entire section speaks of two different characters of compensation. First it speaks of "just compensation" as applied generally. It then creates the exceptional class, and for that class it demands "full compensation," and adds "which compensation shall be ascertained by a jury." Ordinarily, these words would not include both characters of compensation, but would include that

last under discussion, to-wit, full compensation, and such we think was the intention. If we are correct in this, it follows that under our constitution, whenever private property is appropriated for right-of-way by a corporation other than municipal, the compensation must be ascertained by a jury, while in all other cases a jury is unnecessary. But it would not follow that a provision for a jury in such other cases would be unconstitutional. The legislature may not curtail the rights of the citizen below the limit fixed by the constitution, but they may properly expand such rights. We see no violation of any constitutional provision, and no possibility of injustice to the property owner, in having the total damages, in cases of this character, ascertained by a jury, and having the benefits assessed and the balance struck by the other tribunal, to-wit, the drain commissioners. This principle was involved and sustained in *City of Cleveland* v. *Wick*, 18 Ohio St. 303.

We ought to remark in this connection that the right of plaintiff to raise the questions we have been discussing under Section 14 of the constitution has not been denied. The questions have been fully discussed on their merits by both parties, and plaintiff's right to raise the same has thus been conceded, and, being conceded, a ruling upon the questions became necessary to a decision of the case.

Section 38 of the statute does not appear in any drainage law that we have examined. We believe it to be new in this connection. It provides for the issuance and sale of county bonds, running for a series of years, and drawing interest at a rate not to exceed 7 per cent. The proceeds of these bonds are to be passed to the drainage fund, and used to meet the expenses of establishing and constructing drains. Provision is made by which the county is to be repaid, certainly to the amount of the principal, and, as we construe it, the interest also, by the municipalities and persons upon whom special assessments are laid under the law. It is urged upon us that this violates Section 185 of our state constitution, which prohibits any county from loaning or giving its

credit or making donations to or in aid of any individual asssociation or corporation except for necessary support of the poor. An analysis of other provisions of this statute shows that the special assessments upon the corporations and persons benefited, and which assessments must equal the entire estimated cost of the drain, with 10 per cent. added, to cover contingencies, must be levied and collected in one year. This might often prove a hardship, and, to avoid it, Section 38 was enacted. When bonds are issued by the county under that section, then the special assessment, which otherwise must be paid in one year, must be divided into as many parts as the bonds have years to run, and only one part is to be extended upon the tax roll and collected in any one year; and the sums thus collected constitute the sinking fund for the payment of the bonds at maturity, and of the annual interest on the same. By this means the payment, which must otherwise be made in one year, may be extended over 20 years. This indulgence to the corporations and persons benefited and specially assessed is obtained by means of the credit of the county. Its bonds are issued under the drainage act, and must so state on their face. The proceeds of the bonds go, not into the control of the county commissioners, but at once into the drainage fund, controlled exclusively by the drain commissioners. The county has its compensation in the provisions which enable it to collect the special assessments out of which to reimburse itself. But, however much or however little may be realized from the special assessments, the county, as such, must pay the bonds at maturity, as well as the annual interest thereon. No refinement of construction or technical rule of law can make this transaction less than a loan of the credit of the county to the parties primarily liable for the cost of the drain. Judge Cooley, speaking for the court in *People* v. *State Treasurer*, 23 Mich. 499, said; "The legislature can neither compel the taxation of municipalities in aid of railroads companies, nor empower them, in order to give such aid, to tax themselves, or to contract indebtedness which must be paid by taxation,"—citing *People* v. *Township Board of*

Salem, 20 Mich. 452. It is true that the Supreme Court of the United States in *Township of Pine Grove* v. *Talcott*, 19 Wall. 666, —a case which went up from the western district of Michigan,— refused to follow the Michigan court; but it was on the ground that the Michigan prohibition against loaning credit extended to the state only, and did not in terms include counties and townships. See, also, upon this point, *Webb* v. *Lafayette Co.*, 67 Mo. 353; *Thomas* v. *City of Port Huron*, 27 Mich. 320.

But it is urged that draining swamp and overflowed lands, when it will conduce to the health and welfare of the community and benefit the highways, is a public service, for which it was within the power of the legislature to make the county originally liable, and that power must include the power to make the county temporarily liable. The conclusion is not warranted under our constitution. It was within the power of the legislature to designate the localities that would be benefited by the drains, and that should bear the burdens thereof. *Stone* v. *Charlestown*, 114 Mass. 214; *Com.* v. *Plaisted*, 148 Mass. 375, 19 N. E. 224; *King* v. *City of Portland*, 2 Or. 146; *Williams* v. *Commack*, 27 Miss. 209. This determination of the legislature is, of course, final. In this case, by placing the benefits and burdens elsewhere, the legislature has declared that the county, *quoad hoc*, is not benefited. The whole burden is thrown upon other corporations and persons. The obligation rests entirely upon them, and they are never relieved. All the county can do is to obtain for them an extension of the time of payment by the loan of its credit. This the constitution prohibits; and the plaintiff, being a property owner and taxpayer within the County of Cass, is entitled to a writ against the said county commissioners perpetually enjoining them from the issuance of bonds of the county under the provisions of said Section 38 of said drainage act.

One more objection is urged against the statute. It is claimed that it violates the provisions requiring uniformity in taxation, found in Section 176 of the constitution. It is first claimed that the provision for special assessment is void. We think not.

Section 130 of the constitution directs the legislature to provide by law for the organization of municipal corporations, restricting their powers as to levying taxes, assessments, etc. It is said this does not apply to counties. It is immaterial. It does not authorize a grant of power to make assessments. It simply recognizes the existence of such power, and directs its restriction. The rule "*expressio unius*," etc., does not apply. We understand counsel to admit—granting the existence of the power to levy special assessments—that such assessments differ radically in their nature and purpose from ordinary taxation, and that the rule which requires uniformity in taxation has no application whatever to special assessments. This has now become so elementary that citations are unnecessary. The real difficulty lies deeper. It is claimed that under this law the special assessments must equal the total cost of establishing and constructing the drain, without regard to the benefits received; that, while the assessments must be in proportion to the benefits received, as between the parties benefited, yet the assessment in each case may exceed the individual benefit, and in the aggregate exceed the total benefits. It is then claimed that special assesments are based upon, and must be measured by, benefits received; and that, when a special assessment exceeds the benefits received, it ceases as to such excess to be a special assessment, but is to that extent taxation proper; and that, under the statute, such taxation is laid upon particular property belonging to particular taxpayers, while, under the rule of uniformity required by the constitution, it should be paid upon all property within the taxing district. The constitutional question thus raised is of much importance, and its solution is not without difficulty. It is not entirely clear from the reading of the statute that it was the legislative purpose to permit special assessments to exceed actual benefits; and, as we hold the entire statute unconstitutional upon other grounds, we decline at this time to pass upon this question; but, in view of the possibilities of future legislation, it may not be improper for us to say that courts seem to view with disfavor any attempt on the

part of the legislature to charge property with special assessments for improvements in excess of the actual benefits received by such property by reason of such improvements. See *Tide-Water Co.* v. *Coster*, 18 N. J. Eq. 518; *Creighton* v. *Manson*, 27 Cal. 614; *Crawford* v. *People*, 82 Ill. 557; *Nichols* v. *Bridgeport*, 23 Conn. 189; *Stephani* v. *Catholic Bishop*, 2 Ill. App. 249; *Chamberlain* v. *Cleveland*, 34 Ohio St. 551; *State* v. *District Court*, 29 Minn. 62, 11 N. W. 133; *State* v. *Seymour*, 35 N. J. Law, 49; *Dyar* v. *Farmington Village Corporation*, 70 Me. 515. But, *contra*, see *Keith* v. *Boston*, 120 Mass. 108; Kingman, Petitioner, 153 Mass. 566, 27 N. E. 778; *Spencer* v. *Merchant*, 100 N. Y. 585, 3 N. E. 682, affirmed in 125 U. S. 345, 8 Sup. Ct. 921.

In closing, we wish to acknowledge our obligation not only to the able counsel in these cases, but also in the case following and ruled by this, *infra*, and to W. J. Kneeshaw, Esq., who filed a brief in support of the law in behalf of Pembina County.

The District Court will reverse the judgment in each case, and sustain plaintiff's demurrer to the answer, and enter judgment as prayed for in the complaint.

Reversed. All concur.

(60 N. W. Rep. 392.)

JOHN O. BYE *vs.* H. L. STAFFORD, *et al.*

Opinion filed September 11th, 1894.

Appeal from District Court, Cass County; *McConnell* and *Templeton*, J's.

Action by John O. Bye against H. L. Stafford and others, county commissioners of Cass County, N. D., for an injunction. From a judgment sustaining a demurrer to the complaint, plaintiff appeals.

Reversed.

Benton & Amidon and *M. A. Hildreth*, for appellant.

R. M. Pollock, States Attorney, and *Chas. A. Pollock*, for respondents.

PER CURIAM. The appellant is a resident taxpayer of Cass County. The respondents are county commissioners of said county. The complaint sets forth with particularity the proceedings by which a certain drain was established in said county, showing clearly that said drain was established in conformity with the provisions of Ch. 55, Laws of 1893. It then alleges that, acting under said statute, the respondents, as such county commissioners, are about to issue and negotiate the interest bearing bonds of said county to defray the costs of said drain. An injunction is asked perpetually restraining the issuance of such bonds. A general demurrer to the complaint was sustained. This case involves the same questions that were raised in *Martin* v. *Tyler*, (decided at this term) 60 N. W. 392, 4 N. D. 278. Following that case, the judgment below must be reversed, and a decree entered granting the relief prayed. It is so ordered.

Reversed. All concur.

(60 N. W. Rep. 401.)

J. P. BIRCHALL *vs.* ALEXANDER GRIGGS.

Opinion filed October 24th, 1894.

Affidavit for Attachment in Alternative—Void.

In an action commenced by attachment, and where there was no personal service of summons, and where the affidavit for attachment stated, as the only ground therefor, "that the defendant is not a resident of the State of North Dakota, or has departed therefrom," *held*, that the court acquired no jurisdiction.

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

Action in attachment by J. P. Birchall against Alexander Griggs, in which there was a judgment for plaintiff by default. From an order denying defendant's motion to set aside the judgment and all proceedings thereunder, and dismiss the action, defendant appeals.

Reversed.

Bangs & Fisk, for appellant.

The affidavit for attachment does not specify any statutory ground therefore. *McDonald* v. *Keiferdorf*, 18 N. Y. Supp. 763; *Hewitt* v. *Terry*, 23 N. W. Rep. 326. The affidavit for publication of summons was fatally defective in that it does not show that any diligence was used to ascertain the residence or address of the defendant. *Jewett* v. *Jewett*, 2 N. Y. Supp. 250; *Cook* v. *Farnam*, 21 How. Pr. 286. The statute must be strictly complied with. *Road Island, etc. Co.* v. *Kenney*, 1 N. D. 311; *Cotton* v. *Rubert*, 27 N. W. Rep. 520.

Fred B. Morrill, for respondent.

If the words of the affidavit are in substantial compliance with the terms of, or necessarily and properly imply the case provided for by the statute, it will be sufficient. *Van Kirk* v. *Wilds*, 11 Barb. 520; *Curtis* v. *Settle*, 7 Mo. 452; *Wiltse* v. *Stearns*, 13 Ia. 282; *Graham* v. *Ruff*, 8 Ala. 171; *Runyan* v. *Morgan*, 7 Hump. 210. The code is to be construed liberally to enable parties to obtain their rights and not as a means of defeating them. *Reed v. Bagley*, 38 N. W. Rep. 830; *Hawes* v. *Boyd*, 25 N. W. Rep. 21; *Auerbach* v. *Hitchcock*, 9 N. W. Rep. 79; *Mayor* v. *Genet*, 4 Hun. 487; *In Re* Thompson, 1 Wend. 44. The affidavit for publication of summons was sufficient. *Grebe* v. *Jones*, 18 N. W. Rep. 81; *Fouts* v. *Maine*, 18 N. W. Rep. 64; *McCormack* v. *Paddock*, 30 N. W. Rep. 602; *Pittiford* v. *Zoellner*, 8 N. W. Rep. 57. Defendants motion is a general appearance in that it asks for an order dismissing the action. *Crowell* v. *Gallaway*, 3 Neb. 220; *Haywood* v. *Thomas*, 22 N. W. Rep. 460; *St. Louis Car Co.* v. *Stillwater Street Ry. Co.*, 54 N. W. Rep. 1064; *Freeman* v. *Burke*, 20 N. W. Rep. 207; *Libby* v. *McIntosh*, 14 N. W. Rep. 354; *Reiney* v. *Burlington*, 45 N. W. Rep. 899; *Newlove* v. *Woodward*, 4 N. W. Rep. 237.

BARTHOLOMEW, C. J. This is an appeal from an order refusing to vacate a judgment and dismiss an action. Respondent sued

appellant in the Cass County District Court, and obtained jurisdiction in *rem*, if at all, through the provisional writ of attachment and publication of summons. There was no service outside the state, nor was any copy of the summons and complaint ever mailed to appellant. Judgment was entered for want of an answer. Afterwards, appellant appeared specially, and moved to set aside the judgment and all proceedings thereunder, and dismiss the action for want of jurisdiction. One of the grounds for said motion was that the attachment affidavit failed to allege any ground for attachment. From the order denying this motion, the appeal was taken.

Among other grounds that need not be stated, our statute allows an attachment upon an affidavit stating that the defendant is not a resident of the state, or has departed therefrom, with intent to defraud his creditors or to avoid the service of a summons. Comp. Laws, § 4995. The ground for attachment stated in the affidavit in this case is as follows: "That the defendant is not a resident of the State of North Dakota, or has departed therefrom." That this affidavit is insufficient to confer jurisdiction is clear upon plain principles of law. The remedy by attachment is purely statutory. It is harsh, arbitrary, and condemns without hearing. It cannot be used except upon substantial compliance with every requirement of the statute. In 1 Am. and Eng. Enc. Law, p. 901, it is said: "The affidavit is the foundation of the jurisdiction of the court. It must be a sworn statement of such facts as the law requires as a condition precedent to the issue of the writ. Its entire omission or the omission of any essential fact will render all the proceedings *coram non judice*." And see the authorities there cited. The allegations of the affidavit must be specific and clear. It is elementary that different grounds for attachment cannot be alleged in the alternative, because in that case affiant swears neither to one ground nor to the other. Wade, Attachm. § 56. But the affidavit in this case is much worse. It states that the defendant is a nonresident of the state. Had it contained nothing more, it would have been good;

but the affiant, probably not being willing to swear that defendant was a nonresident of the state, added, "or has departed therefrom." But this latter fact is in itself entirely innocent. It gives a creditor no right to seize the defendant's property unless the affidavit also shows that such departure was with intent to defraud creditors or avoid the service of summons. Clearly, the affidavit states no ground for attachment, and conferred no jurisdiction.

It is urged, however, that since the motion asked that the judgment be set aside, and all proceedings thereunder annulled and the case dismissed, the appearance was in fact general, although stated to be special. The motion asked only what must necessarily follow without asking, in case the court never acquired jurisdiction. The appearance was special. The order appealed from is reversed, and the District Court directed to enter an order setting aside such judgment, annulling all proceedings thereunder, and dismissing the case.

Reversed. All concur.

(60 N. W. Rep. 842.)

T. O'BRIEN *vs.* H. MILLER.

Opinion filed October 27th, 1894.

Appeal—Failure to Assign Error—Affirmance.

Appellant's counsel having failed to assign errors in this court, the judgment of the court below is affirmed, under Sup. Ct. Rule No. 15.

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

Action by T. O'Brien against Henry Miller, commenced in Justice's Court, and taken on appeal by plaintiff to the District Court. From a judgment affirming the judgment of the justice dismissing the action, and for costs in favor of defendant, plaintiff appeals.

Affirmed.

Curtiss Sweigle and *Gustave Schuler*, for appellant.

W. E. Purcell, for respondent.

WALLIN, J. This action was instituted in a Justice Court to recover money. Issue was joined by complaint and answer. In the Justice Court both sides introduced their evidence, and the justice entered judgment in favor of defendant, dismissing the aetion, and for costs. A statement of the case was settled in Justice Court, and plaintiff perfected an appeal to the District Court upon questions of law only. In District Court, on defendant's application therefor, an order was made directing the justice who heard the case to make and certify a further return of the proceedings had before him in the action. Such further return was made, and filed in the District Court, and was considered in connection with the original return, in deciding the case. The District Court affirmed the judgment, and plaintiff appeals. A bill of exceptions was settled in the District Court, specifying, in substance, that the District Court erred in overruling plaintiff's objections to the action of the District Court in directing the justice to make a further return, and erred in overruling plaintiff's motion to set aside such return, and in rendering judgment for defendant. No other errors were specified in the bill.

In the brief filed in this court in appellant's behalf, no errors whatever are assigned. By this omission, appellant's counsel has completely ignored the highly salutary and very plain requirement of rule No. 15 of the rules of this court, which rule has long existed, and been published with the other rules governing the proceedings in this court. Rule 15 requires the appellant to assign—*i. e.* point out—such errors, and only such, as he relies upon in this court. The assignment is required to be made in appellant's brief, and must refer to the specifications of error which the statute, as well as a rule of this court, requires to be inserted in a statement or bill of exceptions when settled, and filed in the court below. Rule 15 provides that "the court will in its discretion only regard errors which are assigned with the requisite exactness." In this case, as has been stated, no assignment

of errors was attempted to be made in this court. It is true that the rule, in terms, reserves a "discretion" which will allow this court to relax the requirement of the rule in furtherance of justice, and upon such terms as might be deemed proper, according to circumstances. This qualification, however, does not imply that the rule can be violated with impunity. In its practical operation, the rule is highly beneficial in expediting the business of the court, and the rule was clearly made to be enforced, unless, for special reasons, and upon timely application therefor, this court should see fit, upon such terms as may be deemed proper, to relax the rule, in furtherance of justice. No such application was made in this case. Nor does the record, in our opinion, disclose a case where it will be necessary, in furtherance of justice, to exercise our discretion in appellant's behalf. We have examined the alleged irregularities in procedure complained of by appellant, and have carefully considered the case upon the entire record. None of the alleged irregularities in either of the courts below have the least bearing upon the merits of the controversy existing between the parties to the action, and all are highly technical in character. Upon such a state of facts, we deem this a proper case to strictly enforce the rule we have referred to. This court had occasion, in a recent case, to affirm a judgment of the trial court for nonassignment of errors. We said in the opinion: "The appellant has failed to assign any errors on this appeal, as required by court rule No. 15. For this omission the judgment will be affirmed, inasmuch as we see nothing in the record to justify us in relaxing the rule." *Investment Co.* v. *Boyum*, 58 N. W. 339. The language we have quoted is equally applicable to the case now under consideration.

The judgment must be affirmed. All concur.

(60 N. W. Rep. 841.)

PHILAMENA BISSONETTE *vs.* O. G. BARNES.

Opinion filed October 26th, 1894.

Illegal Seizure by Sheriff—Exemptions—Sufficiency of Evidence.

After an examination of the findings filed by the District Court, *held*, that such findings have ample support in the evidence.

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

Action by Philamena Bissonette against O. G. Barnes for conversion. From a judgment for plaintiff, defendant appeals.

Affirmed.

C. R. Fowler and *H. C. Southard*, for appellant.

C. E. Joslyn, for respondent.

WALLIN, J. The facts necessary to a disposition of this case may be summarized as follows: The defendant, as sheriff, and under a valid execution against the plaintiff's property, levied upon and took out of plaintiff's store situated in the City of Fargo, certain personal property belonging to the plaintiff, of the value of $625, and consisting of a stock of millinery, etc. In due course of law, plaintiff demanded a return of the property from the defendant, claiming the same as property exempt from sale on legal process under Section 5128 of the Compiled Laws. The regularity of the levy and of the demand is not questioned. This action is brought to recover the value of the property. A jury trial was waived, and the court below found for the plaintiff, and entered judgment in her favor for the value of the merchandise, with interest added. Upon the record sent up, and under the assignments of error in this court, there is but a single question presented for our consideration, and that question arises wholly upon the sufficiency of the evidence to sustain the findings of fact. The defendant contends, and it is his sole contention here, that the evidence shows, and that the court below should have so found, that the plaintiff was at the time of the levy a nonresident of the state, and consequently was not entitled to the benefit of

the exemption laws of the state. There was considerable evidence bearing upon the question of plaintiff's legal residence, as well as that of her husband; but to reproduce it, and comment upon it in this opinion, can serve no useful purpose in disposing of the case. After a very careful consideration of all the testimony offered in the case, we are clearly and unanimously of the opinion that the findings and judgment have ample support in the evidence. Finding no error upon the record, the judgment must be affirmed. All concur.

(60 N. W. Rep. 841.)

STATE *vs.* F. W. DELLAIRE.

Opinion filed November 23rd, 1894.

Liquor Nuisance—Indictment—Names of Persons to Whom Sold.

In an indictment under Section 13 of the prohibition statute, which declares all places to be common nuisances where intoxicating liquors are sold or kept for sale in violation of the provisions of the act, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, it is not necessary, when it is charged that intoxicating liquors were so sold, to state the names of the parties to whom such sales were made.

Time—Sufficiency of Indictment.

That section requires that the liquors should be sold or kept for sale in violation of the provisions of that act, and the indictment should so state. It is not enough to state generally that the acts were done contrary to the statute in such case made and provided. An indictment under that section charges no offense unless it states that the prohibited acts, or some of them, were done or permitted in the building during the time that it is charged the defendant kept the same; but indictment in this case *held* sufficiently definite and certain in this respect.

BARTHOLOMEW, C. J., dissenting.

Error to District Court, Stutsman County; *Rose*, J.

F. W. Dellaire was indicted for keeping and maintaining a common nuisance. A demurrer to the indictment was sustained, and the state brings error.

Reversed.

S. L. Glaspell, for the state.

It is unnecessary to state the names of the persons to whom liquor is sold. *People* v. *Sweetser*, 1 Dak. 308; Whart. Cl. and Pl. Pr. 155, 251; Whart. Cr. Law, 2445; Black on Intoxicating Liquors, 464. Where the offense charged is the keeping and maintaining a common nuisance, a particular sale is not the gravamen of the offense. Black on Intoxicating Liquor, 481, 486; *Skinner* v. *State*, 22 N. E. Rep. 115; *State* v. *Brennan*, (S. D.) 50 N. W. Rep. 625; *Com.* v. *McKenna*, 33 N. E. Rep. 389; *State* v. *Farley*, 53 N. W. Rep. 1089. A nuisance is a continuing offense. The indictment specifies the time as on the first day of January, A. D. 1892, and at divers times up to and including January 10th, 1894. The indictment was framed upon authority of *Com.* v. *Sheehan*, 9 N. E. Rep. 839. The meaning of this allegation is to charge one offense for a single period of time, beginning with the first day and ending with the last day named. *State* v. *Reno*, 21 Pac. Rep. 803; Whart. Cr. Pl. and Pr. 321, 126. The indictment is not bad for duplicity. *State* v. *Billby*, 21 Wis. 205: *State* v. *Schweiten*, 27 Kan. 499; *State* v. *Notan*, 10 At. Rep. 481; Black on Intoxicating Liquor, 440.

Barrett & Marcy, for defendant in error.

BARTHOLOMEW, C. J. The state sued out a writ of error from an order sustaining the defendant's demurrer to an indictment, which, omitting the formal parts, charged the defendant with "the crime of keeping and maintaining a common nuisance, committed as follows: The said F. W. Dellaire and Charles White, on the 1st day of January, A. D. 1892, and at divers times up to and including January 10th, 1894, in this County of Stutsman and State of North Dakota, did keep a place, to-wit, the certain brick building known as the 'Tom Driscoll Building,' situated on lot 8 in block 24, according to the original plat of the City of Jamestown, in said county, in which place intoxicating liquors were kept for sale, and where persons were permitted to resort for the purpose of drinking intoxicating liquors as a beverage, and where intoxicating liquors were sold contrary to the form of the statute

in such case made and provided, against the peace and dignity of the State of North Dakota." The demurrer presents three principal points: *First*, the indictment does not name the parties to whom the intoxicating liquors were sold, or give any excuse for not so doing; *second*, it does not state that such liquors were sold or kept for sale in violation of any provision of the prohibition statute; *third*, it is uncertain as to the time when such liquors were so kept in said building, or when parties resorted to said building for the purpose of drinking intoxicating liquors as a beverage, or when intoxicating liquors were sold in said building.

Referring now to the first point, it has been repeatedly held that, when it was sought to prosecute a party for the crime of selling intoxicating liquors as a beverage, the indictment should state the names of the parties to whom such liquors were so sold, or excuse the omission. But this rule is so far from uniform that it is not even possible to say upon which side of the question the weight of authority is arrayed. In a note to Section 464, Black, Intox. Liq., the authorities for and against the position are cited in great numbers. In this case the offense charged is not selling intoxicating liquors, but keeping and maintaining a common nuisance. Section 13 of our prohibition statute (Chapter 110, Laws 1890) declares that "all places where intoxicating liquors are sold, bartered or given away, in violation of any of the provisions of this act, or where persons are premitted 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 act, are hereby declared to be common nuisances," and it is further provided that the owner or keeper of such place shall, upon conviction thereof, "be adjudged guilty of keeping a common nuisance." We notice that selling intoxicating liquors contrary to the provisions of this act does not constitute the offense. Nor does keeping intoxicating liquors for sale contrary to the provisions of this act constitute the offense. Neither is the offense committed by permitting persons to resort to the place for the purpose of drinking intoxicating liquors as a

beverage. They are evidences of the offense. It is keeping the place where these things, or some of them, are done, that constitutes the offense. Proof of keeping by the defendant, and that any one of the prohibited acts was done by the defendant in such place during such keeping, would make the offense complete. Proof that all the prohibited acts were done would do no more. The offense is single. Since the selling does not constitute the crime in this case, we think the logic of those cases which hold, in prosecutions for selling intoxicating liquors, that the name of the party to whom the sale was made must be stated, does not apply. If it be necessary to state the name of the party to whom the liquor was sold, then, for the same reason, it must be necessary to state the names of the parties who were permitted to resort to the place for the purpose of drinking. This is not claimed, and we think has never been held. Yet in each case the name sustains the same relation to the substantive offense. The case of *McLaughlin* v. *State*, 45 Ind. 338, is confidently relied upon as authority for the position of the defendant in error; and it must be admitted that the case is strongly in his favor, but we think it should be distinguished. True, that was a prosecution under a statute which declared all places where intoxicating liquors were sold contrary to the act to be common nuisances; but the court said: "By the section now under consideration, the act of selling by the person keeping the room, etc., is what constitutes the offense, without any referenee to the manner in which the house is conducted or kept." This cannot be said under our statute. The offense of which the party must be convicted, if convicted at all, is that of "keeping and maintaining a public nuisance." A nuisance must be something that can be abated,—a continuing act. Selling a drink of liquor to A. is an instantaneous act, and one that cannot be abated; by keeping the room where such liquor is sold is a continuing act, and the statute declares it a nuisance, and directs its abatement. Other provisions of the statute provide punishment for the act of selling. See *State* v. *Freeman*. 27 Iowa, 333. In Black, Intox. Liq. § 486, it is said:

"When the prosecution is upon a statute which provides that all places kept for the illegal sale of liquor shall be deemed public nuisances, and directs the punishment of the keeper of such place, an indictment against such person will ordinarily be good if it describes the offense in the language of the statute." It has been so held in *State* v. *Welch*, (Me.) 7 Atl. 475; *Commissioners* v. *Howe*, 13 Grey, 26; *Commissioners* v. *Wright*, 12 Allen, 190; *Skinner* v. *State*, 120 Ind 127, 22 N. E. 115; *State* v. *Freeman*, *supra*. Tested by this rule, this indictment is sufficient upon this point. While it does not in all respects follow the words of the statute, as we shall immediately see, yet it was not vulnerable to the objection that it did not state the names of the persons to whom the liquors were sold.

The statute already quoted requires, in order to constitute the offense charged, that the intoxicating liquors be sold "in violation of any of the provisions of this act, or that such intoxicating liquors be kept for sale in violation of this act." The indictment in this case ends with the usual formula: "Contrary to the statute in such case made and provided." This was not sufficient. In order to constitute the crime of "keeping and maintaining a common nuisance," as here used, it is not enough to violate some other statute. The liquor must be sold or kept for sale in violation of some provision of Chapter 110 of the Laws of 1890, and the indictment should so state. Still, the demurrer should not have been sustained upon that ground, because the indictment did allege in the words of the statute that defendant in error kept a place where persons were "permitted to resort for the purpose of drinking intoxicating liquors as a beverage." If the state had proved that persons were so permitted to resort to such place while so kept by defendant, it would have been entitled to a conviction, because proof of that fact would have been as effective to establish the crime as proof of all the facts set forth in the statute.

But the last objection to the indictment is, in the opinion of the writer hereof, fatal. It is not sufficiently specific as to time.

True, time is not an ingredient of the offense charged. True, also, that proof that intoxicating liquors were sold in the building in violation of the act, or kept for sale contrary to the act, or that persons were permitted to resort to the building for the purpose of drinking intoxicating liquors as a beverage at any time on or between the dates charged, and while defendant so kept the said building, would have warranted conviction. But the difficulty lies in the fact that the indictment does not state that any of the prohibited acts were done or permitted in the building between January 1, 1892, and January 10, 1894, or while the defendant kept the same. It may be that defendant kept said building on and at all times between said dates, and that intoxicating liquors were sold and kept for sale therein contrary to the provisions of the prohibition act, and persons permitted to resort thereto for the purpose of drinking intoxicating liquors as a beverage, prior to January 1, 1892, in which event every word in the indictment would be true, and yet defendant would be guilty of no offense whatever. True, on the other hand, proof of the prohibited acts during the term charged would do no violence to the words of the indictment, but, taking them in their usual acceptance, such is not their necessary meaning. I think we can indulge no presumptions, and read nothing into an indictment for the purpose of sustaining it; but my associates think the indictment sufficient upon this point also, and consequently the order of the District Court is reversed.

CORLISS, J. Judge Wallin and myself, while we concur in the opinion of the Chief Justice in all other respects, are unable to agree with him in his view that the indictment is insufficient on the ground that the keeping of the place, and the resorting of persons to such place, for the purpose of drinking intoxicating liquors as a beverage, are not alleged to have been contemporaneous. The allegation is that the defendant, at certain specified times, "did keep a place * * * where persons were permitted to resort for the purpose of drinking intoxicating liquors as a beverage." At these times he not only kept a place, but he kept

a place where a certain thing was permitted to be done. These two elements of the crime are bound up together by the closest connection, and the time specified clearly relates to both. The construction which the Chief Justice places upon the indictment seems to us to interpolate into it some additional language. His conclusion is that the pleading is open to the interpretation that the thing permitted to be done at the place might, consistently with the language of the indictment, have been done before defendant kept the place. To express such an idea, the language must have been: "Where such persons had been permitted," etc.; or "where, before such time, persons were permitted," etc. This is not the language of the indictment. It will not change the meaning of the words used to transpose them. Let us place the allegation as to time at the end. It could have been placed there without violating any rule of law. The indictment would have read, to give its substance, as follows: "The defendants kept a place where persons were permitted to resort for the purpose of drinking intoxicating liquors as a beverage on the 1st day of January, 1892, and at divers times up to and including January 10, 1894," Would such an indictment be open to the criticism that it left it uncertain whether the keeping of the place and the permitting of the particular thing to be done therein were contemporaneous? The case of *Skinner* v. *State*, (Ind. Sup.) 22 N. E. 115, is in point. There the allegation was that at a particular time the defendants "did then and there keep a place where intoxicating liquors were sold," etc. The use of the words "then and there" before the word "keep" was mere surplusage, for the allegation was that defendants, "on the 1st day of June, 1888, and continuously thereafter, to the day of making this indictment, at the state and county aforesaid, did then and there keep," etc. The time and place were fully set out just before the words "did keep a place," and adding the words "then and there" were entirely unnecessary. With these idle words eliminated, the indictment was the same as the indictment in this case; and it was sustained by the court. "The words used in an indictment must

be construed in their usual acceptance in common language, except words and phrases defined by law, which are to be construed according to their legal meaning." Comp. Laws, § 7247. If I should state that on a certain day I kept a place where liquors were sold, would I be understood in common parlance as asserting that the liquors were sold there, not while, but before, I kept the place? To our minds the meaning is clear, and the order appealed from must be reversed; and it is so ordered.

Reversed.

(60 N. W. Rep. 988.)

STATE *ex rel* ENDERLIN STATE BANK *vs.* RODERICK ROSE.

Opinion filed March 31st, 1894.

Assignment for Benefit of Creditors—Property not in Custody of Law.

An assignment for the benefit of creditors under the provisions of our statutes does not place the property of the assignor in custody of law.

Void Order of District Court.

Such property having been attached in the hands of the assignee, the District Judge of the district in which such assignment was executed made an order directing the sheriff forthwith to surrender possession thereof to the assignee on the theory that the property was in custody of the court. Such order was not made in any action or special proceeding pending in court. It was granted upon the mere affidavit of the assignee, without hearing the sheriff or the plaintiff in the attachment suit, and without notice to them, or either of them. *Held*, that the order was absolutely void, and should be set aside on *certiorari*. *Held*, further, that the plaintiff in the attachment suit was the person beneficially interested, within the meaning of § 5508, Comp. Laws, and could therefore sue out the writ.

Action Against Sheriff—Not Adequate Remedy at Law.

Held, further, that the right of the plaintiff to hold the sheriff responsible for the property attached, for the reason that he could not justify surrender of the property under a void order, was neither an adequate nor a speedy remedy, within the meaning of § 5507, Comp. Laws, which forbids the issue of the writ of *certiorari* when the relator has such a remedy.

Action Against Sheriff is Not a Remedy.

Held, further, that such a remedy against the sheriff is not a remedy at all, within the meaning of this section, for the reason that the remedy therein referred to is one which, like an appeal or a writ of error, will enable the relator to annul the proceeding complained of as void.

Certiorari—Restitution Under.

On *certiorari* this court has power to order restitution of everything taken from the relator under the void proceeding which is annulled.

Judgment on Certiorari is Entered in Supreme Court.

The judgment on *certiorari* is entered in this court. No mandate is sent to the inferior tribunal to render judgment. For this reason, and because the District Court is utterly without jurisdiction in the matter, and therefore has no jurisdiction to order restitution, the judgment in this case annulling the order will contain a direction that a writ of restitution issue out of this court to restore to the sheriff the property taken from him under the order.

Direction to Assignee—Void.

As the order directed the sheriff to surrender possession of the property, the application for the writ is not premature because the assignee was directed by the order to hold property until the validity of the assignment should be determined, or until the further order of the court. So far as the right of the relator to have the sheriff hold and sell the property to satisfy the plaintiff's claim is concerned, the proceeding has terminated.

Attachment Continued by Giving Appeal Bond.

It was contended that relief should not be granted relator, because, by the surrender by the sheriff under the order of possession, the lien of the attachment was lost; that no new levy could be made, because the warrant had been returned by the sheriff, and also because it had been set aside by the District Court; and that, therefore, relator could derive no benefit from an annulment of the void order and from restitution of possession. There is nothing to show that the warrant has been returned; nor does it appear that the plaintiff in the attachment suit, who has appealed from the order vacating the attachment, has not secured a continuance of the life of the warrant of attachment by giving the bond prescribed by § 5228, Comp. Laws. (Might not a new warrant of attachment issue on the same papers if the old one had been returned, and the property seized and held under the new warrant?) *Held*, that the court would not deny relief on these grounds, as these questions are not directly before the court. After the sheriff has taken possession, they can all be raised and tried in actions to which the proper persons are parties, and should be settled in that way, and not in this proceeding. The judgment in this case does not settle them, or conclude any one with respect to them. It is only when it is clear, beyond all doubt; that relator can derive no benefit from *certiorari*, that the writ will be denied.

Original application by the Enderlin State Bank for an order to show cause why a writ of *certiorari* should not issue to Roderick Rose, Judge of the Fifth Judicial District Court.

Conditional order.

Ed. Pierce, *Edward Engerud*, and *Newman*, *Spalding & Phelps*, for petitioner.

G. K. Andrus and *Ball & Watson*, for repondent.

CORLISS J. We are asked to issue a writ of *certiorari* to Hon. Roderick Rose, judge of the district court for the fifth judicial district. It is agreed by counsel that the facts before us are the same facts which would be disclosed by a return to the writ. Our decision, therefore, will not only settle the preliminary question whether the writ should issue, but also the ultimate question whether the order of the District Judge sought to be reviewed by this proceeding was valid or void. An assignment for the benefit of creditors was made by one Reuben P. Jennings, an insolvent, to M. H. Kiff. The assignee accepted the trust, and the assignment was duly recorded. The inventory required by the statute was duly filed, and the necessary bond given by the assignee. The assignor resided, and the assignment was recorded in Barnes County, in the Fifth Judicial District of the state. Subsequently, the relator, a creditor of the assignor, commenced an action against him in the District Court of the Fourth Judicial District. In that action a warrant of attachment was issued, directed to the sheriff of Barnes County, and under this warrant the sheriff levied on the property which was in the hands of the assignee under the assignment. Thereupon Judge Rose, upon the application of the assignee, and without notice, made the following order: "In the matter of the assignment of R. P. Jennings to M. H. Kiff, assignee. Upon reading the affidavit of M. H. Kiff, assignee, and of R. P. Jennings in the above entitled matter, and upon consideration thereof, it is hereby ordered that Hans C. Stenshoel, sheriff of Barnes County, North Dakota, forthwith deliver to M. H. Kiff, assignee, all the stock of merchandise, moneys, and personal property, of all kinds whatsoever, formerly belonging to said Reuben P. Jennings, which he, the said sheriff, took from said M. H. Kiff, the assignee, by virtue of attachments issued out of the District Court of Ransom County, North Dakota, in the cases of *The Enderline State Bank* v. *Reuben P. Jennings*, and *George R. Newell & Co.* v. *Reuben P. Jennings*; and it is further ordered

that the said assignee proceed under the said assignment according to law, and hold the proceeds of the sales of the assets until the validity of the said attachments can be determined, and until the further order of this court. Done at Valley City, N. D., December 13th, 1893. Roderick Rose, Judge. To Hans C. Stenshoel, Sheriff of Barnes County, N. D." The order was not made in any action or special proceeding pending before the court, and for that reason it is here contended that it is utterly void for want of jurisdiction. It is this order which we are asked to annul by this proceeding. But it might not be decisive of this question that the order was made in a summary manner. If the position taken by the learned trial judge, that the property attached was in custody of law, is correct, then it may well be that the court had power to restore, in a summary manner, the possession of the property to the officer of the court from whom it had been taken. See *Sabin* v. *Adams*, (Wash.) 32 Pac. 793. Therefore, whether the court had power to make this order depends upon the solution of the single question whether the property was in the custody of the law when the sheriff seized it. If it was not, it is too obvious to justify discussion that the order was absolutely void.

The section of the assignment law upon which rests this contention of the learned trial judge is section 4675, Comp. Laws. We quote it in full: "After the lapse of six months from the date of filing his bond the assignee, on motion of any one of the creditors, with ten days' notice, accompanied by an affidavit of the creditor, his agent or attorney, setting forth his claim and the amount thereof, and that no account has been filed within six months, may be ordered by the court, or by the judge thereof, at any place in his judicial district, to render an account of his proceedings within a given time, to be fixed by the court, or the judge thereof, not to exceed fifteen days. All proceedings under this title shall be subject to the order and supervision of the Judge of the District Court of the county in which such assignment was made, and such judge may, from time to time, in his

discretion, on the petition of one or more of the creditors, by order, citation, attachment or otherwise, require any assignee or assignees to render accounts and file reports of his or their proceedings and of the condition of such trust estate, and may order or decree distribution thereof; and such judge may, in his discretion, for cause shown, remove any assignee or assignees and appoint another or others instead, who shall give such bonds as the judge, in view of the condition and value of the estate, may direct, and such order or removal and appointment, shall in terms transfer to such new assignee or assignees all the trust estate, real, personal and mixed, and may be recorded in the deed records in the office of register of deeds of any county wherein any real estate affected by the assignment may be situated. And such judge may by order, which may be enforced as upon proceedings for contempt, compel the assignee or assignees so removed to deliver all property, money, choses in action, book accounts and vouchers, to the assignee or assignees so appointed, and to make, execute and deliver to such new assignee or assignees such deeds, assignments and transfers as such judge may deem proper, and to render a full account and report of all matters connected with such trust estate. Whenever any assignee so removed shall have fully accounted for and turned over to the assignee or assignees appointed by the judge, all the trust estate and make a full report of all his doings, and complied with all orders of the judge touching such estate, and also whenever an assignee has fully complied with his trust; he may by order of the judge be fully discharged from all further duties, liabilities and responsibilities connected with the trust. In either case he shall give notice by publication in some newspaper of the county, if there be one printed and published therein, if not, in a newspaper published at the capital of the territory, once in each week, for at least three weeks, that he will apply to such judge for such discharge, at a time and place to be stated in such notice, which time shall not be more than three weeks after the last publication of the notice. If upon the hearing the judge shall be satisfied that the assignee

is entitled to be discharged, he shall make an order accordingly; or if, in the opinion of the judge, anything remains to be done by such assignee, he may require the performance thereof before making such order. Such order shall have the effect of discharging the assignee and his sureties from all further responsibility in respect to the trust, and such order shall not be refused on account of any failure on the part of the assignee to comply with the formal provisions of law, where no loss or damage to any one shall have occurred through such failure. Whenever the trust estate shall have been taken out of the hands of the assignee by proceedings in bankruptcy in the Federal Court, the assignee may in like manner be discharged, upon showing that he has fully accounted with the assignee in bankruptcy, and turned over to him the whole of the trust estate." The other provisions of the law need not be here referred to. It is very clear to our minds that our statutes regulating assignments for the benefit of creditors do not constitute either an insolvency or a bankrupt law. An assignment executed under them creates a mere trust. If valid, the title to the property vests in the assignee, in trust to be disposed of in strict accordance with the terms of the assignment, except in the single case of a preference. If the instrument contains a preference, the assignment is void, but the title is not kept from passing from the assignor on that account. In such a case the statute declares that the whole property becomes instantly a trust fund, to be administered in equity in the District Court for the benefit of all creditors alike. It was under this provision of the statute that the case of *Straw* v. *Jenks*, 6 Dak. 414, 43 N. W. 941, was decided. For that reason it is not in point in this case.

Why was it necessary to provide specifically that the property in such a case should become a trust fund, if in all cases the executions of an assignment, however void, placed all the property in the custody of the District Court, to be administered for the benefit of all creditors? The very first section of the assignment law (section 4660) provides that every such assignment is

subject to the statutes relating to fraudulent transfers. This is a declaration that, when the intent of the assignor in making the assignment is to delay or defraud creditors, it is void as to them, and that the innocence of the assignee will not save it, he not being a bona fide purchaser of the assigned property. Comp. Laws, § § 4656, 4666; Wait, Fraud. Conv. § 319. An assignment void as to creditors is, as to them, no assignment. The title to the property still remains in the assignor, and is subject to attachment by his creditors. Did the legislature intend that a fraudulent, and therefore a void, assignment should place the assignor's property, to which he still holds the title, in custody of the law? What is to become of it in the hands of the court? Will the court administer a void trust? Will it distribute property under a void assignment? There is no power in the court to order a dollar paid to any creditor, except under the terms of the assignment; and what will the court do with the assets when the assignment is void? If, despite the invalidity of the assignment, the court could proceed and distribute the property among creditors, as under bankruptcy or insolvency laws, the case would be entirely different. It would then be assimilated to those cases which are relied upon by counsel for defendant. But there is no such power in the court under our statutes. The court is authorized by the statute to control the proceedings of the assignee in the administration of his trust, upon the theory that there is such a trust created by a valid assignment to be administered. This is all there is meant by the provision of section 4675 that "all proceedings under this title shall be subject to the order and supervision of the Judge of the District Court of the county in which such assignment was made." The object of the provision (and it is upon this provision that defendant rests his contention that he had power to make the order in question) was not to vest in the District Court, as a court of equity, jurisdiction over the trust, for that it would possess independently of the statute, but to authorize that court, and the judge thereof, to exercise a more constant and summary supervision over the assignee, as trustee for the creditors,

than a court of equity could exercise by the use of its ordinary remedies, by conferring upon the judge power to act at all stages in the administration of the trust, upon petition and notice, without a formal suit in equity. This power is conferred upon the chancellor with reference to proceedings under the assignment, and not with respect to such proceedings as assail it as void. When the assignee is disturbed in his possession by a creditor who has the assigned property attached, on the theory that the assignment is void, he must seek redress the same as any other trustee. He must resort to the ordinary remedies to secure a return of the property by replevin, or to obtain damages for its conversion. The District Court can control him in the administration of the trust, if there is a valid trust; but it cannot control a third person who is not proceeding under the trust, but in hostility to it, on theory that the instrument creating it is void. There is no clear provision upon which this claim rests that the property is in custody of law the moment the physical act of executing an assignment is performed. We are asked to infer this legislative intent when the consequence is to lead us to a conclusion which defeats the clear purpose of the legislature. They have declared, in effect, in the very first section, that an assignment is void when the assignor executes it with fraudulent intent; that it is no assignment; that nothing passes by it to the assignee; that the title to all the property still remains in the assignor; that it is still subject to seizure by creditors. And yet how can it ever be seized if it is in the custody of the law? How is it to be removed from the custody of the law? It cannot remain there forever. It is the assignor's property. His creditors have a right to seize it to pay their claims. The court cannot hold it as trust property, for the trust is void, neither can the court administer it as the assets of a debtor in bankrupcty or insolvency proceedings, as there is no law authorizing such a course. What is to become of the property? For what purpose is it in the custody of the law? Who can withdraw it? On what conditions will the court relax its grasp? If the mere physical act of signing a fraudulent and void

assignment places the property in the custody of the court, then, in effect, no assignment can be void, despite the declarations of the statute to the contrary, because no one can assail it by seizure of the property, and thus secure a priority which it is the policy of our law to accord to the diligent creditor as to property which the debtor stills owns; but a bill in equity must be filed to overthrow it, and in that case all creditors can intervene and secure an equal share,—just what they would have secured under the assignment itself. Section 4663, Comp. Laws, specifies five different provisions which will render void an assignment containing any one of them as against nonassenting creditors. Section 4671 declares that the assignment shall be void unless it is recorded, and unless the inventory is filed within 20 days after the date of the assignment. These provisions are of no effect if the property is in custody of the law. No creditor can reach it, and thus secure preference. All must share alike in the property, just the same as though the assignment were valid. Why, then, did the legislature declare it void in such cases? Defendant's position leads to this conclusion: that the legislature have vested, in the District Court of the district in which an assigment is made, exclusive jurisdiction to determine whether the assignment is valid, and have rendered their express declaration that in a large number of cases an assignment is void,—of no possible benefit or use to a diligent creditor,—by cutting him off from all chance of gaining priority by a seizure of the property. They have, according to the contention of the defendant, put the property in the custody of the law for the sole purpose, in many cases, of having the District Court decide that the assignment is void, and that, therefore, neither the assignee nor the court should exercise any control over the property; that it belongs to the assignor, and that therefore, his creditors have a right to seize it for their claims. There is abundant authority to support our view that the property was not in custody of the law when seized by the sheriff. *Farmer* v. *Cobban*, (Dak.) 29 N. W. 12; *Wright* v. *Lee*, (S. D.) 55 N. W. 931–936; *Adler* v. *Ecker*, 2 Fed.

126; *Lapp* v. *Van Norman*, 19 Fed. 406; *Lesher* v. *Getman*, 28 Minn, 93, 9 N. W. 585; *Lehman* v *Rosengarten*, 23 Fed. 642.

In *Lesher* v. *Getman*, 28 Minn. 93, 9 N. W. 585, the court declared that the property was not in *custodia legis*, although the act of 1876, under which the assignment was made, contained just such a provision as is contained in § 4675, Comp. Laws, with respect to the proceedings being subject to the supervision and control of the Judge of the District Court. See § 6 of the General Laws of Minnesota for 1876. In *Wright* v. *Lee*, (S. D.) 55 N. W. 931-936, the court had before it for construction our assignment law, it having been inherited by both states from the late Territory of Dakota. That court came to the same conclusion we have reached; and we refer to the very convincing language of Judge Kellam at pages 936-938. His reasoning is entirely satisfactory to our minds, and the question has been so ably discussed by him that no further comment is needed. We have carefully examined all the cases that hold that the property is in the custody of the law where an assignment for the benefit of creditors is made, but fail to see that they are in point, the statutes construed therein being radically different from ours, so far as this feature is concerned. We cite them for the benefit of the profession. *Lowe* v. *Kean*, (Ill Sup.) 29 N. E. 1036; *Hanchett* v. *Waterbury*, 115 Ill. 228, 32 N. E. 194; *Wilson* v. *Aaron*, (Ill. Sup.) 23 N. E. 1037, and cases cited; *Shoe Co.* v. *Mercer*, (Iowa) 51 N. W. 415; *Bank* v. *Schranck*, (Minn.) 44 N. W. 524; *Scott* v. *McDaniel*, (Tex. Sup.) 3 S. W. 291; *In re Mann* (Minn.) 19 N. W. 347; *Blum* v. *Welborne*, 58 Tex. 157; *Kingman* v. *Barton*, 24 Minn. 295; *Shoe Co.* v. *Adams*, (Wash.) 32 Pac. 92; *Mansfield* v. *Bank*, Id. 789, 999; *Sabin* v. *Adams*, Id. 793. Our conclusion is that the property was not in the custody of the law, and that, therefore, the order of the District Judge was void, it not having been made in either an action or a special proceeding pending before the court, and having been granted without according to the sheriff or the plaintiffs in the attachment any right to be heard, and without giving either of them notice of the application for the order.

Nothing which this court said in *Bank* v. *Freeman*, 1 N. D. 196-202, 46 N. W. 36, conflicts with these views. The question here presented was not before the court in that case. We adhere to what was there said when the language is construed, as it should be, in the light of the facts and questions then before the court.

But it is urged that the writ should not be granted, even assuming that the order is void. We are confronted with the claim made by the defendant that the relator is not the party beneficially interested in the writ, and that he has another plain, speedy, and adequate remedy. The contention is that the sheriff, and not the plaintiff in the warrant of attachment, should have applied for the writ. It is true that the sheriff, after a levy, has a special property in the goods seized, and that this special property is commensurate with his duty under the writ. That duty is to hold the chattels seized as security for any judgment which may be recovered in the action, and sell them at public auction to satisfy such judgment. He may vindicate this special interest in the property by suing in replevin, or for the conversion of the property. 2 Freem. Ex'ns, § 268; Drake, Attachm. (5th Ed.) § 291. The plaintiff in the writ cannot maintain such actions. 2 Freem. Ex'ns, § 268; Drake, Attachm. (5th Ed.) § 291. Indeed, it has been held that he cannot bring an action on the case for damages. *Barker* v. *Mathews*, 1 Denio, 335. But this case has been questioned, and must be deemed overruled. *Howland* v. *Willetts*, 9 N. Y. 170. But it is not at all decisive of the question that the sheriff may resort to those remedies to defend his possession. He is not the real party in interest. He is allowed to defend his possession by those remedies because upon making a levy he becomes answerable to the plaintiff in the writ for the goods attached, if the plaintiff recovers judgment and the attachment is not set aside, or to the defendant therein in case the writ is vacated or the plaintiff fails to recover judgment. He is allowed to defend his possession merely to protect himself against liability to the successful party to the suit. Personally, he has not the slightest interest in the matter, aside from his fees.

The one for whom the seizure is made, for whom the property is held, for whom the sheriff brings replevin or trover if his possession is disturbed, and who will finally reap the fruits of the attachment, is the plaintiff in the writ. Comp. Laws, § § 4993, 5006. The sheriff is the mere instrument for initiating by seizure, and continuing by possession, the plaintiff's lien under the writ upon the property seized. The plaintiff's lien so secured is said to be private property, within the protection of constitutional provisions. 1 Wade Attacm. § 358, and cases cited; *Williamson* v. *Railroad Co.*, 29 N. J. Eq. 334; *Hannahs* v. *Felt*, 15 Iowa, 141. In *Howland* v. *Willetts*, 9 N. Y. 170, the court says: "All the cases hold, however, that the sheriff acts for and in behalf of the plaintiff in the execution, and that the plaintiff is the substantial party,—the one immediately and directly interested in the levy, and the property or money acquired by virtue thereof." The plaintiff in the writ in this case is therefore the real party interested in setting aside the obstacle to the sheriff's possession of the attached property, *i. e.* the order made by Judge Rose, already set forth in the opinion. It is true that the sheriff is also interested, as he may be held responsible for the property to the plaintiff in the writ if the order is void. He cannot justify a surrender of possession under such an order. It is also true that under certain circumstances the plaintiff in the writ might not, in fact, be financially interested in having the order annulled, and the property restored to the sheriff. If the sheriff's bondsmen are good for the amount of the plaintiff's claim, and the bond has not been exhausted by former recoveries, or if the sheriff himself is good for the amount, the plaintiff would not suffer by the action of the court in making the order. But its interest in maintaining the lien of the attachment cannot depend upon these circumstances. The lien is plaintiff's, and it has a right to assail any illegal interference with such lien. As supporting our view that the plaintiff in the writ is the "party beneficially interested," within the meaning of § 5508, Comp. Laws, see *People* v. *Andrews*, 52 N. Y. 445-449; *Palmer* v. *Circuit Judge*, (Mich.) 47 N. W. 355;

Town of Hillsboro v. *Smith*, (N. C.) 14 S. E. 972; *Hart* v. *Scott*, 50 N. J. Law, 585, 15 Atl. 272; *Staates* v. *Inhabitants of Washington*, 44 N. J. Law, 605; *Dexter* v. *Town Council*, (R. I.) 21 Atl. 347; *Miller* v. *Jones*, 22 Cent. Law J. 397; *Campau* v. *Button*, 33 Mich. 525.

It is also urged by defendant that the relator has another plain, adequate, and speedy remedy at law. The order is not appealable. It was not made in an action or a special proceeding. In granting it the District Judge merely exercised, in a summary manner, what he regarded as his control over property which he held to be in the custody of the court through the possession of its officers,—the assignee. But it is insisted that the relator will not be prejudiced by the failure of the sheriff to hold the attached property. He is answerable for it to relator, it is said, whether he keeps or relinquishes possession of it. If it is not forthcoming upon execution, the sheriff cannot justify his failure to sell it because a judge without jurisdiction has ordered it taken from his control, and the relator can sue him for damages and recover. But how is such a remedy adequate when the sheriff and his bondsmen are insolvent, or when the bond has been exhausted and the sheriff is insolvent, or when the creditor's claim exceeds the amount of the sheriff's bond and the sheriff himself is insolvent? Should we deny relator relief, there is no certainty that he will be able to collect his claim from the sheriff or his bondsmen. Moreover, such a remedy is not speedy. Instead of the relator enjoying his speedy right to realize the fruits of his judgment by sale under execution, he is compelled to undertake a more or less protracted litigation against the sheriff and his bondsmen to secure his rights. The mere fact that the relator may treat the proceeding as void will not bar his application for the writ. In most of the cases in which the writ has been allowed, the proceeding was utterly void; but it was not intimated in any of them that this would defeat the petitioner's prayer for the writ. Said the court in *Starr* v. *Trustees*, 6 Wend. 564, 567: "It may be said that these parties have their remedy by action, and therefore

a *certiorari* will not lie. Where there is no jurisdiction, there is a remedy by action; but that does not deprive this court of jurisdiction, nor prevent a party injured from pursuing this remedy. There are many cases in our reports of justices's judgments reversed where they were utterly void." In *People* v. *Judges of Suffolk Co.*, 24 Wend. 249, the court say, at page 253: "Suppose a justice of the peace were to try and decide an action of ejectment; would the common pleas have power to review the proceeding on appeal? Clearly, the whole would be void. Being out of the statute, the only direct proceeding for redress would be by *certiorari*. For this there would be no strict necessity, because the judgment might be regarded as a nullity, and impeached collaterally. Still, this court, would perform what is the main office of a *certiorari*,—the keeping of unfair magistrates within the compass of their power. We should therefore reverse the judgment of the magistrate." "But that a proceeding is void for want of authority or jurisdiction in the inferior tribunal is not a sufficient reason for refusing to remove it by this writ." 2 Spell. Extr. Rel. § 1911, and cases cited. Had the sheriff applied for this writ, it would have been no answer to his application that he could have treated the order as void, and have refused to obey it by surrendering possession of the property. And the right of the plaintiff in the attachment to treat the order as void does not afford him as much protection as it would afford the sheriff. He cannot hold the property himself, or compel the sheriff to hold it. He can only sue the sheriff for damages for surrendering possession under the void order. The language of the statute is that the writ may be granted "when there is no writ of error or appeal nor in the judgment of the court any other plain, speedy and adequate remedy." Comp. Laws, § 5507. "*Nioscitur a sociis*" is a familiar maxim of interpretation. The "other remedy" which will prevent the issue of the writ of *certiorari* must be a remedy which, like a writ of error or an appeal, will set aside and annul the void proceeding of which the petititioner complains. Our statute is the same as that of California; and in *California*

Pac. R. Co. v. *Central Pac. R. Co.*, 47 Cal. 528, the court rendered a decision which is an express authority for the proposition which we have just enunciated. Said the court: "It seems clear that the defendant had no plain, speedy, and adequate remedy except by *certiorari*. An action for trespass done under color of the order might, perhaps, give compensation for the actual damages sustained, but defendant has the right to have the order annulled before the damages it purports to authorize have been committed. He is not bound to wait until the injury is done, but may demand relief by way of protection against injuries contemplated by the order itself. The same language was employed in the chapter of the practice act which treated of the writ of mandate; but this court held that to supersede the remedy by mandamus the party must not only have a specific, adequate, legal remedy, but one competent to afford relief upon the very subject matter of the application, and one which is equally convenient, beneficial, and effective as the proceeding by mandamus." The "subject matter" of relator's application for the writ in this case is the annulment of the order claimed to be void. A right to sue the sheriff in the future does not afford the relator relief upon such subject matter. It supplies him with no remedy to set aside this troublesome order, which bars his right to collect his judgment out of the property attached. See, also, *Le Grand* v. *Fairall*, (Iowa,) 53 N. W. 115; *Insurance Co.* v. *Duffie*, (Iowa,) 25 N. W. 117.

It is further insisted that the proceedings are still in *fieri*, and that, therefore, the application for the writ of *certiorari* is premature. But the order complained of does finally settle the very matter of which relator complains. By it the learned judge finally decides that the sheriff cannot hold and sell the property under execution issued on the judgment recovered in the attachment suit until the plaintiff in that suit has attacked and overthrown the assignment, by proceedings in the District Court over which he, the learned judge, presides, instituted for the express purpose of setting aside the assignment. But we hold that

plaintiff had, and has, the right to have the sheriff hold and sell this property under the attachment, judgment, and execution without securing leave from any court. This order stands in his way. Prohibition will not afford him redress. It would have stopped the making of the order, but it will not set it aside. Those two writs are complementary where there is usurpation of jurisdiction. When the proceeding is beyond the reach of prohibition, *certiorari* will lie. If the assignment is valid, the assignee can protect himself and the creditors by replevin or an action for conversion. It is said that the warrant has been returned, and that, therefore, there is nothing under which the sheriff can secure a new lien on the property. There is no evidence of a return before us. If the lien was not lost by surrender of the property under the compulsion of an order of the court, then it would not be necessary for the sheriff to make a new levy; but he would hold the property under the old levy, after the return of the warrant, just the same as in ordinary cases where the warrant has been returned. A return does not destroy a lien which has once attached. *Gerdes* v. *Sears*, (Or.) 10 Pac. 631-633. The return is always made long before judgment and execution. This is not a proceeding in which such questions should be settled. The sheriff should have restored to him the possession of which he was deprived by the error of the judge, and the rights he and the plaintiff will secure by such restoration are a matter for future investigation when the proper parties are before the court. This is true, also, of the claim that no benefit will come to the relator by setting aside the order, for the reason that the attachment has been vacated. It may be that plaintiff, who has appealed to this court from the order vacating the attachment, has given the statutory security provided for in § 5228, Comp. Laws, and in this manner continued in force the attachment pending the appeal. These questions are not directly before us on either the facts or the law, and, should we decide against the relator on these grounds, and refuse to annul the order and direct restitution, we might do it an irremediable injustice, by a

mistake as to the facts or the law, or both, upon questions which are not directly before us, and which can and should be litigated when the proper parties are before the court, and which ought not to be decided until they are directly involved, and have been fully investigated and discussed. If the warrant has been returned and the lien lost, it is by no means clear that the relator may not have a new warrant on the same papers. See *Hamill* v. *Phenicie*, 9 Iowa, 525; *Mojarrieta* v. *Saenz*, 80 N. Y. 547. Under this the property could be seized and held. Nor is it certain that the order vacating the warrant would prevent the issue of a new warrant on the same papers, as the giving of security under section 5228 (and security may have been given) makes it the duty of the court to order the continuance of the attachment, and leaves it as much in force pending the appeal as if the order vacating it had never been made. The rule which withholds the writ of *certiorari* when its issue will be of no benefit to the relator applies only to cases where it is certain that he can derive no advantage from it, and not where the matter is involved in serious doubt, as in this case.

But it is urged that the writ should not be granted, because it will result in no benefit to the relator for another reason. We cannot, it is said, order a return of the property to the sheriff. But, after the order is annulled, the sheriff may retake the property from the possession of the assignee if the lien still exists, or he can secure a new lien by another levy. There will then be no obstacle in his way, as there is at present. In an early Wisconsin case (*In re Booth*, 3 Wis. 1,) it was insisted that the Supreme Court should not issue *certiorari* to review the action of a judge in discharging a prisoner on *habeas corpus* because that court could not order him remanded to custody. In reply to this the court said that "a simple reversal of the order of discharge by this court, without remanding the prisoner, would enable the person from whose custody the relator was discharged to retake the prisoner." See, also, *Welch* v. *Van Auken*, (Mich.) 43 N. W. 371. Whether the sheriff has lost his lien on the property by

surrendering possession to the assignee under the order of the court is not material. If he has lost it, it is important that this order, if void, should be set aside, so that he may levy anew upon the property under the old warrant if he still has it, or under a new one if he has returned the old one; for, while the order stands, it will deter the sheriff from making another levy. A second levy without securing an annulment of the order would only result in another such order, with possible punishment of the sheriff for contempt. We are clear, however, that we are not restricted in our judgment in this proceeding to a mere annulment of the order. Incidental to the power of an appellate tribunal to reverse judgments of an inferior court is the power to order restitution of everything which has been taken from the party who is successful on the appeal, by virtue of the judgment which has been reversed. This power to order restitution is not limited to reversals on appeal or writ of error. It is a power which the court exercises without special statutory authority to render efficacious its appellate jurisdiction. It can exercise the same power when, on writ of *certiorari*, it has annulled the proceeding of some inferior court for want of jurisdiction. A court would be shorn of a power most important to the suitor for the complete redress of the wrong done him by the usurpation of jurisdiction by an inferior court if it were compelled to stop at annulling the void order, without directing that everything be restored to the suitor which was taken from him under its sanction. Where it is shown that the relator in the writ has been thus wronged by the illegal and void proceeding, the superior court will order restitution. *Peacock* v. *Leonard*, 8 Nev. 247; *Paul* v. *Armstrong*, 1 Nev. 82–104; *Arrowsmith* v. *Vanarsdale*, 21 N. J. Law 471; *Ex parte Shotwell*, 10 Johns. 304–307; 2 Spell. Extr. Rel. § § 2042, 2044. And where, as in this case, the judgment is entered in the court issuing the writ of *certiorari*, the writ of restitution will issue from that court, especially where the tribunal whose proceedings are annulled was utterly without jurisdiction. *Peacock* v. *Leonard*, 8 Nev. 247. See, also, *Arrowsmith* v. *Vanarsdale*, 21 N. J. Law, 471; *Paul* v. *Armstrong*, 1 Nev. 82–104.

The direction that restitution be made is often embodied in the judgment of the appellate court. See *Duncan* v. *Kirkpatrick*, 13 Serg. & R. 294; *Flemings* v. *Riddick*, 5 Grat. 272; *Haebler* v. *Myers*, 132 N. Y. 363, 30 N. E. 963; *Ex parte Morris*, 9 Wall. 605; Elliott, App. Proc. § 584; *Morris* v. *U. S.*, 7 Wall. 578; *Kennedy* v. *Hamer*, 19 Cal. 374; *Harlan* v. *Scott*, 2 Scam. 65; *Perry* v. *Tupper*, 71 N. C. 385; *Lee Chuck* v. *Quan Wo Chong*, 81 Cal. 222, 22 Pac. 594. Whether the writ of restitution should issue from the appellate tribunal when the judgment of that court is entered in the court to which the case is remanded for final judgment it is not important to decide. See *Hall* v. *Wells*, 54 Miss. 289, 307; *Vroman* v. *Dewey*, 23 Wis. 626. In this case there is no power in the District Court to order the issue of the writ, as the order annulled is void. There is no action or proceeding before that court in which it can make such order; nor has it jurisdiction over the parties. This proceeding is not before us on appeal. The writ has been issued by this court, not in the exercise of its appellate jurisdiction, but under the power of superintending control over inferior tribunals, vested in this court by the constitution. State Const. § 85. But whether the writ of *certiorari* is issued by this court in the exercise of appellate jurisdiction, or under the power of superintending control, it is clear that the power is vested in this court to issue a writ of restitution when, under *certiorari*, it has annulled an order or judgment of an inferior court under which the successful party in this court has lost property or rights, and it appears that the lower court has no power to order the issuing of such writ. The only ground on which it has been held that the writ should issue from the lower court is that the final judgment is not entered in the superior or appellate court, but that it is entered in the court below on the mandate of the superior or appellate court. In such cases the superior or appellate court will direct the lower court to issue the writ of restitution. See Elliott, App. Proc. § 584; *Hall* v. *Wells*, 54 Miss. 289; *Vroman* v. *Dewey*, 23 Wis. 626. But in this proceeding the judgment is entered in this court. Only a copy of

the judgment is sent below. Comp. Laws, § § 5515, 5516; *Leonard* v. *Peacock*, 8 Nev. 157. No judgment is entered in the District Court upon our mandate, as in ordinary cases on appeal. Moreover, the District Court would have no power to order the issue of a writ of restitution, because, as we have before said, it is utterly without jurisdiction in the matter. We have no power to direct it to make such an order. There is no action or proceeding before it in which it could make such an order. The whole proceeding is before us, and it must be finally disposed of in this court. That it is our duty, under such circumstances, and that it is within our power, to embody, in the judgment of this court annulling the order, a direction that a writ of restitution issue out of this court to restore to the sheriff the property which has been taken from him by this order, is clear upon authority as well as upon principle. *Peacock* v. *Leonard*, 8 Nev. 247. See, also, *Paul* v. *Armstrong*, 1 Nev. 82–104; *Kennedy* v. *Hamer*, 19 Cal. 374; *Arrowsmith* v. *Vanarsdale*, 21 N. J. Law, 471; *Ex parte Shotwell*, 10 Johns. 304–307; 2 Spell. Extr. Rel. § § 2042, 2044. This court is vested with power (but a specific grant was not necessary) to issue "such original and remedial writs as may be necessary to the proper exercise of its jurisdiction." State Const. § 87. And, if the case should be one in which the record did not disclose what had been wrested from the relator by the void proceedings of the inferior court, this court would have full power to inquire into the matter, that the writ, when issued, might specify, the property or right to be restored. In this case it appears upon the record of these proceedings that the sheriff has been dispossessed under the order. While the District Court has no jurisdiction in the matter, still, if it does, in fact, set aside the order which it has made, and also restores the property to the possession of the sheriff, all that could be accomplished by the writ of restitution would be accomplished without it. We will withhold the writ of *certiorari* at present. If satisfied that nothing has been done in conformity with this opinion, after a reasonable time we will issue the writ, and proceed to judgment on the

return, without further argument. The judgment will contain a provision for the issue of a writ of restitution directed to one of the marshals of this court, commanding the officer holding it to place the sheriff in possession of the property taken from him under this void order. All concur.

(58 N. W. Rep. 514.)

CHAS. E. ERSKINE, *et al vs.* STEELE COUNTY.

Opinion filed November 8th, 1894.

County Commissioners—Powers—County Warrants—Validity—Rights of Bona Fide Purchaser.

The County of Steele was formed in the year 1883, out of the territory previously lying within the Counties of Traill and Griggs. In that year the commissioners of Steele County, without legislative authority, agreed with one M. that the latter should transcribe from the records of Griggs and Traill Counties, into the records of Steele County, such parts of such records as related to real estate situated in Steele County, for the agreed price of $2,010 in cash. It was further agreed that M. should receive, as compensation a county warrant sufficient in amount, when sold at the prevailing discount, to realize the contract price of $2.010. Under this arrangement a county warrant of Steele County was issued for the face amount of $2,680, and delivered to M., the additional sum included in the warrant being given to make good a prevailing discount upon Steele County warrants. A warrant was issued by Steele County officials to one B., for $389.77, which was issued wholly to make good a discount upon other warrants delivered to B. Both of the warrants were purchased by the deceased, Messena B. Erskine, during his lifetime. This action is upon both warrants. *Held*: *First*, that the warrants issued to M., was wholly illegal and void from its inception, for the reason that the commissioners of Steele County, in the absence of legislative authority, either general or special, to do so, were without power to enter into any such arrangement. Their contract with M., was *ulra vires*, and hence they had no power to issue said warrant to M. *Second*, such portion of the warrant to M., as represented discount upon Steele County warrants is illegal and void. The commissioners were without power to enter into an agreement for such discount. *Third*, the warrant to B., being wholly issued for discount, is void for the same reasons. *Fourth*, county warrants are nonnegotiable instruments, within the meaning of the law merchant, and hence the plaintiff, as a good faith purchaser of the warrants, occupies no better position than that occupied by the parties to whom the warrants were originally issued. Plaintiff cannot recover.

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

Action by Charles E. Erskine and William H. Crosby, administrators of the estate of Messena B. Erskine, deceased, against Steele County, on certain county warrants. From a judgment for plaintiffs, defendant appeals.

Reversed.

George Murray, (*F. W. Ames* of counsel,) for appellant.

The warrant to E. J. McMahon for transcribing records, was illegally issued. The county commissioners had no authority to contract for such services. *Rasmussen* v. *Board of County Commissioners*, 43 N. W. Rep. 3. Counties have only such powers as are expressly conferred upon them or necessarily implied. *McCormack* v. *Commissioners*, 2 N. W. Rep. 707; *Supervisors* v. *Sullivan*, 8 N. W. Rep. 12; *Merritt* v. *Batty*, 8 N. W. Rep. 559; *Gould* v. *Stevens*, 23 N. Y. 463; *Perrin* v. *C. H. & Del. Co.*, 9 How. 172; *Bradley* v. *Mayor*, 20 N. Y. 312. The act of the county commissioners in adding discount to the warrants was illegal and the discount portion of the warrants is void. *Arnot* v. *City of Spokane*, 33 Pac. Rep. 1063; *Clark* v. *Des Moines*, 19 Ia. 199; *Foster* v. *Coleman*, 10 Cal. 279; *Bauer* v. *Franklin Co.*, 51 Mo. 205; *State* v. *Wilson*, 9 S. W. Rep. 155; *Dorsey* v. *Whitehead*, 1 S. W. Rep. 97; *Barton* v. *Swempton*, 44 Ark. 437; *Sharp* v. *Pulaski Co.*, 4 Dill. 209.

Newman, Spalding & Phelps, for respondent.

The commissioners had power to procure the transcription in question. Comp. Laws, § § 545, 592; *Webster Co.* v. *Taylor*, 19 Ia. 117. They also had power to contract for the building of a jail for the county. Section 607, Comp. Laws. Their power being otherwise unrestricted they could make any contract which would be valid if made by an individual. Dillon Munc. Corp. 472. *Brady* v. *Mayor*, 1 Barb. 584; *Kelley* v. *Mayor*, 4 Hill 263; *Jackson Co.* v. *Rundleman*, 100 Ill. 379. Had an individual made the contracts payable in gold coin, they would have been valid. *Sam* v. *Gluckauf*, 87 Am. Dec. 121, note. Counties have power to pay in money instead of warrants. *Martin* v. *Tyler*, 60 N. W. Rep. 392.

WALLIN, J. This action is brought to recover the amount purporting to be due according to the terms of certain county warrants issued by the officials of Steele County, and which were subsequently purchased by Massena B. Erskine, deceased, during his lifetime. The warrants were drawn on the general fund of the county, and were presented to the county treasurer for payment. Payment was refused for want of funds, and the warrants were then registered for payment. The warrants which are now contested are two in number, described as follows: A warrant dated November 19, 1883, for $2,680, issued and delivered to one E. J. McMahon; a county warrant dated March 31, 1884, for $389.77, issued and delivered to one Charles R. Black. The fact of issuing and delivering the warrants, and their sale to the deceased during his lifetime, is not controverted. The defense set out in the answer as to both warrants, when briefly stated, is that they were issued without authority of law and without lawful consideration. A jury trial was waived, and, after a trial upon the merits, the court filed its findings of fact and conclusions of law, and directed judgment for the plaintiff, whereupon judgment was entered for the full face amounts of said warrants, with interest added.

The findings are as follows: "(1) That the said defendant, on the 19th day of November, 1883, made and delivered to E. J. McMahon a certain county warrant or order upon its county treasurer, whereby said treasurer was directed to pay to said E. J. McMahon, or order, the sum of $2,680 out of the general funds of the treasury of defendant, not otherwise appropriated, and belonging to said county. That said county warrant or order is in the words and figures following, to-wit: 'Treasurer of Steele County: Pay to E. J. McMahon, or bearer, twenty-six hundred and eighty 00-100 dollars out of the general funds in the treasury, not otherwise appropriated, for transcribing records in Traill and Griggs Counties.' That said warrant was thereafter, for value, duly transferred to this plaintiff, and was on the 30th day of November, 1883, duly presented to the treasurer of said county defendant for payment, and payment was refused, and the

said warrant was thereupon endorsed: 'Presented for payment November 30th, 1883, but not paid for want of funds in treasury. Clarence J. Paul, County Treasurer.' That said warrant was so as aforesaid issued to said McMahon under and by virtue of a contract made and entered into by and between said McMahon and the said defendant, under and by virtue of which it was agreed that the said McMahon should transcribe for the defendant so much of the records of the Counties of Traill and Griggs as related to real property within the County of Steele for the sum of $2,010 in cash. That the said warrants of said county were, at the time, of the issue of said warrants, worth only seventy-five cents on the dollar; and the said warrant was so as aforesaid issued for the sum of $2,680, pursuant to, and in fulfillment of, the contract of the said defendant and the said McMahon. That no part of said warrant has been paid. (2) That on the 31st day of March, 1884, defendant made, executed, and delivered to Charles R. Black its certain county warrant or order upon its treasurer, whereby said treasurer was directed to pay to said Charles R. Black, or order, the sum of $389.77 out of the general funds in the treasury of the defendant, not otherwise appropriated, which said county warrant or order was in the words and figures following, to-wit: 'Treasurer of Steele County. Pay to Charles R. Black, or bearer, three hundred and eighty-nine and 77-100 dollars, out of the general funds in the treasury, not otherwise appropriated, for amount due on county building account of, discount on orders.' That thereafter, and on the 31st day of March, 1884, said warrant was presented to the treasurer of the defendant for payment, and payment thereof refused, and said warrant indorsed as follows, to-wit: 'Presented for payment March 31st, 1884, but not paid for want of funds in the treasury, and registered for payment March 31st, 1884.' That said warrant was so as aforesaid issued to said Black for the balance due him under and by virtue of the contract made and entered into between said Black and the defendant, whereby the said Black agreed to erect for the defendant a certain jail building, for which it was, under and

by virtue of said agreement, agreed that he should receive $1,210 in cash, and that the defendant should issue its warrant for sufficient to cover the discount on its warrants at the then market price of same, and to make the amount paid by such warrants equal to the sum of $1,210 in cash. That said warrant so as aforesaid issued to said Black was the balance due him under and by virtue of said contract. That said warrant was thereafter, for a valuable consideration, duly transferred to this plaintiff, and no part of the same has been paid.

"On the foregoing facts I find as conclusions of law: Conclusions of law: (1) That the warrant or order mentioned and described in the first finding of fact herein is a valid, existing indebtedness of the said defendant, and that the plaintiff is entitled to recover thereon the sum of $2,680, with interest thereon from the 30th day of November, 1883, amounting to the sum of $4,526.24. (2) That the warrant mentioned and described in the second finding of fact herein is a valid, existing indebtedness of the defendant, and the plaintiff is entitled to recover thereon the sum of $389.77, with interest from and after the 31st day of March, 1884, amounting to the sum of $649.26. That plaintiff is entitled to judgment for his costs and disbursements herein, to be taxed by the clerk."

The findings of fact are not assailed in this court, and the appellant assigns error only upon the conclusions of law found by the trial court, to the effect that the plaintiff was entitled to judgment. It is conceded that the territory now embraced within the boundaries of Steele County was formerly, and until March, 1883, included within the limits of the counties of Traill and Griggs. It appears from the first finding of fact that the warrant issued to McMahon for the lump sum of $2,680 was issued in accordance with the terms of a contract between McMahon and the county commissioners, but upon considerations which were distinct and independent in their nature. Under the contract, McMahon was to transcribe from the records of Traill and Griggs Counties such parts thereof as related to real estate

situate within the county of Steele; and by the terms of the contract a warrant was to be delivered to McMahon, in payment for the work, sufficiently large to yield the contract price, taking into account the discount at which the warrant would or could be sold in the market. In short, the commissioners agreed to issue, and did issue, a warrant which would yield, when sold in the market, $2,010 in cash, which was the contract price for the work. County warrants are nonnegotiable paper, within the meaning of the law merchant, and hence the plaintiff purchased the warrants subject to whatever defenses were available as against the parties to whom they were originally made payable. The plaintiff has all the rights which the original holders of the warrants had, but has no other or different rights. Was the warrant in question a valid warrant when issued? We think this question must be answered in the negative. In our opinion, the warrant was issued without a valid consideration, without authority of law, and in defiance of the law. Prior to issuing the warrant in question there never had been any special legislation clothing the commissioners of Steele County with power to contract for a transcription of the records such as that under consideration, or any other. Some four years after the warrant to McMahon was issued, a general statute was enacted by the territorial legislature, expressly authorizing all county commissioners to procure such work to be done. Comp. Laws, § 545. This statute cannot, of course, be invoked in aid of the respondent's contention. If the enactment has any bearing, it tends to show that, in the opinion of the legislature at least, the power did not exist at the time the commissioners of Steele attempted to exercise it. Counsel for respondents cite Comp. Laws, § 592, and *Kilvington* v. *City of Superior*, (Wis.) 53 N. W. 487, and other cases, none of which appear to us to be in point. Subdivision 5, § 592, Comp. Laws, empowers county commissioners to furnish necessary blank books, blanks, and stationery to certain county officers, including registers of deeds; but such language cannot possibly he stretched suffiently to cover an authority such as respondent is contending

for. It does not appear that McMahon was ever register of deeds of Steele County; much less does it appear that the commissioners were empowered by the section cited, or by any law, usage, or custom then in existance, to compensate the register of deeds out of county funds for any entries or transcriptions made in his official record for the benefit of private parties. The precise opposite is true. The statute in terms makes it the duty of registers of deeds to place upon record certain documents and muniments of title at the request of private parties and at their expense, not exceeding the sums prescribed as fees in the statute. It was the official duty of the register of deeds in Steele County, his fees therefor being tendered, to place any and all such papers upon record upon presentation to him of the original papers or properly certified copies thereof. Comp. Laws, §§ 624-632. When so entered of record, such record became notice to the world, and could, under certain circumstances, be used in court as evidence. Id. §§ 5309-5311. Whether the transcription made by McMahon would or would not possess any legal validity as notice, or otherwise, is unnecessary to decide in this case; but, to say the least, there is grave reason to doubt the legal value of such transcribed records. In the case of *Kilvington* v. *City of Superior*, cited by counsel, the court held that the general power conferred upon village trustees to "appoint a board of health, prevent the deposit of unwholesome substances, and prevent or abate nuisances is sufficient to authorize a contract for the erection of a crematory for the consumption of any matter calculated to effect the health or comfort of the community." The reason of this holding is plain. While the authority to erect a crematory was not expressly conferred by the legislature upon the trustees, such authority was implied if necessary in carrying out the power to abate nuisances, etc., which power was given in clear terms. But we see no analogy in the case cited to the case at bar. The right to enter into a contract such as that concluded with McMahon was not expressly conferred upon the commissioners, nor was such authority necessary or at all appropriate to the

execution of any power vested in the commissioners by any law of the territory then existing. In the absence of legislative authority authorizing it, any such contract was, in our opinion, clearly *ultra vires* in character. We therefore hold that the warrant was wholly void from its inception. It was issued without authority of law, and upon no legal consideration. *Rasmussen* v. *Board*, (Minn.) 43 N. W. 3; *Pugh* v. *Good*, (Or.) 23 Pac. 827.

We are equally clear that so much of the McMahon warrant as represented discount ($670) is illegal and void upon independent grounds. Essentially the same question has been frequently presented to courts in other jurisdictions, and the authorities, as far as we have examined them, are unanimous in condemning such discount transactions. Judge Dillon, in his learned treatise upon Municipal Corporations (volume 1, 4th Ed., § 503.) says: "Without express authority from the legislature, a municipality cannot discount its warrants for more than the sum actually due the claimant; and as to the excess they are void, and the holder will be treated only as the equitable assignee of the valid, legal claim of the payee." In *Foster* v. *Coleman*, 10 Cal. 278, a claim for services to the amount of $1,650 was allowed by the board of supervisors. County warrants of the county were then at a discount, and worth only 40 cents on the dollar. The board ordered a warrant to issue for a sum which, at the prevailing discount, would sell for $1,650, the amount due the claimant. Upon such order the warrant issued. A taxpayer of the county brought suit, and the county treasurer was enjoined from paying the warrant. The Supreme Court, in the course of its opinion, referring to the order of the board directing the warrant to issue said: "The effect of the order was to create a debt or liability on the part of the county, and this the supervisors were not empowered to do for any purpose except as provided by law. Their action was entirely without authority, and all together indefensible." The settlement and allowance of an illegal claim against the county when made by a county board, has no more conclusive effect than such an adjnstment would have if made by private

persons. See *Commissioners* v. *Keller*, 6 Kan. 511. In a recent case, clearly in point, the Supreme Court of the state of Washington, in referring to the act of a municipality in discounting its own warrants, uses the following language: "Such a proceeding is manifestly beyond the the scope of legitimate corporate power, and a practice of that character might lead to ruinous results. City warrants are evidences of indebtedness, or promises to pay, and are payable with interest prescribed by law; and the corporation cannot cast upon the taxpayers any further burden in respect thereto, and the courts have uniformly, as far as we are advised, disapproved of any effort to do so." *Arnott* v. *City of Spokane*, (Wash.) 33 Pac. 1063. See, also, *Clark* v. *Des Moines*, 19 Iowa, 199; *Bauer* v. *Franklin Co.*, 51 Mo. 205; *Skirk* v. *Pulaski Co.*, 4 Dill. 209, Fed. Cas. No. 12,794. The authorities cited, and others to the same effect, are severe in their animadversions upon discount transactions, when attempted by municipal corporations in endeavoring to bring their depreciated warrants up to par. The principal ground upon which the cases rest is the essential illegality and want of power in the governing body to enter into such financial transactions; and the cases uniformly and strenuously condemn all attempts to engage in such discounts as being highly dangerous, and likely to lead to disastrous results.

Respondents' counsel contends that the cases cited should be distinguished from the case under consideration for the reason as counsel claims, that it does not appear in such cases that the discount was given as a result of a contract made in advance to do so. This contention, we think, is not true in fact of all the cases (see *Arnott* v. *City of Spokane*;) but if it were true, we think the cases cited are strictly in point. To our mind it is a self evident proposition that, if the law forbids county boards to allow claims, and issue warrants to make good their depreciated paper, for the reason that such discount transactions are vicious, dangerous, and wholly without authority of law, for the same reason county boards would be without authority to enter into contracts to issue such warrants. It would certainly be a signal

and dangerous perversion of fundamental principles of law to sanction a transaction which is clearly in violation of law upon the ground that it is done under a contract to do the illegal act. If the thing done is without authority of law, the agreement to do it must be equally so, and for the same reason. The act of issuing discount warrants to bring depreciated municipal orders up to par is also, in our opinion, distinctly usurious in character, inasmuch as such transactions, in their practical operation, if carried out, compel the corporation to pay a bonus upon deferred payments above the rate of interest established by statute. In all points of view, such discount transactions are illegal, as well as vicious and dangerous in their tendencies.

What we have written upon the discount feature of the McMahon warrant renders it unnecessary to comment upon the warrant referred to in the second finding of fact. That warrant is void also for the reason that it was issued to make good a discount bonus, and for no other consideration whatever. It follows that the judgment entered below must be reversed, and the action dismissed. All concur.

(60 N. W. Rep. 1050.)

GEORGE A. BENNETT *vs.* NORTHERN PACIFIC RY. CO.

Opinion filed November 13th, 1894.

Injury to Employe—Erroneous Charge.

Judgment reversed for error in charging the jury that liability of defendant depended solely upon freedom of plaintiff from contributory negligence, the defendant's negligence not being established by the evidence as a matter of law.

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

Action by George a Bennett against the Northern Pacific Railroad Company for personal injuries. Judgment for plaintiff, and defendant appeals.

Reversed.

Ball & Watson, for appellant.

An employe is not liable to a servant injured through a latent defect, the existence of which it did not suspect. It can be held in such case only upon proof of its failure to use ordinary care to discover such latent defect. *Roberts* v. *Baxter*, 44 Cal. 187; *Railroad Co.* v. *Fort*, 17 Wal. 553; *Railroad* v. *Wagner*, 21 A. & E. R. R. Cases, 637. The servant who undertakes for reward to perform certain work, is presumed to bring into the business a degree of skill, ability, judgment, care and caution commensurate with the hazard and danger of the business in which he engages to serve and the presumption is that he assumes the ordinary risks attending such employment. *I. B. & W. R. R.* v. *Flanigan*, 77 Ill. 365; 1 Harris on Damages by Corp. 272; *Ladd* v. *R. R. Co.*, 119 Mass. 412; *Ford* v. *R. R.*, 110 Mass. 240; *Shany* v. *Mills*, 66 Me. 420; *R. R. Co.* v. *Gildersleeve*, 33 Mich. 134; *Wallingford* v. *R. R. Co.*, 26 S. C. 258. An instruction to the jury which does not arise out of the facts of the case is inapplicable to it and is erroneous if calculated to mislead or confuse them. *Perkins* v. *Eckert*, 55 Cal. 400; *Chicago, etc.* v. *Robbins*, 2 Black 417; *Bank* v. *Eland*, 9 Wall. 554; *Hawks* v. *Naglee*, 54 Cal. 51; Thompson on Charging Jury, 62. When an instruction is based upon a state of facts not warranted by the evidence, the manifest tendency of which is to lead the jury to infer the existence of such facts and thereby take an erroneous view of the case, it is ground for reversal. *Willis* v. *R. R. Co.*, 17 Am. and Eng. R. R. Cases, 542; *St. Louis* v. *Risley*, 10 Wall. 91; *U. S.* v. *Breitling*, 20 How. 254; *Jones* v. *Randolph*, 14 Otto 108; *Boardman* v. *Reed*, 6 Pet. 328; *Ins. Co.* v. *Baring*, 20 Wall. 158; *Miller* v. *R. R. Co.*, 41 N. W. Rep. 28; *Sawden* v. *Idaho*, 55 Cal. 443.

S. L. Glaspel, for respondent.

The instructions of the court assigned for error when read with the charge complete and in the light of undisputed facts seem to be fair and without error of which any just complaint can be made. Counsel relies upon former opinions in this case. 3 N. D. 91, 2 N. D. 314.

CORLISS, J. This case has been tried three times in the District Court. This is its third appearance in this court. The opinions on the two former appeals are reported in 2 N. D. 112, 49 N. W. 408, and 3 N. D. 91, 54 N. W. 314. We are loath to send the case back for a new trial, but we find no escape from the conclusion that the court erred in its charge. Twice in the course of his charge the learned judge instructed the jury that if the plaintiff could not, after careful examination, discover any defect in the coupling apparatus, the defendant was liable. The jury were by this language told that the inability of the plaintiff to discover the defect after careful examination established the negligence of the defendant. It is obvious that the defendant's negligence depended upon no such fact. This fact merely exonerated the plaintiff from the charge of contributory negligence. Defendant's negligence must be determined from other considerations. We are unable to discover, from a careful study of the whole charge, that this error was neutralized by other portions of the court's instructions. Nor are we able to hold that defendant's negligence was established as a matter of law. It was a question of fact for the jury. So far as we know, they have never passed upon it. The court informed them that they must find defendant negligent if plaintiff was not himself careless. This verdict may rest upon a mere finding by the jury that plaintiff was not negligent.

The judgment is reversed, and a new trial ordered. All concur.

(61 N. W. Rep. 18.)

ROBERT HANNAH *vs.* E. C. CHASE.

Opinion filed November 13th, 1894.

Effect of Recitals in Sheriff's Deed.

In a sheriff's deed under foreclosure proceedings by advertisement, the grantee was named and described as "Globe Investment Company, formerly Dakota Mortgage Loan Corporation." *Held*, that such recital was no evidence that the Globe Investment Company had succeeded to the rights of the Dakota Mortgage Loan Corporation.

Presumption of Regularity—Jurisdictional Facts.

The legal presumption that a public officer has done his duty will not extend so far as to warrant a court in presuming the existence of an independent jurisdictional fact, of which there is no other evidence.

Foreclosure by Advertisement—Identity of Grantee.

Nor does such presumption apply to the acts of an officer specially authorized by statute to sell real estate in foreclosure proceedings by advertisement, and while proceeding under such authority.

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

Action by Robert Hannah against E. C. Chase to determine adverse claims to certain land. Judgment for defendant, and plaintiff appeals.

Affirmed.

Fred B. Morrill, for appellant.

The object of this action is to try the legal title and right of possession to the land in question. *Wood* v. *Conrad*, 2 S. D. 405, 50 N. W. Rep. 903. The presumption is that the officer in making the deed, did his duty. *Faley* v. *Kane*, 4 N. W. Rep. 355; *Herrick* v. *Ammerman*, 21 N. W. Rep. 836; *Love* v. *Cherry*, 24 Ia. 204. It is the duty of the sheriff to complete the sale by executing a deed of the premises sold, to the original purchaser or any person who may have acquired the title or interest of such purchaser. Sections 5423, 5160, Comp. Laws.

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

Plaintiff must recover, if at all, on the strength of his own title.

Kircher v. *Murray*, 54 Fed. Rep. 620; *Foley* v. *Kane*, 4 N. W. Rep. 355. The sheriff's deed is void upon its face, because issued to the wrong party. A naked power conferred by law on an officer or private person, must be strictly followed and one claiming a right under the exercise of such a power must show that it was strictly pursued in accordance with the directions of the law. Throop on Public Officers, 556; *Thacher* v. *Powell*, 6 Wheat. 119; *Jackson* v. *Esty*, 7 Wend. 148; *Williams* v. *Peyton*, 4 Wheat. 77. The presumption that an officer does his duty will not be allowed to sustain a vital jurisdictional fact. Throop Public Officers, 559; *Albany* v. *McNamara*, 117 N. Y. 168. To found the power to act against a private right of property there must be affirmative proof of compliance with prerequisites. Throop Public Officers, 559; *In re Buffalo*, 78 N. Y. 366; *In re Carlton Street*, 16 Hun. 497. The sheriff in making sales acts as the agent of the mortgagee, and is appointed by the legislature by the name of his office and not *virtute officie*. *Berthold* v. *Herman*, 12 Minn. 221; Throop Public Officers, 560. The rule that officers will be presumed to have done their duty does not extend to agents appointed by the legislature *pro hac vice* to sell lands for the payment of the owners debts; the correctness of their proceedings must be affirmatively proved. Throop Public Officers, 560; *O'Brien* v. *McCann*, 58 N. Y. 373; *Hilton* v. *Bender*, 69 N. Y. 75. The recitals in the sheriff's deed are not evidence against the owner. *McMurtry* v. *Keifner*, 54 N. W. Rep. 844; *Costello* v. *Burke*, 19 N. W. Rep. 247; *Hilton* v. *Bender*, 69 N. Y. 75.

BARTHOLOMEW, C. J. This action was brought under § 5449, Comp. Laws, to determine adverse claims to the S. E. ¼ of section 23 in township 131 N., range 53 W., in Sargent County. Both parties claims title from one Winfield S. Wolfe. The trial below was to the court, and defendant prevailed. Plaintiff prosecutes this appeal. Defendant is in possession. It is only after plaintiff has shown a right in himself, superior to the right of possession, that defendant's title becomes material. We may therefore enter at once upon a consideration of plaintiff's title.

The facts upon which he relies are undisputed. It is simply the right that the law gives him from such facts that is questioned. In February, 1885, Winfield S. Wolfe, the fee owner of said land, executed a mortgage thereon in favor of the Dakota Mortgage Loan Corporation, which was duly recorded. Upon a subsequent default, this mortgage was foreclosed by advertisement, and a sheriff's certificate of sale issued to the mortgagee on June 2, 1888. This certificate was properly recorded, as was also the usual affidavit of publication and what purported to be a sheriff's affidavit of sale; but this last instrument was sworn to before the register of deeds of Sargent County, an officer who at that time was without authority to administer an oath. No redemption was made or attempted, and on January 3, 1890, a sheriff's deed was executed upon such certificate, and in the deed the grantee is named and described as "the Globe Investment Company formerly Dakota Mortgage Loan Corporation, of the County of Suffolk and commonwealth of Massachusetts." This grantee subsequently conveyed the land to the plaintiff herein by warranty deed. Upon the foregoing instruments, or duly authenticated copies thereof, plaintiff rested his right to recover. Plaintiff also sought to introduce a copy of a statute purporting to have passed by the legislature of Massachusetts in 1888, by which the name of "Dakota Mortgage Loan Corporation" was changed to "Globe Investment Company." This copy was authenticated only by the certificate of a notary public to the effect that he had compared it with the engrossed act in the office of the secretary of state, and that it was a true copy thereof. On defendant's objection to its incompetency, the copy was excluded and exception saved. But the proof or authentication of the copy was so clearly insufficient that we may dismiss it with its statement. Comp. Laws, § 5302; Whart. Ev. § 305.

The court found that the sheriff's affidavit of sale was entirely void, because the *jurat* was made by a party not authorized to administer oaths. But whether or not the court considered the record of such an instrument necessary to establish a record title

under the foreclosure is not apparent. Nor is it necessary for us to pass upon the point. The court held that the sheriff's deed made pursuant to the certificate of sale, and made to the Globe Investment Company, was ineffective to convey any title whatever, because the certificate was made to the Dakota Mortgage Loan Corporation as purchaser, and the Globe Investment Company in no manner connected itself with the rights or interests of the Dakota Mortgage Loan Corporation under the certificate. If plaintiff's grantor had no title, it, of course, conveyed none to plaintiff; and that point alone, if well taken, would decide the case. Against this position, it is urged that the recitals in the deed are sufficient *prima facie* to establish the right of the Globe Investment Company to succeed to the interests of the Dakota Mortgage Loan Corporation. We think otherwise. The statute does not make the sheriff's deed evidence of any such recitals. See Comp. Laws, § § 5160, 5428, 5437. Nor would such recitals be evidence of the matters stated in the absence of statutes. In *Costello* v. *Burke*, 63 Iowa, 361, 19 N. W. 247, the court said: "The conveyances introduced show that John Bannington was vested with the title, and there is no competent evidence that it has ever passed from him. The recitals in the deed to Costello that the grantors therein are the heirs at law of John Bannington, deceased, are not competent evidence either of his death or their heirship. These recitals are no part of the conveyance, and they are no more competent as evidence of the facts stated than they would be if embodied in any other writing signed by the parties." See, also, *Hill* v. *Draper*, 10 Barb. 454; *Smith* v. *Penny*, 44 Cal. 161; *Hardenburgh* v. *Lakin*, 47 N. Y. 109; *McMurtry* v. *Keifner*, 36 Neb. 522, 54 N. W. 844. This is not a case where the truth of the matter contained in the recitals comes in question between the parties to the deed. Here it is sought to bind a third party, and, under the authorities, it is clear this cannot be done.

But by § 5423, Comp. Laws, it was made the duty of the officer who made the sale or his successor in office, in case no redemption was made, "to complete the sale by executing a deed of the

premises to the original purchaser, his heirs or assigns, or to any person who may have acquired the title and interest of such purchaser by redemption, or otherwise." Under the presumption that a public officer has done his duty, we are asked to assume without proof that in this case the sheriff executed the deed to the party to whom the law made it his duty to execute it; *i. e.* to the party that had legally succeeded to the interest of the Dakota Mortgage Loan Corporation. To state the position baldly: Where, upon a foreclosure by advertisemcnt, the sheriff executes a certificate of purchase to A., and subsequently executes a deed of the premises to B., does the law presume without proof that B. has legally succeeded to the rights of A.? This must be answered in the negative. The authority to execute the deed to B. depends, not upon the performance of any precedent duty on the part of the officer, but upon the existence of an entirely independent fact, and a fact that is jurisdictional, because, unless A.'s rights have in some manner passed to B., the officer is entirely without authority to deed to B. Now, the presumption in favor of the legality of official acts never goes to the extent of supplying a jurisdictional fact. Whart. Ev. § 1318; *Miller* v. *Brown*, 56 N. Y. 383; *Jewell* v. *Van Steenbrugh*, 58 N. Y. 85, 92; *Wheeler* v. *Mills*, 40 Barb. 644; *City of Albany* v. *McNamara*, 117 N. Y. 168, 22 N. E. 931; *Hilton* v. *Bender*, 69 N. Y. 75, 83; *Osburne* v. *Tunis*, 25 N. J. Law, 633–662; *Telfener* v. *Dillard*, 70 Tex. 139, 7 S. W. 847; *Keane* v. *Cannovan*, 21 Cal. 291.

For a further reason we do not think plaintiff is in position in this case to claim the benefit of the usual presumption that a public officer has done his duty. Our statute providing for these sales (§ 5416, Comp. Laws) declares that they must be made by the person appointed for that purpose in the mortgage, or by the sheriff of the county or his deputy. Making the sale is not a duty that necessarily pertains to the sheriff's office. The duties of a sheriff, aside from his general duties as a peace officer, are those of chief executive officer of courts of record. Judicial sales are necessarily made by a sheriff, unless, by special order, some other

party is empowered to make the sale. But a sale under a power contained in a mortgage, when foreclosed by advertisement, is not a judicial sale. It is a sale in pursuance of a contract, and the contracting parties may appoint in the mortgage whom they will to act as their agent in conducting the sale. But, if they fail to appoint, then the law selects for that purpose the sheriff of the county or his deputy. And, in making the sale, the appointee of the law acts in the same capacity as would the appointee of the parties in performing the same service; *i. e.* as the agent of the parties. His appointment is for a special purpose, and the legal presumption that we are discussing does not cover such a case. Throop, Pub. Off. § 560, and cases cited; *Murphy* v. *Chase*, 103 Pa. St. 260; *Keane* v. *Cannovan, supra;* Mechem Pub. Off. 581. It is very clear that plaintiff failed to establish any title whatever in himself. Defendant's title need not be considered.

Judgment affirmed. All concur.

(61 N. W. Rep. 18.)

M. S. HOSTETTER *vs.* BROOKS ELEVATOR COMPANY.

Opinion filed November 22, 1894.

Appeal Statute—Prospective in Operation.

Chapter 82, Laws 1893, construed, and *held* not to apply to a case tried in the year 1892, where the trial was had and the record thereof completed by filing the judgment roll, embracing findings and a bill of exceptions.

Specifications of Error.

Held, where the bill of exceptions contained no specifications of errors of law, such errors, if they exist, will not be considered in this court, in reviewing the case. This established and statutory rule applies to cases of trials to the court, where no motion for a new trial is made below, the same as in other cases. Laws 1891, Ch. 121; Sup. Ct. Rule No. 13.

Assignments of Error—Court Rules.

Where assignments of error in this court do not refer to the abstract, they are insufficient assignments, under Rule 15 of the rules of this court; and such assignments of error will not be considered unless, for reasons satisfactory to the court, said rule is relaxed, in furtherance of justice, and on such terms as may be deemed just.

Exceptions to Findings of Fact.

Where exceptions to findings of fact do not specify wherein such findings are not justified by the evidence, this court will not explore the record to ascertain whether or not the finding is supported by the evidence.

Findings Supported by the Evidence.

Findings of fact examined with reference to the evidence. *Held*, that such findings are supported by the evidence.

Mortgage of Future Crop—Filing.

Sections 4328, 4379, Comp. Laws, construed. *Held*, that an instrument in the form of a chattel mortgage, covering a crop not yet planted, may be filed in the office of the register of deeds of the county where the land described in the mortgage is situated, and such filing will be constructive notice to third parties of the rights of the mortgagee, as in other cases. In such cases the filing gives priority, and the lien will attach as soon as the crop comes into existence by the agency of the mortgagor. Following *Grand Forks Nat. Bank* v. *Minneapolis & N. E. Co.*, 6 Dak. 357, 43 N. W. 806; *Bank* v. *Mann*, 2 N. D. 456, 51 N. W. 946.

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

Action by M. S. Hostetter against the Brooks Elevator Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Cochrane & Feetham, for appellant.
Bangs & Fisk, for respondent.

WALLIN, J. This action is to recover the value of certain wheat. The plaintiff claims a special property in the wheat, under a chattel mortgage. The salient facts are as follows: On the 16th day of January, 1890, one William Rogers was the owner of a certain quarter section of land in Pembina County, and on that day executed and delivered to M. S. Hostetter & Son his promissory note for the sum of $410.50 and interest at 12 per cent. per annum, and to secure the note, executed and delivered on said day a chattel mortgage in the usual form, whereby he mortgaged to said M. S. Hostetter & Son all crops of every name and nature, to be sown, grown, planted, or harvested on said real estate during the years 1890 and 1891. On January 21, 1890, the mortgage was filed in the office of the register of deeds of Pembina County. The note and mortgage were sold and transferred to the plaintiff, and certain payments were made and indorsed on the note in October and November, 1890. In the season of 1890 there was sown, raised, and harvested on the land a crop of wheat, by said Rogers, to the amount of 1,200 bushels. Plaintiff claims that Rogers unlawfully sold 1,000 bushels of said wheat to the defendant, and delivered the same to the defendant in the month of October, 1890, and that the defendant converted the wheat by mixing it with other wheat, and shipping it out of the state. Plaintiff seeks to recover only to the extent of his mortgage lien. Judgment was entered for the plaintiff for $393.15, the amount of his claim, with interest and costs.

The action was tried by the court without a jury, and findings of fact and conclusions of law were made and filed on the 18th day of May, 1892. A bill of exceptions was settled on July 20, 1892. The record transmitted to this court embraces the judgment, findings, and bill of exceptions. Subsequently to the settlement of the bill and the entry of judgment, the Judge of the District Court, who presided at the trial, certified to the testimony adduced at the trial; and thereby, as claimed by the

appellant's counsel, such testimony became a part of the judgment roll below, and a part of the record transmitted to this court. The certification of the testimony is claimed to have been made under the provisions of Ch. 82, Laws 1893. We are clear that such testimony, except so far as it may have been embodied in the bill of exceptions, forms no part of the record, and hence cannot be considered in this court. Chapter 82, Laws 1893, had not been enacted when the trial was had, nor did such statute become a law until long subsequent to the entry of judgment and the filing of the roll embracing the bill of exceptions. The statute, in terms, is made to apply only to such cases as are "tried in the District Court according to the provisions of this act." When so tried, "no exceptions need be taken or findings of fact made." It certainly is true that the trial of the action was not had "according to the provisions of the act," and it is equally true that findings of fact were filed, and that exceptions thereto were duly settled and filed. Manifestly, therefore, the act cited cannot apply to the record under consideration.

To certain of the findings of facts, as filed in the court below, counsel for the defendant took exception; and such exceptions, after being settled and allowed by the trial court, were filed and incorporated with the record. In such bill there were no specifications of errors of law either made, or attempted to be made. In this court, appellant's counsel has made an assignment of errors embracing 24 errors, 14 of which relate to errors of law accruing at the trial in rulings upon the admission of evidence. The assignments of error based on such rulings at the trial cannot be reviewed in this court. The statute and a rule of this court are explicit in requiring errors of law accruing at the trial to be specified in the bill or statement. Where a motion for a new trial is made,—whether based upon a bill or a statement,—the errors must be specified. Compiled Laws, § 5090. Where there is no jury trial, and no motion is made, alleged errors of either law or fact must nevertheless be specified in a statement framed

in the manner required in cases where a motion is made. Laws 1891, Ch. 121; Sup. Ct. Rule No. 13.

Nor is the appellant's assignment of errors of law based upon rulings at the trial sufficient under Rule 15 of the rules of this court. None of said sasignments embrace any reference to the abstract. Rule 15 requires that each assignment of error in this court shall embrace a reference to the specification in the bill or statement to which it relates, and "also to the page or pages of the abstract in which the matter is found upon which the error is assigned." True, the requirement of the rule may be relaxed by this court, in the exercise of its discretion and in furtherance of justice; but the rule was made to be observed by counsel, and it will be enforced unless, for good reasons, it is relaxed in furtherance of justice. We have had occasion in two cases to enforce the requirement of Rule 15 in another of its features. See *O'Brien* v. *Miller*, (decided at this term) 60 N. W. 841; *Investment Co.* v. *Boyum*, (N. D.) 58 N. W. 339. It follows, both under the statute and rule of court, that appellant's assignments of errors of law based upon rulings upon the admission of evidence will not be considered in reviewing this record.

Turning now to the exceptions to the findings of fact which are embraced in the record, it appears that some of the attempted exceptions are wholly insufficient. This may be said of the first finding of fact, which embraces three distinct and important propositions of fact. To this, defendant files only the following exception: "Finding No. 1 not justified by the evidence." This is wholly insufficient as a specification. It does not distinctly point to either of the facts found in finding of fact No. 1, nor does it specify wherein the evidence fails to justify the finding of any particular fact. Under the established practice, as embodied in the statute and rule of court, this general form of exception is insufficient, and therefore such exception cannot be considered in disposing of the case. Laws 1891, Ch. 121; Sup. Ct. Rule No. 13. Others of the exceptions filed are obnoxious to the same objection. But we deem it unnecessary to allude to them, further than

to reiterate the settled rule that exceptions to findings of fact are not sufficient when they do not specify particularly wherein the finding is not sustained by the evidence. In the case under consideration, however, it happens to be true that the enforcement of the statutory requirements governing exceptions to findings of fact will make no difference with the disposition of the case. We have carefully examined the evidence embraced in the bill, with reference to all of the findings of fact, and find that each and all of them have support in the evidence. We may concede that as to some of the findings the evidence is not wholly convincing to our minds. Nevertheless, in the entire absence of rebutting testimony (none was offered,) we are of the opinion that the court below was justified in making the findings, and are entirely clear, in view of the evidence, that this court, sitting only as a court of review, ought not to disturb any of the findings. See *Jasper* v. *Hazen*, (N. D.) 58 N. W. 454.

Briefly mentioned, the points in the findings of fact most strenuously combated by the appellant's counsel are: *First*, the finding to the effect that the defendant had actual notice, when receiving the wheat, that plaintiff had a lien upon it; *second*, that the defendant did purchase, receive, and ship out of the state wheat covered by the mortgage, to the amount of 1,000 bushels, and of the value of $720; *third*, the finding that plaintiff made demand of the wheat of plaintiff before bringing this action. As already stated, we think the findings, including these specially referred to, are sustained by evidence; but, as we are also of the opinion that a discussion of the evidence in detail will serve no useful purpose, we shall refrain from any analysis of the testimony.

The facts stated in the complaint, so far as now controverted, are each and all found to be true; and from such findings the court below finds, as conclusions of law, that the plaintiff is entitled to judgment for the amount stated above. This conclusion of law is rigorously assailed in this court by the plaintiff's counsel. His contention is, in brief, that the instrument under which the plaintiff claims his lien on the grain is not, in its legal

effect, a chattel mortgage, and that, when properly construed, it is, at most, an agreement to give a lien at a future date. Quoting from his brief, "A valid chattel mortgage cannot be given upon property not in existence, as an unplanted crop." Counsel cites many authorities from other states, and the following provisions of the Civil Code: Sections 4802, 4351, 4356, 2675, 2676, 4346, 3611, 3606, 4380, 4379. Counsel contends particularly that, while section 4328 authorizes an agreement to give a lien upon property not in existence, it does not sanction the giving of a chattel mortgage upon such property. Counsel lays much stress, also, upon the language of section 4379, and urges that under that section the filing of the instrument, which is a chattel mortgage in form, is not notice to the world, because, as counsel claims, the filing of a chattel mortgage must be done in the county where the property "is at such time situated." The filing and execution of the instrument in this case occurred in January, before the crop was sown; and counsel argues from this that there was no valid filing, because (not being in existence) none of the property was in the county when and where the filing was made. We concede that there is some force and plausibility in the arguments presented by counsel, and also that some of the authorities cited may go to the full length claimed by counsel. We shall not, however, enter into any discussion of the cases, nor shall we at this time consider how far they may or may not be in point, in view of our local statutes upon the subject of mortgages. It is enough to say, under the rule *stare decisis*, that we are of the opinion that the principal points of plaintiff's contention are settled in this jurisdiction adversely to the views of plaintiff's counsel, and that we are aware of no considerations of law, justice, or public policy requiring us to annul an established rule of property in this state, and to reverse previous holdings in this jurisdiction. The instrument under which plaintiff claims a lien is in the usual form of a chattel mortgage, and it embraces an authority, upon condition broken, to foreclose the mortgage, by taking possession of the crop and selling the same. This instrument,

long before the crop was planted, was filed in the county where the land was situated upon which the wheat was raised, and was undischarged of record when the defendant purchased the wheat, and shipped it out of the state. Under the authority of the cases hereafter cited, and aside from the actual notice of of the lien, which the court below found the defendant received, we shall hold that the filing of the instrument was sufficient to impart constructive notice of the lien, and that the lien attached, as a mortgage lien, as soon as the grain was planted by the mortgagor. The precise questions involved here were exhaustively considered by the late Supreme Court of Dakota Territory in the case of *Grand Forks Nat. Bank* v. *Minneapolis & N. E. Co.*, reported in 6 Dak. 357, 43 N. W. 806. Chief Justice Tripp, speaking for the court, after citing sections 4379, 4380, Comp. Laws, uses the following language: "Clearly, these sections do not make void or invalid an instrument filed before or subsequent to its delivery or inception as a mortgage, so that it be properly filed before hostile interests attach. The statute does not require a filing of the mortgage, to give it validity, as in some states. The requirement of the filing is to cut off rights of innocent third parties. Between the parties to the instrument, the mortgage is valid, though never filed. If, as claimed by the defendant, the mortgage must be filed in the office of the register of deeds of the county where the property is situated at the time it is made, this mortgage would come within such requirement, since it was not a mortgage until the lien attached by the bringing into existence the property enumerated therein, and at such time it was already filed, and prior to any rights accruing to this defendant." This court, in *Bank* v. *Mann*, 2 N. D. 460, 51 N. W. 946, used language which may be reiterated here. We said: "The policy of authorizing a party to thus indefinitely incumber his crops may appear of doubtful benefit and of dangerous tendency, but these considerations are for the legislature, and not for the court." While it may be true that the provisions of the Code governing liens and the making and filing of chattel mortgages upon

property not yet in existence are not entirely clear to our minds, nor altogether harmonious with each other, or with the decisions of courts in other jurisdictions, it is nevertheless true that we do not conceive it to be either necessary or expedient to disturb a judicial construction of such statutes which has rendered them practically certain and reasonably clear in their requirements. To hold at this late day in the history of the legislation and judicial exposition upon the subject in this jurisdiction that an instrument given to secure a debt, which is in form a chattel mortgage covering an unplanted crop to be raised on land described in the instrument, is not, in its legal effect, and cannot become, a chattel mortgage, even as between the parties, but is, at most, an agreement for a lien of some undefined nature, would, in our opinion, be a startling surprise to the business community, and, in its practical effect, would destroy a form of security which is in very common use in all parts of the state. We are of the opinion that such a holding is not required at our hands by the exigency of this case. If the existing laws are unwise or unjust, the remedy should be sought in the legislative branch of the government.

It follows that the judgment of the District Court must be affirmed. All concur.

(61 N. W. Rep. 49.)

HAZELTON BOILER CO. *vs.* FARGO GAS AND ELECTRIC CO.

Opinion filed November 22, 1894.

Sale—Warranty Construed.

At a time when the defendant owned and operated a horizontal tabular steam boiler, plaintiff sold defendant an upright steam boiler, and gave the defendant a written warranty, which contained the following language: "We hereby guaranty that the boiler in regular practice, properly managed, shall evaporate ten pounds of water from one pound of good coal at 212 Fahrenheit, which we guaranty to be a saving of at least twenty per cent. in fuel over any horizontal tubular boiler." *Held* (construing the language quoted,) that the last clause, viz: "Which we guaranty to be a saving of at least twenty per cent. in fuel over any horizontal tubular boiler,"—is a definite warranty of the fuel saving capacity of the boiler sold, when compared with the horizontal tabular boiler. Said last clause is legally binding, and is not a mere expression of opinion or "puffing" on the part of the vendor.

Evidence—Error to Direct Verdict.

Evidence having been introduced tending to show a breach of the fuel saving clause of the warranty, and damages resulting therefrom, it was error to exclude such evidence from the case, and to direct a verdict for the plaintiff, despite the fact that defendant did not claim a breach of that part of the warranty relating to the evaporative capacity of the boiler sold.

Striking out Portion of Pleading—Error.

Held, further, that it was error (for reasons given in the opinion) to strike from the defendant's answer a certain paragraph thereof.

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

Action by the Hazelton Boiler Company against the Fargo Gas & Electric Company on a contract for the sale of a boiler. Judgment for plaintiff, and defendant appeals.

Reversed.

W. C. Resser, (*Seth Newman* of counsel) for appellant.

The defendant offered upon the trial testimony tending to establish all the facts necessary to substantiate the defense of fraudulent representations. The evidence given and offered was sufficient on the question of fraud to warrant the submission of the case to the jury. *Meyer* v. *Salazee*, 24 Pac. Rep. 507; *Derby* v. *Peck. L. R.*, 14 App. Cases, 337; *Litchfield* v. *Hutchinson*, 117

Mass. 195; *Smith* v. *Countryman*, 30 N. Y. 655. If the defense of fraud was imperfectly stated, the defect should have been met by a motion to make more definite and certain and not by a motion to strike out. *Yerkes* v. *Crum*, 2 N. D. 72, 49 N. W. Rep. 422. Parole evidence of fraudulent oral representations as an inducement to the making of a written contract is admissable. 1 Bigelow on Fraud, 175; Addison on Torts, § 1216; Hillard on Torts, 4, 5 and 12; *Antle* v. *Sexton*, 26 N. E. Rep. 691. The contract contains two warranties. The second warranty was "which we guarantee to be a saving of at least 20 per cent. in fuel over any horizontal tubular boiler." Upon its face this clause purports to be an express and positive warranty, and not an expression of opinion, and it must be construed as such. *Chapman* v. *Murch*, 19 Johns. 290; *Towell* v. *Gatewood*, 33 Am. Dec. 437; *Osgood* v. *Lewis*, 18 Am. Dec. 317; *Oneida Mfg. Society* v. *Lawrence*, 4 Cow. 440; *Thrall* v. *Newell*, 19 Vt. 202; *Pinney* v. *Andrews*, 41 Vt. 631. By their acts under the contract, the parties treated the guaranty as a whole, and their conduct and acts are admissable as evidence of the construction which they put upon the warranty. When the terms of a contract are uncertain and its true intent and meaning doubtful, then the practical construction which the parties put upon the contract by their conduct thereunder is of vast importance in ascertaining its true meaning. *Heidenheimer* v. *Cleveland*, 17 S. W. Rep. 524; *Chicago* v. *Sheldon*, 9 Wall. 50; *Topliff* v. *Topliff*, 122 U. S. 121; *District of Columbia* v. *Gallagher*, 124 U. S. 505; *Central Trust Co.* v. *Wabash R. R. Co.*, 34 Fed. Rep. 254; *O'Dea* v. *Winona*, 43 N. W. Rep. 97; *Knox County* v. *Ninth National Bank*, 147 U. S. 91; *Stone* v. *Clark*, 35 Am. Dec. 370; *Emery* v. *Webster*, 66 Am. Dec. 274.

W. E. Dodge, for respondent.

The oral negotiations set out in the answer, merged in the written contract, which superceded them, and it was not error to strike these paragraphs from the answer. Section 921, Civil Code. The answer does not set out a defense in the nature of a breach

of warranty. The purchaser of personal property must have relied upon the statements of the seller as to the quality of the article sold, in order to maintain an action for breach of warranty. *Watson* v. *Roode*, 46 N. W. Rep. 491; *Holliday* v. *Briggs*, 15 Neb. 219. Defendant does not declare, nor does it seek to recover upon a breach of warranty in the contract, but upon a subsequent agreement, which it declares was entered into between the parties. It follows "that a warranty given after a sale has been made is void, unless some new consideration be given, for the warranty." Benjamin on Sales, § 611; *Reed* v. *Wood*, 9 Vt. 285; *Vincent* v. *Leland*, 100 Mass. 432; *Conger* v. *Chamberlain*, 14 Wis. 258; *Summers* v. *Vaughn*, 35 Ind. 323.

WALLIN, J. The controlling facts involved in this action are as follows: At and prior to April 17, 1889, defendant was operating a gas and electric plant at the City of Fargo, and had in use in its plant a certain horizontal tubular steam boiler, and, being desirous of adding to the power of its plant, defendant entered into negotiations with the plaintiff for the purchase of a boiler. Considerable correspondence was had between the parties, resulting in a contract of sale. The correspondence was between the secretary of defendant, one Seth Newman, and one C. D. Dennis, who was plaintiff's representative, and the sale contract was signed by them in behalf of the parties. All of the contract of sale which we deem important in our discussion of the case is as follows: "Fargo, D. T. April 17, 1889. The Fargo Gas & Electric Company, Fargo, D. T.—Gentlemen: We propose to furnish you, f. o. b. cars at New York, N. Y., one Hazelton steam boiler of 215 horse power. * * * The horse power of this boiler is based upon the evaporation of thirty pounds of water per horse power from 212 Fahrenheit, with ordinary firing, and we hereby guaranty that the boiler in regular practice, properly managed, shall evaporate ten pounds of water from one pound of good coal at 212 Fahrenheit, which we guaranty to be a saving of at least twenty per cent. in fuel over any horizontal tubular boiler That the boiler shall be well made, of good material, and operate

freely with ordinary care and with all ordinary fuels, and ready to run by June 15, 1889. This boiler shall be furnished as specified for twenty-five hundred and eighty dollars, payable one-half when the boiler shall have been erected and tested, and performing as guarantied, or within sixty days after its arrival in Fargo; one-half in four months, with interest at six per cent. per annum. Should the boiler fail to meet the guaranty, we agree to remove the same at our own expense, or, if you so elect, to accept a sum for the boiler that shall be in proportion to the difference between the work done and the work guarantied." The boiler was delivered under said contract, and one-half of the purchase money was paid. This action is for the balance of the purchase price. The complaint sets out in effect the sale and delivery of the boiler as above stated, and that after the delivery the boiler was fully tried and tested, and was found to perform the work as guarantied, and was then approved and accepted by the defendant, and that defendant has ever since retained and used the boiler, but has neglected and refused to pay the balance of the purchase price as before stated. A copy of the contract is made a part of the complaint. Defendant answered the complaint, admitting the sale and delivery under the contract, and as a defense, by way of recoupment, set out fraud in the sale, and a false warranty, and damages resulting therefrom to the amount of the unpaid purchase money. When the case was called for trial, and before any evidence was offered, the plaintiff moved to strike from the answer "paragraphs five, six, seven, eight, and nine, for the reason that the allegations of fact contained in the paragraphs named set forth an alleged oral agreement and oral reprensentations made prior to the written contract set up in the complaint and admitted in the answer, which written contract, it was claimed, superceded such oral negotiations, and in which the same was merged." The court reserved its ruling, but later in the trial the motion was granted, and said paragraphs of the answer were stricken out. This ruling is assigned as error in this court.

The record shows that the principal contention at the trial turned

upon the proper construction to be put upon the warranty feature of the sale contract. Plaintiff's contention at the trial and in this court is, in effect, that the following words, viz: "Which we guaranty to be a saving of at least twenty per cent. in fuel over any horizontal tubular boiler,"—are not to be regarded as a substantial or binding feature of the warranty, but, on the contrary, should be treated as an expression of opinion, or as mere "puffing," upon the part of the vendor. The defendant's counsel takes the opposite view, and insists that the words quoted should be construed as constituting a vital feature of the contract. The nature of this contention may be well illustrated by extracts from the briefs of counsel. Plaintiff's counsel says, referring to the words above quoted, that they are "not a representation relating to the quality of the boiler itself, but to the quality of all horizontal tubular boilers, concerning which the plaintiff is shown to have no peculiar knowledge or different knowledge from that which the defendant possessed." Defendant's position is briefly stated in the following language, taken from the brief of counsel: "The contract contains two warranties * * * : 'We hereby guaranty that the boiler in regular practice, properly managed, shall evaporate ten pounds of water from one pound of good coal, with feed water at 212 degrees Fahrenheit.' The second warranty was as follows: 'Which [referring to the former warranty quoted] we guaranty to be a saving of at least twenty per cent. in fuel over any horizontal tubular boiler.' Both together, as understood by the parties, being in fact and effect a guaranty of the economic qualities of the Hazelton." Expressed in other language in defendant's brief, defendant argues that "the first warranty quoted is a warranty of work to be done by the boiler. The second warranty is a guaranty of certain beneficial results which shall accrue to the defendant by the performance of such work, and that, construed together, they constitute a warranty of economic qualities in comparison with horizonal tubular boilers." It appears by the evidence that the first installment of

the purchase money was made after the Hazelton boiler had been in operation some two months, and without complaint as to its merits as a boiler. It appears that some time in the fall of 1889 defendant made complaints to plaintiff that the boiler was not working as it was warranted to work. Several letters passed upon the subject, and as a result of the correspondence a number of trial tests of the boiler were had in the years 1889 and 1890, the last of which were had in December, 1890, and January, 1891. All of these trial tests were had at Fargo, in defendant's gas plant. One or more tests were made by the respective parties acting independently, while others, and notably the last, were had under the joint supervision of the representatives of both parties. The most conspicuous, and to us the most significant, feature of the several tests is the fact that the Hazelton boiler was tried in competition with said horizontal tubular boiler, which boiler defendant at the time still had in operation in its plant. The trial tests of the boiler appear to have been made without objection on plaintiff's part, in competition with the horizontal boiler. The tests were made under varying conditions as to fuel, water, temperature, etc., and obvious purpose of them all was to ascertain, and, if possible, to demonstate by experiment, whether or not the Hazelton boiler fulfilled the requirements of the written warranty with respect both to the evaporative and economic qualities of the Hazelton as compared with the horizontal tubular boiler. The evidence shows, and the fact seems to be conceded, that there is no breach of the warranty with respect to the evaporating capacity of the boiler sold. The tests made show that it would, when properly managed, "evaporate ten pounds of water from one pound of good coal at 212 Fahrenheit;" thus fully meeting the requirement of the feature of the warranty last above quoted. The entire contention at the trial, on defendant's part was to show a breach as to that particular clause of the warranty relating to the economic or financial result of the specific work guarantied and which work the Hazelton boiler did, when fairly tested, in fact perform. Defendant, without objection, put in evidence a

good deal of the detail connected with the several competitive trials of the two boilers, and some of the evidence tends strongly to show that the evaporative work performd by the Hazelton boiler, when operated under the best conditions, was not a saving of 20 per cent. in fuel over defendant's horizontal tubular boiler. Defendant claims that, when made under proper and equal conditions, the Hazelton boiler did not do more economical work than the horizontal boiler with which it was operated in competition, despite the fact that under certain partial and unscientific tests it had appeared to do so. Upon this feature of the case all the testimony came from the defendant. Nor does counsel for plaintiff claim in this court that the evidence adduced fails to sustain defendant's contention as to the economic feature of the warranty; his contention being, as already seen, that such feature is not a material part of the warranty, and should therefore be ignored by this court, as it evidently was by the learned trial court. Defendant at the trial repeatedly offered to show by testimony to the effect that none of the representatives or officers of the company who negotiated the purchase of the boiler on defendant's part "had any knowledge of the comparative economic or other value of the different kinds of boilers; that they were in need of additional boiler power in their plant at Fargo, and desired to purchase such as would be most economical in the saving of fuel in doing a given amount of work; and that, at the time of entering into the contract, it was represented by Mr. Dennis, on behalf of the plaintiff, that the boiler [the Hazelton] which was subsequently purchased by said defendant would save at least twenty per cent. in fuel over any horizontal tubular boiler; that, as a matter of fact, the Hazelton boiler purchased by the defendant was valued and priced at nearly, if not quite, double the horizontal tubular boilers of the same capacity; that the sole inducement of the defendant to purchase the boiler was the representation that the said Hazelton boiler would save at least twenty per cent. in fuel over any horizontal tubular boiler; that Mr. Dennis so represented to defendant, and

the defendant so believed from such representations, and made such purchase, at a cost of about double what it would otherwise have expended for the doing of its work, simply by reason thereof." This evidence was objected to upon two grounds: *First*, because not pleaded in the answer; *second*, because all the negotiations leading up to the sale contract were merged in and superseded by the written contract of sale. This objection was sustained, and such evidence was excluded from the jury. Defendant offered to show by the witness Newman, who, as has been stated, was secretary of the defendant, and represented it in negotiating the purchase, that the original draft of the contract of sale was prepared by the plaintiff and submitted to Mr. Newman without containing the clause now in the contract, and which constitutes the bone of contention, viz: "Which we guaranty to be a saving of at least twenty per cent. in fuel over any horizontal tubular boiler." That, when so presented, said Newman, in behalf of the defendant, refused to sign such contract, or buy said boiler, unless said clause guarantying the saving in fuel was inserted. That thereupon said clause was so inserted, and said contract was then executed. This offer was objected to on the ground that it was incompetent and immaterial, and the objection was sustained. Defendant further offered to put in evidence certain letters written in plaintiff's behalf during the negotiations for the sale, wherein the statement was made and emphasized that the Hazelton boiler was in its practical operation an exceptional fuel saver, and that said boiler would be in its use very much more economical as a fuel saver than any horizontal tubular boiler would be. This evidence was excluded upon the same ground. Defendant also offered to show that the first installment of the purchase money was made with reference to the 60 days clause of the contract, and was made after the boiler was in use, but before it had been tested as to its evaporative or fuel saving capacity. This evidence was excluded as incompetent and immaterial. At the close of the evidence, defendant's counsel requested the court to instruct the jury fully as to the

meaning and effect of the language used in the sale contract. It will be unnecessary to set out defendant's requests in their entirety. It will suffice to say that the trial court was requested, among other instructions, to charge the jury as follows: "That part of the contract which provides that the boiler, in regular practice, properly managed, shall evaporate ten pounds of water from one pound of coal, with feed water at 212 degrees Fahrenheit,' is a guaranty of the work which the boiler should do; and that part of the contract which provides 'which we guaranty to be saving of at least twenty per cent. in fuel over any horizontal tubular boiler' is a guaranty of the result of that work in the saving of fuel when compared with the work done by any tubular boiler." The court refused to charge the jury as requested. The plaintiff by its counsel then moved the court "to direct the jury to return a verdict for the plaintiff for the amount claimed in the complaint, upon the ground that there is no evidence on the part of the defense proving, or tending to prove,—and no allegations in the answer under which said proof could be admitted,—the existence of any warranty in the contract between the parties for the breach of which the defendant is entitled to damages and recoupment as a modification of the consideration named in the original contract." Which motion was granted, and, pursuant thereto, the verdict was returned for the plaintiff. All of the rulings and instructions given to the jury to which reference has been made were excepted to by the defendant, and such rulings, including the refusal to give the instructions requested by the defendant, are assigned as error.

The record has been sufficiently reviewed to explain the essential nature of the controversy which prevailed at the trial, and which, in one form or another, came up for discussion at almost every stage of the trial. It abundantly appears in the rulings of the learned trial court that the construction placed upon the warranty feature of the sale contract by the counsel for the plaintiff was adopted in its entirety by the court below; and that all of its rulings upon the admission of testimony and upon requests for

instructions asked for by the defendants counsel, as well as the final instruction to return a verdict for the plaintiff, are in harmony with and result from the adoption of the plaintiff's construction of the warranty. As we have reached the conclusion that the plaintiff's construction of the warranty is fallacious, we shall accordingly hold that the rulings below which are in consonance with such views were erroneous. Assuming them to be erroneous, it is obvious that they were highly prejudicial to the rights of the defendant. What is the proper construction of the language employed in the warranty? is the crucial question in the record. When analyzed, the terms of the warranty are found to consist of two parts or clauses. The first has reference only to the evaporative capacity of the Hazelton boiler, without any reference to or comparison with any other boiler. It is an explicit representation and warranty on the part of the vendor that the boiler sold, "in regular practice, properly managed, shall evaporate ten pounds of water from one pound of good coal at 212 Fahrenheit." The meaning of this clause is clear, and has not been questioned; and it appears, also, that the defendant does not claim that this branch of the warranty has been broken. It is plaintiff's contention, however,—and, as has been said, this view was adopted by the trial court,—that the clause of the warranty above quoted constitutes the whole of the warranty which is legally operative or binding upon the plaintiff, and that the remaining clause is, in legal contemplation a mere harmless expression of opinion on the part of the vendor, or what is sometimes denominated "puffing." The remaining clause of the warranty reads: "Which we guaranty to be a saving of at least twenty per cent. in fuel over any horizontal tubular boiler." This clause is the occasion of the controversy. Defendant insists that its meaning is plain, and that it is a binding and operative feature of the contract. The evidence shows that at and prior to the sale the defendant owned a horizontal tubular boiler which was in use in defendant's plant, and defendant claims that the clause we are discussing was placed in the sale contract purposely, and with the

obvious intention to represent and warrant that the Hazelton boiler, would when in operation so operate and work as to be a saving in fuel of at least 20 per cent. "over any horizontal tubular boiler," including, of course, the horizontal tubular boiler then in use in defendant's plant. We think defendant's interpretation of this clause is correct. The words are few and simple, and convey, to our minds at least, an explicit declaration as to the fuel saving capacity of the Hazelton boiler as compared with the horizontal boiler. The second clause of the warranty seems to us to be a very natural addition to the first clause, with which it is closely connected. True, the first clause, standing alone, embodies a clean cut statement of fact; and it may well be true, also, that the first clause alone, if used in a transaction between boiler experts, would be adequate to convey a clear and explicit idea relative to the fuel saving capacity of the boiler under consideration; but we think that the first clause alone would not convey to the mind of the nonexpert or average business man any idea whatever of financial or practical value. Certainly, the first clause contains no explicit statement as to the fuel-saving qualities of the Hazelton boiler. We think the second clause of the warranty was inserted to supplement the first, and to convey a distinct and explicit representation as to the comparative fuel saving qualities of the two kinds of boilers. Assuming the correctness of our interpretation of the language used in the sale contract, it follows that defendant had a right to show at the trial, if able to do so, that there had been a breach of the warranty in the matter of the comparative fuel saving qualities of the boilers, and was entitled to have the jury (in estimating the damages) pass upon that feature as a question of fact. As has been seen, defendant introduced evidence, without objection, tending to show a breach of this part of the warrant, and the damages resulting therefrom. We think such evidence was properly admitted, and that the case should have been submitted to the jury, with proper instructions, including the instructions requested by defendant's counsel, and that to refuse to do so was prejudicial error in the trial court.

We do not think that the sale contract is so ambiguous or obscure in its language or meaning that it became absolutely necessary at the trial to introduce evidence (as defendant unsuccessfully and repeatedly offered to do) tending to show the facts and circumstances leading up to the sale, and the execution of the contract, for the purpose of showing the sense in which the words employed in the warranty were used. But, on the other hand, we are of the opinion that in view of the developments at the trial, and from the standpoint of the plaintiff's counsel, and rulings of the court below, it was manifest error to exclude such evidence. If the fuel saving clause of the contract was of doubtful or ambiguous meaning, then (under a well settled rule of construction) it was proper to search for its true meaning in the light of the extraneous facts and circumstanccs. This rule is voiced by the Code. Section 3562 reads: "A contract may be explained by reference to the circumstances under which is was made and the matter to which it relates." Section 3564 reads: "If the terms of a promise are in any respect ambiguous or uncertain it must be interpreted in the sense in which the promisor believed at the time of making it that the promisee understood it." At the trial, counsel were at loggerheads as to the meaning of the fuel saving clause of the contract, defendant's counsel contending that the clause had a plain and definite meaning, while plaintiff's counsel disputed this, and insisted upon an entirely different interpretation. The learned trial court seemed to have agreed with the plaintiff's interpretation. Under these circumstances we think it was error, from the standpoint of the court below, to exclude from the case the evidence, both oral and written, tending as it would have done, not to vary or contradict the writing, but to throw light upon the meaning of the fuel saving clause and upon the sense in which that language was understood by both parties.

As we have determined to grant a new trial, at which the pleadings may be amended so as to simplify the issues, we do not consider it necessary to rule upon the error assigned upon the

order of the trial court striking out five paragraphs of the answer, further than to say that it was clearly error to strike out the ninth paragraph of the answer, for the reasons assigned in the motion to strike out. Paragraph 9, in effect, set out a breach of the warranty with respect to both the evaporative and fuel saving qualities of the boiler in question. It was a breach of the warranty and the resultant damages that constituted the grounds of the defense, and hence they should not have been stricken out of the answer.

The judgment will be reversed, and a new trial granted. All concur.

(61 N. W. Rep. 151.)

R. S. TYLER *vs.* JAMES SHEA.

Opinion filed December 10th, 1894.

Acceptance of Benefit Under Judgment is Waiver of Right to Appeal.

The judgment appealed from declared that respondents would be entitled to a deed of certain land from appellant provided they paid appellant a sum of money and delivered to him a note and mortgage for a further sum within 90 days after date of the decree. In case of their failure so to do, their rights were to be barred, and the appellant was to be immediately entitled to the exclusive possession of the property. Appellant applied to the court for an order awarding him execution to put him in possession of the land, claiming that respondents were in default. His application having been denied, he appealed to this court. *Held* that, by thus accepting a benefit under the judgment, *i. e.* the right to be heard whether he was entitled to possession thereunder, he had waived his right to appeal from the judgment for the purpose of having the case tried anew in this court.

Acceptance of Benefit Under Judgment Does Not Waive Right to Appeal—When.

A party does not, however, waive his right to appeal from a judgment by accepting a benefit thereunder, if the benefit is one to which he is so absolutely entitled that a reversal of the judgment will not affect his right to it. Neither is his right to appeal lost by accepting anything under a judgment, when the appellate court has power to modify the judgment so as to make it more favorable to appellant, without reversing it or interfering with the provisions in his favor of which he accepted the benefit. But in such case he must appeal from only the portion of the judgment which is adverse to him, and the court will upon such appeal do no more than modify the judgment in that respect.

Appeal for New Trial—Whole Case Investigated.

When a party appeals for a new trial of a case in the appellate tribunal, the whole case is open to investigation, and not merely that portion of the judgment which is adverse to the appellant.

Equitable Power to Modify Judgment.

A court of equity, in furtherance of justice, has power to modify a judgment in a particular not affecting the merits of the case, but merely relating to the mode of carrying into effect the decision of the court.

Enlargement of Time to Make Payment.

Where a time is prescribed within which money must be paid to entitle a party to the benefit of the judgment, the court may, even after such time has expired, extend it by a modification of the judgment in furtherance of justice; and it may modify a judgment directing payment to be made to a party by providing that the payment may be made to the clerk of the court for the benefit of such party.

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

Action by R. S. Tyler against James Shea, administer of the estate of Edward A. Schram, and others; for the possession of real estate. From a conditional judgment in favor of defendants, and from an order denying his application for execution thereon, plaintiff appeals. Appeal from judgment dismissed.

Order denying application reversed.

Newman, Spalding & Phelps, for appellant.

The default of November 1st, 1892 and appellants action thereupon entitled appellant to possession of the premises under the terms of the contract. *Iowa R. R. Land Co.* v. *Mickel*, 41 Ia. 402; *Thurston* v. *Arnold*, 43 Ia. 43; 1 Smiths L. Cases, 95; *Steele* v. *Biggs*, 22 Ill. 643; *Oliver* v. *Livingston*, 62 Ill. 528; *Wallace* v. *Maples*, 23 Pac. Rep. 860; *Kerns* v. *McKean*, 4 Pac. Rep. 404; *Wells* v. *Smith*, 31 Am. Dec. 274; *Waterman* v. *Banks*, 144 U. S. 394; *Drown* v. *Ingalls*, 28 Pac. Rep. 759; Bish, Conts. 1347.

When time is the essential element of the contract, equity in the absence of fraud or waiver, will not interfere to save a forfeiture. Pomeroy's Eq. Jur. 455. When a place of payment is fixed by the agreement of parties, an offer of payment must be made at that place. *LaFarge* v. *Pickert*, 21 Am. Dec. 209; *Bates*

v. *Bates*, 12 Am. Dec. 572; *Friess* v. *Rider*, 24 N. Y. 367; *Franchot* v. *Leach*, 5 Cow. 506; *Post* v. *Springsted*, 13 N. W. Rep. 370; *McCauley* v. *Leavitt*, 37 Pac. Rep. 164; *Hoys* v. *Tuttle*, 46 Am. Dec. 309; 17 Am. Law Reg. 745; *Roberts* v. *Beatly*, 21 Am. Dec. 410; *Wyman* v. *Winslow*, 26 Am. Dec. 542; Comp. Laws, §§ 3461, 3462. The trial court seems to have held that plaintiff waived the place of tender by not objecting. Silence is no waiver of the place of performance. *Friess* v. *Rider*, 24 N. Y. 367.

The deposit of the money mentioned in the decree with John Shippam was unavailing. Such payment may be disregarded unless made pursuant to a rule or order of court or under a statutory provision. 1 Tidds Practice, 566; *Dubois* v. *Dubois*, 6 Cow. 494; *Baker* v. *Hunt*, 1 Wend. 103; *Levan* v. *Sternfield*, 25 At. Rep. 854; *Davidson* v. *Lamphrey*, 16 Minn. 405

W. E. Purcell, for respondents.

The appeal from the judgment herein should be dismissed. Appellant in attempting to enforce the judgment as entered by moving for execution upon it, adopted it as his own. He cannot seek to enforce and avoid the same judgment. *Knapp* v. *Brown*, 45 N. Y. 207; 4 Waits Pr. 215; *Bennett* v. *Van Sickle*, 18 N. Y. 480; *Lamphrey* v. *Henk*, 16 Minn. 405; *Murphy* v. *Spaulding*, 46 N. Y. 553. The tender was sufficient. The money, notes and mortgage were deposited in the People's Bank of Wahpeton, September 3rd, 1891. Plaintiff was notified by letter. The notes and mortgage were exhibited to him and he was told that the money was ready to be delivered to him. He made no objection either to the sufficiency of the notes or mortgage or the money or the time, place or manner of the offer to perform. He thereby waived all objections to the sufficiency of any of them. Sections 3462, 3469, 3474, Comp. Laws. *Pinney* v. *Jorgenson*, 27 Minn. 26; *Sands* v. *Lyon*, 18 Conn. 18; *Union Mutual Life Ins. Co.* v. *Union Mills*, 37 Fed. Rep. 286; *Holmes* v. *Holmes*, 12 Barb. 137; *Breed* v. *Hurd*, 6 Pick 357; *Steele* v. *Biggs*, 22 Ill. 643; *Sargent* v. *Graham*, 5 N. H. 440; 25 Am. and Eng. Enc. L. 903, note P.; *Monahan* v. *Moore*, 9

Mich. 9; *Fosdyek* v. *Van Husan*, 21 Mich. 570. Courts of equity are constituted for the purpose of working even handed justice even though in so doing they must in some cases over-ride injustice apparently legal. 36 Cent. L. Jr, 471; *Duffy* v. *O'Donovan*, 46 N. Y. 223; *White* v. *Damon*, 7 Ves. 30. Where time admits of compensation, courts of equity will not declare a forfeiture, but will relieve against it, and compensate the party demanding relief by way of interest or in a proper case by interest and damages. *DeCamp* v. *Feay*, 5 Serg. & R. 323; *Gibbs* v. *Shampion*, 5 Ohio 335; *Button* v. *Schroyer*, 5 Wis. 598; *Seton* v. *Slade*, 7 Ves. 265; *Hennessy* v. *Woolworth*, 128 U. S. 438.

CORLISS, J. We have two appeals before us in this case,—one is from the judgment, and the other from an order made after judgment. The plaintiff is appellant in both appeals. The action was instituted to recover possession of certain real estate. The defense was that the plaintiff had agreed to sell this land to Edward A. Schram, and that Schram had not made default in performing his contract, but had at all times been, and his heirs still were, willing and able to perform the same; and the prayer of the answer was that plaintiff might be decreed to convey the land according to the contract, on performance of the covenants and agreements on the part of Edward Schram by his heirs. The defendants are the administrator and the two heirs at law and next of kin of Edward Schram. The trial resulted in a judgment in favor of defendants, adjudging that they were entitled to a deed of the premises in question, upon making a certain payment, and on executing and delivering a note and a mortgage on the land to secure the balance of the purchase price to plaintiff, or upon paying the whole of such purchase price to plaintiff, provided either was done within 90 days after the date of the judgment. It was further adjudged that the plaintiff should in that case execute and deliver to defendants a warranty deed of the property; but that, in the event of the failure of defendants to comply with either one of these provisions within 90 days, the plaintiff should immediately thereafter become entitled to the

exclusive possession of the land, and the defendants would thereafter be forever barred from any right thereto or interest therein. Subsequently to the rendering of this judgment, and after the period of 90 days has elapsed, the plaintiff, claiming that defendants had failed to comply with the provisions of the decree to be performed on their part, applied to the court, on notice, for an order that execution issue to put him in possession of the property. This application was denied, and from the order denying the same plaintiff has appealed. He has also appealed from the judgment, and asks for a new trial of the case in this court under the act of 1893, Ch. 82. Before arguing on the merits the appeal from the judgment, respondents moved to dismiss the appeal on the ground that appellant had availed himself of a right conferred on him by this judgment, and had thereby waived his right to appeal from the judgment.

The rule is well settled that one cannot accept or secure a benefit under a judgment, and then appeal from it, when the effect of his appeal may be to annul the judgment, unless his right to the benefit is absolute, and cannot possibly be affected by the reversal of the judgment. See cases in note to *Clark* v. *Ostrander*, 13 Am. Dec. at p. 550, and *Smith* v. *Coleman*, (Wis.) 46 N. W. 664; *Murphy* v. *Spaulding*, 46 N. Y. 556; *Bennett* v. *Van Syckel*, 18 N. Y. 481; *Knapp* v. *Brown*, 45 N. Y. 208; *Laird* v. *Giffin*, (Wis.) 54 N. W. 584; *Construction Co.* v. *O'Neil*, (Or.) 32 Pac. 764; *Flanders* v. *Town af Merrimac*, 44 Wis. 621; *Webster-Glover Lumber & Manufaciuring Co.* v. *St. Croix Co.*, (Wis.) 36 N. W. 864; *Independent Dist. of Altoona* v. *District Tp. of Delaware*, 44 Iowa, 201; *Corwin* v. *Shoup*, 76 Ill. 246; *Holt* v. *Rees*, 46 Ill. 181; *Bolen* v. *Cumby*, (Ark.) 14 S. W. 926; *Alexander* v. *Alexander*, 104 N. Y. 643, 10 N. E. 37. We must be careful not to ignore an important qualification of the general doctrine. Where the reversal of the judgment cannot possibly affect the appellant's right to the benefit he has secured under the judgment, then an appeal may be taken, and will be sustained, despite the fact that the appellant has sought and secured such benefit. To illustrate

this doctrine, we may instance the case of an action to recover $1,000, in which the only defense is a counterclaim for $500. It is obvious that $500 of plaintiff's claim is admitted. If the defendant succeeds in establishing his counterclaim, thus reducing plaintiff's recovery to $500, the plaintiff may collect the $500 awarded to him by the judgment, and still appeal from such judgment to secure a reversal, to the end that he may defeat the counterclaim and recover judgment for his entire demand on a new trial. The $500 he is entitled to absolutely. The reversal of the judgment and the second trial of the case cannot impair his right to it. Accepting this sum is therefore not inconsistent with his attempt to reverse the judgment, that he may on a new trial recover more. He can never recover less. It is the possibility that his appeal may lead to a result showing that he was not entitled to what he has 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. The following decisions enforce this doctrine: *Reynes* v. *Dumont*, 130 U. S. 354–394, 9 Sup. Ct. 486; *Embry* v. *Palmer*, 107 U. S. 3, 2 Sup. Ct. 25; *Higbie* v. *Westlake*. 14 N. Y. 281; *Mellen* v. *Mellen*, (N. Y. App.) 33 N. E. 545; *Cocks* v. *Haviland*, (Sup.) 7 N. Y. Supp. 870; *Construction Co.* v. *O'Neil*, (Or.) 32 Pac. 764; *Morriss* v. *Garland*, 78 Va. 215; *Manufacturing Co.* v. *Huiske*, (Iowa) 29 N. W. 621; *Dudman* v. *Earl*, 49 Iowa, 37. The case of *U. S.* v. *Dashiel*, 3 Wall. 688, belongs to this class. The reasoning of the opinion delivered in denying the motion to dismiss is unsatisfactory in its statement of the grounds on which the decision rests, but, when we turn to the opinion of the court on the merits (4 Wall. 182,) we discover that the defendant did not dispute his liability for the amount for which judgment was rendered against him, but only with respect to the balance of the claim; his defense as to such balance being that the money was stolen from him, and that, therefore, he was not accountable for it to the government, whose money it was, in his custody as paymaster in the army of the United States. The

judgment was rendered for this amount not in dispute, and a portion of it was collected before the writ of error was sued out. The motion to dismiss was properly denied, because the reversal of the case could not affect plaintiff's right to what it had collected. Defendant conceded that so much was due. Again, cases will arise—they have arisen—in which the appellant has the right to ask for a more favorable judgment in the appellate court without having the case sent back for a new trial, on which, of course, the whole matter would be open again for investigation, which might result in a judgment not so favorable to plaintiff, or even one that would be adverse to him. In the class of cases in which a new trial of the whole case may result from the appeal, the element does not exist that exists in the one we have already alluded to. No portion of plaintiff's claim is admitted. Everything is in controversy. Under such a state of the pleadings, it is obvious that a reversal of the judgment and a new trial may result in a decision showing that the plaintiff was not entitled to what the former judgment gave him. In such a case the plaintiff cannot accept what that judgment gives him, and then by appeal pursue a course which may overthrow the right of which, he has availed himself. But if it is 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 accceptance 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. There are several cases in which this doctrine has been enforced, and others in which it has been recognized. *Monnet* v. *Merz*, (Super. Ct. N. Y.,) 17 N. Y. Supp. 380, affirmed in 131 N. Y. 646, 30 N. E. 866; *Clowes* v. *Dickenson*, 8 Cow. 328, as explained in *Knapp* v. *Brown*, 45 N. Y. 208; *Tarleton* v. *Goldthwaite*, 23 Ala. 346; *Inverarity* v. *Stowell*, 10 Or. 261.

If appellant could have appealed from only that portion of the judgment which was favorable to the defendant, to secure a modification of the judgment in this respect, he might with much

force have claimed that he had done nothing inconsistent with an appeal for this specific purpose. He might have well asserted that he had only sought to take advantage of that portion of the judgment which contingently gave him the right to possession, and that by his appeal he was merely seeking such a modification of the judgment as would give him that right absolutely, not fettered by conditions,—not postponed as to its enjoyment. If we were at liberty to treat this as the full scope of his appeal, we might entertain it for the sole purpose of ascertaining whether the court had not erred in giving the defendants any rights in the land in controversy, and, in case we should reach that conclusion, we would then modify the judgment by expunging therefrom all provisions relating to any matters save the right of the plaintiff to the immediate possession thereof as the owner of the legal and equitable title to the same. But the terms of the act under which the appeal is taken will not permit our mere modification of the judgment appealed from. We are required by this law to try the case anew upon the same record, and to render final judgment in the action. It is true that we might render judgment in favor of the appellant absolutely, but it is equally true that we might conclude that the trial court was right, and, in giving judgment on this theory of the case, we could fix a new time within which defendants might by payment secure the title. Should we decide that defendants were not in default in performing the contract, we would afford them an opportunity, within a reasonable time after the entry of our judgment, to obtain the title. The appellant sought to secure possession within 90 days after the entry of the judgment appealed from. Should we fix a new time within which defendants might secure the title, and during which appellant could not have possession, it would then be clear that the appellant had sought to obtain a benefit under the judgment which his own appeal would overthrow, so far as relates to the matter of time. Can a party seek to avail himself of the benefit of a clause in a judgment giving him possession of land, after certain time has elapsed, and yet by appeal ask for a new trial of

the case, which may result in a decision that he was not entitled to possession at the time he sought to obtain it? We are clear that he cannot. The appellant could not ask for a new trial of the case with reference to those provisions of the judgment which were against him, and at the same time insist that the balance of the judgment favorable to him should stand without investigation. When a case is appealed for a new trial, the whole case is open for judicial inspection; and the decision upon such new trial must necessarily be founded upon an examination of the case as broad as that made by the lower court. When a party who has been defeated as to a portion of his claim in a justice's court appeals for a new trial in the District Court, he cannot there insist that the judgment, in so far as it is favorable to him, shall stand, and only the balance of the case be litigated. The whole case is to be tried anew, and in that trial he runs the risk of losing that which the justice's judgment gave him. Where the claim is indivisible, and is all in dispute, the appeal for a new trial gives the defendant the same right to be heard on the whole case which it gives to the plaintiff who appeals. In such a case, the ordinary rule that the respondent cannot complain of those portions of the judgment which are against him, or, indeed, of any portion of the judgment, does not apply, because the appellant, by the nature of the relief he seeks by his appealing for a new trial, opens up the entire case to a second investigation. Indeed, there is high authority for the doctrine that such an appeal, of itself, supersedes the judgment appealed from and annuls it as effectually as though a new trial had been granted by the court in which it was rendered. These authorities hold that the appeal places the case in the same position as though it had never been tried. The judgment no longer exists for any purpose. *Bank* v. *Wheeler*, 28 Conn. 433; *Curtiss* v. *Beardsley*, 15 Conn. 518; *Campbell* v. *Howard*, 5 Mass. 376; *Sharon* v. *Hill*, 26 Fed. 337–345; *Earl* v. *Hart*, (Mo. Sup.) 1 S. W. 238: *Burns* v. *Howard*, 9 Abb. N. C. 321; *Yeaton* v. *U. S.*, 5 Cranch, 281; *State* v. *Forner*, (Kan.) 4 Pac. 357.

Whether, in view of other provisions of our statutes, an appeal for a new trial in this court, under the act of 1893, annuls the judgment appealed from, when the appeal is taken or when final judgment is rendered in this court, we need not now determine. Neither do we wish to be understood as holding that this act is constitutional. Its validity has not been challenged in this case, and we therefore refrain from determining that question, not having the aid of the research and argument of counsel on that point. We believe that both precedents and principle fully sustain our view that appellant has waived his right to appeal for a new trial if he has in fact accepted some benefit under the judgment. *Alexander* v. *Alexander*, 104 N. Y. 643, 10 N. E. 37. See, also, the cases first cited in this opinion.

But it is urged that appellant did not waive his right to appeal because he did not in fact secure possession of the land. His application for an order that execution issue to put him in possession was denied. This contention does not meet the question. The appellant waived his right to appeal if he obtained any benefit under the judgment which on the appeal may be taken from him. He applied for an order that an execution might issue to put him in possession. Whence did he derive the right to make this application, if not from a judgment? Was it not a valuable right,—the right to be heard whether he should have the benefit of that portion of the judgment which was favorable to him? Was not that right exercised by him? Is he not still exercising it by appealing to this court from the order denying his application for an execution? He enjoyed in the court below, and is enjoying in this court, a right under this very judgment which he is appealing from. Were it not for this judgment, he would have nothing to hang a hope upon; he would not be here with his appeal from the order. The judgment gave him a right to be heard whether an execution should issue. It is a valuable right. It is one he could not have exercised without the judgment, and he has enjoyed the benefit of it. The inconsistency of

these two appeals is apparent when we consider that we might, if we entertained them both, hold, on the appeal from the order, that the appellant was entitled to execution when he applied for it, and at the same time hold on the appeal from the judgment that the defendant should have 90 days after the rendition of the judgment in this court in which to make the necessary payments to secure title, and that during that time the appellant should not have possession. We have no doubt that the appellant accepted such a benefit under the judgment as precludes his right to appeal from it, the benefit being one which his appeal from the judgment might show he was not entitled to. *Murphy* v. *Spaulding*, 46 N. Y. 556; *Bennett* v. *Van Syckel*, 18 N. Y. 481; *Garner* v. *Garner*, 38 Ind. 139; *Sims* v. *Lawes*, 22 La. Ann. 105. The appeal from the judgment is therefore dismissed.

This leaves the appeal from the order to be considered. The judgment directed that the money should be paid and the note and mortgage should be delivered to the plaintiff within 90 days from the date of the decree; and that in case the defendants should fail to make such payment and delivery to the plaintiff, the latter should thereafter immediately become entitled to the exclusive possession of the land, and all rights of the defendants therein be forever barred. It is obvious that the judgment was not complied with according to its letter. The money was not paid to plaintiff, nor were the note and mortgage delivered to him. The payment and delivery were made to the clerk of the court. We are clear that this was not a compliance with the decree. So long as this decree remains unmodified, the plaintiff is entitled, upon these facts, to an order awarding him execution to put him in possession of the land. But, after careful investigation, we have reached the conclusion that the District Court had power, and still has power, to modify its decree in the interests of justice, by extending the time in which this money may be paid and the note and mortgage delivered, or by authorizing the payment and delivery to be made to the clerk of the court. This latter is the usual practice, as it provides a common place

in court where the provisions of the decree may be carried out. It is quite customary in cases like this to declare that the deed, properly executed, shall be delivered to the clerk within a specified period, and that the other party shall pay his money and deliver his papers to the clerk within a certain other period; and that, upon receipt by the clerk of such money and papers, he shall deliver the deed and turn over to the other party the money and securities delivered to him; and that, in the event of the failure of the party to pay such money and deliver such securities within the prescribed time, he shall be barred of all rights in the property, and that the deed delivered to the clerk shall be restored to the grantor therein, and that he shall be given possession of the property. On the motion for an order for execution, the District Court had power to modify its judgment in this way, and still has such power; or it might have modified the judgment by extending the time within which such payment and delivery of papers might be made. Such modification would not in any manner affect the merits of the case. The judgment would stand just as before, except with respect to a matter wholly within the discretion of the trial court,—the question of time or the question of mode of carrying out the decision of the court,—which decision was in substance that defendants might secure the legal title by paying certain money and executing and delivering certain papers. The decision of the court on the merits would be entirely undisturbed by such modification. The fact would still remain that defendants could secure the land by making a certain payment, and by securing the balance of the purchase price, and in no other way, just as much after such modification as before. This portion of the judgment, which we hold may be modified, never rests upon evidence, in the sense that the evidence in the case controls these questions. They are determined by the court without reference to the evidence, being only questions of the mode of carrying out the decision of the court upon the merits. Having decided that the defendants were entitled to a conveyance of the land upon making a certain payment, and

executing and delivering certain papers, the question of time, and the question touching the manner of making payment and delivery, rested in the sound discretion of the trial court, unaffected by the evidence in the case. That courts of equity may, with respect to such matters, modify their decrees in furtherance of justice does not admit of doubt; and we cannot conceive of a case calling more urgently for the exercise of this beneficient power than the case now before us. The defendants, within the 90 days, paid the money and delivered the papers to the clerk of the court, and notified plaintiff of that fact, and plaintiff received this notice before the 90 days had expired. It would be a reproach to a court of equity if it had no power to relieve against a failure to comply strictly with a decree in a matter relating, not to the merits of the case, but solely to the mode of carrying out the decision of the court upon the merits. The authorities fully sustain our conclusion that this power of modification exists. 2 Daniell, Ch. Pl. & Pr. (3d Am. Ed.) pp. 1017, 1018; *Rauth* v. *Railroad Co.*, (Super. Ct. N. Y.) 23 N. Y. Supp. 750; *Conklin* v. *Railroad Co.*, (Sup.) 13 N. Y. Supp. 782. See, also, *Hatch* v. *Bank*, 78 N. Y. 487; *New York Ice Co.* v. *Northwestern Ins. Co.*, 23 N. Y. 357; *Clark* v. *Hall*, 7 Paige, 382; *Adams* v. *Ash*, 46 Hun. 105; Freem. Judgm. § 70; *Genet* v. *Canal Co.*, 113 N. Y. 475, 21 N. E. 390; *Jones* v. *Davenport*, (N. J. Ch.) 17 Atl. 570. In *Rauth* v. *Railroad Co.*, (Super. Ct. N. Y.) 23 N. Y. Supp. 750, the court by order extended the time within which the decree required money to be tendered, and subsequently modified the decree again by an order directing the payment of the money into court. In *Conklin* v. *Railroad Co.*, (Sup.) 13 N. Y. Supp. 782, the court extended the time within which to deliver a deed as fixed by the decree, after the time had expired. In answer to the application for the order awarding execution, defendants might have applied for a modification of the decree. Had this been done, and the judgment been modified by extending the time or by directing the payment and delivery to be made to the clerk of the court, the motion must have been denied, and

on appeal we would have affirmed the order so modifying the decree. But nothing of this kind was done. So long as the decree stood as originally rendered, plaintiff was entitled to the order prayed for. We therefore reverse the order denying the application for an order directing the issue of an execution to put plaintiff in possession of the premises, but we do not direct the granting of such an order. We merely leave the motion in the same position in which it was before it was decided, thus affording the trial court an opportunity to determine whether it will modify the judgment as suggested. The trial court will take such action upon the application for the order for execution, not inconsistent with this opinion, as to the court shall seem to be most conducive to justice.

The appeal from the judgment is dismissed, and the order is reversed. All concur.

(61 N. W. Rep. 468.)

NOTE—The act authorizing trial of questions of fact *de novo* on appeal to the Supreme Court (Ch. 82, Laws 1893) is referred to by the court although its constitutionality is not decided in *Hostetter* v. *Brooks Elevator Co.*, 4 N. D. 357, 61 N. W. Rep. 49; *In re Eaton*, 62 N. W. Rep. 597. The constitutionality of a similar statute was denied in Wisconsin. *Klein* v. *Valerius*, 57 N. W. Rep. 1112. Findings of fact and verdicts against the clear preponderance of testimony will be set aside. *Jasper* v. *Hazen*, 4 N. D. 1; *In re Eaton*, 62 N. W. Rep. 597; *Paulson & Co.* v. *Ward*, 4 N. D. 108.

FIRST NATIONAL BANK OF DECORAH *vs.* A. H. LAUGHLIN, *et al.*

Opinion filed December 10th, 1894.

Provision for Collection Expenses—Destroys Negotiability of Note.

The action being upon a written instrument, which, when executed and delivered by the makers thereof (the defendants,) was in all respects a negotiable promissory note, in form, except as to the words quoted below, which words constituted the last sentence of the instrument above the signatures, viz: "Agreeing to pay all expenses incurred by suit or otherwise in attempting the collection of this note, including reasonable attorney's fees,"—*held*, that the instrument was a nonnegotiable instrument when executed and delivered.

Material Alteration Extinguishes Debt.

Suit being brought upon such instrument by a good faith purchaser thereof before its maturity, and it appearing when the note was offered in evidence that the words above quoted were striken out and erased from the instrument, *held*, that if it appeared by the evidence that after the delivery of the instrument to the payees, and without the consent of the makers, the instrument was altered as aforesaid, such alteration would be material, and, if fraudulently made, it would so operate as to extinguish the note as a legal obligation, and the debt evidenced thereby.

Counterclaim for Money Paid Upon Note Which Had Been Fraudulently Altered.

The defendants, by their counterclaim, alleged, in substance the following facts: That said defendants, at the time of executing and delivering the above described instrument, executed and delivered to the same payees another instrument, couched in precisely the same language as that sued upon, except as to time of payment and the amount agreed to be paid; that said instrument after such delivery, and without defendants' consent, was also fraudulently altered by striking therefrom the words about quoted; and that after such alteration, and at the maturity of the note, the plaintiff presented said note for payment to the defendants, and that defendants paid said altered note to plaintiff in ignorance of the fact of such alteration. *Held*, when liberally construed, that the facts alleged are not sufficient to constitute a counterclaim. There is no averment that the note which was paid was given without consideration, and unless it was so given it would be both illegal and contrary to natural justice to compel the plaintiff to refund the money.

Evidence Improperly Admitted.

Objections to testimony offered by the defendants in support of their counterclaim were duly made by the plaintiff's counsel, and overruled by the trial court. *Held*, upon the grounds last above stated, that such rulings were prejudicial error.

Court Rules Relaxed in Furtherance of Justice.

Held, further, where an error of law is properly specified in a bill or statement, this court (pursuant to No. 15 of its rules) will, in its discretion, relax the requirement concerning the assignment of errors in this court when, as in this case, to do so will, in the opinion of this court, be in furtherance of justice.

Specification of Particular Grounds of Motion Excludes Others Not Mentioned.

Where, in a motion to direct a verdict for the plaintiff, the grounds of the motion were severally and distinctly stated, and such grounds were invalid, *held*, that a denial of the motion was not error. *Held*, further, that the attention of the court and opposing counsel having been directed to certain specified grounds, all other grounds were excluded, and no other or different grounds will be considered by this court in reviewing the ruling.

Objections Waived by Failure to Demur.

At the trial, plaintiff objected to testimony offered by defendants to prove the counterclaim, upon the ground that the matter set up in the answer does not constitute a counterclaim in this action. The objection was overruled. *Held*, that the ruling was proper, inasmuch as this objection can only be raised by demurrer.

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

Action by the First National Bank of Decorah against A. H. Laughlin and others on a promissory note. Judgment for defendants, and plaintiff appeals.

Modified.

Newman, Spalding & Phelps, for appellant.

The alteration to effect the validity of the note, or the obligation of the defendants under it, must be material. 2 Parsons on Contracts, 716, 724; Parsons on Notes and Bills, 564; Jones on Const. of Contracts, 263–4; *Harrington* v. *Crane*, 5 Cal. 173; *Turner* v. *Billingham*, 2 Cal. 520; *Brown* v. *Pinkham*, 18 Pick. 172; *Burlingame* v. *Brewster*, 22 Am. Rep. 177; *Hayes* v. *Mathews*, 30 Am. Rep. 226. The alteration complained of was immaterial. The obligation of the defendants was the same with or without the clause erased.

The defendants cannot recover on their counterclaim. They were not accommodation makers, but had received and held the full consideration for their money paid. The defendants were

guilty of want of ordinary care which as between them and the plaintiff, an innocent party, they were bound to use, and did not on the discovery of the alteration demand repayment. 3 Rand. on Com. Paper, 562, 563; *Johnson* v. *Com. Bank*, 27 W. Va. 343; *Young* v. *Adams*, 6 Mass. 182; *Gloucester Bank* v. *Salem Bank*, 17 Mass. 33; *Price* v. *Neal*, 3 Burrows, K. B. 1354; *Gillette* v. *Brewster*, 20 At. Rep. 105.

P. H. Rourke, for respondents.

As the notes were originally made they were nonnegotiable in form. *Garretson* v. *Purdy*, 3 Dak. 178, 14 N. W. Rep. 100; §§ 1822, 1827, Civil Code. The erasure of the stipulation for payment of attorneys fees and costs, was a material alteration. It changed the obligation from a nonnegotiable contract to a negotiable promissory note. Daniels Neg. Inst. 1395; Edwards on Bills, 95; *State* v. *Stralton*, 27 Ia. 424; *Brown* v. *Straw*, 6 Neb. 536. The effect of such alteration is to destroy the altered instrument as a legal obligation, whether made with a fraudulent intent or not. Daniels on Neg. Inst. 1411; *Harsh* v. *Kleppen*, 20 Ohio St. 200; *Booth* v. *Power*, 56 N. W. Rep. 31; *Needles* v. *Shaffer*, 60 Ia. 65; Fraudulent alterations extinguish the debt. Daniels Neg. Inst. 1410; *Booth* v. *Powers*, 56 N. Y. 31; *Meyer* v. *Huneke*, 55 N. W. Rep. 412. The burden of proof is on plaintiff to show that the alteration was made before the instrument was delivered. Daniels Neg. Instruments, 1417; *Adair* v. *Egland*, 58 Ia. 315. A note materially altered is void in the hands of innocent third parties, who took the same for valuable consideration before maturity and without notice. *Scofield* v. *Ford*, 9 N. W. Rep. 309; *Wait* v. *Pomeroy*, 20 Mich. 425. Money paid under a mistake of fact may be recovered back. Daniels Neg. Inst. 1369; *Louisiana* v. *Wood*, 101 U. S. 198; *Carpenter* v. *Northburg Nat. Bank*, 123 Mass. 69. A party making payment upon a security bearing a forged signature, supposing it to be genuine may recover back the amount. Daniels Neg. Inst. 1369; *Welsh* v. *Goodwin*, 123 Mass. 77. And if the signature be genuine but the instrument has been so altered as to render it void, the accomodation party who pays

it by mistake or ignorance of alteration may recover back the amount. Daniels Neg. Inst. 1369; *Fraker* v. *Little*, 24 Kan. 598; *Fraker* v. *Cullum*, 21 Kan. 555. Defendants counterclaim was proper. *McGregor* v. *Auld*, 21 N. W. Rep. 835; *First Nat. Bank* v. *O'Connell*, 51 N. W. Rep. 832. But if this payment was not a proper subject of counterclaim, plaintiff should have raised the question by demurrer and they have waived their right to object, by replying thereto. *Campbell* v. *Jones*, 25 Minn. 157; *Walker* v. *Johnson*, 9 N. W. Rep. 632; *Lace* v. *Fixer*, 19 N. W. Rep. 762.

WALLIN J. Plaintiff sues as the bona fide purchaser of a promissory note. The complaint is in the usual form, and describes the note upon which suit is brought. Plaintiff claims as indorsee of Rix & Goodenough. The action was against the makers of the note. The defendants, in their answer, deny that they ever executed or delivered the note described in the complaint, but admit that they executed and delivered to the firm of Rix & Goodenough a writing in all respects similar to the note described, except that it contained the words: "Agreeing to pay all expenses incurred by suit or otherwise in attempting the collection of this note, including reasonable attorney's fees." And they allege that after the execution and delivery of said note, and without the knowledge or consent of defendants, or either of them, the said note was materially and fraudulently altered by striking therefrom the words above quoted, and allege that said alteration changed said note from a nonnegotiable to a negotiable instrument, and rendered the said note void, and extinguished the indebtedness upon which it was based. They further set up that the note in suit and two others were executed and delivered by them to said Rix & Goodenough as the purchase price of one stallion purchased by them from said firm at the agreed price of $2,000; that one of said notes was for $600, and the other two, one of which is here in suit, for $700 each; that said stallion was sold with a warranty to the effect that he was sound and healthy, and a good foal getter. They negative the existence of these qualities, and allege that the horse was worthless. As a separate

and distinct counterclaim, defendants alleged the execution and delivery of the $600 note, the same being identical in all respects with the note sued upon except as to amount and date of maturity; allege the alteration of said note in the same manner and for same purpose as the note in suit; and state that at or soon after the maturity of said note the defendants, by mistake, and in ignorance of said alteration, paid the amount of said note to the plaintiff herein, and took the same up. Defendants demand judgment of dismissal as to plaintiff's cause of action; also judgment on said counterclaim for the sum of $662, with interest from November 1, 1891. There was a jury trial, and the verdict was, "No cause of action as to the note described in the complaint," and was in favor of defendants to the full amount of said counterclaim. The plaintiff moved for a new trial, basing the motion on a statement of the case. The District Court denied the motion, where upon judgment was entered below upon such verdict, from which plaintiff appeals to this court.

The errors assigned in this court are:

The court erred in permitting defendants to amend their answer. This assignment of error is untenable. During the trial the court permitted the answer to be amended by adding thereto the following words concerning the warranty: "And in the sale of said stallion by said Rix & Goodenough, and the purchase by defendants, the defendants relied wholly upon said warranty, and purchased the horse upon the faith thereof, and not otherwise." The trial courts have extensive discretionary powers under the Code in the matter of granting amendments to the pleadings, either before or after judgment, in furtherance of justice; and it is well settled that the exercise of such discretion will not be reviewed by the appellate courts except in cases of abuse. The amendment allowed in this case introduced no new feature into the case, and could not, we think, have operated as a surprise to the plaintiff. Finding no abuse of discretion in allowing the amendment, this assignment of error is overruled.

The second assignment of error is as follows: "The court

erred in admitting evidence of the alleged alteration of the notes in question." Against plaintiff's objection thereto, evidence was introduced by the defendants tending strongly to show that all of the notes, when signed and delivered by the makers thereof to Messrs. Rix & Goodenough (the payees,) were in the words and figures as set out in the defendants' answer; and that all of said notes, after their execution and delivery as aforesaid, were altered by some one other than the defendants, by striking therefrom, and from each and all of them, the following language: "Agreeing to pay all expenses incurred by suit or otherwise in attempting the collection of this note, including reasonable attorney's fees." We are of the opinion that the testimony was admissable. The defense of a material and fraudulent alteration of the notes after their delivery is pleaded in the answer both as to the note sued upon by the plaintiff and the note pleaded in connection with the defendants' counterclaim. We think the defense of a material and fraudulent alteration of the notes as above pleaded in the answer is a valid legal defense to the notes, and, if established by testimony, would operate, as against the defendants, to extinguish both the notes and the debt evidenced by them. The notes, in the form in which they were drawn and delivered to Rix & Goodenough, were, by a decided weight of authority, nonnegotiable instruments. The last sentence in the notes above the signatures operates to render the paper nonnegotiable in form and in law; but if the erasure was done after delivery, and for a fraudulent purpose, the effect would be to nullify them, and extinguish the debt as against the makers. When so altered, the notes would have the appearanee on their face of valid, negotiable paper, as the legal presumption *prima facie* is that alterations appearing upon written instruments were made before delivery. But, as we said, the notes, when fraudulently altered after delivery, would, as against the makers, cease to be valid obligations, even in the hands of a good faith purchaser. A settled public policy, long sanctioned by the courts, demands that such fraudulent paper should be rendered null and void as against the maker thereof.

After such alteration, the paper is no longer the same paper as that sent out by those who executed and delivered the original instrument. This doctrine has long since become elementary law, and is distinctly voiced by the Civil Code. Comp. Laws, § 3595; 1 Am. & Eng. Enc. Law, p. 502, note 1. See authorities below. It is settled that the alteration of a note nonnegotiable in form when delivered so as to invest it with the form and guise of negotiable paper is a material alteration, and, if done fraudulently, the alteration will extinguish the debt as well as the note as against the makers. Daniel, Neg. Inst. § § 1395, 1410; Rand. Com. Paper, § § 1742, 1750, 1753; *Eckert* v. *Pickel*, 59 Iowa, 545, 13 N. W. 708; *Huntington* v. *Finch*, 3 Ohio St. 445; *Ide* v. *Churchill*, 14 Ohio St. 372; *Johnston* v. *May*, 76 Ind. 293; *Chism* v. *Toomer*, 27 Ark. 108; *Lee* v. *Starbird*, 55 Me. 491; *Booth* v. *Powers*, 56 N. Y. 31; *Plow Co.* v. *Campbell*, (Neb.) 52 N. W. 883. In the last case cited it is held that a defendant under a general denial may show that a note signed and delivered by him is not his obligation, because it has been fraudulently altered since its delivery, and made negotiable in form, and its character thereby changed. This was held as against a good faith purchaser. The case is much in point, and cites numerous authorities in support of the general proposition we have laid down.

But appellant's counsel contend that the notes as originally framed and delivered were negotiable paper, and cite authority in support of their contention. But, in our opinion, the decided weight of precedent will show that the language claimed to have been erased would render them nonnegotiable. The Code seems to settle the point against appellant's contention. Section 4462 reads: "A negotiable instrument must not contain any other contract than such as is specified in this article." We think the contract contained in the words claimed to have been erased is collateral, and it is clear that such contract is not to be classed with any of the permissable contracts enumerated in the article in which section 4462 is found. The section quoted received a construction at the hands of the late Supreme Court of Dakota

Territory, and that learned court held that the section was decisive of the point now involved in this case. *Garretson* v. *Purdy*, 3 Dak. 178, 14 N. W. 100. The note in that case contained the following clause: "If action be commenced thereon, attorney's fees for collection." This note was held to be uncertain as to the sum to be paid, and in the course of the opinion the following language was quoted from *Woods* v. *North*, 84 Pa. St. 410, which, despite its metaphor, we reiterate with approval: "But a collateral agreement, as here, depending, too, as it does, upon its reasonableness, to be determined by the verdict of the jury, is entirely different. It may well be characterized, like an agreement to confess a judgment was by Chief Justice Gibson, as 'luggage' which negotiable paper, riding, as it does, on the wings of the wind, is not a courier able to carry. If this collateral agreement may be introduced with impunity, what may not be? It is the first step in the wrong direction which costs. These instruments may come to be lumbered up with all sorts of stipulations, and all sorts of difficulties, contentions, and litigation result." See *Morgan* v. *Edwards*, (Wis.) 11 N. W. 21; *Bank* v. *Purdy*, (Mich.) 22 N. W. 93; *Manufacturing Co.* v. *Newman*, 45 Am. Rep. 750. But appellant's counsel further contend that the last sentence in the note in suit was wholly void under the statute, and that the note was neither better nor worse after striking it out. Counsel cites § 1, Ch. 16, Laws 1889, to show that the clause, so far as it relates to the payment of an attorney's fee, is void under the express language of the statute; and then cites § 3577, Comp. Laws, to show that the rest of the obnoxious sentence is also void as "contrary to the policy of express law, though not expressly prohibited." Section 1, Ch. 16, Laws 1889, was aimed at attorney's fees alone, and such fees, when stipulated to be paid in any "note, bond, mortgage, or other evidence of debt," were declared to be "against public policy and void." The act goes on to prescribe attorney's fees to be taxed upon foreclosures of mortgages, real and personal, and whether in court or by advertisement; but we can discover no intimation in the

statute that it was the legislative purpose to deal with the matter of the "expenses incurred by suit or otherwise in attempting the collection" of notes,—*i. e.* expenses outside of attorney's fees. On the contrary, we think that the fact that no charges for collection were mentioned in the statute, other than attorney's fees, shows inferentially that attorney's fee alone were in the mind of the legislature; and we are of the opinion that we would not be justified in concluding from that statute, or from any other, that expenses of collection aside from attorney's fees are against the policy of express law. We therefore hold that the language in question—aside from attorney's fees—is not void, but forms a part of the instrument, and operates, as already shown, to render the paper nonnegotiable.

The third assignment is: "The court erred in admitting evidence of warranties not contained in Exhibit B." Exhibit B was the bill of sale of the stallion, and among its provisions is this: "In case the above mentioned stallion fails to be a reasonable foal getter, through any defect, at the time of sale, the said purchasers have the right to return said stallion after a fair trial of two years, and receive another of equal value in exchange; said stallion to be returned to us in as good and sound condition as when sold. If said purchasers desire to take a stallion of higher value, they may have the privilege by paying us the difference." The fourth assignment is as follows: "The court erred in admitting evidence with reference to breach of warranty." The third and fourth assignments of error may be considered together. Counsel argues in this court that evidence of a breach of the warranty was inadmissable, for the reason that the writing in terms imposes upon the purchasers of the stallion the duty of returning the same within two years in the event of a breach of the warranty, and that defendants are limited to that course, and cannot recoup in damages for any breach. We do not so construe the writing. The language is: "Said purchasers have the right to return said stallion," etc. The wording clearly confers upon defendants an option, but this stipulation is not imperative in

form, but is permissive in its terms. It does not purport to make the remedy exclusive. We think the right to return as stipulated is merely a cumulative remedy, and one which may be resorted to at the purchaser's option, in addition to common law remedies for a breach of warranty. There was some evidence introduced, against plaintiff's objection, tending to prove that collateral and oral warranty of the horse was made in addition to that embodied in Exhibit B. This evidence was stricken out, however, during the trial, under the charge of the court could not possibly have operated to plaintiff's prejudice. In fact, all the evidence touching warranties—whether written or oral—was put in the case for a special purpose, and was not introduced in support of the counterclaim or as a basis for recouping damages as for a breach of warranty. This is made entirely clear by the court in its charge to the jury as follows: "Testimony was offered here as to the warranty of this horse, and testimony was offered as to whether or not he fulfilled the warranty. This was introduced simply for the bearing it had upon the question of whether or not these notes were changed after they were delivered. It was offered by the defendants for the purpose of showing the motive Rix & Goodenough might have had, or the reason why they would have made this alteration; and you may consider it for that purpose, and for no other." We are of the opinion that the evidence was competent, at least for the special and limited purpose for which it was offered as explained in the charge, and therefore we shall overrule the two assignments of error now under consideration.

The fifth assignment of error is as follows: "The court erred in submitting the case to the jury." At the close of the testimony plaintiff moved the court to direct a verdict for the plaintiff on the ground that "there is no testimony showing that there has been any alteration of the note in suit by any party entitled to benefit under it or by his consent; and, further, that the undisputed testimony shows that the plaintiff is the bona fide holder of the note in suit, purchased for full value, before maturity, and without knowledge of any defense." This motion was overruled,

and plaintiff excepted to the ruling. The ruling was clearly proper. Whether the notes had been altered after delivery, and, if altered, by whom the alteration was made, and for what purpose, were all questions of fact to be submitted to the jury under the evidence and instructions of the court. Nor would the fact, if it were a fact, that the notes were purchased in good faith after a fraudulent alteration, make any difference in the legal aspects of the case, if the jury found the fact of a fraudulent alteration after delivery. "The plaintiff further move the court to withdraw from the consideration of the jury any consideration of the counterclaim attempted to be filed in defendants' answer, upon the ground that there is no sufficient allegation in the answer showing any intentional destruction, cancellation, or material alteration of the note upon which this suit is brought by any party entitled to any benefit under it." This ground of the motion to withdraw the counterclaim is obviously invalid. Its concluding language points directly to another feature of the case, viz. the note upon which "suit is brought;" but, if the objection was aimed at the allegations touching the counterclaim, it is still, in our opinion, unsound. We think the pleader has substantially alleged a fraudulent alteration of the counterclaim note, and that under such averments evidence of a fraudulent alteration was clearly admissible. The objection goes to the pleading, and not to the evidence.

The plaintiff requested that the counterclaim be withdrawn from the consideration of the jury upon the further ground "that the counterclaim attempted to be pleaded in this action is based upon a fraud, and is not a proper subject for a counterclaim in this action." Error cannot be affirmed of this ruling. Whether the counterclaim, assuming it to be well pleaded, was one that could be interposed in this action, is a question which could not be raised at the trial by motion, and could only be raised by demurrer. Comp. Laws, § 4918; *Walker* v. *Johnson*, (Minn.) 9 N. W. 632; *Lace* v. *Fixen*, 39 Minn. 46, 38 N. W. 762; *Ayres* v. *O'Farrel*, 10 Bosw. 143. Moreover, we are of the opinion that

the counterclaim attempted to be pleaded, if any exists, does not sound in tort, but, on the contrary, arises *ex contractu*; *i. e.* from an implied promise on plaintiff's part to refund the money paid under a mistake of fact to discharge the first note of the series in question. As has been seen, the precise grounds upon which the plaintiff rested its motion to direct a verdict in its favor were specified in the motion, thereby directing the attention of the trial court and the opposing counsel to the particular grounds and reasons stated in the motion, to the exclusion of all others. We have already said that in our opinion the several grounds of the motion are untenable, and it follows not only that the denial of the motion was not error, but also follows, under an established rule of practice, that this court, in reviewing the ruling of the trial court in denying said motion, will not explore the record for other grounds which may be, and in this case could be, found in the record, but which were not called to the attention of the court below. Naming the grounds operates to exclude all other grounds. *Belcher* v. *Murphy*, (Cal.) 22 Pac. 264; *Shain* v. *Forbes*, (Cal.) 23 Pac. 198 (see page 200;) *Coffey* v. *Greenfield*, 62 Cal. 602; Haynes, New Trials & App. § 116; *Mattoon* v. *Railroad Co.*, (S. D.) 60 N. W. 740. In its charge to the jury the learned trial court said, in substance, that if the jury found from the evidence that the notes given for the stallion were fraudulently altered after their delivery, as claimed by the defendants, their verdict must be for the defendants. This instruction was pertinent to the testimony and to the issues made by the pleadings, and undoubtedly stated the law correctly. But the court further instructed the jury as follows: "I will instruct you further, gentlemen, that the presumption is that the note is in the same condition now that it was when it was signed and delivered. That is a presumption of law, and you must believe that, and find it as a fact, unless the defendants have convinced you that they are right as to whether or not there has been an alteration made in these notes after they were signed and delivered, as claimed by these defendants. Then you must find a verdict for the defendants for

the amount of that $600 note, with the amount of interest." It is very clear to our minds that the instruction quoted embraces a legal fallacy, and that such instruction was highiy prejudicial error. While it is true, as has been shown, that a fraudulent and material alteration of the notes would operate to extinguish the notes and the debt evidenced by them, and would defeat any action brought upon such notes or the debt against the defendants, it by no means follows that the law will permit the defendants to recover back from the plaintiff the amount paid in taking up one of the notes which was paid in ignorance of the fact of its alteration. By their counterclaim defendants are seeking to recover from the plaintiff the money paid in taking up the note which first matured of the series of notes given for the stallion; and the jury were instructed, in effect, that the defendants could recover if they found that the fraudulent and material alteration of the counterclaim note had been made as claimed by the defendants. This does not follow. The money, though paid in ignorance of the alteration, was in fact paid, and was intended to be paid, to take up a note given for the purchase money of a stallion sold to defendants for the agreed price of $2,000. The note, being a written instrument, imports a consideration under the Code, and the evidence shows that it was given in consideration of the sale of a stallion sold for $2,000 to the defendants, and delivered to them, and never returned. It appears that defendants at the trial offered evidence tending to show a breach of the warranty of the stallion, but it has been seen that all such evidence was introduced for the sole purpose of suggesting a possible motive for the alteration of the notes; and the jury was squarely instructed to consider all such evidence for that purpose, and that alone. We have examined the evidence, however, and find that while it tends to show a breach of warranty, it fails to show any amount of damages in dollars and cents as resulting from such breach, and wholly fails to show that the stallion was of no value whatever. The pleadings, the evidence, and the instructions to

the jury are, one and all, replete with proof that the defendants defended, as against the plaintiff's cause of action, and prosecuted their counterclaim, upon one and the same theory, namely, that the fraudulent alteration of all of the notes and the payment of one of the notes under a mistake of fact, if established at the trial, would suffice—*First*, to defeat the plaintiff's cause of action; and, *second*, to secure a recovery against the plaintiff upon the counterclaim. But this theory, while it applies to the facts to the extent of defeating the plaintiff's action upon one of the notes, is only partially applicable to the cause of action attempted to be set up as a counterclaim. The counterclaim is in the nature of an action for money paid to plaintiff by defendants under a mistake of fact. The payment under a mistake of fact was shown, and it further appeared that it was paid to discharge a note given by the defendants for a horse, which note the plaintiff had bought in good faith before maturity, and then held. For technical reasons, and largely upon considerations of public policy, already sufficiently discussed, no action could have been maintained upon the note so paid, as against the defendants, and for the same reasons an action would not lie at law upon the debt evidenced by the note. But here the plaintiff was not suing upon either the counterclaim note or the debt behind it, and hence the rule barring a recovery does not apply in the same way or to the same extent. Here the general rule governing the payment of illegal or outlawed claims under a mistake of fact is applicable. In such cases it is elementary that it is not enough to show the illegality of the claim and the fact of payment under a mistake of fact. The proof must go further and show that the money so paid was not due in equity and good conscience and that upon principles of natural justice the money should be returned. See Keener, Quasi Cont. Ch. 2, for an instructive discussion of the subject. On page 43 the learned writer uses the following language: "To entitle the plaintiff who has paid money under a mistake to recover the money so paid, he

must not only prove that he has paid the money without receiving the equivalent contemplated by him, but he must, in addition thereto, prove that it is against conscience for the defendant to retain the money so paid. Thus, for example, money paid in ignorance of the fact that the statute of limitations has run, cannot be recovered; for, although the creditor could not have collected the claim by suit had the debtor interposed the defense of the statute of limitations, yet, since he received from his debtor only what in point of conscience was due, he is doing nothing inequitable in refusing to return it;" citing *Moses* v. *Macferlan*, 2 Burrows, 1005, in which Lord Mansfield uses pointed language to the same effect as that quoted above. As the proposition is elementary, it will suffice to cite in addition to the numerous cases cited in Keener on Quasi Contracts a very full collection of cases in 18 Am. & Eng. Enc. Law, p. 225 *et seq.* Applying this principle to the case under consideration, it is obvious that the instruction of the court with reference to the counterlaim was erroneous and misleading; nor did plaintiff's counsel as he should have done, request that the court should instruct the jury properly or otherwise than it did. But, turning to the record, we find the charge of the court to the jury was not challenged by a single exception; nor is any error predicated upon the charge attempted to be assigned in this court. It follows, of course, that the judgment, for technical reasons, cannot be reversed upon the ground of an erroneous charge to the jury.

But, looking further, the record discloses another error, which, in our opinion, is fatal. We think the answer fails to state facts sufficient to constitute a counterclaim, and that the question was properly raised at the trial by objections to the testimony. The objections were all overruled, and an exception was taken to the rulings. The rulings are specified as error in the statement of the case. No testimony was offered at the trial tending to supply the facts omitted in the pleading. The omission in the counterclaim as pleaded is this: No facts are pleaded, or attempted to be pleaded, showing the equity to refund the sum paid. There was

no allegation of facts showing or tending to show that it would be against good conscience or natural justice for the plaintiff to keep the money paid over to the plaintiff in taking up the note which first matured. For reasons already given, these facts are vital. They would constitute the gravamen of the counterclaim if they were pleaded therein. They were omitted from the counterclaim. It is true that the answer in another part—*i. e.* that which has reference to the defense pleaded as to the note upon which plaintiff brings the action—contains averments which might have sufficed had they been repeated or realleged in the counterclaim, but such facts were not repeated, realleged, or incorporated by reference. The averments in the defensive part of the answer to which we refer are as follows: "That said stallion was at the time of said sale unsound and unhealthy, and a poor foal getter, and of no value whatever, and has ever since so remained." These facts, if alleged, would show that the note which was paid was given without consideration, and would raise an equity in favor of the defendants, and supply the missing element in defendants' counterclaim. But none of these averments appear in the counterclaim. There is no attempt, in setting out the counterclaim, either to reallege such facts or to incorporate them by sufficient reference, which might have been done. The counterclaim, it is true, refers to the note as one of the series given for the stallion; but this is merely descriptive of the note, and serves to indentify it, but it falls far short of a statement of the essential facts to which reference has been made, or other equitable facts. All material facts must be stated in each cause of action or counterclaim; nor can a material fact be supplied by any statement elsewhere made in the pleading, unless the same is incorporated by suitable and apt words of reference. See *Jasper* v. *Hazen*, 2 N. D. 401, 51 N. W. 583; Bliss, Code Pl. § 121. The same author (section 346,) quoting from a New York case, uses this language: "By the well settled rules of pleading, each answer must of itself be a complete answer to the whole complaint as perfectly as if it stood alone. Unless in terms it

adopts or refers to matter contained in some other answer, it must be tested as a pleading alone by the matter itself contains." Tested by this elementary rule of pleading, the averments of the counterclaim are insufficient. The material fact, if it is a fact, that the note connected with the counterclaim was given without consideration, is neither alleged nor attempted to be alleged. Nor is such omission supplied by any evidence, while, on the contrary, the entire scope and tenor of the averments in the counterclaim show clearly that the defendants expected to recover on the counterclaim by showing the payment of the altered note under a mistake of fact. As has been seen, such facts alone are not sufficient. This error appears properly specified in the statement of the case, but is not assigned as error in this court. Under the circumstances, however, we feel fully justified in exercising a discretion reserved in Rule 15 of the rules of this court to relax the rule in this case in furtherance of justice. See *O'Brien* v. *Miller*, (decided at this term) 60 N. W. 841. The judgment against the plaintiff upon the counterclaim is entirely without support in the pleadings or in the proof, and upon the record before this court it is as conspicuously illegal as it is manifestly unjust. It follows that the judgment must be modified, and a new trial granted, as to the counterclaim. In all other respects the judgment will be affirmed. The appellant will recover the usual costs and disbursements in this court. See *Braunsdorf* v. *Fellner*, (Wis.) 45 N. W. 97; Haynes, New Trials & App. § 295.

Modified and affirmed. All concur.

BARTHOLOMEW, C. J. (concurring.) I concur in the opinion prepared by Judge Wallin. I think the facts of this case distinguish it by material differences from *Fraker* v. *Little*, 24 Kan. 598, and *Garland* v. *Bank*, 9 Mass. 408, and *Talbot* v. *Bank*, 129 Mass. 67. *Fraker* v. *Little* presents a case of a material alteration of a promissory note. The note was given by plaintiff to a bank of which Little was subsequently the receiver. In ignorance of the alteration, plaintiff paid the note, and afterwards, on learning the fact, brought an action to recover the money paid, and was

successful. The learned jurist who wrote that opinion said: "Plaintiff being but an accommodation maker, there was no antecedent indebtedness of his to the bank." Therein lies the distinction. Plaintiff in that case executed the note solely for the accommodation of the president of the bank, and received no consideration whatever. The alteration extinguished all legal obligation. Plaintiff paid the note in ignorance of the alteration. As against him, there was no equity to forbid a recovery. By a recovery he simply received back that with which he had parted for nothing, and in no manner enriched himself. The distinction between the case under consideration and the cases from Massachusetts is perhaps less obvious. These cases are similar in their facts. In each an indorser had discounted a negotiable note at the bank, and received the proceeds therefrom. Subsequently the indorser paid the note to the bank, believing that there had been such presentment for payment to the maker, and such protest, as made the indorser liable on his indorsement. In fact, for technical reasons, the presentment had been insufficient in each case to charge the indorser. On ascertaining the facts the indorser tendered the note back to the bank, and brought suit to recover amount paid, and was successful. Now, it may be that in each case the bank parted with its money solely on the strength of the indorsement, and the indorser certainly received the money. But originally he parted with the amount of the note when he received it from the maker. He acted as the conduit through which the note passed from the maker to the bank, and received from the bank that with which he had parted. Thus far in theory at least, for I do not consider the discount—his estate was neither better nor worse for the transaction. When he repaid the money to the bank, he paid a demand which he was under no legal obligation whatever to pay. To the extent of such payment his estate was impoverished. By a recovery he received back that which he had parted for nothing. His estate was in no manner enriched by the transaction. In the case at bar the defendants have the horse, the contract price for which was

$2,000. They have paid, by mistake, $600 of that amount. It is settled that they can be required to pay no more. If now they recover the amount paid, they will have received back all with which they parted, and will also have the horse, which they have failed to prove was worthless, or was not worth all that has been paid. In other words, they will have something of value for nothing. This is not equitable, and, on the broad principle announced in the main opinion, the judgment on the counterclaim is properly reversed.

(61 N. W. Rep. 473.)

THE MINNESOTA THRESHER MANF'G CO. *vs.* W. H. LINCOLN.

Opinion filed December 13th, 1894.

Breach of Warranty—Motion to Direct Verdict—Specification of Grounds —Waiver.

The note sued on was given for the purchase price of a separator sold by the plaintiff to the defendants upon the following contract of sale: "The buyer shall have three days after it is first started to ascertain whether said machinery is or is not as warranted and represented. If then it is not, he shall at once discontinue use of it, and state full particulars wherein it fails, by letter mailed at once to the seller at Stillwater, Minn., and wait until seller gets a man there to right it. The buyer shall render the man sent necessary and friendly assistance, and, after he is through, shall at once give the machinery a fair trial of two days, and, whatever part of the machine is not as warranted or represented, he shall then return such part to where he got it, and the seller may either furnish another part, or may require the return by the buyer of the remainder of such machine, and then furnish another in its place, or refund what he received for it. If, however, the trouble arose from the improper handling of the machine, the buyer shall pay the costs of thus righting it. The use of all or part of said machinery after said two day's trial shall be conclusive evidence that it is as warranted and represented, and shall estop the buyer from all defenses, on any ground, to the payment therefor. No claims, counterclaims, demands, or offsets shall ever be made or maintained by the buyer on account of delays, imperfect construction, or any cause whatever, except as provided herein. The terms and conditions hereof shall not be waived, altered, or changed without a special written agreement signed by said thresher company or their specially authorized agent therefor at Stillwater, Minn." The answer alleged a breach of the warranty, and that the separator was worthless as a separator; also, set out a counterclaim for $1,000 for the value of grain wasted by the separator. At the close of the evidence, on motion of plaintiff's counsel, the District Court directed a verdict for plaintiff for the amount due on the note. The grounds of the motion were, in substance, that the testimony of the defendants showed that the defendants had by their conduct elected to waive any and all claims for damages, or by way of counterclaim for breach of the warranty. *Held*, that the only question which the trial court could properly consider in passing upon the question presented by the motion is whether the testimony did or did not show such waiver. The attention of the trial court and opposite counsel having been directed by the terms of the motion to the one matter of waiver, no other question will be considered in reviewing the ruling upon the motion. *Bank* v. *Laughlin*, 4 N. D. 391, 61 N. W. 473.

Failure to Return Machine—Directed Verdict.

It appeared in evidence that the defendants, upon a trial thereof, found that the separator wasted grain, and thereupon sent a certain notice of such defect by mail, addressed to the plaintiff at Fargo, N. D. Pursuant to such notice, three several experts came to defendants' premises, one after another, claiming

to represent the plaintiff. The second expert, after working upon the machine, gave it up, and went away stating that he could not remedy the defect. The third which came, after working all night upon the separator, went away without promising or suggesting that he would return, and without curing the defect. No attempt was afterwards made by any one to remedy the defect in the machine, nor did the plaintiff ever agree to send another expert, or otherwise attempt, or agree to attempt, to fix the separator. *Held*, (conceding, without deciding, that the notice of defects sent by defendants was sufficient, and that the experts were sent by the plaintiff in response to the notice) that such evidence showed a failure on the part of the plaintiff to remedy the defect, and that under the contract, upon such failure, the defendants were bound to return the machine; and not having at any time returned the machine, as required to do, they have waived any claim arising upon a breach of said warranty. The motion upon this evidence was properly granted.

Order Granting New Trial Reversed.

The trial court having by its order set aside such verdict upon the ground that the motion to direct a verdict was not properly granted. *Held*, that the order setting aside the verdict and granting a new trial is erroneous.

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

Action by the Minnesota Thresher Manufacturing Company against W. H. Lincoln and others. A verdict for plaintiff was directed, and, from an order granting defendants a new trial, plaintiff appeals.

Reversed.

John E. Greene, for appellant.

H. C. Southard, for respondent.

WALLIN, J. The plaintiff bases this action upon defendants' promissory note for $470. Defendants answered the complaint, admitting the execution and delivery of the note, and that it was unpaid; and, further answering, allege that the note was given for the purchase price of a separator sold by plaintiff to defendants with a warranty, that there was a breach of such warranty, and that the separator was of no value whatever as a separator. Defendants' answer also embodied a counterclaim, as follows: "That on or about the 1st day of September, 1891, they bought from plaintiff the certain separator hereinbefore referred to; that plaintiff represented and warranted that said separator was as good as any separator made, and would do as good work as any;

that, relying wholly on said representations and warranty, defendants bought said machine; that defendants immediately upon commencing to thresh the grain upon their farm in Cass County, found that said machine was not as good, and would not do as good work, as other machines; that it was a poor machine, and that it wasted grain in threshing; that defendants immediately notified plaintiff of the defect, and that an expert was sent by the plaintiff to remedy the defect, but that the machine was not improved thereby; that defendants again notified plaintiff of the fact that it could not be made to work satisfactorily, and again an expert was sent out, but that said machine was not improved, and a third time an expert undertook to fix said machine; that defendants were unable to get another separator at that time, and were obliged to finish the threshing which they were engaged upon with it; that during the time defendants were obliged to use said machine, as aforesaid, it wasted wheat in excess of that which any other separator would waste, and in excess of what a good machine would waste, to the value of $1,000.00. Wherefore defendants demand judgment (1) that said note described in said complaint be canceled; (2) that they have judgment against said plaintiff for the sum of $1,000.00, with interest from the date hereof, and the costs and disbursements of this action." Plaintiff served a reply denying the allegations of the answer set up as a counterclaim. There was a jury trial, and at the close of the testimony, upon the motion of counsel for plaintiff, the trial court directed a verdict for the plaintiff for the amount of the note, with interest. A motion for a new trial was made, chiefly upon the ground that the court erred in directing a verdict for the plaintiff. The trial court, by its order, vacated the verdict, and granted the application for a new trial, and the plaintiff appeals from such order.

The only error assigned in this court, which we shall deem it necessary to notice, is "that the court erred in granting defendants' motion for a new trial." At the trial, after introducing the note in evidence, the plaintiff rested its case, and in rebuttal put

in evidence the contract of sale embracing the warranty of the separator, the material parts of which are as follows: "It is agreed that the only warranty or representations binding upon the seller are as follows: (1) That said machinery is well built, and, with proper management, capable of doing well the work for which it was intended, and the engine of developing its rated power, conditional, however, that the buyer shall set up, start, and operate it in a proper and skillful manner, and without changing the original construction or any part of it. The buyer shall have three days after it is first started to ascertain whether said machinery is or is not as warranted and represented. If then it is not, he shall at once discontinue use of it, and state full particulars wherein it fails, by letter mailed at once to the seller at Stillwater, Minn., and wait until seller gets a man there to right it. The buyer shall render the man sent necessary and friendly assistance, and, after he is through, shall at once give the machinery a fair trial of two days, and, whatever part of the machine is not as warranted or represented, he shall then return such part where he got it, and the seller may either furnish another part, or may require the return by the buyer of the remainder of such machine, and then furnish another in its place, or refund what he received for it. If, however, the trouble arose from the improper handling of the machine, the buyer shall pay the costs of thus righting it. The use of all or part of said machinery after said two day's trial shall be conclusive evidence that it is as warranted and represented and shall estop the buyer from all defenses, on any ground, to the payment therefor. No claims, counterclaims, demands, or offsets shall ever be made or maintained by the buyer on account of delays, imperfect construction, or any cause whatever, except as provided herein. The terms and conditions hereof shall not be waived, altered, or changed without a special written agreement signed by said thresher company or their specially authorized agent therefor at Stillwater, Minn." It further appeared from plaintiff's testimony that the machine was sold through the firm of Hughes & Williams,

which firm was plaintiff's local agent at Fargo; also, that Williams was the general agent of plaintiff for the State of North Dakota. The undisputed testimony offered by the defendants shows the following state of facts: The separator was delivered to defendants, who were partners largely engaged in wheat raising, in August, 1891, and was never returned to the plaintiff or its agents. In the first season the separator was used in threshing all of the defendants' crop, aggregating some 35,000 bushels of wheat and 7,000 bushels of oats and barley.

In support of defendants' counterclaim, W. H. Lincoln, one of the defendants, testified as follows: "We had not threshed over half a day before the machine gave us trouble. We notified the company at Fargo that the machine was not giving satisfaction, and to send out a man to fix it. This was after we had used it half a day. They sent out an expert. The difficulty of the machine of which we notified the company was, it was carrying the grain over into the straw, and not cleaning it properly. I told the agent who came out to fix it what the trouble was. We were threshing at the time he arrived, and he saw the machine work. I stopped the machine, and he looked it over, and said he could not fix it, because he did not have the material to fix it. He admitted that it needed fixing, but he did nothing to it. He said that he was going to Fargo, that night, and would send a man right out. They did send a man within two or three days. He took his tools, and went into the machine, and tried to fix it, but gave it up as a bad job. He said, 'I cannot fix it.' I understood the man to mean he could not stop the machine from throwing grain over into the straw. I simply understood that he himself could not fix it, and make it do good work. I didn't know the agent's name who came out there. He was a man sent out there, as I supposed, to repair and look after machines at work in the field. It was not any one with whom we had a contract or any other understanding or agreement for the purchase of the machine. Q. What did you say to the agent upon his notifying you that he came there to fix the machine? A. I told him that

we would not use the machine any more, and we got ready to throw off the belt. He said that we could go ahead and use the machine, and that he would try and fix it. He said, 'If we cannot fix it, we will furnish you another, and make it right.' I had a talk with Mr. Hughes after the second man was out there, at his office in Fargo; going to Fargo same night expert was there. I told him that his man had been out there and tried to fix the machine, and gave it up. I told him we could never accept the machine in that condition. Mr. Hughes said that he could fix the machine. I explained to him that it was wasting grain, and he said it could be fixed. A third expert was sent out after this talk with Mr. Hughes, and I supposed it was by his orders, or the orders of the house at Fargo. We continued to use the machine because there was no other in the market to be had at any price. I tried to buy a separator that day in Fargo. Hughes & Williams did not have any, so they said. The last expert that came out pretended to work on the machine the biggest part of one night, but I was never able to see that they made any change. When the last mam came, we had threshed a section and a half of grain, and still had a section and a half to thresh. Q. You said that the machine wasted grain. Please state how much grain the machine wasted, if you know. A. Why, I think the machine wasted 25 bushels of grain every time we threshed a half day on the place; that is, at each setting. We usually made two settings of the machine a day. We had used the machine two or three days when the first expert came. It was from two to four days after that the second expert came, and I think, then, two days later, the last man was sent out. After I saw Mr. Hughes, it was ten days, and perhaps more, that we were using the machine before the last man came out. After he came, we tried to get another machine, but were not able to do so. It took us something over thirty-five days to do our threshing that year. We had used this machine about half a day when we discovered that it did not separate the grain properly. We then notified the company by mail. We sent in notice to Fargo to the Minnesota

Chief Company. We had used the machine two or three days before the expert arrived at the farm. He got there two or three days after we sent the notice. We operated it until he got there, and it was in operation when he arrived. The only defect of which we complained was that it wasted the grain, and did not properly clean it. It is possible to change any machine so as to throw the grain over the sieves, but I do not know as it is possible to change any separator so as to carry grain over into the straw. To the best of my recollection, the second expert came within four days after the first one had gone. During all that time we had used the machine the best we could. From the time we started up the machine until the second expert came, nobody could have made us believe but what the machine was all right and could be fixed, and I supposed that the man that had been sent out there was not competent, or something of that kind. I supposed it would be fixed just as soon as they could do it, and we used the machine with that idea. At the time I saw Mr. Hughes in Fargo, we had been using the machine in the neighborhood of a week or ten days. After the second expert came, and said he could not fix it, I lost faith in the machine. We continued to use it because there was nothing else that I could get, and I had to get the crop threshed. At the time I talked with Mr. Hughes, he said that he would send somebody out from that office. Experts came. They tried to fix the machine, but failed to do so. We continued to use it, and threshed our entire crop with that machine in 1891. We did not return the machine or any part of it, to Fargo, nor to Gardner. I, myself made the bargain for the purchase of this machine, and am a member of the partnership that transacted the business. As to the estimate of the amount of grain that was wasted by this machine, anything of that kind has to be guesswork. I did not make any calculation based upon any examination, or anything of that kind, of the chaff that falls from the machine." E. H. Lincoln testified: "I was present at the farm where this machine was working during the threshing season. I was there when the experts testified to

by W. H. Lincoln came out there, and heard and took part in the conversation between W. H. Lincoln and the expert that was there the second time, when he came, and reported that he came there for the Chief Company to fix the machine. We stopped the machine, and he tried to fix it. We started and stopped several times, and he finally made up his mind that he could not fix it. He said that it was beyond him,—that he could not remedy the machine. Then we made up our minds that we would not use the machine any more, and threw off the belt, and stopped, This expert then said, 'you had better go on and use it, and perhaps someone else can fix it.' He said that the company would do all that was right about the machine, and either fix it so that we could make that machine work, or give us a new one that would work. We went on and used it. That night my brother went to Fargo to see if the Minnesota Chief folks could furnish us with another machine, and, if not, to buy another machine of another kind. I had one talk with Mr. Hughes some time during the threshing season, and I think it was after the last expert had been out to the farm. I told him that the machine was not doing what it ought to; that it was a failure, in my estimation; and Mr. Hughes said that the machine could be fixed properly; he was sure it could be fixed; that the company would do what was right with the machine; and that, if they could not fix it, they would furnish us with another machine." Other witnesses testified that the separator wasted grain, but no testimony was offered of the aggregate of the grain wasted, or of the value of the whole or part of the wasted grain.

At the close of the testimony, the plaintiff, by its counsel, moved the court as follows: "The plaintiff, by its counsel, at this time requests the court to instruct the jury to find a verdict for the plaintiff for the amount claimed in the complaint, on the ground that the evidence failed to show a defense to the cause of action set forth in the complaint; that the evidence shows that the plaintiff fulfilled, upon its part, the conditions of the contract

for the sale and warranty of the machine in question; and that the defendants, by their own testimony, have established a waiver of all claims for damages or other defense arising from any breach of the warranty,—which request and motion was granted by the court, and the defendants duly except."

We think the terms of the motion were sufficiently explicit under the rule requiring the grounds of such motions to be specified. The language of the motion, fairly construed, directed the attention of the court and opposite counsel, not only to the "contract for sale and warranty" in evidence. It further asserts that "the defendants by their own testimony, have established a waiver of all claims for damages or other defense arising from any breach of the warranty." To decide the motion with reference to the grounds stated, it was necessary that the trial court should explore the testimony offered by the defendants, and to consider such testimony in connection with the written contract of sale and warranty, in order to ascertain whether or not it was true, as claimed in the motion, that such testimony showed a waiver of all claims for damages or other defense arising from any breach of the warranty. The testimony, not being contradicted, did show a breach of the warranty; but the difficult question remained, whether defendants had shown by testimony that they had waived "all claims for damages" arising from such breach. To determine this question it was necessary to carefully examine the writing which contained the agreement between the parties. We have already quoted the contract of warranty, and, when analyzed, it appears that it imposed upon the parties certain reciprocal duties and obligations. It declared: "That the buyer shall have three days after it is first started to ascertain whether said machinery is or is not as warranted and represented. If then it is not, he shall at once discontinue use of it, and state full particulars wherein it fails, by letter mailed at once to the seller at Stillwater, Minnesota, and wait until seller gets a man there to right it." It is noticeable that this agreement, unlike many machine contracts which had been drawn into litigation, nowhere

required the buyer to give any notice to the agent making the sale. The only duty as to the notice resting upon the buyer was to "state full particulars wherein it fails, by letter mailed at once to the seller at Stillwater, Minnesota." To sustain the counter-claim, the defendants had the burden of showing that the required notice had been given by them to the seller at Stillwater, Minn. No such notice was shown or claimed to have been sent. The testimony as to notice is this: "We then notified the company by mail. We sent in notice to Fargo to the Minnesota Chief Company." Liberally construed, this testimony might imply that some kind of notice, the nature of which does not appear, was mailed, addressed to plaintiff at Fargo, N. D. Standing without support, this testimony certainly fails to show such notice as the agreement required; and failing to give the notice stipulated for would without doubt, unless waived by the seller, operate under the contract to defeat any claim for damages arising from a breach of the warranty of the separator. *Fahey* v. *Machine Co.*, (N. D.) 55 N. W. 580.

Counsel for defendants contend that the stipulation requiring notice to the seller to be sent to Stillwater, Minn., has been waived. No express waiver is claimed to have been made, but it is urged that the facts disclosed by the evidence show a constructive waiver of notice by the plaintiff. The testimony shows that, within two days after the notice was mailed to Fargo, an expert appeared at defendants' premises, claiming to represent the plaintiff, and examined the machime, but did not attempt to remedy the trouble; that the expert went away, and, within a day or two, a second expert came and attempted to repair the machine, but failed to do so, and a third came, and made an unsuccessful attempt to put the separator into working order. The last expert, it appeared, came in response to an oral request made to a member of the local agency at Fargo by one of the defendants. The fact that the experts came in response to the notice sent to Fargo, and attempted to remedy the defect in the separator, is relied upon as a waiver of the requirement as to notice; and, the

requirement being made for the benefit of the sellers, it is argued that it had a right to waive it, and that sending the experts showed that the notice had been received by the plaintiff at Stillwater, and had been acted upon by the controlling officers or agents of the seller, whose headquarters are at Stillwater, Minn. The reasoning is plausible, but the fact cannot be ignored that the defendant had the burden of showing, no notice having been sent to Stillwater, that the notice which was sent to Fargo was a proper notice, and that it was in fact received and acted upon at headquarters by the seller. The fact that certain persons claiming to be experts came in response to the notice sent to Fargo certainly does not show conclusively that they were selected for this particular work upon orders emanating from Stillwater, nor does it appear that such experts as were sent to fix the separator were not sent by the local agents without the knowledge of those in charge of the plaintiff's business at Stillwater. In fact, the evidence upon this point tends strongly to show that the local agents, upon the request of the defendants to do so, sent the experts themselves. Whether the agents did or did not consult with the officials at Stillwater before sending out the experts, or at any time, does not appear, nor is there any evidence bearing upon this point in the case. The stipulation requiring notice, stating "full particulars" wherein the machine fails to do good work, to be sent to the managing office of the company, is plainly written in the contract, and no suggestion is made that the parties had the legal right to enter into such stipulation. The requirement of notice is, in our opinion, not only valid in law, but for reasons pointed out in *Fahey* v. *Machine Co.*, *supra*, is one which is just and reasonable in itself.

The case cited is pressed upon our attention as being decisive of this case, and it is claimed that under the authority of that case we should hold that the defendants here must fail because in this case, as that cited, no notice was in fact sent to the headquarters office. But the cases are not parallel in their facts. In the case cited, the company introduced affirmative testimony, which was

not disputed, tending to show that the required notice was never in fact received or acted upon at the headquarters office, and that nothing was known, at the center of authority, of the failure of the machine, until many months had elapsed after the sale. In the case at bar the plaintiff has offered no such evidence, and we are unable to ascertain definitely from the evidence whether the experts which attempted to remedy the fault in the separator were sent by the plaintiff or by the local agency. If the local agents, without authority to do so, and without the knowledge or approval of the managing office, sent out certain experts of their own selection to fix the machine, we are quite clear that such action could not be construed as a waiver of the stipulation as to giving notice. What was said by this court in *Fahey* v. *Machine Co.*, was said after due deliberation, and was adhered to upon reargument, and we have no desire to modify the views expressed in that opinion. At the same time, we have no intention of expanding the doctrine of that case to cover cases arising upon other and dissimilar facts. It happens to be true, in the case under consideration, that the point of nonnotice was not decisive of the motion to direct a verdict. In our opinion, the action of the court below in directing the verdict was proper, without regard to the question of notice; and hence we shall not rule this case upon that point, but shall simply say that we are inclined to the view that under an established rule of practice requiring the court, upon motions of this character, to give the adverse side the benefit of all reasonable and fair inferences which can be drawn from the evidence, it would have been proper to have denied the motion, had it rested upon the point of nonnotice alone, and submitted the question of fact to the jury as to whether the notice mailed to Fargo had been received and acted upon at the office of the general management at Stillwater.

But the grounds of the motion were an alleged waiver on defendants' part of all claims arising upon a breach of warranty; and proceeding now upon the assumption that a proper notice was sent to and received at the Stillwater office, and that the

experts were those of plaintiff's own selection, we are required to look further into the evidence to ascertain whether the record discloses a waiver. Reverting to the contract, we learn that, after the "man" (in this case "man" is to be construed as in the plural number) sent to repair the machine "is through," the contract provides that the buyer "shall at once give the machine a fair trial of two days, and, whatever part of the machine is not as warranted or represented, he shall then return such part to where he got it, and the seller may either furnish another part, or may require the return by the buyer of the remainder of such machine, and then furnish another in its place, or refund what he received for it. * * * The use of all parts of said machinery after said two days' trial shall be conclusive evidence that it is as warranted and represented, and shall estop the buyer from all defenses, on any ground, to the payment therefor. No claims, counterclaims, demands, or offsets shall ever be made or maintained by the buyer on account of delays, imperfect construction, or any cause whatever, except as provided herein." The meaning of this provision is plain and unambiguous. By the agreement, defendants saw fit to substitute, for any common-law damages to which they might be entitled, arising from any breach of warranty, the right or privilege of returning the machine if the plaintiff, after notice of defects, failed to put the machine in order, and make it work as warranted. But the defendants were limited to the period of two days' use of the machine after the man or men sent to repair the machine got through or completed their work of repairing the machine. The evidence is undisputed that two experts attempted to fix the machine. The last one worked all night, and went away without agreeing to return or promising to have another one sent. None of the experts succeeded in remedying the defect. Upon this point the witness W. H. Lincoln testified: "The last expert that came out pretended to work on the machine the biggest part of one night, but I was never able to see that they made any change. When the last man came, we had threshed a section and a half of grain, and

still had a section and a half to thresh." On cross-examination this witness said: "Experts came. They tried to fix the machine, but failed to do so. We continued to use it, and threshed our entire crop with the machine in 1891. We did not return the machine, or any part of it, to Fargo nor to Gardner." From this evidence it appears that, after the notice of defects was sent (assuming that a proper notice was sent,) the plaintiff sent experts to cure the defect in the separator; that, after repeated endeavors to correct the trouble, the experts wholly failed to do so, and one and all disappeared without promising to return; and that, after the last expert went away, defendants continued to use the separator for a period of more than two days, and in fact threshed a section and one-half of grain with the separator after the experts departed from defendants premises in the year 1891. So far as appears, the defendants are still in possession of the separator. This witness further testified: "We continued to use it because there was nothing else that I could get, and I had to get the crop threshed." After a careful consideration of this evidence in connection with all the evidence in the case, we are forced to the conclusion that the defendants intentionally and deliberately chose not to return the machine, but to keep it despite its defects. The result of this course was necessarily, under the terms of the contract, to waive any money damages which may have accrued from a breach of the warranty.

The evidence discloses that the position of the defendants when the experts ceased their efforts without repairing the defect was extremely difficult, and one which presented an embarrassing alternative. It appears that defendants were convinced, after the second expert went away without having benefitted the machine, that the separator was incurably wasteful; and, having reached this conclusion, they determined to purchase another machine, and one of them went to Fargo for that purpose, but found that no other could be had, because at that time none were in the market. In this dilemma defendants were forced to allow the remainder of their large crop to go unthreshed and be lost, or, on the other

hand, to utilize the separator in their possession, which it appears did satisfactory work, with the drawback of wasting a portion of the grain. As has been seen, the defendants made their election, and preferred, under the circumstances, to keep the machine they had, rather than allow their crop to perish. But this election, under the terms of the sale contract, operates as a waiver of money damages arising from any breach of the contract of warranty. The defendants' position was certainly embarrassing; but it was one which they had invited by entering into the contract of sale. The courts, under such circumstances, are powerless to mitigate the hardship incident to the case, as their duty is confined to the exposition and enforcement of agreements. The courts cannot, as seems to be contended by counsel, annul or construe away an agreement otherwise legal, on the sole ground that in its enforcement it operates harshly in a given case which is presented for judicial determination.

But our attention is directed to the following testimony of the witness Lincoln: "I had one talk with Mr. Hughes some time during the threshing season, and I think it was after the last expert had been out to the farm. I told him that the machine was not doing what it ought to; that it was a failure, in my estimation; and Mr. Hughes said that the machine could be fixed properly; he was sure it could be fixed; that the company would do what was right with the machine; and that, if they could not fix it, they would furnish us with another machine." The claim is made that this talk of the local agent so operated upon the written contract as to extend the stipulated time fixed by contract for the return of the machine, and in its effect gave defendants leave to retain the machine for an indefinite period, and until they were further notified, or informed that the company could not fix the machine. We cannot so construe the conversation. Mr. Hughes gave his individual opinion to the effect that the separator could be fixed, and that the company would fix it. But it nowhere appears that Mr. Hughes was an expert, or had special skill in repairing machines; nor did he assume to say

when the company would repair the machine. He had not been selected by the plaintiff, and sent out as an expert to repair this machine, nor was he commissioned to give an opinion as to whether or not the trouble with this machine was remediable. On the contrary, the plaintiff expressly and in writing reserves the right to itself to say, after sending out experts of its own selection, whether or not they would continue their efforts to repair, or whether they would cease their efforts, and take back the separator, if tendered within the time limited in the agreement. We have seen the true reason why the defendants chose not to return the machine, and there is no testimony which even suggests that defendants were deterred or persuaded from returning the machine by anything said or done by Hughes, or any one else. But the contract clearly shows that the local agent was powerless in the premises, and had no authority whatever to enter into any agreements with the defendants to extend time or otherwise alter the terms stated in the writing. The writing closes with the following sentence: "The terms and conditions hereof shall not be waived, altered, or changed without a special written agreement signed by said thresher company or their specially authorized agent therefor at Stillwater, Minnesota." There is no pretense that the local agent was specially authorized to alter the agreement or to extend time or performance under it. This feature of the contract, like its other parts, was binding upon the parties. *Reeves* v. *Corrigan*, 3 N. D. 415, 57 N. W. 80. Our conclusion is that the evidence introduced by the defendants fully justified the trial court in granting a motion to direct a verdict on the grounds stated in the motion.

In conclusion, it should perhaps be explained that this opinion is written after full argument upon a rehearing. Our conclusions as to the disposition of the case proper to be made have not been at all changed by the reargument, but, on the contrary, have been much strengthened. In the former argument our attention was not especially drawn to the grounds of plaintiff's motion to direct a verdict, and accordingly, upon the first argument, we did

not observe the fact that the grounds embraced in the motion did not cover the question of damages, or any question except that of a waiver. In the former decision we reviewed the whole evidence, and concluded that it wholly failed to sustain either the defense or the counterclaim pleaded in the answer, and accordingly held, as we now hold, upon another ground, that the motion was properly disposed of; but we are, upon consideration, forced to the conclusion that the question upon the motion, both in the trial court and in reviewing the case in this court, must turn upon the grounds stated in the motion, and upon no other. See *Bank* v. *Laughlin*, (decided at this term) 61 N. W. 473, 4 N. D. 391, and *Mattoon* v. *Railroad Co.*, (S. D.) 60 N. W. 740. Finding no error in directing a verdict for the plaintiff, the order setting aside such verdict, and granting a new trial, must be reversed, and judgment entered for the plaintiff upon the verdict. All concur.

(61 N. W. Rep. 145.)

WALTER A. WOOD HARVESTER CO. *vs.* C. E. HEIDEL, *et al.*
DULUTH DRY GOODS CO. *vs.* C. E. HEIDEL, *et al*, (*two cases.*)
MERCHANTS' STATE BANK OF FARGO *vs.* C. E. HEIDEL, *et al.*

Opinion filed December 22, 1894.

Dismissal of Appeal—Reinstatement.

The appeals in the four above entitled cases having been dismissed for failure to file the transcripts within the time prescribed by Rule 9, the court holds, on motion to reinstate such appeals, that appellants have not excused their default. See opinion for facts urged to excuse failure to comply with the rule.

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

Action by the Walter A. Wood Harvester Company against Charles E. Heidel, August Heidel, and others, and separate actions by the Duluth Dry Goods Company and by the Merchants' State Bank of Fargo against the same defendants. Defendants had judgment in all the actions, and plaintiffs separately appealed. The appeals were dismissed, and appellants moved to reinstate.

Denied.

Ball & Watson, for appellant, Walter A. Wood Harvester Co.

Newman, Spalding & Phelps, for appellants, Duluth Dry Goods Co., and Merchants' State Bank.

Frank J. Young and *T. R. Palmer*, for respondents.

CORLISS, J. The appeals in the above entitled four cases were dismissed by order of the chief justice, for failure to comply with Rule 9, requiring the appellants to cause the record to be sent up to this court within 60 days after the appeal is perfected, or within 20 days after service of notice by the respondent to send up such record, in case of appellant's failure to cause the record to be transmitted within 60 days. Appellants in all four cases have made motions in this court to reinstate these appeals.

In support of these motions, it is first urged that Rule 9 is void because it denies to the appellant a right to be heard on the

application to dismiss the appeal, the order of dimissal being made *ex parte*, on papers showing that the provisions of the rule have not been complied with, and also because, as is claimed, it seeks to confer judicial power on a single judge in vacation, which only the court can exercise. This contention would destroy a similar rule in many of the states. Indeed, in some of the states no application to even a judge for an order of dismissal is necessary. The order is entered *ex parte* by the clerk, on a *prima facie* showing that the appellant has failed to send up the record within the specified time. See *Bowers* v. *Tallmadge*, 23 N. Y. 167; *Schenck* v. *Ringler*, (N. Y. App.) 11 N. E. 382, 383; *Sweygert* v. *Sweygert*, (S. C.) 9 S. E. 657. We cannot agree with appellant that this rule denies him a right to be heard on the question of fact whether he has failed to send up the record in time. On a motion to reinstate the appeal, he may be fully heard, and on such motion the decision of the clerk, or of a judge of the court, that the rule has been violated, is fully open to review. Neither the clerk nor the judge exercises judicial functions in dismissing the appeal. The rule declares that unless the record is sent up within the prescribed period the appeal is deemed to have been abandoned, and the order of dismissal is merely a record of what has been already accomplished by the appellant's own neglect. But the validity of the action of the clerk or judge in making such record depends upon the existence of the fact that the rule has not been complied with, and not upon his decision that the fact exists. Whether the fact does exist is open to inquiry, and will be investigated and determined by the court on motion to reinstate, the same as though such order of dismissal had never been made. If the court finds that the fact does not exist, it will treat the order of dismissal as a nullity, because it has no foundation of fact on which to rest. This line of reasoning also answers the claim that this rule confers upon a single judge functions which only the court can exercise. In all our investigations, we have discovered no decision in which it has been held, or even intimated, that such a rule is void for the

reasons urged against the validity of our Rule No. 9 in these cases. On the contrary, similar rules have been everywhere upheld. Our rule we regard as wise and just. It protects the respondent, who was the successful litigant in the lower court, from being long deprived of the fruits of his victory by an appeal which the appellant has no intention of prosecuting. On the other hand, it will never work injustice to the appellant, who may secure an extension of the time in which to send up the record on making a sufficient showing to the court. Ordinarily, this application for further time should be made before the time has expired, if the court is in session, or has power to act in vacation with reference to such matters. But there is no hardship to the appellant in this. He has 20 days after the respondent has served notice on him to cause the return to be made, or in which to make his application for further time. If the court is not in session, and has no power in vacation to extend the time, then it will relieve the appellant, and reinstate the appeal after the time has expired, provided the appellant has been diligent in his efforts to procure the return to be made in time, and has caused it to be made as soon as possible after the expiration of such time. Application should be made to the court, at the earliest practicable moment, to secure an extension of time, or to be relieved from default. In this state it would require a strong case to entitle the applicant to relief. Our rule is very liberal in its allowance of time. The appellant has 60 days in which to send up the record, but if he fails to send it up in that time his appeal cannot be dismissed. It can only be dismissed because of his continued failure to have the record transmitted for 20 days after the respondent has served notice on him to cause such record to be sent up. Thus the appellant has at least 80 days after he has perfected his appeal to send up the record to this court. The rule of the New York court of appeals allows only 30 days. See *Spoore* v. *Fannan*, 16 N. Y. 620. It is not pretended that the record was transmitted to this court in time.

But the appellants insist that the rule is void, and, further, that

they have made a sufficient showing on this motion to reinstate the appeals to call for the indulgence of the court. Having held that the rule is valid, we now come to the question whether appellants have sufficiently excused their default to entitle them to be relieved from the consequences of their failure to comply with the rule in question. The appeals are from orders vacating attachments. The excuse for the delay in sending up the records is the alleged failure of the judge before whom the motions to dissolve such attachments were argued to settle the question as to what papers were used on such motions, in time to enable appellants to comply with the rule. The appeals were perfected May 12, 1984, and it is claimed that the learned judge did not definitely determine what papers were used on the motions until July 28th. But we are not satisfied that appellants were diligent in presenting this matter to the judge, and in urging the importence of an early decision. The learned judge has made no affidavit in these motions to reinstate, and we think that, in the absence of any positive statement from him to that effect, it is very improbable that he would have so long delayed the settlement of the question as to what papers were used on the motions to set aside the attachments, had he been pressed for a decision, and informed of the importance of a speedy conclusion, that the record might be transmitted in time. There are some general statements in the affidavit on which these motions to reinstate are based, that a controversy arose about the time the appeals were taken touching the papers which were properly a part of the record, and that appellants' counsel had a conversation with the judge about the matter in the latter part part of April, 1894, and at various other times, culminating in a conversation on or about July 28th, 1894, in which the judge stated the conclusion he had reached. This falls far short of showing that diligence was used in getting the record in shape for transmission to this court. Appellants' counsel were aware that there was a misunderstanding with reference to the papers used, two weeks before the appeals were taken. On motion, made upon notice, to have the

orders vacating the attachments amended by inserting recitals that all the papers were used on these motions which appellants claimed were used, or to have this question settled and certificates made, stating what papers were used, the matter could have been brought to a hearing long before the expiration of 80 days after appealing the cases, and it is fair to assume that a decision would have been speedily rendered. All that would then have remained to be done would have been to have the necessary certificates made, and the proper papers filed, and the record transmitted. A few days would have sufficed for this. It appears that Judge Rose informed appellants' counsel what papers he had concluded were used on the motions, 10 days before the expiration of the 20 days after service of the notice by respondents' counsel that the record should be transmitted. Here was ample time to prepare the certificate, and have the papers sent up. The excuse offered to account for appellant's failure to have the record transmitted within this time shows want of diligence on their part. They claim that some of the papers were not on file, and that it took time to find them and have them filed. But due diligence is not made out by a failure for over 80 days after taking an appeal, and for 20 days after being notified to have the record sent up, to make an inquiry as to what papers are on file in the case in which the appeal is taken. It was not until after August 6th that appellants discovered that all the papers were not on file. This shows that no effort to ascertain whether all the papers were on file had been made prior to that time. Had appellants exercised due diligence in this respect, the necessary papers would doubtless have been on file when Judge Rose settled the question as to what papers were before him on the motions, and no time would have been lost in finding and having them filed. Appellants still had 10 days, after Judge Rose informed them that he had made up his mind on this question in dispute, in which to cause the record to be filed in this court. We are clear that these circumstances show that appellants have not succeeded in their efforts to excuse their

failure to comply with this salutary rule. The fact that they have incurred expenses in printing abstracts and briefs creates no equity in their behalf. It is undisputed that such expenses were not incurred until after the 20 days after service of respondents' notice had expired, and the appeals had been actually dismissed. It is true that no motion of the application for such dismissal was served. This was not necessary. Nor were appellants informed of the dismissals before commencing to print their abstracts and briefs. They were, however, notified of such dismissals by the clerk after the papers were placed in the printer's hands, and there is nothing to show how far the printing had progressed at the time they received such notice. But the complete answer to this claim of prejudice is that Rule 9 of this court was a standing notice to appellants that after 20 days from the service of notice to send up the records the respondents could have the appeals dismissed *ex parte*, in case such records were not transmitted within such time. They were bound to know that after such time the appeals might be dismissed without notice to them, and an inquiry of our clerk would have resulted in their ascertaining the fact of such dismissals before any expenses had been incurred. The courts have repeatedly refused to reinstate appeals dismissed for failure to send up the record in time, when the facts were fully as favorable to the appellants as in these cases, and in some of the decisions a much stronger case for reinstatement was made. *Grigsby* v. *Purcell*, 99 U. S. 505; *Richardson* v. *Green*, 130 U. S. 104, 9 Sup. Ct. 443; *Fayolle* v. *Railroad Co.*, 124 U. S. 519, 8 Sup. Ct. 588; *Spoore* v. *Fannan*, 16 N. Y. 620; *Smith* v. *Solomon*, (Cal.) 24 Pac. 286; *Tile Works* v. *Hall*, (Neb.) 44 N. W. 45.

The motions are denied in all four cases.

BARTHOLOMEW, J. I concur in result, without committing myself to all that is said in the opinion relative to the flexibility of court rules.

(61 N. W. Rep. 155.)

NOTE—Supreme Court rules are enforced rigidly and will not yield except in cases of extreme hardship. *Hostetter* v. *Brooks Elevator Co.*, 4 N. D. 357; *O'Brien* v. *Miller*, 4. N. D. 308; *Globe Inv. Co.* v. *Boyum*, 3 N. D. 538; *First National Bank* v. *Laughlin*, 4 N. D. 391.

STATE *vs.* WM. COLLINS.

Opinion filed January 2, 1895.

Embezzlement—Indictment.

In a prosecution for embezzlement under our statute, it is necessary to allege the ownership of the property embezzled, and prove the same as alleged.

Error from District Court, Bottineau County; *Morgan*, J.

Wm. Collins was convicted of embezzlement, and brings error. Reversed.

Bangs & Fisk, *E. A. Maglone*, and *C. E. Gregory*, (*Cochrane & Feetham*, of counsel,) for plaintiff in error.

Norman A. Stewart, State's Atty., and *Bosard & McDermot*, for the state.

BARTHOLOMEW, C. J. There must be a new trial in this case, upon the first ground urged by plaintiff in error. The prosecution was for embezzlement under § 6801, Comp. Laws, which reads as follows: "If any clerk or servant of any private person, co-partnership, or corporation, except apprentices and persons within the age of eighteen years, fraudulently applies to his own use or secretes with fraudulent intent to appropriate to his own use any property of any other person which has come into his control or care by virtue of his employment as such clerk or servant, he is guilty of embezzlement." "Embezzlement" is defined by § 6796, Comp. Laws, to be "the fraudulent appropriation of property by a person to whom it has been intrusted." Embezzlement is a statutory expansion of common law larceny, made to prevent a failure of justice that would occur under the technical rules that the law had applied to larceny. It covers cases where the property which is the subject of the offense comes into possession of the defendant without any technical trespass; in other words, where property is intrusted to the party. It will be noticed that under our statute, quoted, it is immaterial whether the property be intrusted to the accused by the owner of the

property, or by some other person for such owner. Consequently, the distinctions which have arisen under statutes providing that the property must be intrusted to the accused by some person other than the owner will have no application in our state. Embezzlement being a cognate offense with larceny, it has ever been held that the same rules with reference to the property embezzled, and the ownership thereof, and the fraudulent intent to convert the property, apply in cases of embezzlement that apply in cases of larceny. On this point Wharton says: "Unless the pleader is relieved from this exactness by special statute, the goods and ownership must be set out and proved with the same exact completeness as in larceny." See Whart. Cr. Law, § 1044. See, also, *State* v. *Lyon*, 45 N. J. Law, 272; *Livingston* v. *State*, 16 Tex. App. 652.

It is elementary that in all prosecutions for larceny the property stolen must be specifically set forth, and also the ownership of such property; and, these allegations being necessary both in indictments for larceny and embezzlement, it follows as a matter of course, that proof of these allegations is also necessary. In the case at bar, defendant was accused of embezzling certain promissory notes. These notes, as alleged, and as the proof shows, were delivered to the plaintiff in error on the 23d day of November, 1893, by Robert A. Fox, the then alleged owner thereof. They were delivered to the plaintiff in error for the purpose of collection and remittance to said Fox. Five days thereafter, to-wit, on the 28th day of November, 1893, Robert A. Fox made a general assignment of all his property, including the notes intrusted to plaintiff in error, for the benefit of his creditors. This is developed by the evidence of the state. Such assignment, of course, carried with it, to the assignees, the legal title to the property in the notes. The crucial question in the case is whether or not the evidence shows an embezzlement or conversion of the property to his own use by plaintiff in error prior to such assignment. The information under which plaintiff in error was convicted charges him with embezzling the property of

Robert A. Fox. Plaintiff in error contends now that there is no evidence whatever of any embezzlement of any property belonging to Robert A. Fox. For the purposes of this case, it is sufficient to say that an embezzlement is accomplished by any act which shows an unmistakable intention on the part of the party to convert the property to his own use, and deprive the owner thereof. Embezzlement may also be evidenced by a demand upon the party to whom the property had been intrusted, made by one entitled to the property, and the refusal of such party to turn the property over, or account therefor. In this case it is shown that there was a demand made upon the plaintiff in error by one of the assignees some time in the month of December, 1893, and plaintiff in error refused to return the property, or account therefor. If this be regarded as the act of embezzlement, it clearly took place after the property had ceased to be the property of Robert A. Fox. But it is claimed by the state that there is other evidence of embezzlement. Plaintiff in error admitted, when on the stand, that he sold the notes that had been intrusted to him, to one McKenzie, for a lump sum. No date is fixed at which said sale took place,—whether before or after the assignment. The state seeks, however, to fix this date before the assignment, by other evidence. That evidence was a statement by plaintiff in error, on the stand, to the effect that he was not written or wired by Frank Collins (his brother) between the time of their talk, a week or 10 days before the assignment, and the time that he disposed of the notes. Subsequently, there was introduced into the case two letters concerning the said notes, written by Frank Collins to plaintiff in error,—one dated November 25, 1893, and the other November 27, 1893; both letters, it will be noticed, being prior to November 28, 1893, the date of the assignment. It is urged that this evidence shows that the sale of the notes to McKenzie must have been prior to November 28, 1893. We cannot, however, give the testimony that effect. We must construe the language of the plaintiff in error as he evidently meant it,—that he received no letter from

Frank Collins between the time of their conversation, a week or 10 days before the assignment, and the time that he disposed of the notes. Now, there is no evidence whatever as to the time when those letters were received. It is not even shown that they were received by mail, or that they ever were placed in the mail. In fact, the evidence of Frank Collins is to the effect that the first one never was mailed. In this state of the testimony, it will not do for us to say that the letters were received prior to November 28, 1893. Nor does the case of *Com.* v. *Butterick*, 100 Mass. 1, in any manner relieve this position. The defendant in error cites that case for the purpose of showing that, having laid the property in Robert A. Fox at the time it was intrusted to plaintiff in error, it was not necessary to prove that it continued to be the property of Robert A. Fox until the time of the conversion. The principle of the case in 100 Mass. is entirely correct, and it is this: The indictment having alleged the property embezzled to be the property of a particular party at the time it was intrusted to the accused, it was not necessary, in the indictment, to allege that the property continued to be the property of that party until the time of the embezzlement, because the law would presume that the ownership continued. The trouble with the application of that case to the case at bar is the fact that the testimony for the prosecution shows, beyond question, that the title to the property passed out of the person in whom it was alleged to be at the time the property was intrusted to plaintiff in error five days after it was so intrusted, while the evidence entirely failed to show whether the act of conversion was prior or subsequent to the date when the title was thus transferred. Such being the case, there was an utter absence of proof that the property embezzled was the property of Robert A. Fox at the time of the embezzlement, as alleged in the information. This failure is fatal, and the case must be reversed, and a new trial awarded.

There are many other errors alleged by counsel, referring to the rulings of the court in admitting and excluding evidence, and in giving the instructions to the jury. It is by no means certain

that these same questions will arise on a second trial. Hence, they need not be further referred to here.

Reversed. All concur.

(61 N. W. Rep. 467.)

J. F. BINGHAM *vs.* E. A. MEARS, *et al.*

Opinion filed November 13th, 1894.

Appeal Bond—Liability of Surety.

It is no defense to an action against sureties on an appeal undertaking that the plaintiff holds security amply sufficient to pay the claim for which the sureties have become bound, and that plaintiff has refused on demand to resort to such security for payment, there being no proof that the sureties were prejudiced by such refusal.

Rights of Surety as to Collateral Held by Creditor.

Whether a surety may not, under exceptional circumstances, compel a creditor to exhaust collateral security before suing him, not decided.

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

Action by J. F. Bingham against E. Ashley Mears and M. B. Mears on an undertaking on appeal. Judgment for plaintiff, and defendants appeal.

Affirmed.

A. S. Drake, for appellants.

A surety can compel the creditor to proceed against the debtor, until he has exhausted his remedy against the debtor. Story's Eq. Jur. 327, 494, 639; Daniels Neg. Inst. 1339; *Black River Bank* v. *Page*, 44 N. Y. 457; *Philadelphia Ry. Case*, 5 At. Rep. 361; § 1681, Civil Code; *Kennedy* v. *Falde*, 29 N. W. Rep. 670, 4 Dak. 319; *Meridan Silver Plate Co.* v. *Flory*, 7 N. E. Rep. 753; *Richards* v. *Oscola County Bank*, 45 N. W. Rep. 294. All the surety has to do to protect his property is to point out property belonging to the principal debtor. *Barnes* v. *Cavanaugh*, 3 N. W. Rep. 803; *Bedwell* v. *Gephart*, 24 N. W. Rep. 585.

Newman, Spalding & Phelps, for respondent.

The obligation of defendants is statutory and not common law. *Thompson* v. *Blanchard*, 3 N. Y. 335; *Doolittle* v. *Dininny*, 31 N. Y. 350. An undertaking on appeal is an absolute independent contract on the part of the sureties, in the nature of a guarantee of payment. *Curtis* v. *Richards*, 9 Cal. 34, *City of Sacramento* v. *Dunlap*, 14 Cal. 421; *Murdock* v. *Brooks*, 38 Cal. 596; *Heebner* v. *Townsend*, 8 Abb. Pr. 234; *Robinson* v. *Plimpton*, 25 N. Y. 487; *Staples* v. *Goky*, 34 Hun. 289.

Plaintiff is not bound to exhaust his remedies against the Mortgage Bank and Investment Co., or resort to collateral. *Heebner* v. *Townsend*, 8 Abb. Pr. 234; *Murdock* v. *Brooks*, 38 Cal. 596; Laws 1891, Ch. 120. § 22; *Wallerstein* v. *American Surety Co.*, 15 N. Y. Supp. 954.

CORLISS, J. The defendants were sureties on an undertaking given on appeal to this court from a judgment. Their only defense to this action against them on the undertaking is that the principal on whose behalf they signed the undertaking assigned to the plaintiff, as collateral to the claim on which such judgment was rendered, certain promissory notes secured by real estate mortgages, and that such collateral security is sufficient to pay such judgment and all expenses; that they have notified the plaintiff that he must resort to such collateral to collect his claim, but that he has failed to do so. Under the circumstances of this case, these facts do not constitute a defense. The general rule is that the surety has no right to insist that the creditor shall first proceed against the principle debtor, or any security which such debtor may have given him. Upon default the surety may at once be sued. 1 Brandt, Sur. § 97. It is true that in cases characterized by exceptional features, equity may compel the creditor to resort first to the property of the principal debtor where this will occasion no inconvenience or delay to the creditor. See *Railroad Co.* v. *Little*, (N. J. Err. & App.) 7 Atl. 361. But the facts of this litigation do not call for the application of this rule. There is no claim that the principal debtor is insolvent, or that these collateral securities will not be available to the sureties in

their hands for their indemnity after they have become by payment subrograted to all the rights of the plaintiff therein. There is also another rule which appears to be well supported, but this case is not brought within its scope. There is authority for the doctrine that upon indemnifying the creditor against the expenses of the proceedings the surety may, in equity, compel him to first exhaust his remedies against the principal debtor. Brandt, Sur. § 238. But in this case no offer of indemnity appears to have been made. This is a simple action at law upon a contract. The right of the sureties with respect to this collateral security is to resort to it themselves on paying the debt, and not to compel the creditor to resort to it. It is because of this right of a surety to look to such security for indemnity after he has paid the debt that the release of such security by the creditor will discharge the surety. When the surety is sued, he cannot, in an ordinary case at least, defend on the ground that the principle should have been first sued, and all efforts to collect the debt from him exhausted. On the same principle, the surety cannot insist that the creditor must first essay to collect his claim out of the collaterals the principle debtor has given him, except in the case mentioned in section 4310. This statute is inapplicable to this action. Another section of our statutes clearly contemplates that the mere failure, after request, to sue the principle debtor, or to proceed against collateral security, will not defeat an action against the surety. The latter may nevertheless be sued, and is liable for every dollar of the debt, except to the extent that he is prejudiced by the refusal of the creditor to proceed as requested. Comp. Laws, § 4305. The fact that the principal debtor has not been sued, or that collateral security has not been exhausted, is never a defense of itself. It is not a defense, even when a request of the surety is shown, that the creditor sue the principle or resort to his collateral, unless the surety is prejudiced by the failure of the creditor to act as requested; and then only to the extent of such prejudice. To have made out a defense because of the failure to resort to this collateral security, defendants should have proved that they had been prejudiced thereby.

Another section of our statute leads us to the same conclusion. Section 4310, Comp. Laws, provides that "whenever property of a surety is hypothecated with the property of the principal, the surety is entitled to have the property of the principal first applied to the discharge of the obligation." Here is a single instance in which the surety may insist that collateral held by the creditor shall be first exhausted. It follows that in no other case does this right exist, unless the right was well established under the decision prior to the enactment of this statutory law. So far from finding such a rule to have been settled at the time our Code was adopted, we have been unable to discover a single authority sustaining such a doctrine where the facts were not exceptional. All the adjudications support the contrary rule. *Fuller* v. *Loring*, 42 Me. 481; *Thorn* v. *Pinkham*, 84 Me. 101, 24 Atl. 718; *Morrison* v. *Bank*, 65 N. H. 253, 20 Atl. 300; *Abercrombie* v. *Knox*, 3 Ala. 728; *Allen* v. *Woodard*, 125 Mass. 400; *Jones* v. *Tincher*, 15 Ind. 308; *Brick* v. *Banking Co.*, 37 N. J. Law, 307; 1 Bandt, Sur. §§ 97, 237; *Buck* v. *Sanders*, 1 Dana, 187; *Day* v. *Elmore*, 4 Wis. 190–198; *Pen* v. *Ingles*, 82 Va. 65; *Davis* v. *Patrick*, 6 C. C. A. 632, 57 Fed. 909; *Callahan* v. *Mitchell*, 29 Ind. 419; *Aultman* v. *Smith*, 52 Mo. App. 351.

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

On Rehearing.

(Jan. 2, 1895.)

The earnestness with which counsel for defendants have pressed upon us their application for rehearing constrains us to go more fully into the discussion of the exceedingly interesting question presented on this appeal. In their main features, the English common law and the Roman civil law differed radically from each other touching the right of the surety to require the creditor to proceed against the principal debtor or the security the debtor had given the creditor before coercing payment by the surety. In the earlier period of Roman jurisprudence, the right of the surety to compel the creditors to resort first to the principal to collect his demand appears to have been well established; but the rule

was gradually departed from. Justinian, however, restored it, and from his time the doctrine was universally recognized throughout the empire. It has been incorported in the jurisprudence of many of the nations of Europe. Burge, Sur. pp. 329–341; *Hayes* v. *Ward*, 4 Johns. Ch. 123–133. But it never secured a footing in England. There the contrary doctrine has prevailed from the earliest times. The common law rule is that the surety must pay and seek reimbursement from the principle or out of the securities the latter has given the creditor. This was always the rule in courts of law. But in equity and in bankruptcy proceedings a rule somewhat analogous to that of the civil law grew up. This rule, however, was less sweeping in its effects upon the creditor than the rule promulgated by Justinian. It more carefully guarded his rights from prejudice. The English law regarded the promise of the surety as an absolute promise, unless it was in terms conditional. The surety was under the same obligation as the principal to pay the debt. The courts of law therefore ignored the equities between the principal and the surety when the creditor was seeking to collect his claim of the latter. In equity, also, the promise of the surety was looked upon as an unconditional promise; but equity, unlike the law, would not, under all circumstances, refuse to consider the rights of the surety in his relation to the principal; and whenever a case arose; special in its character, calling for the aid of equity to protect the surety from injury, that court, true to its traditions and its fundamental principles, extended relief to the surety, whenever it could so without, on the other hand, affecting the right of the creditor to the payment of his debt according to the terms of his contract. But in all such cases equity required that the creditor should be saved from delay, from expense, and from all risk. 1 Brandt, Sur. § 238; 24 Am. & Eng. Enc. Law, p. 799, and cases. When the object of the surety's appeal to equity was to compel the creditor to exhaust the collaterals in his hands before proceeding against the surety, the foundation of equitable relief was the inability of the surety himself to enforce such

collateral after paying the debt, or the possibility that the creditor by some act had impaired its value or destroyed its legality. The mere fact that the creditor held security for the debt did not entitle the surety to appeal to equity for a decree that the creditor look first to such security for his pay. In such a case the surety could protect himself by paying the claim, and by being subrogated to the creditor's rights to the security. But if, after payment by him, he could not enforce such security, or if grave doubt existed as to its legality because of some act of the creditor with respect to it, then a special case was presented, necessitating the interference of equity to prevent injustice to the surety; but even in such cases equity never interposed its aid without exacting the most ample protecting of the creditor against all damages because of delay, and all expenses of other proceedings than those against the surety, and the most complete indemnity against all loss because of the creditor's right of recovery against the surety being postponed. Mr. Burge, in his work on Suretyship, after referring to the civil law which permits the surety to compel the creditors to first sue the principal and exhaust collaterals, says, at pages 341 and 342: "The jurisprudence of England and of those colonies which adopt it does not, in that part of it which administers strict law as distinguished from equity, give this privilege to the surety. But in the administration of that part which is called equity and in the administration of the bankrupt laws a relief similar in its effect is afforded to him. It treats the creditor, however, as entitled to avail himself of all his securities in order to obtain the full payment of his demand. Thus, if the creditor have both a personal remedy against the surety for his demand, and also a fund to which he may resort for payment, and to which fund the surety even, when he has paid the creditor what is owing to him, cannot resort, a court of equity will, when it is satisfied that the creditor has the clear means of making his demand effectual against the fund, and upon the surety's indemnifying the creditor against the consequences of all risk, delay, and expense, compel the creditor to

make the fund available towards the satisfaction of his debt, before he proceeds personally against the surety." Said the chancellor in *Hayes* v. *Ward*, 4 Johns. Ch. 123, at p. 131: "I am not aware that there is any general rule in chancery that the creditor must look to the principal debtor, and exhaust his remedy against him, before he can be permitted to resort to the surety. The general language in the books and the practice have been otherwise, and the surety has been considered (without any formal adjudication upon the point, and perhaps without any examination of it upon principle) as amenable in ordinary cases to the creditor in the first instance, though the creditor may have taken ample security. The creditor has usually called on the surety at his election, and left him to resort to the principal debtor for his indemnity after he has paid the debt, and after he has been clothed by substitution with all the rights and securities of the creditors. 'The holder of the security, therefore, in general cases,' says Lord Eldon in *Wright* v. *Simpson*, 6 Ves. 734, 'may lay hold of the surety; and, till very lately, even in circumstances under which the surety would not have had the same benefit that the creditor would have had.' But in late cases, and under particular circumstances, Lord Eldon admits that the surety has a right to call upon the creditor to do the most he can for his benefit." Referring to these cases holding that this may be done, the chancellor says of them: "But all instances to which I have alluded may be considered as cases of a special nature. They do not appear to establish any such general rule as that derived from the civil law requiring the principal debtor to be first sued, which rule prevails in all those countries where the civil law is an essential part of the municipal law of the land." The chancellor granted relief to the surety in this case solely upon the ground that there was reason to believe that the creditor, by tainting his security with usury through subsequent dealings therewith, had rendered it void; thus placing the surety in a position where he could not have the benefit of it upon paying the debt. On this question the chancellor said: "I put this case entirely upon the

ground of the allegation, to which no answer has been given, that the mortgage is infected with usury, and would be useless and void if placed by substitution in the hands of the surety. If this should happen to be the case, the plaintiff, on paying, might be deprived of all indemnity from his principal by reason of the conduct of the creditor." Said the court in *Newcomb* v. *Hale*, 90 N. Y. 327, at p. 330: "Spencer, C. J., in his opinion in *King* v. *Baldwin*, 17 Johns. 386, seems to assume that a surety may always proceed in a court of equity, after the debt becomes due, to compel the creditors to collect of the principal debtor. But the authorities do not sustain the broad proposition assumed by the learned judge. There must be some specific equity beyond the mere relation of surety and creditor to entitle the surety to this relief." In a recent case in the circuit court of appeals that court rendered a decision directly in point. *Davis* v. *Patrick*, 6 C. C. A. 632, 57 Fed. 909. In the course of the opinion the court said: "Some cases have been cited by the learned counsel for the plaintiffs in error, the authority of which we do not dispute, that under certain circumstances a court of equity, at the instance of the surety, will coerce a creditor to proceed with the collection of his claim against the principal debtor. But these are cases where, by the delays and forbearance of the creditor, the surety is liable to sustain loss, or where the creditor has access to a fund for the payment of his debt, which the sureties cannot make available. The principle has never been extended to a case like the one at bar, where the creditor has merely exercised his right of election as between two remedies for the collection of a debt, and where the securities held by the creditor may be made immediately available to the surety by his paying the debt and seeking subrogation." In *Irick* v. *Black*, 17 N. J. Eq. 189–195, the court said: "If the court is asked to interfere on behalf of the surety before judgment is recovered against him, he must present some special ground of equitable relief." See, also, *Bank* v. *Smith*, (Cal.) 35 Pac. 1027; *Bank* v. *Wood*, 71 N. Y. 407, 411, 412; *Abercrombie* v. *Knox*, 3 Ala. 728.

The general rule that some peculiar equity must exist in favor of the surety—that the case must be an exceptional one to entitle the surety to relief—applies as fully when the surety is seeking to compel the creditor to first sue the principal as when he is insisting that the creditor shall first exhaust the security he holds. These rules of the common law constitute the law of this state, so far as they have not been changed by statute. We will shortly come to that subject. Now, it is obvious that defendants' answer discloses no special equity in their favor. The security which they ask the court to compel the creditor to exhaust they can secure absolute control of by themselves paying the claim they owe. As between the creditor to whom a debt is owing and the surety who owes it, equity very properly declares that the creditor ought not to be compelled to enforce, for the benefit of the surety, the security he holds, but that the surety himself should pay the debt, and enforce such security for his own benefit. But we are referred to several statutes as having radically changed the common law. They have already been mentioned in the original opinion. Among them, the first we will consider is § 4305, Comp. Laws. This section declares that: "A surety may require his creditor to proceed against the principal, or to pursue any other remedy in his power which the surety cannot himself pursue, and which would lighten his burden; and if in such case the creditor neglects to do so, the surety is exonerated to the extent to which he is thereby prejudiced." This provision has a history. It is the statutory embodiment of the rule established in the State of New York in the early days of that state. That rule was first announced by the Supreme Court of that state in *Pain* v. *Packard*, 13 Johns. 174, and was finally settled by the court of errors in *King* v. *Baldwin*, 17 Johns. 384, by the casting vote of the president of the court, a layman who was *ex officio* president of the court by virtue of holding the office of lieutenant governor of the state. It was an anomaly in the law. It rested upon the doctrine that equity would, in special cases, require the creditor to first proceed

against the principal debtor or callateral security held by the former. But this doctrine did not warrant such a rule so broad as to apply to all cases, whether any special equity existed or not. See *Newcomb* v. *Hale*, 90 N. Y. 327–330. The court might have deduced from this doctrine that equity would, under peculiar circumstances, compel the creditor to first look to other sources than the surety for his pay, under the rule that in such cases, and in such cases only, this duty might be cast upon him by a notice to him from the surety to proceed against the principal, or to exhaust collaterals; and that in such cases, and in only such cases, the creditor's failure to do so would exonerate the surety to the extent that it caused him injury. But the court, in *King* v. *Baldwin*, ignored this limitation, and laid down the rule in language whose legal effect is the same as that of the section of our statute above quoted (*i. e.* section 4305.) The New York decisions furnish a clue to the meaning of this provision. The spirit of it is, not to prevent suit against the surety after the creditor has been notified to proceed against the principal, but to place the hazard of the subsequent insolvency of the principal or the subsequent impairment of the security wholly upon the shoulders of the creditor. If the contention of the counsel for defendants that this statute introduces the civil law rule that the surety may always require the creditor to first sue the principal or exhaust the collateral he holds is sound, it is remarkable that the courts of the state which first declared the rule embodied in that section have since that time been called upon, as has been frequently the case, to apply the doctrine that a surety is subrogated to the rights of the creditor on paying the debt. Sureties would have invoked this civil law rule had it been introduced by the New York doctrine in that state; and, instead of paying and exercising the right of subrogation, they would in every case have compelled the creditor to resort to the principal or to collaterals in the first instance. That the rule enunciated in section 4305 does not carry with it the other rule contended for by counsel for defendants—the civil law rule—is apparent from the fact that in

New York, where the former rule has existed for more than one-half a century, we find the courts steadily refusing to recognize the civil law rule, except to the extent that it has been recognized in England. In New York, equity will interfere in only exceptional cases, where special equities in favor of the surety exist. *Newcomb* v. *Hale*, 90 N. Y. 327, 330; *Bank* v. *Smith*, 71 N. Y. 407, 411, 412; *Hayes* v. *Ward*, 4 Johns. Ch. 123, 131, 133, 134; *Warner* v. *Beardsley*, 8 Wend. 199, 200. We therefore discover no reason for holding that section 4305 has wrought the radical change in the common law which counsel for defendants contend that it has.

We are referred to two other sections of our statute as favoring the views of defendants' counsel. They are § § 4310, 5166, Comp. Laws. They provide as follows:

"Whenever property of a surety is hypothecated with the property of the principle, the surety is entitled to have the property of the principle first applied to the discharge of the obligation." Section 4310.

"In all cases where judgment is rendered upon any instrument in writing, in which two or more persons are severally bound, and it shall be made to appear to the court, by parol or other testimony, that one or more of said persons so bound, signed the same as surety or bail for his codefendant, the court must, in entering judgment thereon, state which of the defendants is principal debtor, and which are sureties or bail. And execution issued on such judgment must command the sheriff or other officer to cause the money to be made of the personal property and real property of the principal debtor but, for want of sufficient property of the principal debtor, to make the same, to cause the same to be made of the personal and real property of the surety or bail. In all cases, the property, both personal and real, of the principal debtor, within the jurisdiction of the court, must be exhausted before any of the property of the surety or bail shall be taken in execution." Section 5166.

These statutes are merely declaratory of settled rules. When both principal and surety have, by the same instrument, mortgaged their property for the debt of the principal, no delay or

loss or risk can result to the surety from so enforcing the mortgage that the property of the principal shall be first sold. Nor is an additional action necessary, as the principal and the surety, and the property of both, are all before the court in the one action to foreclose the mortgage. In such a case, equity, to prevent a multiplicity of actions, and to protect the surety with slightest injury to the creditor, will direct that the principal's property be first sold. The courts had established this rule before it found its way into our Code. 1 Brandt, Sur. § 237, and cases cited; *Weil* v. *Thomas*, (N. C.) 19 S. E. 103; *Wheat* v. *McBrayer*, (Ky.) 26 S. W. 809. The case of *Richards* v. *Bank*, (Iowa,) 45 N. W. 294, on which counsel for defendants lay so much stress, belongs to this class. So does *Railroad Co.* v. *Little*, (N. J. Err. & App.) 7 Atl. 356. And yet the existence of this rule has never been regarded as involving as a necessary consequence the establishment of the broad rule of the civil law that in every case the surety can compel the creditor to first seek elsewhere for his pay. This is true of the rule laid down in section 5166. It is, in terms, restricted in its application to cases in which judgment is rendered against both principal and surety. It does not apply when the surety is sued alone. When both of the debtors are before the court, no delay or injury can result to the creditor from being obliged to sell the property of the principal first. His right to a judgment against the surety is not thereby postponed. This is very different from delaying the creditor until he has obtained judgment against the principal, or has exhausted collaterals, when he has sued the surety alone, as he has a perfect right to do, unless the obligation is joint. While these two statutes, and also section 4305, are steps in the direction of the policy of the civil law,—steps which the courts had taken under the common law without statutory authority,—yet it is indefensible to declare that these provisions, limited in their scope, should be construed as being so sweeping in their effect as to revolutionize the common law on this subject. The doctrine announced in *King* v. *Baldwin*, 17 Johns. 384, has been regarded as an unwarranted innovation

upon the common law in most of the states, and their courts have refused to adopt it. See 1 Brandt, Sur. § 242. And even in the state in which it originated it has never been extended, but the whole drift of the adjudications there is to strictly limit its operation. *Trimble* v. *Thorne*, 16 Johns. 151; *Newcomb* v. *Hale*, 90 N. Y. 327–329; *Wells* v. *Mann*, 45 N. Y. 327; *Converse* v. *Cook*, 25 Hun. 44; *Hunt* v. *Purdy*, 82 N. Y. 486; *Lawson* v. *Buckley*, 49 Hun. 329, 2 N. Y. Supp. 178; *Goodman* v. *Simonson*, 74 N. Y. 133; *Warner* v. *Beardsley*, 8 Wend. 194, 198, 199. Certainly it is not a legitimate inference to deduce from the statutory adoption by this state of this special doctrine a purpose to introduce the whole policy of the civil law with respect to the rights of sureties against the creditors into our system of jurisprudence. The implication is the other way, and this implication is very much strengthened by the fact that, while our Code expressly confers upon the surety the right to compel by judicial proceedings the principal to pay the debt (a right recognized by the common law,) it nowhere declares that the surety may by action compel the creditor to first sue the principal, or exhaust the collaterals he holds. See Comp. Laws, § 4306. The decision in *Davis* v. *Patrick*, 6 C. C. A. 632, 57 Fed. 909, is directly in point. There an action was brought upon a supersedeas bond, given on appeal from a judgment. The sureties contended that the creditor could not proceed against them until he had exhausted his remedy against real estate of the principal debtor nearly sufficient in value to pay his claim, which he had attached in the action in which the judgment appealed from had been rendered. The court decided against the sureties, and in refusing to sustain their contentions the court used the language which we have already quoted. Nor was the decision in that case placed upon the ground that in the Federal Courts no equitable defense to an action at law can be interposed. On this point the court said: "It is to be observed that the plea last mentioned merely asserts an alleged equitable right or defense, and it is doubtful, to say the least, whether such alleged equity could, in any event,

be pleaded as a defense to a suit at law in the Federal Courts when the distinction between legal and equitable defenses is still fully preserved. But we do not care to dwell on the latter suggestion. It is obvious, we think, that the plea did not disclose a right on the part of the sureties to have the lien discharged, or the attached lands sold, before a suit was maintained on the supersedeas bond, which a court of equity would recognize and enforce even on a bill filed for that purpose." We have assumed throughout the course of this opinion that the surety may, under our system of procedure, secure by answer the relief which formerly he could obtain only by filing a bill. It has been urged by counsel for plaintiff that the sureties upon an undertaking on appeal are not within the scope of the equitable principles to which we have referred. We have been unable to assent to his view. It is true that their obligation is as unconditional as that of the principal. So is the obligation of the surety upon a promissory note signed by himself and the principal debtor. But he is none the less a surety, and entitled to all the rights of a surety. Unless made in terms conditional, the promise of a surety is always as absolute as that of the principal. 1 Brandt. Sur. § 1; *Harris* v. *Newell*, 42 Wis. 691; *Warner* v. *Beardsley*, 8 Wend. 199. The equitable right of a surety to compel the creditor, under certain peculiar circumstances, to proceed first against the principal or collateral security, does not rest upon the terms or nature of the contract on which he is surety, but upon broad equitable principle that, as between himself and the principal debtor, the latter ought to pay the debt. *Harris* v. *Newell*, 42 Wis. 692. When, coupled with this equity, special facts, which take the case out of the ordinary category, are found to exist, the right exists irrespective of the terms or nature of the contract, provided, of course, that the right is not waived by the language of the contract. The cases cited by counsel for plaintiff do not hold to the contrary. They merely hold that the surety upon such an undertaking is liable absolutely, and no execution against the principal upon the judgment appealed from is necessary

before suing the surety. The decision in *Davis* v. *Patrick*, 6 C. C. A. 632, 57 Fed. 909, is directly against the contention of the plaintiff's counsel in this respect. See, also, *Wood* v. *Fisk*, 63 N. Y. 245. The authorities cited by counsel for defendants are cases in which the court had both parties before it, or the property of both which had been pledged for the debt, or in which, by reason of the peculiar nature of the litigation, it was possible to protect the surety's equity without in the least degree interfering with the right of the creditor to enforce the contract without delay. *Paxton* v. *Rich*, (Va.) 7 S. E. 531; *Beckham* v. *Duncan*, (Va.) 9 S. E. 1002; *Richards* v. *Bank*, (Iowa,) 45 N. W. 294; *Hoppes* v. *Hoppes*, 123 Ind. 397, 24 N. E. 139; *Weil* v. *Thomas*, (N. C.) 19 S. E. 103; *Wheat* v. *McBrayer*, (Ky.) 26 S. W. 809; *Neimcewicz* v. *Gahn*, 3 Paige, 614; *Blackman* v. *Joiner*, (Ala) 1 So. 851; *Railroad Co.* v. *Little*, (N. J. Err. & App.) 7 Atl. 356–361. The whole trend of the common law decisions is in the direction of regarding the right of the creditor to compel the surety to at once perform his contract as superior to the equity of the surety that, as between himself and the principal, the latter ought to pay the debt.

It is urged that the plaintiff should have issued execution on the judgment affirmed on the appeal before suing the sureties. The statute is a complete answer to this contention. It provides that a breach of the undertaking is established by neglect to pay the judgment affirmed within 30 days after such affirmance. Laws 1891, Ch. 120, § 22. The complaint contains an averment that more than 30 days had elapsed since the affirmance of the judgment by the Supreme Court. This allegation is not denied. In the absence of such a provision, the sureties would be liable at once upon the affirmance of the judgment. No case can be found holding that the issue of an execution upon the judgment affirmed is a condition precedent to liability on the part of the surety, in the absence of a statute making such act a condition precedent. On the contrary, the decisions are all the other way. *Davis* v. *Patrick*, 6 C. C. A. 632, 57 Fed. 909; *Babbitt* v. *Finn*, 101

U. S. 7–13; *Murdock* v. *Brooks*, 38 Cal. 596–604; *Smith* v. *Ramsay*, 6 Serg. & R. 576; *Anderson* v. *Sloan*, 1 Colo. 484; *Wallerstein* v. *Surety Co.*, (City Ct. N. Y.) 15 N. Y. Supp. 954. The rehearing is denied.

The judgment is affirmed. All concur.

(61 N. W. Rep. 808.)

OCTAVIA J. PARSONS *vs.* GUSTAV VENZKE.

Opinion filed December 12th, 1894.

Commissioner of General Land Office—Powers.

The commissioner of the general land office has power to cancel an entry, but this power is not unlimited.

Equity Will Correct Mistake of Commissioner.

When it has been exercised under a mistake as to the law to the injury of the rightful claimant, a court of equity will correct the error, and compel the holder of the patent to convey to the one who but for such mistake would have obtained the patent himself.

Decisions of Land Department on Matters of Fact—Final.

The decision of the land department, so far as it relates to matters of fact involved in the cancellation of an entry, is binding on the courts, provided the parties interested have been heard, or have had an opportunity to be heard.

Cancellation of Entry—Presumption.

The courts will presume that the power has been properly exercised, and it is therefore incumbent on one who is claiming the legal title, despite the cancellation of an entry, to prove that the entryman acted in good faith, and fully complied with the law. The mere fact that the proceedings may have been *ex parte* will not entitle him to relief, unless he was in fact entitled to a patent at the time the entry was canceled. The fact that he was not heard, and had no chance to be heard, merely gives him the right to prove in court the facts showing that he had earned the patent at the time the entry was canceled.

Affidavit of Service—Knowledge of Hearing.

The failure to require the filing of an affidavit that the party to be served cannot be personally served is not fatal to the power of the department to act upon a mere publication of notice of the hearing, without personal service, where the party does in fact know of the hearing, and has an opportunity to be heard.

Opportunity to be Heard—Rules of Department.

Whether the decision of the commissioner as to matters of fact will be regarded as binding by the courts depends upon general principles, and not upon the question whether the proceedings have been in conformity with the rules of the department which, having been made by the department itself, may be abrogated or disregarded by it. Disregard of rules which does not result in a denial of the right or in the loss of an opportunity to be heard will not affect the binding force of the decision. The most strict observance of all rules will not foreclose an investigation of the facts in court when, in the particular case, the right to hearing has been denied, or an opportunity to be heard has not been given.

Courts Will Not Disturb Decision of Department—When.

When a full opportunity to be heard has been afforded, the courts will not disturb the decision of the commissioner because of errors relating to the burden of proof, the competence of evidence, or the weight of evidence.

Bona Fide Purchaser—How Affected.

The commissioner's power to cancel an entry is not affected by the fact that the property has been transferred or mortgaged to a purchaser or mortgagee who parts with value, in good faith, without knowledge of the facts because of which the entry is canceled. But *quaere* whether such purchaser or mortgagee is debarred from proving the *bona fides* of the entry by proceedings in the land department, culminating in a cancellation of the entry, when he has no knowledge of such proceedings.

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

Action by Octavia J. Parsons against Gustav Venzke and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

J. E. Robinson and *S. B. Pinney*, for appellant.

When a patent for land is issued by mistake, inadvertance or other cause to parties not entitled thereto, they will be declared trustee's of the true owner. *Johnson* v. *Towsley*, 13 Wall. 72; *Stark* v. *Stars*, 6 Wall. 402; *Lindsey* v. *Hawes*, 2 Black. 554; *Cornelius* v. *Kessell*, 128 U. S. 456; *Widdcombe* v. *Childers*, 124 U. S. 400; *Moore* v. *Robbins*, 96 U. S. 530; *Bernier* v. *Bernier*, 147 U. S. 242. An executive officer does not have power to forfeit land, when a qualified person makes final proof, purchase and payment therefor, in the form and manner prescribed by law, and when the land is subject to pre-emption. *Smith* v. *Ewing*, 23 Fed. Rep. 741; *Wilson* v. *Fine*, 40 Fed. Rep. 52; *United States* v. *White*, 17

Fed. Rep. 561; *Smith* v. *Camp*, 2 Minn. 155; *Ames* v. *Grimes*, 2 Ia. 1; *Sillyman* v. *King*, 36 Ia. 307; *Cady* v. *Eighmey*, 54 Ia. 618; *Brill* v. *Stiles*, 35 Ill. 305; *Aldrich* v. *Aldrich*, 37 Ill. 32; *Norton* v. *Blankenship*, 5 Mo. 346; *Mayer* v. *McCollough*, 1 Ind. 339; *Guynne* v. *Niswauger*, 15 Ohio 368; *Cornelius* v. *Kessell*, 58 Wis. 237, 128 U. S. 456; *Carroll* v. *Safford*, 3 How. 460; *Witherspoon* v. *Duncan*, 4 Wall. 210. By entry, which includes a purchase and payment the emptor acquires a vested interest in the property. *Hutchings* v. *Low*, 15 Wall. 77; *Cornelius* v. *Kessell*, 128 U. S. 461. It is contended that under the constitution and laws of the United States, judicial power to declare penalties and forfeitures rests in the courts and not in officers of the land department. Section 536, R. S.

The pre-emption right was a preference right to purchase a quarter section of land. In the absence of congressional inhibition it was assignable. *Treadgall* v. *Pintard*, 12 How. 24; *Myers* v. *Croft*, 13 Wall. 291; Proof was made in the form and manner required by law and the rules of the land department, and to the satisfaction of the register and receiver, the land was paid for and the usual duplicate receipt obtained. After such payment Simpkins title was that of a purchaser in possession. It may have been voidable but it was not void. *Brumley* v. *Goodrich*, 40 Wis. 134; *Crocker* v. *Balangee*, 6 Wis. 643; *Graham* v. *Ry. Co.*, 102 U. S. 157. Until divested of title the entry man or his grantees had a vested interest in the land. *Frisbie* v. *Whitney*, 9 Wall. 187; *Hutchins* v. *Low*, 15 Wall. 77; *Risdon* v. *Davenport*, 57 N. W. Rep. 482. A party cannot by his misconduct so forfeit a right, that it may be taken from him without judicial proceedings in which the forfeiture shall be declared in due form of law. Cooley's Const. Lim. 444; *Leck* v. *Anderson*, 57 Cal. 251; *Boorman* v. *Santa Barbara*, 65 Cal. 313.

Against a *bona fide* purchaser a fraudulent sale cannot be avoided. *Thurston* v. *Blanchard*, 33 Am. Dec. 700.

S. H. Snyder and *Curtiss Sweigle*, for respondent.

The inquiry here should be, had the commissioner or secretary the power to cancel the final certificate issued to Simpkins under

the facts as disclosed by the record in the case? "The power of supervision given the secretary and commissioner is a general one, a supervision over all the acts of the register and receiver. There is no exception made in the matter of issuing final certificates." *Vantongeren* v. *Hefferman*, 5 Dak. 180; *Swigart* v. *Walker*, 30 Pac. Rep. 162; *Dorcey* v. *McCarthy*, 12 Pac. Rep. 104; *Jones* v. *Meyers*, 26 Pac. Rep. 215; *Sorrenson* v. *Meyers*, 26 Pac. Rep. 218; *Judd* v. *Randall*, 29 N. W. Rep. 589; *Gray* v. *Stockton*, 8 Minn. 529; *Hosmer* v. *Wallace*, 47 Cal. 461; *Figg* v. *Hensley*, 52 Cal. 299; *Hestus* v. *Breman*, 50 Cal. 211; *Bellows* v. *Todd*, 34 Ia. 31; *McLane* v. *Bovee*, 35 Wis. 27; *United States* v. *Steenerson*, 50 Fed. Rep. 504; *Carr* v. *Fife*, 44 Fed. Rep. 713; *Lee* v. *Johnson*, 116 U. S. 48; *Knight* v. *United Land Ass'n*, 142 U. S. 160; *American Mortgage Co.* v. *Hopper*, 56 Fed. Rep. 67. The forfeiture provided for by statute is a forfeiture of the money paid. There is no such thing as a forfeiture of the land, since the title does not vest until the final action of the land department determines the existence of the conditions necessary to that result. *American Mortgage Co.* v. *Hopper*, 56 Fed. Rep. 74. Plaintiff is not a *bona fide* purchaser, she was charged with knowledge of the law, that the final certificate did not vest the title to the land in Simpkins, and was thereby put upon inquiry to ascertain whether or not the final proof of Simpkins was made in good faith. 1 Warvelle on Vendors, 266; *American Mortgage Co.* v. *Hopper*, 56 Fed. Rep. 67; *Randall* v. *Edert*, 7 Minn. 359. The purchaser of an equitable title, takes at his peril and acquires the property burdened with every prior equity charged upon it. *Shoupe* v. *Griffiths*, 30 Pac. Rep. 93. Where the matters to be determined by the department are questions of fact, or mixed questions of law and fact, the decision of the department is final and cannot be reviewed by the court. *Ard* v. *Pratt*, 23 Pac. Rep. 646; *Jeffords* v. *Hine*, 11 Pac. Rep. 351; *Ferry* v. *Strutt*, 11 Pac. Rep. 571; *Porter* v. *Bishop*, 6 So. 863; *Keane* v. *Riggers*, 28 Pac. Rep. 653; *Puget Mill* v. *Brown*, 54 Fed. Rep. 987; *Johnson* v. *Towsley*. 13 Wall. 73; *Shepley* v. *Cowan*, 91 U. S. 330; *Moore* v. *Robbins*, 96 U. S. 330; *Lee* v. *Johnson*, 116 U. S. 48.

CORLISS, J. The plaintiff's theory of action, as disclosed by his complaint, is not the one that was developed upon the trial. The complaint is framed under § 5449, Comp. Laws, to try an adverse claim to plaintiff's alleged title. The pleading contains an allegation that the plaintiff is the owner in fee simple of the land in question. On the trial it appeared that the plaintiff was not the owner in fee simple; that he did not pretend to hold the legal title; but that, on the contrary, he was seeking by this action to have the defendant, who held the legal title, adjudged to be a mere trustee for the plainfiff as to such title, and to procure a decree directing defendant to convey the same to the plaintiff. The pleadings and the proof are not in harmony; but, as no point has been made touching the failure of the plaintiff to establish the cause of action he had alleged, we will consider the pleadings as amended to conform to the evidence, and turn to the latter for our guidance in determining whether the theory on which the case was tried below and argued in this court can be sustained.

The defendant holds a patent for the land. The plaintiff claims under a pre-emptor whose certificate was canceled by the commissioner of the general land office before defendant made the entry on the land under which he obtained his patent. The question which confronts us at the very threshold relates to the power of the commissioner to cancel entries which have been allowed by the officers of the local land office. In this connection a more particular reference to the facts is advisable. The entry under which plaintiff claims was made by Willis B. Simpkins, January 11, 1883. In less than a month after he had received his patent certificate, he conveyed the land to Charles J. Wolfe, who sold the land to Jessie J. Russell, by whom it was mortgaged. The plaintiff claims as a purchaser under the sale on foreclosure of this mortgage. These transfers and this mortgage were all executed prior to the cancellation of Simpkins' entry. After the cancellation of this entry, the defendant entered the land as a pre-emptor, and ultimately obtained a patent. It is the legal title under this patent which the plaintiff seeks to secure by this

action. If he is correct in his premise that the commissioner had no power to cancel the entry, or, assuming his power, that we can inquire whether it was properly exercised in this case, and from that inquiry conclude that it was not properly exercised, then it follows that the defendant must be deemed to hold the legal title in trust for him, and ordered to convey such title to him. Said the United States circuit court of appeals in a recent case: "No principle is more firmly established in American jurisprudence than that, after the title has passed from the United States to a private party, it is the province of the courts to correct the errors of the officers of the land department which have resulted from fraud, mistake, or erroneous views of the law; to declare the legal title to the lands involved to be held in trust for those who have the better right to them; and to compel their conveyance accordingly." *Bogan* v. *Mortgage Co.*, (May term 1894; 8th Circuit) 11 C. C. A. 128, 63 Fed. 192. To same effect, see *Bernier* v. *Bernier*, 147 U. S. 242, 13 Sup. Ct. 244; *Silver* v. *Ladd*, 7 Wall. 219; *Johnson* v. *Towsley*, 13 Wall. 72.

The first inquiry is whether this power of cancellation exists. The authorities are divided upon this question, but the great weight of the adjudications supports the power, and so does the better reason. *Holmes* v. *State*, (Ala.) 14 South 51; *Judd* v. *Randall*, (Minn.) 29 N. W. 589; *Mortgage Co.* v. *Hopper*, 56 Fed. 67; *Lewis* v. *Shaw*, 57 Fed. 516; *Jones* v. *Meyers*, (Idaho,) 26 Pac. 215; *Swigart* v. *Walker*, (Kan.) 30 Pac. 162; *U. S.* v. *Steenerson*, 1 C. C. A. 552, 50 Fed. 504; *Stimson* v. *Clarke*, 45 Fed. 760; *Bogan* v. *Mortgage Co.*, *supra*; *Freese* v. *Scouten*, (Kan.) 36 Pac. 741; *McLane* v. *Bovee*, 35 Wis. 27; *Vance* v. *Kohlberg*, 50 Cal. 346; *Hosmer* v. *Wallace*, 47 Cal. 461; *Figg* v. *Hensley*, 52 Cal. 299; *Fernald* v. *Winch*, (Kan.) 31 Pac. 665; *Bellows* v. *Todd*, 34 Iowa, 31. See, also, *Harkness* v. *Underhill*, 1 Black, 316–325; *Barnard* v. *Ashley*, 18 How. 43; *Cornelius* v. *Kessel*, 128 U. S. 456–461, 9 Sup. Ct. 122. The argument employed to assail the existence of the power begs the whole question. It necessarily assumes that the power does not exist. The argument, in substance, urges the

sacredness of vested rights. But if the statute, when properly construed, vests the power of cancellation in the commissioner, it is idle to talk of vested rights which will interfere with the lawful exercise of this power. The government has not finally decided that the entryman is entitled to the land. The certificate merely evidences the fact that the local officers are satisfied that he has made out a good claim to the land. But if the commissioner has authority to investigate, and comes to a different conclusion, then the entryman has no vested rights which the commissioner takes away by canceling the entry. His claim is not vested, but contingent. Its validity depends upon its approval by the commissioner. If he disapproves it, it fails to become a vested right. The disapproval does not destroy; it merely prevents with respect to the claimant the existence of a vested interest in the land. Said the court in *Mortgage Co.* v. *Hopper*, 56 Fed. 67–74: "There is no such thing as a forfeiture of the land, since the title does not vest until the final action of the land department determines the existence of the conditions necessary to that result. There is no such thing as a forfeiture of an equitable estate or interest, since, as has been abundantly shown, it does not appear that the original entryman was ever invested with any such estate or interest. The alleged forfeiture is merely the exercise of an undoubted authority by the proper officers of the land office to cancel an entry made upon false testimony,—an authority so exclusive in such department that what is done under it in the decisions of questions of fact cannot be questioned anywhere else, unless such tribunal has been prevented by some fraud practiced from fairly trying the question." The question is purely one of power, and it is illogical to argue against its existence by a line of reasoning which rests ultimately upon a denial of the power as the basis of such reasoning. The question of vested rights is foreign to the inquiry. If there is power, there can be no vested rights which can defeat its exercise. If there is no power, then the question of vested rights is of no possible moment, as the want of power will defeat its exercise without

the aid of further argument. We do not wish to be understood as ignoring the doctrine that the entryman secures such standing before the law that the commissioner cannot illegally or arbitrarily cancel the entry. *Johnson* v. *Towsley*, 13 Wall. 72–85.

The state of the record will not, however, permit us to rest here. It is contended that, even conceding the existence of this power, it was improperly exercised in this case. The general doctrine is that this power is not unlimited; that the courts will not always refuse to investigate the question whether it has been properly exercised. Said the court in *Bogan* v. *Mortgage Co.*, *supra:* "But the supervisory or reviewing power of the commissioner of the land office or of the secretary of the interior is not an arbitrary, unlimited, or discretionary power, but a power that must be exercised according to law, and not in violation or disregard of it. When it is so exercised, and its exercise is not induced by fraud or mistake, the results it produces are sustained by the courts. Where its exercise has been induced by fraudulent misrepresentations or by material mistake of fact, or when the power has been exercised in violation or in disregard of law, the results produced are uniformly so modified by the decrees of the courts that those who are entitled in equity to the titles to the lands ultimately obtain them." To same effect are *Cornelius* v. *Kessel*, 128 U. S. 456, 9 Sup. Ct. 122; *Bernier* v. *Bernier*, 147 U. S. 242, 13 Sup. Ct. 244. It is well settled that, if the commissioner cancels an entry under a misconception of the law, the courts will rectify the error, and give the land to the one who would have received the patent if the mistake had not been committed. There are numerous cases in which this has been done. See, among others, the authorities last cited. But it is not pretended here that the cancellation of Simpkins' entry was the result of a mistake of law. The entry was canceled on the ground that it was fraudulent and speculative, and that Simpkins' final proof was false. These were all matters of fact. The commissioner having power to investigate them, and to reach a conclusion upon them, his decision is final, unless the case is

taken out of the ordinary rule by what are characterized as its exceptional features. It is one of the elements of the law that the decision of the land department on a question of fact is ordinarily binding on the courts. *Vantongeren* v. *Hefferman*, 5 Dak. 180, 38 N. W. 52, and cases cited; *Johnson* v. *Towsley*, 13 Wall. 72; *Quinby* v. *Conlon*, 104 U. S. 420; *Barden* v. *Railroad Co.*, 14 Sup. Ct. 1030; *Heath* v. *Wallace*, 138 U. S. 573, 11 Sup. Ct. 380; *Steel* v. *Refining Co.*, 106 U. S. 447, 1 Sup. Ct. 389; *Lee* v. *Johnson*, 116 U. S. 48, 6 Sup. Ct. 249. Many other authorities might be cited. The reasons for this rule are so obvious, and have been so often stated, that it would be a waste of time for us to allude to them.

Do the peculiar facts of this case take it out of this general rule? This brings us to a further consideration of the evidence. On September 13, 1884, W. W. McIlvain, special agent of the general land office, made a report to that office, in which he stated that only six acres of the tract in question had been cultivated, and that this constituted all the improvements on the land; that he thought there had never been any actual residence established on the land; that the claimant was entirely unknown in the neighborhood; and that the entry must have been fraudulent. This report was supported by four affidavits. Simpkins' final proof was false, and his entry fraudulent, if these facts were true. On this report the commissioner ordered a hearing before the local officers. A summons was issued and served by publication, the special agent certifying that the summons could not be personally served on Simpkins; that he was informed that Simpkins was not a resident of the territory; and that he believed that personal service could not be made upon him. It will be noticed that these facts were not sworn to, but were embodied in a mere certificate of the special agent. On the day set for hearing, S. B. Pinney appeared specially for Simpkins, and moved that the proceedings be dismissed, on the ground that there had been no legal service upon Simpkins. This motion was denied. Mr. Pinney was then notified by the receiver that he might and must

offer any evidence he had to support the entry made by Simpkins. On demand of Mr. Pinney for a copy of the allegations which formed the basis of the order that a hearing be had, the receiver exhibited to him the letter of the commissioner, directing the local officers to order a hearing, which letter referred to the report of the special agent that the proof made by Simpkins was false and the entry fraudulent. Thereupon Mr. Pinney insisted that the burden was on the government to offer evidence that the entry was fraudulent; and, the special agent having stated that he would offer no evidence, the case was closed, Mr. Pinney refusing to submit any evidence until the special agent should have introduced evidence on behalf of the government. The papers were then sent to the commissioner, who ordered, May 6, 1886, that the entry be held for cancellation. Mr. Pinney, still acting for Simpkins, then appealed to the secretary of the interior. His appeal was transmitted to the secretary of the interior, but was returned to the commissioner, with direction, to follow general instructions of July 6, 1886, (5 Dec. Dep. Int. 149,) which in substance required that, in case of an appeal from the decision of the commissioner holding an entry for cancellation upon the report of a special agent, the commissioner should order a hearing, instead of transmitting the case to the secretary. A second hearing was ordered by the commissioner, but, before this hearing took place, Mr. Pinney, representing the grantee, who then owned the property, and the mortgagee, who held the mortgage upon it which has since been foreclosed, applied for a *certiorari* to the commissioner, directing him to send up the papers on the appeal, instead of rehearing the case. This application was granted by the secretary. The papers having been transmitted to him, he held, on April 1, 1889, that the decision of the commissioner holding the entry for cancellation should be affirmed.

It is urged by plaintiff that the commissioner failed to acquire jurisdiction in the proceedings to cancel the entry, for the reason that the summons was not personally served, and that no affidavit for publication was ever made. The publication was made, as we

have already stated, upon the mere certificate of the special agent. We are referred to a rule of the department requiring an affidavit in such cases. It is the same rule which is set forth in the opinion in *Risdon* v. *Davenport*, (S. D.) 57 N. W. 483. That case is cited as in point on this question. The rule is not pleaded, as it was in the South Dakota case; but it seems to be our duty to take judicial notice of the rules and regulations of the land department. *Caha* v. *U. S.*, 152 U. S. 211, 14 Sup. Ct. 513. In the South Dakota case the failure to file an affidavit before publication is regarded as fatal to the jurisdiction of the commissioner, as in actions in courts of law. Even if we could assent to this view, it would not aid the plaintiff. After his special appearance had been overruled, Mr. Pinney, by his conduct, appeared generally. Thereafter the department was not without jurisdiction, although the error could have been taken advantage of within the department despite the general appearance. When a special appearance to object to jurisdiction is, after the objection is overruled, followed by a general appearance, the question of jurisdiction is not open to collateral attack. *Miner* v. *Francis*, 3 N. D. 549, 58 N. W. 343. The method of procedure in acquiring jurisdiction in cases where personal service cannot be made is prescribed by the legislature. The legislature having prescribed the particular mode of securing jurisdiction, the courts cannot change this mode or disregard it. But there is no limitation on the broad power of the commissioner to cancel entries save that imposed by the courts. Congress has not fixed the rules of practice and limited the mode of procedure. Neither has the department imposed upon itself any restriction of its power. The rule in question emanates from the department, and is subject to its control. The department may abrogate it. The department may suspend its operation in a particular case, or disregard it. The courts will not arrogate to themselves the right to compel obedience to a rule which the power that ignores it may at any time abolish. We must, however, not lose sight of the principle that in disregarding its rules the department must not act in an

arbitrary manner,—must not deny to the entryman any right to be heard. This limitation upon its power is imposed by the courts, and therefore cannot be ignored by the department. Should one of the rules of the department lead to arbitrary action by it,—should it result in a denial of a hearing,—the courts would restore to the entryman the rights he had lost by such unfair procedure, culminating in the cancellation of an honest entry. But, when the department has failed to require compliance with its own rules, it would be an unbecoming interference with an independent branch of the government for the courts to assume to dictate to the department that it should obey its own regulations, which it might at any moment abrogate, the action of the department not being arbitrary in the particular case. The rule in question was disregarded by the local officers and by the commissioner, and their action was affirmed by the secretary of the interior. This was not fatal to the action of the department in canceling the entry, unless it resulted in an *ex parte* proceeding, in which the entryman had no chance to be heard, culminating in a cancellation of a *bona fide* entry. That it did not result in the denial of the right of the entryman to be heard is apparent from the evidence. On the day set for hearing, Mr. Pinney, representing the entryman, appeared specially, and objected to the proceedings, on the ground that no affidavit had been filed. This being overruled, he at first refused to offer any evidence until the charge had been exhibited to him; and, when he was shown this, he still declined to make any proof until the government should have offered evidence to impeach the entry. Simpkins at this time had ample chance to be heard. After the case had been sent to the commissioner, and the entry held for cancellation, he appealed to the secretary of the interior. Under the existing rules, it was, as we have already stated, the duty of the commissioner to order a hearing, instead of transmitting the papers to the secretary. This hearing was ordered, and would have been had if Mr. Pinney had not applied for and obtained a *certiorar* under which the papers were transmitted to the secretary. At

this time Mr. Pinney represented Simpkins and his grantee and the mortgagee of such grantee. Here was a second opportunity to be heard,—an opportunity afforded to all parties in interest. The department does not appear to have acted arbitrarily under these circumstances. On the application to have the secretary order the papers sent to him, it is stated as a reason why this should be done, instead of another hearing being had before the commissioner, that only questions of law were raised by the appeal, and that it did not controvert the facts alleged against the entry, or allude thereto. Moreover, arbitrary action of the department in canceling the entry would not of itself entitle the plaintiff to the relief he seeks. He invokes equity to decree that he is in equity entitled to the legal title. His position is that he had earned it, and that the government held it in trust for him, and that the government's grantee also holds it impressed with such trusts. It is not the certificate which entitles him to the legal title. The right to the title comes from compliance with the law. The certificate, so long as it stands, is evidence that the holder of it has complied with the law. When it is once set aside, it ceases to be of any value as evidence, and the party who claims the legal title because it was issued to him originally must show that he did in fact comply with the law, and that, because of the arbitrary action of the land department, he had no chance to establish that fact before the department.

Said the circuit court of appeals in *U. S.* v. *Steenerson*, 1 C. C. A. 552, 50 Fed. 504, at p. 509: "But if it appears in a given case that when, in the proper course of business, the commissioner of the land office was called upon to determine whether the pre-emptor was entitled to a patent, he adjudged that the entry was fraudulent, and therefore void, then the claimant is without a final adjudication in his favor, and he must resort to other evidence to sustain his claim." In this very case the proceedings to cancel the entry were *ex parte*, and yet the court ruled that this circumstance would not excuse the citizen from showing compliance with the law after the evidence of such compliance had been

annulled. Said the court: "But it is equally true that such action of the commissioner, being practically *ex parte*, is not conclusive, and that it is still open to Hanson and his grantees to establish a right to the land by proving a valid entry on his part, and performance by him of the acts required to complete a preemption entry." An *ex parte* cancellation may be in accordance with the facts. The courts do not decree that a person is entitled to the legal title merely on the ground that the cancellation of his entry was *ex parte*. If so, then a fraudulent entryman would secure the title merely because the department had not heard him when it canceled the entry. The commissioner having general power to cancel, the courts must assume that the power was not employed to the injury of an innocent entryman. His right to be heard in the courts on the question of fraud when the proceeding is *ex parte*—a right recognized by *U. S.* v. *Steenerson*, 1 C. C. A. 552, 50 Fed. 504–510—affords him ample protection. But, having no certificate with which to make out a *prima facie* case, he must resort to other evidence. Indeed, there is a strong intimation in this case that, as against the United States at least, he must offer other evidence when he claims the right to the legal title, not only when his entry has been canceled, but in all cases where he still holds the patent certificate. Said the court in that case: "The final certificate or receipt acknowledging payment in full, and signed by the officers of the local land office, is not in terms nor in legal effect a conveyance of the land. It is merely evidence on behalf of the party to whom it is issued. In a contest involving the title to land, wherein a person claims adversely to the United States, it is open to such claimant, notwithstanding the legal title remains in the United States, to prove that, by performance on his part of the requisite acts, he has become the equitable owner of the land, and that the United States holds the legal title in trust for him; but as the claimant in such case has not received a patent or formal conveyance, and has not become possessed of the legal title, he is required to show performance

on his part of the acts which when done entitle him under the law to demand a patent of the land." In *Swigart* v. *Walker* the cancellation was made, on the ground that the entryman had previously made a similar entry in another state, and therefore had no right to make the second entry. The proceedings appear to have been *ex parte*. There was nothing in the findings of the court to show that there had been a hearing or any notice given, and yet the court ruled that it would be presumed that the cancellation was lawful. The court said: "We have no doubt of the power of the commissioner. It is not claimed to have been exercised erroneously or fraudulently, and, if he is warranted in taking such action in any case, it will be presumed to have been regularly and legally done in this case." In *Holmes* v. *State*, (Ala.) 14 South. 51, the court held that, after cancellation of an entry, the entryman must support his claim to a patent by other evidence, saying: "Although it is averred in the answer that respondent made the necessary permanent improvements, and continuously resided upon the land from the date of his entry (to-wit, 1881) to April, 1884, when the same was commuted from a homestead entry to a cash entry, and the payment of the cash entry, there is no proof in the record of the truth of these averments other than such as may be inferred from the register's and receiver's certificate and receipt. The government had not issued to him a patent to the land; and, while the certificate and the receipt may have entitled him *prima facie* to the patent, they did not exclude the land department from investigating and determining the truth of the facts upon which the certificate and receipt were issued, and the *bona fides* of his homestead claim, and, if found fraudulent or untrue and insufficient, to cancel the same. The burden resting upon respondent in these respects has not been met or overcome."

In *Risdon* v. *Davenport*, (S. D.) 57 N. W. 482, the question arose upon the pleadings, the plaintiff having demurred to the answer. The defendant was the holder of a mortgage upon land, executed by the entryman whose entry had been canceled. Plaintiff held a patent under an entry made subsequently to such cancellation,

and was seeking by the action to have the mortgage annulled as a cloud on his title. He was thus attacking the validity of the canceled entry. The defendant set up that he had made a lawful entry, and that the same had been canceled without his being heard, and that the notice to him was not legal, for the reason that it was served only by publication, without any proof by affidavit that he could not be served personally. The court held that the answer set up a good defense. But it contained two elements which are lacking in this case. It was averred that the defendant was not heard. In the case at bar the entryman and his grantee and mortgagee have been heard, or they had a chance to be heard. It appeared from the answer in that case, as the court construed it, that his entry was honest, and that he had complied with the law. If there was any evidence in this case showing that Simpkins made the entry in good faith, and had complied with the law, a different conclusion might be reached. The failure of Simpkins to offer evidence of these facts on the first hearing, the refusal of Simpkins and his grantee and the mortgagee of his grantee to take advantage of the second hearing, when such evidence might have been offered, electing to have the case reviewed on the record already made, and the utter absence of any evidence in this case as to these facts, are very persuasive indications that such facts could not be proved. If Simpkins was not a *bona fide* entryman, he could not have claimed the legal title, even though the cancellation of his entry had been made *ex parte*. By showing that he had no opportunity to be heard before the department, the entryman makes out a case for a hearing in court; but, as he assumes the attitude of complaining of the action of the department, he must show that it operated to his prejudice. As he is in the position of claiming the legal title, he must prove by evidence that he has fully earned the same by an honest compliance with the law. The burden is on him, and it cannot be sustained without offering evidence in addition to the certificate and its *ex parte* cancellation. It is further urged that the local officers erred in requiring Simpkins to offer evidence to sustain

the entry before any evidence had been introduced by the government. But this was a matter for the decision of the department. The commissioner or the secretary might have held that this was error, and for that reason might have sent the proceedings back for further hearing. But they did not. They sustained the local officers. Assuming that they were wrong, their error cannot be collaterally reviewed by the courts. The decision of the land department on questions of fact properly before it, is conclusive on the courts, and such department must necessarily settle for itself what rules of evidence it will accept and follow. The collateral attack and overthrow of a decision on a question of fact, because the tribunal making the decision erroneously shifted the burden of proof from the shoulders of one litigant to those of the other, has yet to find support in future adjudications. There is no authority for such doctrine up to the present date. Again, an entryman, until a patent has been issued to him, is in the position of a claimant. He is asking for a patent. True, the local officers had been satisfied with Simpkins' proof, but the commissioner also must be satisfied. May he not say to the claimant, "I have reason to believe that your entry is fraudulent, and I require further proof?" Moreover, there is no claim made that the entry was not fraudulent; nor is there any evidence on the point. This consideration, of itself, would, for the reasons already stated, be sufficient to defeat plaintiff's contention based upon the ruling of the department as to the burden of proof.

There is nothing in the point that there was no evidence before the commissioner that the entry was fraudulent; or at least no competent evidence. The courts cannot review the decisions of the land department on the ground that the evidence was insufficient, or that only incompetent evidence was before it. The power to try questions of fact necessarily embraces the power to pass upon the weight and competency of evidence.

There is much force in the decision of the court in *Lewis* v. *Shaw*, 57 Fed. 516, that a cancellation is a nullity as against an

innocent purchaser, who is not heard, and who receives no notice of the proceedings, provided the entry was in fact an honest one, and the entryman actually complied with the law. Not having been offered an opportnnity to be heard before the land department as to these matters of fact, may he not litigate them in an action brought to enforce his right to the patent? But in this case (*Lewis* v. *Shaw*) the innocent grantee did not stop with an allegation that he had not been a party to the cancellation proceedings, but averred that, as a matter of fact, the entry was honest, and in conformity with law. The question arose on demurrer to the bill, and the case before the court was one where there had been, as to the plaintiff, an *ex parte* cancellation of a valid entry. The allegation that he was not and had no chance to be heard furnished a foundation for his further averment that the entry was legal. In the absence of the prior allegation, the court must have adjudged that the question whether the entry was legal was not open to investigation, having been settled, so far as it depended on matters of fact, by the decision of the department. See *Barden* v. *Railroad Co.*, 14 Sup. Ct. 1030, 1038, 1039; *Refining Co.* v. *Kemp*, 104 U. S. 651; *Steel* v. *Refining Co.*, 106 U. S. 450, 1 Sup. Ct. 389; *Heath* v. *Wallace*, 138 U. S. 573, 11 Sup. Ct. 380. After the litigant has shown that the decision ought not to be conclusive upon him, because he was not and could not be heard, or for some other equally valid reason, he must still prove that the entryman has complied with the law, and has acted in good faith, because such litigant is claiming that he has a right to the legal title, and these facts are indispensable to the maintenance of such claim. The certificate, being canceled, is no longer evidence of them. The case of *Lewis* v. *Shaw* is not in point, for three reasons: There is no evidence in the case at bar that the entry was in fact lawful and honest; second, it is apparent, as we have already seen, that the owner and also the mortgagee of the property, at the time the cancellation proceedings were pending, had full opportunity to be heard in support of the entry; and, finally, the want of jurisdiction, if any, was not cured in that case,

as it was in this, by a general appearance after the objection to the jurisdiction had been overruled. The case of *Stimson* v. *Clarke*, 45 Fed. 760, admits the power to cancel, and yet practically decides against the existence of such power. This decision must be placed in the list of the authorities which are in conflict with our decision. Among these cases are *Smith* v. *Ewing*, 23 Fed. 741, and *Wilson* v. *Fine*, 40 Fed. 52.

We now come to the last question in this case. There is evidence warranting the conclusion that the mortgagee to whom the land was mortgaged before these cancellation proceedings were instituted was a mortgagee in good faith, for a valuable consideration, and made the loan without notice or suspicion of any failure on the part of Simpkins to comply with the law, or of his fraudulent purpose in making the entry. The plaintiff, under the foreclosure, occupies the same vantage ground. Do these facts prevent a cancellation of the entry? We think not. Here, again, the cases disagree. But on this point, as on the general question of the power to cancel, the weight of authority, and we think the better reason, support our view. *Swigart* v. *Walker*, (Kan.) 30 Pac. 162; *Jones* v. *Meyers*, (Idaho,) 26 Pac. 215; *Judd* v. *Randall*, (Minn.) 29 N. W. 589; *Figg* v. *Hensley*, 52 Cal. 299; *Fernald* v. *Winch*, (Kan.) 31 Pac. 665; *Mortgage Co.* v. *Hopper*, 56 Fed. 67, 74, 75; *Lewis* v. *Shaw*, 57 Fed. 516; *Freese* v. *Scouten*, (Kan.) 36 Pac. 741. When the *bona fide* purchaser who holds the interest of the entryman at the time of the commencement of the cancellation proceedings is not heard, and has no chance to be heard, before the department, possibly the proceedings will be regarded as *ex parte* with respect to him, and he be allowed to prove in court the lawfulness of the entry. See *Lewis* v. *Shaw*, 57 Fed. 516. See, also, *U. S.* v. *Steenerson*, 1 C. C. A. 552, 50 Fed. 504; *Lindsey* v. *Hawes*, 2 Black, 254; *Garland* v. *Wynn*, 20 How. 8; *Lytle* v. *Arkansas*, 22 How. 193. There is a strong disposition on the part of the courts to throw about the entryman, and those who claim under him, protection against arbitrary destruction of their rights. See *Cornelius* v. *Kessel*, 128 U. S. 461, 9 Sup. Ct. 122, in addition to the cases last above cited.

It is urged that the act of March 3, 1879, has limited the power of the commissioner. That act merely provides that, before making final proof, the applicant shall file with the register notice of his intention to make such proof, stating therein the description of the land and the names of the witnesses by whom he will prove the necessary facts, and that thereupon the register shall publish for a period of 30 days a notice that such application has been made. After that final proof can be made. It is said that this gives notice to the world that the applicant claims that he has complied with the law, and is entitled to enter the land, and that thereupon the government must make its investigation before allowing the entry, and not after. But the government, before this act was passed, was in every case apprised of the intention of the applicant to enter the land in time to investigate the facts before accepting final proof. Moreover an investigation before entry will not always lead to a correct conclusion. Subsequent conduct may throw new light on the problem. The man who seemed honest on the day of entry may be shown by later developments to have been not a *bona fide* settler, but a mere speculator. This act possibly gave the government improved facilities for detecting fraud in advance; but no legislation could so improve them as to render subsequent investigation of no importance in the carrying out of the policy of preventing the acquisition of public lands by dishonest methods. It is a most extraordinary contention that this act, which in no manner alludes to the power of the commissioner, should be interpreted as abrogating this most valuable and even indispensible power of the commissioner to investigate the lawfulness of an entry after it has been allowed. We hold that the act of 1879 in no manner affects the commissioner's power to cancel an entry.

We are next referred to section 7 of the act of March 3, 1891, entitled "An act for the repeal of the timber culture law, and for other purposes." That portion of section 7 which relates to this case provides as follows: "And all entries made under pre-emption, homestead, desert land, or timber culture laws, in which

final proof and payment may have been made and certificates issued; and to which there are no adverse claims originating prior to final entry, and which have been sold or encumbered prior to the first day of March eighteen hundred and eighty eight, and after final entry, to *bona fide* purchasers, or encumbrancers, for a valuable consideration, shall unless upon investigation by a government agent fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the land department of such sale or encumbrance." At the time this act became a law, the entry in question was not in existence. It was canceled several days before. The act does not relate to such entries. Secretary Noble so ruled in Case of Ross, 12 Dec. Dep. Int. 446.

The judgment is affirmed.

BARTHOLOMEW, C. J. (concurring.) My associates reach a judgment of affirmance without referring to § 2262, Rev. St. U. S., and purely upon common law principles. I concede that their conclusion is correct upon those principles. I concede, also, that the same conclusion must be reached under that section, as construed in *Mortgage Co.* v. *Hopper*, 56 Fed. 67, and cases there cited. The construction there given to the statute simply makes it declaratory of the law as it stood without the statute so far as it refers to conveyances of the land. I confess that, in the absence of such construction, I might have concluded that the statute was enacted expressly to relieve parties who had invested money as the record shows that plaintiff did in this case. But the construction is unmistakable, and a federal construction of a federal statute ought to control this court; hence I concur.

(61 N. W. Rep. 1036.)

E. V. HOFFMAN *vs.* BANK OF MINOT.

Opinion filed December 17th, 1894.

Notice of Appeal—Service on Clerk.

The service of the notice of appeal upon the clerk of the court from which the appeal is taken is jurisdictional, and where the record fails to show such service this court cannot hear the case.

Discharge of Receiver—Consent of Parties.

It is not error for the trial court to refuse an application to discharge a receiver, even where both parties to the record consent to such discharge. Before the receiver is discharged, he should be required to pass his accounts, and proper provision made for his compensation.

Judgment of Dismissal—Compensation—Accounts—Application to Vacate Dismissal by Receiver.

Where parties to an action in which a receiver has been appointed subsequently consent to a judgment of dismissal of the action, without making any provision for the settlement of the accounts of the receiver, or for his compensation, it is not error on the part of the court, on the application of the receiver, to set aside the order dismissing the case.

Appeal from District Court, Cass County; *Rose* and *Lauder*, J's.

Action by E. V. Hoffman against the Bank of Minot. From an order appointing a receiver, from an order refusing to discharge the receiver, and from an order overruling a previous order dismissing the original action, defendant prosecutes three separate appeals, which are consolidated, and disposed of in one opinion.

Affirmed.

E. Ashley Mears and *J. C. Marshall*, for appellant.

Newman, Spalding & Phelps, for receiver.

BARTHOLOMEW, J. There are three cases, *eo nomine*, but they are so interwoven and interdependent that it will be more satisfactory to dispose of them all in one opinion. They all arise out of efforts made by the defendant and appellant to discharge a receiver appointed in the original action brought by the plaintiff against the defendant.

We are first confronted with a motion made on behalf of the receiver to be permitted to appear in this court and resist the appeals. This receiver was appointed soon after the institution of the action. The action was brought by plaintiff in her own name, and, so far as the record discloses, neither on the behalf of, or in the interest of, any other party. The receiver being but the officer of the court, and subject at all times to the orders of the court, and standing entirely indifferent, as between the parties, it is difficult to conceive of any legal reason that would give him any right to appear in this action, except so far as necessary to protect his individual interests, or the rights of his bondsmen. Such, we think, has been the almost universal holding of the courts. See Beach, Rec. § 791, and cases cited; High, Rec. § 846, and cases cited; 20 Am. & Eng. Enc. Law, p. 227, cases cited in note 1. This principle would require us to overrule the motion in two of these cases, and, as the conclusion we have reached leads us to an affirmance in the third case, his appearance therein becomes immaterial, and hence the motion is denied.

Upon the first case, which is an appeal from the order appointing the receiver, we find, on reference to the record, that there is no evidence of any service of notice of appeal either upon the plaintiff in the action, or upon the clerk of the court from which the appeal is taken. We have repeatedly held that the service of this notice upon the clerk was jurisdictional, and that even the appearance of the respondent in the action in this court would not give us jurisdiction, where there had been no service of notice on the clerk. And see *Gold Street* v. *Newton*, 2 Dak. 39, 3 N. W. 311. We are therefore left without jurisdiction to determine this appeal. We are satisfied, however, that the result would not have been different, even had the notice of the appeal being served, because the receiver was appointed on the application of the plaintiff, contained in her original complaint, supplemented by an affidavit. The abstract which the appellant has brought into this court discloses the complaint, the affidavit, and the order, and we are asked to set aside the order because the complaint and affidavit

do not show sufficient grounds for making it; but reference to the record that has been sent up from the lower court discloses the fact that in the certificate of the judge who made such order, and which is appended to such record, it appears that the order was made upon the complaint, affidavit, and the answer of the defendant. This answer does not appear in the abstract. Under well established principles, we cannot presume error, nor can we reverse upon an emasculated abstract. We must presume that, if the showing made by the complaint and affidavit be insufficient, it was supplemented either by a statement of sufficient facts, or by consent contained in the answer.

Some time after the appointment of the receiver in the original case, the parties to the action went before the Honorable W. S. Lauder, Judge of the Fourth Judicial District, in the absence of the Judge of the Third Judicial District, in which district the action was brought, and, upon the motion of the defendant, consented to by the plaintiff, asked to have the receiver discharged. The judge to whom this application was made was not the judge who made the original order appointing the receiver, but upon the hearing—the receiver not appearing, and not having been notified—the judge refused to grant an order discharging the receiver. From the order thus made, the second appeal was taken. We are very clear that we cannot disturb that order, first, because orders of that character are so peculiarly in the discretion of the trial court that it is only in exceptional cases, and where abuse of discretion is unquestionably shown, that this court would interfere with an order made by the trial judge. In this case, so far from finding any abuse of discretion, it seems too clear for argument that the order was in all respects right. The application for the discharge did not ask that the receiver be notified, and requested to pass his accounts, or that any provision be made in any way for payment for his services, or for disbursements that he may have made. A party cannot thus apply to a court, have a receiver appointed and enter upon the discharge of his duties, execute his bond, take charge of property, incur large disburse-

ments, and then, on his own motion, have such receiver discharged, without making any provision whatever for his disbursements and compensation. High, Rec. § 837; *Fay* v. *Bank*, Har. (Mich.) 195; *Crook* v. *Findley*, 60 How. Pr. 375. It is clear that the order refusing to discharge the receiver was correctly made, and it must be affirmed.

The third appeal arises in the following manner: Subsequent to the application above noticed the parties went before Judge Lauder, and, by stipulation, dismissed the original action, allowing judgment to be rendered against the plaintiff for costs. In this application it was in no manner disclosed to the court that any receiver existed in the case. The court made an order dismissing the case, and directing judgment against the plaintiff, as per the stipulation. Very soon thereafter, and as soon as knowledge of these facts came to the receiver, that officer, by his attorneys, applied to Judge Lauder for an order setting aside the order of dismissal; setting forth in the application the existence of a receivership, and that such order of dismissal had been made without notice to or knowledge of the receiver, and in fraud of his rights. Upon such application, Judge Lauder set aside the order of dismissal, and from this latter order the third appeal is taken. This order is not appealable, under Laws 1893, Ch. 83.

For the reasons stated under the second appeal, and on the authorities there cited, it becomes apparent that the order from which the appeal is taken was in all respects proper.

It must therefore be affirmed. All concur.

(61 N. W. Rep. 1031.)

E. V. HOFFMAN *vs.* THE MORTGAGE BANK AND INVESTMENT CO.

Opinion filed December 17th, 1894.

Appeal from District Court, Cass County; *Rose* and *Lauder*, J's.

Action by E. V. Hoffman against the Mortgage Bank & Investment Company. From an order appointing a receiver, from an order refusing to discharge the receiver, and from one overruling a previous order dismissing the original action, defendant prosecutes three separate appeals, which are consolidated, and disposed of in one opinion.

Affirmed.

E. Ashley Mears and *J. C. Marshall*, for appellant.

Newman, Spalding & Phelps, for receiver.

PER CURIAM. There are three cases under the same title. They are, in all respects, identical in principle and in their facts with the three cases of *Hoffman* v. *Bank*, (decided at this term) 61 N. W. 1031, 4 N. D.—. Following the decisions rendered in those cases, the orders appealed from are all affirmed. All concur.

(61 N. W. Rep. 1032.)

FREDERICK H. JACKSON *vs.* CITY OF ELLENDALE.

Opion filed December 18th, 1894.

Water Mains in City—Lateral Service Pipes—Duty to Repair—Severance of Connection.

A city established a system of water works which did not include lateral service pipes. These and the expenses of putting them in were to be paid for by the one who connected with the water main in the street. *Held*, that such lateral pipe was owned and must be kept in repair by the one who made the connection, and not by the city, and that the city was justified in severing such connection where the owner refused to pay the expenses of repairing a break in such lateral service pipe in the street a short distance from the main pipe, although he had paid his water rates for a period running beyond the time when said connection was severed.

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

Application by Frederick H. Jackson for a peremptory writ of mandamus to compel the City of Ellendale to repair the service pipe connecting the city water main with his premises. From an order denying peremptory writ, plaintiff appeals.

Affirmed.

George W. Parkes, for appellant.

A. D. Flemington, for respondent.

CORLISS, J. The judgment appealed from denied plaintiff's application for a peremptory writ of mandamus. An alternative writ was issued. To this writ defendant interposed an answer. The proceeding was tried, and the court made its findings of fact and conclusions of law. Upon them the judgment appealed from rests. We will first consider whether these findings of fact, so far as they are unchallenged, warrant the judgment. The unchallenged facts which they embody are substantially the following: The defendant, the City of Ellendale, constructed a system of water works within its corporate limits for the benefit of its citizens. This system consisted of an artesian well and water mains laid in its streets. The construction of lateral service pipes was not a part of this system. These were to be constructed at the expense of the persons who desired to make connections with

such mains. It was provided by ordinance that, when any person desired to connect the water main with his premises, he should file a petition for that purpose, stating the number of feet, kind, and size of the pipe he desired to lay down in making the connection, and also stating the total cost thereof for work and materials; and it was further provided that he should pay the city clerk a sufficient sum of money to pay for such work and materials. Such ordinance further declared that no one should use water from this system without first paying "all costs and expense of furnishing and putting in the pipe to connect the water main with his premises." The plaintiff paid his water rates in full to November 1, 1894, On the 18th of November, 1893, plaintiff's service pipe broke in the street, a short distance from the main pipe. Plaintiff was requested by the city to pay or bear the expense of repairing such break. He refused to do either. Thereupon his connection with the water main was severed by the city.

This proceeding was instituted to compel the city and its officers to restore such connection. We have neither statutory provision nor ordinance to aid us in the settlement of this case. Upon the vital points, we are left entirely to general principles. In the first place, there is no express declaration in any ordinance as to the ownership of these service pipes after they are constructed. Neither is there any legislation on the subject. But it is provided in the ordinance referred to that the owner of the land shall pay all expenses of making the connection. His ownership of the service pipe naturally follows, there being nothing to call for a different conclusion. The water system established by the city, and which it must maintain, stops at the main. It does not embrace service pipes. These are to be paid for and owned by the one who makes the connection with the main. This work is to be done under the control of the city, to prevent the waste of water from leakage because of bad wormanship or poor material. But the fact remains that it is the owner of the property who makes and pays for the connection, and who there-

fore owns this lateral pipe. When the city has kept its main pipe in order, and has brought its water to the mouth of the connecting service pipe, and has started that water flowing in that pipe towards the premises of the one who has made such a connection, it has discharged its duty. It is under no obligation to keep in repair a pipe which is not a part of its system, and which it does not own. What is the duty of the one who has made such connection with respect to the service pipe owned by him? Obviously, he must not suffer it to remain in defective condition, thus wasting the water of the city. His duty is an implied one. It arises out of the very nature of the case. If he fails to discharge it, the city, to prevent waste of water, may stop the flow of water into this lateral pipe when it is being wasted because the owner of such pipe refuses to keep it in repair. There being no cut off between the break and the main pipe, the only way to stop the waste in this case was by severing the connection, and plugging up the main, or by plugging the lateral pipe when it leaked. The latter was done. We are asked to compel the city to undo this. We are unable to discover any principle upon which we should command the city and its officers to restore this connection so long as plaintiff refuses to pay the expenses of repairing this lateral pipe. He would not have been allowed originally to receive water through a leaky pipe. Neither can he insist that it is his right to continue to receive water through a pipe after he has refused to mend it, which has become leaky since the connection was made.

The record discloses numerous specifications of errors of law, but they all relate to matters which are foreign to the material facts of the case. The material facts are undisputed, and there is no claim of any error connected with the proof of such facts. The only attack upon the findings is with respect to a matter which may be eliminated from the findings without affecting the judgment. These alleged errors are therefore not prejudicial.

The judgment is affirmed. All concur.

(61 N. W. Rep. 1030.)

STATE *ex rel* ROBERT BUTLER *vs.* J. F. CALLAHAN.

Opinion filed January 28th, 1895.

Enforcement of Right to Office by Mandamus.

As a general rule the writ of mandamus issues to admit in office a candidate holding a valid certificate of election, who has qualified by taking the official oath, furnishing the prescribed official bond, and who has demanded possession of the incumbent.

Holding Over—Intruder Not a De Facto Officer.

Where a *de facto* officer is exercising official functions under color of right, the writ does not issue to dispossess him; but where an incumbent is holding over after the expiration of his term, and until a successor is elected and qualified, and has no other claim to the office, he is not such *de facto* officer, as against a candidate who holds the proper certificate of election, and has qualified for the office in manner and form as the law directs. Such incumbent is a mere intruder, as against such relator.

Title to Office Not Tried by Mandamus.

The prevailing rule of law is that the title to an office will not be tried by mandamus. Some states hold otherwise.

Statutory Method of Trying Title to Office.

In this state the title to a county office may be tried either by the statutory mode of contest, as provided by §§ 1489–1501, Comp. Laws; or by a civil action in the nature of *quo warranto*, initiated by an official representative of the county, as provided by § 5345 *et seq.*, Comp. Laws.

Prima Facie Title Admitted—Ultimate Title Not in Issue on Mandamus.

In mandamus against a county officer holding over after the expiration of his term; brought by a relator having a certificate of election, and who has duly qualified for the office by taking the oath and giving the required bond, the relator's *prima facie* title to the office cannot be defeated by an answer which admits the *prima facie* title, but contains averments of fact which involve the ultimate title of the relator to such office. Such an answer is demurrable if it contains only such facts as would, if established, defeat the relator's ultimate title, in a proper proceeding to try title.

Right of Possession—And Ultimate Title Distinguished.

In this case it appears by the averments in the alternative writ that the relator has such *prima facie* title to the office of county superintendent of schools of Cass County, and has demanded possession of the defendant. Defendant's answer to the writ admits the facts constituting such *prima facie* title, and alleges, as new matter, that the relator, when his term commenced, and for some time prior thereto, did not have or hold the educational certificate prescribed by statute (§ 34, Ch. 62, Laws 1890,) or its equivalent. The trial

court sustained relator's demurrer to the answer. *Held*, that such ruling was proper. *Held*, further, that the new matter in the answer had reference only to the relator's ultimate title to the office, and such title cannot be litigated in this proceeding, which involves only the right of present possession. In such cases the relator cannot be driven out of court by the mere fact that the incumbent pleads facts in his answer which call for a determination of the relator's ultimate title to the office, and only that title.

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

Application upon relation of Robert Butler against J. F. Callahan, to compel defendant to surrender to plaintiff possession of the office of county superintendent of schools. From a judgment directing the issuance of a peremptory writ, defendant appeals.

Affirmed.

Benton & Amidon, for appellant.

Mandamus will not lie to try title to office. Merrill on Mandamus, 143; McCrary on Elections, 322, Spelling Ext. Rel. 1572, 1510; *Peo.* v. *Barrett*, 8 N. Y. Supp. 677. *Title* indicates election to the office and possession of the legal qualifications. Mandamus does not lie except to enforce a clear legal right. Merrill on Mandamus, 56; Meechem on Officers, 478; *Peo.* v. *Board*, 129 N. Y. 360; *Peo.* v. *Sheffield*, 47 Hun. 481; Spelling Ext. Rel. 1574, 1370, 1563. The weight of authority is, that a person must possess the legal qualifications for an office at the time of his election as well as at the time of the commencement of the term. *Peo.* v. *Leonard*, 14 Pac. Rep. 853; *Privett* v. *Brickford*, 26 Kan. 53; *Demaree* v. *Scates*, 32 Pac. Rep. 1123; *Taylor* v. *Sullivan*, 47 N. W. Rep. 802. Mandamus will not lie to instate a person in office who could be at once removed by *quo warranto*. Spelling Ext. Rel. 1790–1; *State* v. *Clark*, 8 At Rep. 509. Where the state calls upon an individual to show his title to office he must show the continued existence of every qualification necessary to the enjoyment of the office. *Peo.* v. *Maywonn*, 5 Mich. 146; *State* v. *Glen*, 14 N. W. Rep. 481.

Charles A. Pollock, for respondent.

Callahan was neither a *de facto* nor a *de jure* officer. He is a usurper, an intruder. He has no title to try. *Supervisors* v. *O'Malley*, 46 Wis. 63; High Ex. Rem. 76. Want of qualification is a defense, which can only be made use of when title is being tried. *Att'y Gen'l* v. *McIver*, 25 N. W. Rep. 499. The person holding the certificate of election is *prima facie*, the officer *de facto* and *de jure*. *Peo.* v. *Kilduff*, 15 Ill. 502; *Peo.* v. *Head*, 25 Ill. 287; *Crowell* v. *Lambert*, 10 Minn. 375; *Atherton* v. *Sherwood*, 15 Minn. 221; *Supervisors* v. *O'Malley*, 46 Wis. 61; *DeArmond* v. *State*, 40 Ind. 469; *Parmenter* v. *State*, 3 N. E. Rep. 387; *State* v. *Board of Commissioners*, 25 N. E. Rep. 10; *O'Donnell* v. *Dusman*, 39 N. J. L. 677; *State* v. *Freeholders, etc.*, 35 N. J. L. 273–217; *Peo.* v. *Hillard*, 29 Ill. 419; *Territory* v. *Shearer*, 2 Dak. 346; *Stone* v. *Small*, 54 Vt. 498; *Discoll* v. *Jones*, 44 N. W. Rep. 726; *Matsker* v. *Neally*, 21 Pac. Rep. 206; *Hoffman* v. *Mills*, 18 Pac. Rep. 516.

The relator holding the certificate of election has the *prima facie* right to the office and is entitled to be recognized. *Robinson* v. *Supervisors*, 13 N. W. Rep. 622.

WALLIN, C. J. The dominating facts in this controversy, as they appear of record, may be stated as follows: The defendant was elected in 1892 to the office of county superintendent of schools of Cass County, and, having the requisite education certificate, duly qualified therefor, and entered upon the discharge of the duties of said office, and has ever since been an incumbent thereof, and now is exercising the functions of said office, and has possession of the office room in the court house, and the books and records of the office. At the election held in June, 1894, the defendant and relator were candidates, and the relator received a plurality of the votes cast for said office in Cass County; and pursuant to such election the relator received the proper certificate of his election, and subsequently, and on the 5th day of September, 1894, qualified for said office, by taking the official oath, and furnishing an official bond, which was approved. On the 6th day of October, 1894, the relator demanded of defendant the possession of the office room, and of the books and records

appertaining to the office, which demand was refused. Upon the relator's petition, an alternate writ of mandamus issued out of the District Court. The facts embodied in the writ, so far as they are now material, have been already stated. Upon the return day the defendant appeared by counsel, and moved to quash the alternative writ, chiefly upon the ground that the writ does not state facts sufficient to entitle the relator to the writ. The motion to quash was denied, whereupon defendant filed his answer to the writ. The answer fails to deny any of the material averments of fact set out in the alternative writ, and none of such facts are controverted. As new matter, the defendant pleads, in substance, the following facts: That the relator, at the commencement of the official term in dispute, and when this proceeding was instituted, did not have or hold the prescribed educational certificate, or its equivalent, as required by Ch. 62 of the Laws of 1890, and especially as prescribed by section 34 of said chapter, which is as follows: "No person shall be deemed legally qualified for the office of county superintendent unless he or she holds a certificate of the highest county grade or its equivalent." The last paragraph of the answer reads: "That, under the statute of this state creating said office of county superintendent, it is made the right and duty of the incumbent of said office to hold the same, and discharge its duties, until a successor is duly elected and qualified, and that this defendant is now, and has at all times been since the first Monday in October, 1894, ready and willing to turn over said office, together with all its insignia and property, to such a successor, and that the reason why defendant has refused, and still refuses, to turn over said office to the relator herein is that said relator is not now, and has not at any time since long prior to said first Monday in October, 1894, been qualified to hold said office, or discharge the duties thereof." To the defendant's answer the relator interposed a general demurrer, for insufficiency. The trial court sustained the demurrer, and, defendant having elected to stand upon the averments of his answer, judgment was entered below directing the peremptory writ to issue. In this

court, it is claimed by the defendant that the trial court erred in denying defendant's motion to quash the alternative writ, and also erred in sustaining the demurrer to the answer.

As has been seen the alternative writ avers, in effect, that the relator, after being elected, received the official certificate of election, and qualified for the office, pursuant to law, and subsequently demanded possession of the office and its records, and possession was refused. These facts being admitted by the motion to quash the writ, the question is presented whether such facts alone are sufficient to entitle the relator to the peremptory writ admitting him into the office. It will be observed that many facts which are vital, as affecting the relator's ultimate right or title to the office, are not set out in the alternative writ. Relator fails to aver that he is of full age, or that he is a resident of Cass County, or citizen of the United States, or of North Dakota. Nor does he allege that he possesses the prescribed educational certificate. If the omitted averments of fact above mentioned, or any of them, are essential, and must be alleged, before the writ can be invoked to instate in office a candidate who has been elected, and has qualified and demanded the possession, then the motion to quash should have been granted. We are clear that such omitted averments of fact are neither necessary nor proper in a case like this. The writ of mandamus issues to place a claimant of an office in possession, who holds the *prima facie* right to take possession; and, as will be seen hereafter, the prevailing rule is that a candidate who is elected, and who qualifies and properly demands possession, has the *prima facie* right of possession, as against a recalcitrating incumbent, who holds over after his term expires. It is quite true, however, and the doctrine is elementary, that the writ will not issue, either to admit into office, or try conflicting title thereto, where the incumbent is in the exercise of official functions, *de facto*, and under color of right. See authorities collected in 14 Am. & Eng. Enc. Law, p. 202, note 1; McCrary, Elect. § 322. This rule is invoked by counsel in defendant's behalf. Counsel argues that defendant is in the exercise of

official functions, *de facto*, and under color of law, *i. e.* under § 17, Ch. 62, Laws 1890, which provides that the county superintendent shall hold his office for a term of two years, "and until his successor shall have been elected and qualified." But the decided weight of authority is against the position of counsel upon this point. Merrill, Mand. § 143, lays down the rule as follows: "So the writ will issue if the incumbents are only holding over until their successors are elected or qualified;" citing in note 5, *State* v. *Freeholders of Hudson Co.*, 35 N. J. Law, 269, and other cases. This precise question was elaborately discussed, and ruled against the defendant's contention, in *Supervisors* v. *O'Malley*, 46 Wis. 35, 50 N. W. 521, which case is very instructive, as it discusses many of the principles of law which apply with equal force to the case at bar. The authorities cited below from the States of Illinois and Minnesota are directly in point, also upon this feature of the case. In *Supervisors* v. *O'Malley*, the court uses this language: "And if a refusal to deliver the possession for a day or a week, or two weeks, constitutes him treasurer *de facto*, so as to compel the party declared elected to proceed by *quo warranto* to oust him before any action can be had to compel him to deliver the books and papers and money belonging to such office, then the whole effect and force of a certificate of election would be avoided, unless the person elected should commence proceedings immediately to recover such books, papers, or money." This reasoning applies to the case at bar, and it is so transparently clear and sound that we shall not suggest further considerations upon which the rule might be supported. We therefore hold that the court below did not err in denying defendant's motion to quash the alternative writ, and that the facts alleged in said writ, *i. e.* the facts of election, qualification, and demand, made out a *prima facie* case in favor of the relator.

Do the facts stated in the answer (which, for the purpose of raising a law question, are admitted in the demurrer,) viz. that at the commencement of the term of office in dispute the relator did not hold the educational certificate prescribed by the statute, or its

equivalent, constitute a bar to the relief sought by the relator? It does not appear from the record upon what grounds, or for what reasons, the trial court sustained the demurrer to the answer. The record is silent as to whether the court below decided the law question arising upon the demurrer upon its merits, or whether the court held that inasmuch as the question presented was one involving the ultimate title to the office, and did not touch the *prima facie* title of the relator, it could not be heard or determined in a mandamus case. Whatever the reason may be for the decision of the learned trial court, the question presented to this court is whether the order sustaining the demurrer was properly made. We think the order was properly made, and can be amply sustained upon the ground that the facts pleaded in the answer are not a defense in mandamus, as against the *prima facie* case made by the relator; but, on the contrary, such facts present the question of the relator's ultimate right to hold the office, which right, in cases like this, can only be heard and determined in one or the other of the modes provided by the statute for the trial and determination of questions appertaining to the ultimate title to a public office in this state. It is familiar history to the lawyer that from an early period the perogative writ of *quo warranto* issued in England, at the instance of the crown, to inquire into and determine a disputed title or right to an office. But before Sir William Blackstone wrote his Commentaries the writ was superseded by another proceeding, known at common law as "information in the nature of *quo warranto*," and whereby all questions were heard and determined which had been triable formerly by the writ of *quo warranto*. 2 Shars. Bl. Comm. Marg. p. 262, 263; Throop. Pub. Off. § § 87, 776, 777; Mechem, Pub. Off. § § 478, 483, 484. In this state the writ, and information in the nature of *quo warranto*, are abolished by statute, and the same enactment provides that "the remedies formerly attainable by the writ of * * * *quo warranto* may be obtained by civil actions." Comp. Laws, § § 5345, 5348 *et seq.* Another statute makes provision for the statutory contest in the District Court,

which contest is available to candidates or others desiring a judicial determination of a disputed right or title to a county office. Comp. Laws, § § 1489, 1501. See *Batterton* v. *Fuller*, (S. D.) 60 N. W. 1071. It appears, therefore, that, under statutory enactments existing in this state, ample provision is made for a trial of a disputed title to an office. A careful perusal of these statutes will also disclose the fact that none of them furnish a speedy remedy, or any remedy, whereby a claimant to an office can compel an incumbent to vacate possession, and surrender the books and papers to a claimant. The statutory remedies will determine the ultimate right or title to the office, but, despite the penalties in *quo warranto* actions, they are inadequate either to admit a successful litigant into an office, or to obtain possession of its insignitia or records. But, aside from the specific considerations to be hereafter advanced, it would seem that the title to an office ought not to be tried in a summary proceeding, like mandamus, in a state where ample provisions are made to determine such questions with greater deliberation in proceedings other than mandamus. It seems reasonable, also, to suppose that, inasmuch as possession cannot be obtained as a result of the litigation involving the title under either of the statutory modes prescribed for that purpose, mandamus—the ancient remedy—is still available for that purpose. In fact, it is elementary that the writ is the appropriate remedy, and, in the absence of express statutory authority, the only practicable remedy found in the law, to instate a claimant in office, and obtain the records and papers thereof. It is undoubtedly true that there is some conflict of judicial opinion upon the point, but the prevailing doctrine, established by a very decided weight of authority, is that mandamus will lie in favor of a candidate who has the certificate of election, and, pursuant thereto, has qualified, and demanded possession of the incumbent. Merrill, Mand. § 142, and cases cited in notes 5–7; High, Extr. Rem. § § 75, 76; Spel. Extr. Rel. § 1509; Mechem, Pub. Off. § 982, and note 3; 14 Am. & Eng. Enc. Law, p. 147, and cases cited in note 1. The point has been specifically ruled in *People* v.

Kilduff, 15 Ill. 502; *People* v. *Head*, 25 Ill. 325; *Crowell* v. *Lambert*, 10 Minn. 375, (Gil. 295;) *State* v. *Sherwood*, 15 Minn. 221 (Gil. 172;) *State* v. *Jaynes*, (Neb.) 26 N. W. 295. The authorities last cited are equally cogent in support of the corollary of the rule above stated, viz. that such *prima facie* title cannot be defeated in mandamus, by an incumbent who is merely holding over after the expiration of his term, by alleging facts which do not tend to defeat the *prima facie* rights of the relator, but do tend to show that the relator's title will be ultimately defeated if the state, at its election, shall institute a proper proceeding to oust the relator. *State* v. *Oates*, (Wis.) 57 N. W. 296; *State* v. *Board of Com'rs*, (Ind. Sup.) 25 N. E. 10. At common law, the writ of *quo warranto* to try title to office would issue only at the instance of the proper official representative of the government, and at his discretion; and this rule prevails in the United States, unless changed by statute. High, Extr. Rem. § 45, note 6; *Barnum* v. *Gilman*, 27 Minn. 466, 8 N. W. 375. The essence of the common law rule, in this feature, seems to be preserved in this state. The civil action which has superseded the writ of *quo warranto* in North Dakota is required to be brought by an official representative of the public, in the name of the state. Comp. Laws, § § 5348, 5349. Nor can a party not beneficially interested in the result be joined as a plaintiff with the state. Id. The rule that the temporary occupant holding over cannot become the champion of public interests, and thus defeat a relator in mandamus, having a *prima facie* right to the office, may, in our judgment, be rested upon other than narrow, technical grounds. From our standpoint, there are general and conservative considerations of public policy upon which the rule may be safely rested. It is common knowledge that the voters of this country do not, as a rule, exercise the right to vote until after a spirited public canvass is had, in which the qualifications of candidates—legal, constitutional, and otherwise—are thoroughly discussed and sifted. The result is that it very rarely happens that a candidate for office, who is legally or constitutionally disqualified to hold the same, is

elected by the voters. The general rule is, manifestly, that the candidate elected is not legally disqualified. After such election (and where a candidate receives an official certificate of election, which is based upon an official canvass of votes, and subsequently qualifies for the office in manner and form as the statute provides,) a very strong presumption arises that he is legally entitled to hold the office, and one sufficiently strong, we think, to entitle him to be admitted to office, as against an incumbent who has no other claim than the statutory right to hold the office until a successor is elected and qualified.

Defendant's counsel concedes that the *prima facie* title of the relator is strong enough to debar the defendant from pleading that the relator was not in fact elected, and admits that the certificate forecloses that question in this proceeding, but contends that other and independent disqualifying facts may be set up against the relator, including the fact of the nonpossession of the educational certificate. We think this contention is untenable, for reasons technical, and otherwise already indicated. The people very rarely elect to office an individual who is neither a minor, an alien, or a non-resident. The general rule, of course, is that the successful candidate possesses all of those qualifications, as well as all other legal and constitutional qualifications to hold the office to which he has been elected. We therefore conclude that the rule of practice we are discussing is salutory, and one which rests upon broad grounds of common sense and a wise public policy. See, also, *Driscoll* v. *Jones*, (S. D.) 44 N. W. 726; *State* v. *Churchill*, 15 Minn. 455 (Gil 369.) It is common ground with counsel in this case that under the prevailing rule of practice the ultimate title to an office will not be heard and determined by mandamus. This rule has the support of such a mass of authority that citations to support it are needless. Able courts, however, hold the contrary doctrine. Merrill, Mand., and cases cited in section 146. Practically, this minority rule seems to be applied, in effect, by the Supreme Court of New York, in *People* v. *Sheffield*, 47 Hun. 481. Counsel for defendant, however,

concedes that the prevailing rule is that title to office cannot be tried by mandamus, and contends that he does not desire to have the title determined here. His position seems to be that inasmuch as the ultimate title to the office is attacked by the defendant, and has become involved by reason of facts set out in defendant's answer, and admitted by the demurrer for the purposes of the case, it appears of record that the relator's title is involved, and consequently, as counsel contends, the relator should go out of court in this proceeding, and seek in another form—*i. e.* by a *quo warranto* action—to establish his claim of title. But the fallacy of this position is apparent for two reasons: *First.* As we have seen, the defendant, a private suitor, has no status which entitles him to become the champion of the state, and consequently, when he seeks to appear in that capacity, he is confronted by the rule which requires that in such a case the public must be represented by the proper official. Comp. Laws, § 5348. *Second.* The contention of counsel presents to our minds a case of logical contradictions, if not one of begging the question. Whether the fact pleaded in the answer, *i. e.* that the relator did not possess the prescribed educational certificate when the term of office in dispute commenced, or its equivalent, constitutes a bar to holding the office, is a question of law, presented by the demurrer. This question, and to determine which requires a trial, counsel insists should have been investigated by the trial court, and sufficiently determined at least to ascertain whether or not the question presented involved the title to the office, and, if it did, then counsel claims that the relator should, under the rule, be kept out of his office until the question so raised should be elsewhere tried and determined. In its final analysis, counsel's position appears to be that where the answer in mandamus presents facts which go to the ultimate title, but do not touch relator's *prima facie* title, the relator must be denied the writ, and hence be kept out of office until another proceeding has settled the question thus thrust upon the court by a private suitor. This reasoning leaves out of sight the rule that counsel

admits to be the prevailing one, viz. that title to an office cannot be tried by mandamus. Despite this concession, however, counsel vigorously contends that in this case—and, of course, all similar cases—the court must try and determine the question whether the facts set out in the answer do or do not involve the title. In our view, this investigation is inhibited by the rule which forbids a trial of title by mandamus. Counsel's contention certainly implies that a relator must go out of court if the title is put in question by the answer, even in cases where a good title in the relator may be established later in a *quo warranto* action. In our judgment, the better rule is that in cases like this nothing can be tried, except such questions as affect the *prima facie* title of the relator; but we desire to limit this rule to cases standing upon the same or similar facts. We are aware of the fact that in a certain class of cases the writ of mandamus cannot be successfully invoked by a relator holding the certificate of election, who has qualified under the statute, and demanded possession. To illustrate: If the votes cast for the relator in June, 1894, had been put in the ballot box at the general election held in November, 1894, and the relator had received a certificate and qualified as a result of the November election, and had demanded possession, he could not resort to mandamus with success. In the case supposed, the court would take judicial notice of facts showing that the election was void, and this fact would defeat the *prima facie* effect of the certificate. We cite two cases among many illustrating this rule: *State* v. *Dodson*, (Neb.) 31 N. W. 788; *State* v. *Board of Health of City of Trenton*, (N. J. Sup.) 8 Atl. 509.

Counsel cites *People* v. *Board of State Canvassers*, 129 N. Y. 360, 29 N. E. 345, and strenuously and very ably argues that it is authority in point in his favor. We do not concede that the case is squarely in point. True, it is a mandamus case, and involves an election; but the relator was not seeking the writ, either to be admitted into the office, or to secure the records of an office. Nor was there a respondent, in the case cited, who was holding over after the expiration of his term of office. In that case, therefore,

the court was not called upon to determine the rights of a successful candidate, who had received a certificate of election, and had qualified by taking the oath and giving the bond. No such question was presented to the court for solution, and no such question was discussed or determined, in that case. The court in that case did, however, refuse to award the writ to compel the state canvassers to discharge their purely ministerial functions and canvass the vote, because and upon the ground that it appeared of record that the relator—who was elected—was constitutionally ineligible to hold the office in question, viz. that of state senator, for the reason that the relator held another and an incompatible office. The ruling was put upon the ground that the writ does not issue to aid in accomplishing an illegal object, which is doubtless an elementary and well-settled doctrine. But we are of the opinion that the question of the eligibility of the relator was not involved, and that the question of his right to sit as a state senator was *coram non judice*, and could not have been constitutionally tried in that case, or by the courts of the state in any case; hence, we think that the court grossly erred when it assumed to sit in judgment upon the question of relator's eligibility, and also, after declaring him to be ineligible, erred in refusing the writ to compel the performance of a ministerial duty, which the court itself affirmed it was the clear statutory duty of the canvassers to perform, *i. e.* to canvass the votes. We regard the case as thoroughly unsound in principle. In our opinion, it proceeds upon false premises to a false and dangerous result. See High, Extr. Rem. § § 55, 56, 60, 61; Merrill, Mand. 139. We shall, however, refrain from a further discussion of the case, not only because we think it not much in point, but for the further reason that its value as a precedent has been minimized, if not wholly destroyed, by the very able and admirable dissenting opinion of Judge Finch, concurred in by Judge Andrews, and published with the majority opinion.

It will follow from the views we have expressed that the judgment of the trial court, ousting the defendant, was properly

entered, and should be affirmed, and this court will so order; and, deeming the case urgent, we shall further direct that the remittitur be transmitted forthwith to the trial court for further proceedings. All concur.

(61 N. W. Rep. 1025.)

NORTHERN PACIFIC RAILROAD CO. *vs.* SAMUEL K. MCGINNIS.

Opinion filed November 8th, 1894.

Gross Earnings Law—Void.

Chapter 99 of the Laws of 1883, commonly known as the "Gross Earnings Law," was repugnant to § 1925 of the Revised Statutes of the United States, and void.

Railroad Land Taxable.

The exemption of the plaintiff's land grant thereunder falls with the statute, and such lands are therefore taxable.

Payment of Gross Earnings Tax Not Bar to Land Tax.

The payment by the plaintiff of the gross earnings tax under the gross earnings law, and the acceptance of the same by the territory (said payment being made before the admission of North Dakota as a state,) do not bar the right of the different counties in which plaintiff's land grant is situated to levy taxes against such land.

Non-mineral Land—Title Relates Back.

Said land grant was not exempt from taxation, because the question of its non-mineral character had not been finally settled.

Unsurveyed Land—Survey Fees.

Unsurveyed portions of plaintiff's land grant are exempt from taxation where the survey fees have not been paid, under the rule laid down in *Northern Pac. R. Co.* v. *Traill County*, 115 U. S. 600, 6 Sup. Ct. 201, as the act of congress providing that said land grant shall be taxable despite the nonpayment of survey fees is by its terms declared to be inapplicable to unsurveyed lands.

Burden on Plaintiff to Show Illegality of Tax.

Plaintiff cannot avail itself of that provision of this act which excepts lands in unorganized counties, for the reason that it has failed to allege that the lands in question were situated in an unorganized county at the time the taxes were levied. The action being in equity to have tax proceedings annulled, the burden is on plaintiff to show the illegality of which it seeks to avail itself.

Tax Proceedings Vacated—Judgment for Tax.

Certain irregularities *held* fatal to the validity of the tax proceedings, but not the taxes themselves in equity. They are the same as are set forth in the opinion in *Railroad Co.* v. *Barnes*, 2 N. D., at p. 389, *et seq.*, 51 N. W. 386. Judgment is therefore directed to be entered for the amount of such taxes, interest, and penalties, under § 1643, Comp. Laws, and the tax proceedings are set aside.

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

Action by the Northern Pacific Railroad Company against Samuel K. McGinnis, county treasurer. From a judgment for plaintiff on the pleadings, defendant appeals.

Reversed.

This action was brought by plaintiff to restrain defendant from selling certain lands held by it under a land grant, part of which were situated in an unsurveyed township, for taxes assessed and levied thereon for territorial, county, and other purposes subsequent to March 9, 1883, on the ground that said taxes were illegal and void, by virtue of an act approved March 9, 1883, which provides that, in lieu of all other taxation upon property of railroad companies, there should thereafter be paid a certain percentage of the gross earnings of such railroad companies.

E. W. Camp, and *S. L. Glaspell*, for appellant.

Cited, *Fargo & S. W. Ry. Co.* v. *Brewer*, 3 N. D. 34; *Grandin* v. *LaBar*, 3 N. D. 446; *N. P. R. R. Co.* v. *Raymond*, 5 Dak. 356; *N. P. R. R. Co.* v. *Barnes*, 2 N. D. 310; *N. P. R. R. Co.* v. *Walker*, 47 Fed. Rep. 681; *N. P. R. R. Co.* v. *Wright*, 54 Fed Rep. 67; *N. P. R. R. Co.* v. *Wright*, 51 Fed. Rep. 68; *N. P. R. R. Co.* v. *Clark*, 153 U. S. 252. Also cases cited in respondent's brief in *Ry. Co.* v. *Barnes*, 2 N. D. 316–320.

Fred M. Dudley, *Ball & Watson*, and *J. B. McNamee*, for respondent.

It is not in the power of the state or county officials to extend survey lines and segregate the odd numbered from the even numbered sections nor can such work be performed by the courts,

Nesselroad v. *Parrish*, 59 Ia. 570; *Robinson* v. *Forrest*, 29 Cal. 318; *Middleton* v. *Low*, 30 Cal. 596; *Powers* v. *Jackson*, 50 Cal. 429; *Bullock* v. *Rouse*, 22 Pac. Rep. 919; *Neff* v. *Paddock*, 26 Wis. 546, *Climer* v. *Wallace*, 28 Mo. 556; *Cooper* v. *Roberts*, 18 How. 173; *Cragin* v. *Powell*, 128 U. S. 691. The complaint alleges that township 144, in range 68, has never been surveyed by the United States government.

Until the government survey, and the ascertainment of the odd numbered sections, the title vested by the granting act, does not attach to the specific tracts of land. *Kan. Pac. Ry. Co.* v. *Dunmeyer*, 113 U. S. 629; *L. L. & G. R. R. Co.* v. *U. S.*, 92 U. S. 733.

The act of July 2d, 1864 makes a grant *in praesenti*. It vested in the grantee the legal title to the lands *eo instanti* subject to the performance of certain conditions subsequent. To perfect the grant it is necessary to ascertain and determine the particular tracts falling within its terms. *St. P. & P. R. R. Co.* v. *N. P. R. R. Co.*, 139 U. S. 1; *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241; *U. S.* v. *S. P. R. R. Co.*, 146 U. S. 570; *Curtner* v. *U. S.*, 149 U. S. 662; *Wis. Cent. R. R. Co.* v. *Price Co.*, 133 U. S. 496; *L. L. & G. R. R. Co.* v. *U. S.*, 92 U. S. 733; *Wineman* v. *Gastrell*, 2 U. S. App. 449. The grant so far as each specific tract is concerned remains a float and the title is potential, until the facts necessary to determine if it be granted are settled and known. *Grant* v. *I. R. R. L. Co.*, 7 N. W. Rep. 113; *R. R. Co.* v. *Howard*, 52 Cal. 227; *Veeder* v. *Guppy*, 3 Wis. 502; *Kirby* v. *Lewis*, 39 Fed. Rep. 66; *Wright* v. *Roseberry*, 121 U. S. 488. Until the issuance of patent the lands are undefined as non-mineral lands. *Davis* v. *Wiebbold*, 139 U. S. 507; *Deffebock* v. *Hawke*, 115 U. S. 392; *Ah Yew* v. *Choate*, 24 Cal. 562; *Merrill* v. *Dixon*, 15 Nev. 401; *Alford* v. *Barnum*, 45 Cal. 482; *U. S.* v. *Reed*, 28 Fed. Rep. 482; *Hunt* v. *Steese*, 17 Pac. Rep. 920; *Dughi* v. *Harkins*, 2 L. D. 721. The lands of the government and of its grantee are unsegregated and indistinguishable, the government and the railroad company are tenants in common of the entire tract. *Frasher* v. *O'Connor*, 115 U. S. 102; *Dubuque, etc. R. Co.* v. *Litchfield*, 23 How. 66;

Griswold v. *Johnson*, 5 Conn. 363; *Veeder* v. *Guppy*, 3 Wis. 502. The interest of the government in all the lands continues to exist. *Mahoney* v. *Van Winkle*, 21 Cal. 553; *Van Reynegan* v. *Bolton*, 95 U. S. 33. And where the land as an entirety is assessed to one having but an unsegregated or equitable interest therein the sale of the land for such taxes will be enjoined. *Colorado Co.* v. *Commissioners*, 95 U. S. 259. The interest of the government in these lands can only be cut off by the interior department, no other tribunal can determine the non-mineral quality of the land. *R. R. Co.* v. *U. S.*, 34 Fed. Rep. 835; *Chandler* v. *C. H. Min. Co.*, 149 U. S. 79; *U. S.* v. *Jones*, 131 U. S. 1; *R. R. Co. U. S.*, 36 Fed. Rep. 610; *Marquez* v. *Frisbie*, 101 U. S. 473; *Forbes* v. *Driscoll*, 31 N. W. Rep. 633; *Litchfield* v. *Register*, 9 Wall. 575; *Wright* v. *Roseberry*, 121 U. S. 488; *Gaines* v. *Thompson*, 7 Wall. 347. It is only when the government has ceased to hold any such right in the property as to justify it in withholding a patent from the donee or purchaser, that the land will be held liable to taxation as his property. *Wis. Cent. R. Co.* v. *Price Co.*, 133 U. S. 496; *Railroad Co.* v. *Prescott*, 16 Wall. 603. The potential interest of the railroad company is sufficient to maintain an action to protect the property. *U. S.* v. *Ry Co.*, 12 Pac. Rep. 769; *U. S.* v. *Goodwin*, 16 Pac. Rep. 850; *Tarpey* v. *Deseret Salt Co.*, 17 Pac. Rep. 631; *Graff* v. *Ackerman*, 57 N. W. Rep. 512; *Frasher* v. *O'Connor*, 115 U. S. 102; *Dubuque* v. *Litchfield*, 23 How. 66; *N. P. R. Co.* v. *Traill Co.*, 115 U. S. 600; *C. P. R. Co.* v. *Howard*, 52 Cal; 227; *C. R. & M. R. Co.* v. *Woodbury Co.*, 29 Ia. 247; *I. R. R. L. Co.* v. *Storey Co.*, 36 Ia. 48; *Davis* v. *Grey*, 16 Wall. 203; *Heydenfeldt* v. *Daney Gold M. Co.*, 93 U. S. 634. The lands are exempt from taxation because of the lien of the United States, for the costs of surveying the same. *R. R. Co.* v. *Traill Co.*, 115; U. S. 600; *Ry. Co.* v. *McShane*, 22 Wall. 444; *Ry. Co.* v. *Prescott*, 16 Wall. 603; *Colorado Co.* v. *Commissioners*, 95 U. S. 259. The act of 1883 is a sale by the state to the railroad company of the privilege of exempting its land from taxation. This act should be liberally

construed in favor of the railroad company. *Ry. Co.* v. *Board of Supervisors*, 29 Wis. 116; *Ry. Co.* v. *City of Milwaukee*, 34 Wis. 271. The exemption of appellants land grant by the "Gross Earnings Law" does not conflict with the 14th amendment to the Federal constitution. *Bell's Gap. R. R. Co.* v. *Penn.*, 134 U. S. 232; *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Pac. Exp. Co.* v. *Seibert*, 142 U. S. 339; *Pac. Exp. Co.* v. *Seibert*, 44 Fed. Rep. 310; *State Board of Assessors* v. *State*, 24 Am. & Eng. R. R. Cases, 546; *R. R. Co.* v. *Barnes*, 2 N. D. 310. Railroad corporations for purposes of taxation may be classed by themselves. Ky. R. R. Tax Cases, 115 U. S. 321; State R. R. Tax Cases, 92 U. S. 575; *Wis. Cent. R. R. Co.* v. *Taylor Co.*, 8 N. W. Rep. 833; *Francis* v. *R. R. Co.*, 19 Kan. 303; *R. R. Co.* v. *Wright*, 13 S. E. Rep. 578; *R. R. Co.* v. *Humes*, 115 U. S. 512; *R. R. Co.* v. *Beckwith*, 129 U. S. 26. The cases holding that statutes exempting property from taxation do not include in the exemption property not essential to the proper business of the exempted property owner, all turn upon the peculiar reading of the exempting statute. The acceptance of the tax under the gross earnings law, estops the county from questioning the constitutionality thereof. *Daniels* v. *Tearney*, 102 U. S. 415; 1 Story on Contracts, § 610; *Tone* v. *Columbus*, 39 Ohio 281; *State* v. *Mitchell*, 31 Ohio, 592; *Ferguson* v. *Landram*, 1 Bush. 548, 5 Bush. 230; *R. R. Co.* v. *Stewart*, 39 Ia. 267; *Pertyman* v. *Greenville*, 51 Ala. 507; *Ry. Co.* v. *McCarthy*, 96 U. S. 258; *St. Louis* v. *Davidson*, 102 Mo. 169; *State* v. *Milk*, 11 Fed. Rep. 389; *U. S.* v. *Oregon Cent. M. Road Co.*, 41 Fed. Rep. 493; *U. S.* v. *R. R. Co.*, 42 Fed. Rep. 351; *U. S.* v. *R. R. Co.*, 55 Fed. Rep. 711; *U. S.* v. *R. R. Co.*, 54 Fed. Rep. 807; *Philadelphia* v. *Ry. Co.*, 142 Penn. St. 484; *City* v. *Consolodated Coal Co.*, 20 S. W. Rep. 699; *Larrimore Co.* v. *Albany Co.*, 92 U. S. 307; *New Orleans* v. *N. O. Water Works Co.*, 142 U. S. 79; *Williamson* v. *New Jersey*, 130 U. S. 189.

CORLISS, J. The complaint in this action is the same as that in the case of *Railroad Co.* v. *Barnes*, 2 N. D. 310, 51 N. W. 386.

The judgment appealed from was rendered on motion for judgment on the pleadings; but the answer failed to deny any of the material averments of the complaint, and therefore, for the purposes of this decision, all of its allegations must be regarded as true. The action was brought for the same purpose as the case of *Railroad Co.* v. *Barnes, supra.* Some of the questions of law presented are the same as those discussed in that case. On these points further discussion is unnecessary. We will merely state our conclusions.

We hold that the gross earnings law of 1883 was unconstitutional, as being repugnant to section 1925 of the Revised Statutes of the United States, regulating taxation in the Territory of Dakota. We regard this question as not open to debate in this court, for the reason that it is a federal question, and has been passed upon by the United States circuit court for this district, both the circuit judge (Judge Caldwell) and the District Judge (Judge Thomas) being agreed on the point. *Railroad Co.* v. *Walker*, 47 Fed. 681. Judge McConnell, who sits in this case, desires to have it appear that he yields his former view, as expressed in *Railroad Co.* v. *Barnes*, 2 N. D. 310, 51 N. W. 386, to the binding force of this decision of the Federal Court, while still adhering to his previous opinion. The gross earnings act being void, it follows that no exemption of plaintiff's land grant could be claimed under it.

It is urged, however, with great earnestness, that, in view of the fact that the plaintiff has paid its gross earnings tax for the year in which the taxes in question were levied on its land grant, the territory and the counties were estopped from collecting such land taxes. But if, as was held in *Railroad Co.* v. *Walker*, 47 Fed. 681, there was no power in the legislature to exempt this land, it is difficult to see how an estoppel can be built up. If the power of the legislature is restricted, that restriction cannot be removed by the act of state officials in receiving moneys which they have no right to receive, and which the party paying it is under no obligation to pay. The plaintiff, being bound to know the law, was

chargeable with knowledge at the time it made this payment to the state that the legislature was powerless to exempt its land grant in consideration of such payment or for any consideration whatever. It would be a novel doctrine that, after the people had tied the hands of their representatives by inhibitions in the fundamental law, these very representatives could ignore these prohibitions by procuring the co-operation of state officials vested with no such power, but as much subject to the restrictions of the organic law as the representatives themselves. Such officials cannot, by the receipt of money, or by express agreement, or in any other way, infuse life into a void exemption statute. The assessor charged with the duty of assessing the land attempted to be exempted, and taxpayers in the taxing district, have a right to insist that the land shall be taxed, for a law higher than statute law has so decreed. The duty of the assessor to assess, the right of the taxpayer to insist that it shall be assessed, rest upon an authority which transcends legislative authority, and cannot be affected by legislative action, although state officials may lend to this attempted violation of the rights of other taxpayers their unlawful co-operation. If this exemption feature were void only because of the invalidity of that portion of the law which assumes to tax the local earnings on interstate traffic, then there would be much force in this contention of plaintiff; not, however, on the theory of estoppel, but on another theory,—*i. e.* that of an executed agreement. If the territorial legislature had had power to exempt the plaintiff's land grant,—and we are of the opinion that the only ground on which the exemption could be held void was that a portion of the consideration for the exemption must fail, because the state could not tax the local earnings of interstate traffic,—then it might possibly be urged that, in so far as the plaintiff had in any year voluntarily paid such unenforceable tax on gross earnings, the state, by receiving the same, had acted upon its standing offer to receive the gross earnings tax, and in lieu thereof, exempt the plaintiff's land grant and other property, and therefore had executed for

that year its proposal to exempt for a specific consideration by allowing plaintiff to accept and act upon the same. But, where there is no power to exempt at all, no matter what the consideration is, the receipt of consideration under an offer to receive it in full for all taxes cannot confer such power. That there was no power to exempt the land grant at all was held in the Walker Case, which we follow. The spirit of provisions like that found in section 1925 of the Revised Statutes of the United States is to prevent unfair discrimination in taxation. The right to the protection of such provisions is the right of the taxpayers; and the object of such provisions is to secure such right from invasion, although the combined power of the state essays to override and destroy it. If, in defiance of constitutional restriction, land can be exempted by a statute, followed by the receipt of money under it, then, for the consideration of a dollar, millions of dollars' worth of property may be exempted, and this enormous burden of taxation unjustly thrown upon the other taxpayers in the taxing district. Half the land in the district might thus escape taxation, and the other half be inequitably loaded with a double burden. Protection against unjust discrimination in taxation under such a doctrine would not rest upon the sure foundation of fundamental law, but be granted or withheld at the good pleasure of the law-making power, and of public functionaries.

It is next urged that plaintiff had no such title to that portion of its land grant against which the taxes in question were levied as would render it taxable, for the reason that it has never been determined whether such land is mineral in character. The contention thus made leads inevitably to the conclusion that no portion of plaintiff's vast land grant is taxable until after patent has issued, as the question whether the land has passed under the grant because of its non-mineral character is never definitely settled until the land department has lost jurisdiction by the issue of patent. *Barden* v. *Railroad Co.*, 14 Sup. Ct. 1030. As a result of this doctrine, millions of acres of land to which the plaintiff unquestionably has title might remain untaxable for a quarter of

a century. When once it is determined that a given section is non-mineral, the title to it is not then for the first time vested in the plaintiff. It is elementary that the title relates back to the date of the granting act so far as place lands are concerned (*Wis. Cent. R. Co.* v. *Price Co.*, 133 U. S. 496–509, 10 Sup. Ct. 341;) and it is such lands, and not indemnity lands, that we have to deal with in this case. The title is as much in the plaintiff before this question is settled as after. *Barden* v. *Railroad Co.*, 14 Sup. Ct. 1030; *Salt Co.* v. *Tarply*, 142 U. S. 241, 12 Sup. Ct. 158. There is no allegation in the complaint that the lands are mineral; neither is there an averment that the land department claims that they may be mineral, and is withholding patents on that account. This fact appeared in the complaint in the case of *Railroad Co.* v. *Clark*, 153 U. S. 252, 14 Sup. Ct. 809; and yet the Federal Supreme Court in that case appears to have regarded the question now under discussion as so utterly untenable that it barely touches it in its opinion. The question was necessarily decided; for, had the contention of the plaintiff in that case been well founded, the court must have sustained its bill to enjoin the tax proceedings, as they would have been utterly without foundation. The allegation of the bill in that case was that the "United States and its officers had refused to certify to the company the lands described in the schedule of the bill, but held the list suspended and unapproved, upon the claim that the lands may be mineral in character, and, as such, excepted from the grant of the company." This averment was admitted by the demurrer, and yet the court said: "There is nothing in the allegations of the bill showing affirmatively that the company did not possess the equitable title or ownership in the lands described and assessed." This question is a federal one, and this authority is decisive on the point. Moreover, if the plaintiff has not sufficient title to support the levy of a tax, it is in no shape to question the legality of the tax. There is no claim that is has any more title than it possessed when the tax was levied. If it had no title then, it has none now. It cannot appeal to equity to prevent the casting of a

cloud on land to which it has no title. If it is ultimately shown that it in fact had no title, because the lands were mineral, it will lose no land by reason of these tax proceedings. There will be an attempted sale of lands which it does not own. If the entire title, legal and equitable, is still in the government, the tax proceedings will injure no one except the purchaser, who buys at the sale; and he will buy with knowledge of the fact that the question of title has not been fully settled, and ought, therefore, to take the risk of loss. We are unable to see why a court of equity should listen to a suitor whose only interest in the matter in litigation, on its own theory, is to save a possible purchaser, who will buy with his eyes open, from being placed in a situation where he may be induced to purchase under state authority land of the United States. If the plaintiff has title, the land ought to be taxed, and the court should not interfere. If it has no title, no cloud can be cast upon its property by these tax proceedings, and it, therefore, has no interests to protect. The case of *Jackson* v. *La Moure Co.*, 1 N. D. 238, 46 N. W. 449, is an express authority against the right to maintain an action to remove a cloud from real estate, or prevent a cloud from being cast thereon, when the plaintiff has no title to the property.

There is a portion of these taxes, however, which cannot be sustained. One of the townships has never been surveyed. Unsurveyed land is expressly excepted from the provisions of the act of congress passed July 10, 1886, declaring lands granted by congress to railroad corporations taxable, despite the fact that the survey fees have not been. This act, in terms, excepts from this rule all unsurveyed lands: "But this provision shall not apply to lands unsurveyed." As to such lands the rule laid down in *Northern Pac. R. Co.* v. *Traill Co.*, 115 U. S. 600, 6 Sup. Ct. 201, still applies. This was held in *State* v. *Central Pac. Ry. Co.*, (Nev.) 25 Pac. 442. In the absence of any authority, we should reach the same conclusion, on the plain meaning of the language used. The complaint alleges that these survey fees have not been paid. The land of the plaintiff in the unsurveyed township

was therefore exempt from taxation. It is urged that the doctrine of the Northern Pac. R. Co. Case is applicable to all of the lands in question, for the reason that unorganized counties are excepted from the provions of the act. But there is no evidence that Stutsman County was unorganized at the time the taxes in question were levied. The plaintiff is attacking these tax proceedings. The burden is on it to show their invalidity. *Farrington* v. *Investment Co.*, 1 N. D. 102–109, 45 N. W. 191. If plaintiff intended to claim that this land was exempt, because it was in an unorganized county, it should have alleged the fact that Stutsman County was unorganized. Mere failure to pay survey fees would not exempt plaintiff's land grant, unless it was in an unorganized county. The latter fact was essential to bring the case within the rule laid down in the Northern Pac. R. Co. Case. Having failed to allege it, we cannot presume it to destroy a tax, the burden of overthrowing which plaintiff has assumed by this action. The only questions remaining relate to irregularities in the tax proceedings. They are the same as those discussed in *Railroad Co.* v. *Barnes*, 2 N. D. 310–389, 51 N. W. 386, and further reference to them in this opinion is therefore unnecessary. We hold, on the reasoning of my opinion in that case, that these irregularities do not affect the validity in equity of the taxes levied. In the absence of any statute changing the equitable rule, the plaintiff would be defeated for failure to pay or tender such taxes before commencing this action. But our statute substitutes a judgment for payment or tender. *Railroad Co.* v. *Barnes*, 2 N. D. 310–394, 51 N. W. 386; *Farrington* v. *Investment Co.*, 1 N. D. 102, 45 N. W. 191. The plaintiff, therefore, had a right to institute this suit to restrain these irregalar tax proceedings, as they would have culminated in tax deeds which, under the statute, would have cast a cloud on plaintiff's title, such deeds being made by statute *prima facie* evidence of the regularity of all prior proceedings. The deeds, because of these irregularities, would have been void, and yet their introduction in evidence

would have established *prima facie* title in the grantees thereunder, without proof of the regularity of the antecedent proceedings. The District Court erred in failing to render judgment upon the complaint, as it stood, against the plaintiff for the amount of the taxes levied, with penalty and interest.

The judgment of the District Court is therefore reversed. The plaintiff is allowed 20 days after the filing of the remittitur in which to apply to the District Court for leave to amend the complaint. Whether such amendment shall be allowed will rest in the sound discretion of that court. If no amendment is allowed, the court is directed to render judgment against the plaintiff for the amount of the taxes, penalties, and interest, according to our decision in the Farrington Case; but the taxes levied against the plaintiff's land in the unsurveyed townships will not be included in said judgment, such taxes being void, for the reason already stated. The judgment will also set aside the tax proceedings, according to the decision in the Farrington Case. All concur.

BARTHOLOMEW, C. J., and WALLIN, J., having been of counsel, took no part in the above case; MCCONNELL, J., of the Third Judicial District, and MORGAN, J., of the Second Judicial District, sitting in their places by request.

(61 N. W. Rep. 1032.)

NORTHERN PACIFIC RAILROAD CO. *vs.* CHRISTIAN A. BENSON.

Opinion filed November 8th, 1894.

Railroad Co. v. *McGinnis*, 61 N. W. 1032, 4, N. D.,— followed.

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

Action by the Northern Pacific Railroad Company against Christian A. Benson, county treasurer. From a judgment for plaintiff on the pleadings, defendant appeals.

Reversed.

Herman Winterer and *E. W. Camp*, for appellant.

Ball & Watson and *F. M. Dudley*, for respondent.

CORLISS, J. The object of this action was the same as that of the action of *Railroad Co.* v. *Barnes*, 2 N. D. 310, 51 N. W. 386. All of the same questions, however, are not presented for decision, owing to the fact that the judgment appealed from was rendered on motion for judgment on the pleadings. After the answer had put in issue most of the averments of the complaint, the plaintiff moved for judgment on the pleadings, and, of course, by this motion, admitted, for the purposes of such motion, that none of the allegations so denied were true. The case, therefore, presents the single question whether the gross earnings law of 1883 was constitutional. This question has been settled in the negative by this court in the case of *Railroad Co.* v. *McGinnis*, (just decided) 61 N. W. 1032.

The judgment of the District Court is therefore reversed, and the case will stand for trial. All concur.

BARTHOLOMEW, C. J., and WALLIN, J., having been of counsel, took no part in the above case; MCCONNELL, J., of the Third Judicial District, and MORGAN, J., of the Second Judicial District, sitting in their places, by request.

(61 N. W. Rep. 1035.)

J. I. MINKLER *vs.* UNITED STATES SHEEP CO.

Opinion filed January 5th, 1895.

Appointment of Receiver—Rights of Judgment Creditor.

To entitle a judgment creditor to an order appointing a receiver of his debtor's property it must be made to appear that the creditor has in good faith exhausted his remedies at law; and to that end it must appear, unless special circumstances are shown to excuse it, that execution has been issued upon the judgment to the sheriff of the county of defendant's residence, and been returned unsatisfied in whole or in part.

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

Action by J. I. Minkler against the United States Sheep Company. From an order appointing a receiver of its property, defendant appeals.

Reversed.

A. S. Drake, for appellant.

Newman, Spalding & Phelps, for respondent.

BARTHOLOMEW, J. This is an appeal from an order appointing a receiver to take charge of all of the property of the defendant, and devote it to the payment of the defendant's debts. The action is in the nature of a creditor's bill, and the receiver was asked for upon the grounds that the plaintiff had in a former action obtained a judgment against the defendant, and caused execution to be issued thereon, and such execution had been returned wholly unsatisfied; that defendant was insolvent, and its securities were scattered throughout the state, and liable to be lost and wasted; that the business of the defendant had been mismanaged by its president and directors; that it was indebted to a large amount; and that, unless a receiver was appointed, the property would be wasted and squandered. The defendant was alleged to be a corporation organized under the laws of this state, and doing business at Fargo. This application was presented to the court *ex parte*, and an order was made thereon appointing a temporary receiver, enjoining defendant from disposing of its

property, directing that the property of defendant be tnrned over to the receiver, and that the defendant show cause before the court on December 18, 1893, why the receivership should not be made permanent. This order, with a copy of the petition upon which it was based, was served upon the defendant on December 6, 1893. No attempt was ever made to discharge this order, nor was any appeal taken therefrom. On December 18, 1893, the defendant filed its verified answer to the petition, in which it specially denied that it was insolvent, or that its property had been lost, wasted, squandered, or mismanaged, or that it had not property to satisfy said judgment; and alleged affirmatively that its principal place of business, as fixed by his charter, was at Leeds, in Benson County, and that no execution had ever been issued upon said judgment to the sheriff of said county, and that plaintiff held collateral security for his debt, which he had not sought to exhaust; that defendant owned unincumbered live stock in the State of North Dakota of the value of $10,000; that the temporary appointment of receiver was made without notice, and upon an application verified only by one of the attorneys, and not by plaintiff in person, and that before the return of the execution defendant by its officers, exhibited to the sheriff personal property of the value of $5,000, upon which the sheriff refused to levy. Substantially these same statements were made in what is termed the "answer" to the order to show cause. Upon these pleadings the court, on the 21st day of December, 1893, signed an order making the temporary receivership permanent, directing the transfer by defendant to the receiver of all property of every kind and nature belonging to the defendant, authorizing the receiver, if he deemed it for the best interests of the creditors, to continue the business of the corporation under the direction of the court, and clothing the receiver generally with all the powers necessary and usual for closing up the financial affairs of a corporation. It is from this order that the appeal is taken. As neither affidavits nor oral evidence are presented to the court, we are required to pass only upon the rights of the respective parties under the pleadings as hereinbefore set forth.

It is first urged against the complaint that it was insufficient to warrant the appointment of a receiver, because it does not show that plaintiff had exhausted his remedies at law in this; that it does not show that any execution upon the judgment obtained by plaintiff against defendant had ever been issued to the sheriff of the county of defendant's residence, nor does it show any excuse why an execution was not so issued. It is not material whether we consider this receiver as appointed under Subd. 4, § 5015, Comp. Laws, which provides that a receiver may be appointed where judgment has been obtained and execution issued upon the judgment and returned unsatisfied, or whether we consider him appointed under subdivision 6 of that section, which authorizes receivers to be appointed in cases where receivers had heretofore been appointed by the usages of courts of equity. The power to appoint receivers for the purpose of enabling a creditor to obtain satisfaction of his judgment in cases where judgment had been obtained and execution issued and returned unsatisfied had long been recognized by courts of equity before the statutory provision contained in subdivision 4 originated. That subdivision is but a declaration of the law as it had theretofore been administered by equity courts. *Child* v. *Brace*, 4 Paige, 309; *Ballentine* v. *Beall*, 3 Scam. 203; *Taylor* v. *Bowker*, 111 U. S. 110, 4 Sup. Ct. 397. And, alike under the statutory provison and under the authority vested in courts of equity, independent of statute, it is held that before a receiver can be appointed in cases of this character it is absolutely necessary that the creditor should have exhausted all legal remedies, and it is absolutely necessary that he should have caused execution to issue upon his judgment, and that such execution should have been returned unsatisfied, in whole or in part. This is elementary, but see *Dunlevy* v. *Tallmadge*, 32 N. Y. 457; *Adsit* v. *Butler*, 87 N. Y. 585; *Taylor* v. *Bowker*, 111 U. S. 110, 4 Sup. Ct. 397; *Preston* v. *Colby*, 117 Ill. 477, 4 N. E. 375; *Wadsworth* v. *Schisselbauer*, 32 Minn. 86, 19 N. W. 390; 4 Am. & Eng. Enc. Law, p. 374, and note 3. In the case of *Paulson* v. *Ward*, 4 N. D. 100, 58 N. W. 792, the writer of this opinion, in speaking

of this requirement for the issuance and return of execution, classed it as a purely formal requirement. That remark was not called for in that case, and was ill considered. In one sense, and in many cases, the requirement is formal, but it is always intended to subserve a very important purpose. The issuance and return of execution unsatisfied is regarded as the best evidence that the creditor has in good faith exhausted his remedy at law, and the courts have ever been strenuous that it should appear that the creditor's efforts had been in all respects *bona fide*, and made with the absolute intent and purpose of collecting the debt through the ordinary processes of the courts of law if that were possible; and to that end it has long been held, and, we believe, universally held, that it is necessary to allege either that the execution had been issued to the sheriff of the county of defendant's residence, or to show exceptional facts which excused such action. The law has gone upon the theory that a debtor's possessions would be found in the county of his residence, and not elsewhere, and that the simple issuance of the execution to the sheriff of any connty other than that of defendant's residence does not show any *bona fide* attempt on the part of the creditor to collect the debt through the process of the law courts. By the appointment of a receiver the debtor is at once stripped of his property. It is taken from his control, passes into the hands of an instrumentality of the court, and is thenceforth devoted to such purposes as the court may direct. The remedy is at once harsh and somewhat oppressive. It is no hardship to the creditor that, before he should avail himself of any remedy that strips his debtor of control of his own property, he should be compelled to show that he had exhausted unsuccessfully all milder means. In this state, judgment entered in the District Courts in the various counties may be transferred to any other county in the state by simply taking a transcript of the original docket, and having it filed with the clerk of the court in the county to which it is desired to transfer the judgment. Thereafter executions may be issued thereon to the sheriff of any

county where the judgment is docketed. See Comp. Laws, § § 5104, 5114.

It is obvious that it would be highly unjust to a debtor should a creditor be allowed to issue execution upon a judgment to the sheriff of some county remote from the debtor's residence, where he had no place of business, and where he pretended to have no property, and then, by simple return of such judgment unsatisfied, the creditor should thereby become entitled to prosecute a proceeding in equity, and have a receiver appointed, and the property of the debtor sequestered, when, at the same time, the issuance of an execution in the county of the residence of the debtor may have disclosed ample property for the satisfaction of the debt. It has been in some cases held sufficient, under exceptional circumstances, if the execution were issued to the sheriff of the county wherein the judgment was obtained, or if issued to the sheriff of any county wherever the debtor had any established place of business. But an examination of the complaint in this case develops the fact that it is not stated where defendant's residence is, it is not stated in what county judgment was obtained; the whole extent and scope of the allegation being that the defendant was a corporation created by the laws of this state, and that at the time of the filing of the complaint in this case it was doing business in Fargo. It is further stated that the judgment was obtained in the Third Judicial District. In what county of that district is not designated. That the execution was issued to the sheriff of Cass County, and returned unsatisfied. It will be noticed that this complaint contains no allegation of the residence of defendant; no allegation that the defendant had any place of business in the county to which execution was issued at the time that the same was issued, and no allegation that the judgment was obtained in the county to which the execution was issued. We think that, in the absence of these allegations, plaintiff has failed to present facts that authorize a court of equity to grant him any relief through a receivership, and we reach this conclusion the more readily in this case because of the fact that the

complaint does allege that the defendant has property in the State of North Dakota. There is no claim that this property is intangible or equitable in its nature, or of such a character that it might not readily be seized on an execution at law; and, if plaintiff had such knowledge of the existence of property of defendant's within the state, it certainly would have been an easy matter for him to have transferred his judgment to the county where such property might have been found, and have made an effort to seize the same on execution. And, in addition to this fact, shown in the complaint, it is shown by the answer, that thousands of dollars worth of unincumbered property belonging to defendant, consisting of live stock, may be found within the state. We think, under the pleadings as they stood at the time the final order was made, the court was unwarranted in appointing a permanent receiver of the property of defendant. That it is necessary that the execution should run in the county of defendant's residence, has been held in the following cases: *Reed* v. *Wheaton*, 7 Paige, 663; *Williams* v. *Hogeboom*, 8 Paige, 470; *Smith* v. *Fitch*, Clarke, Ch. 265; *Wilbur* v. *Collier*, Id. 315; *Fox* v. *Moyer*, 54 N. Y. 125; *Durand* v. *Gray*, 129 Ill. 9, 21 N. E. 610. In this latter case, in speaking of the purpose of the issuance and return of execution, the court said: "The purpose may be to establish a matter of fact merely,—that the defendant has or has not property whereon an execution may be levied. It is manifest—*First*, that if the plaintiff in execution knows that the defendant in execution has property in a particular county, he should send an execution to that county; *second*, the execution should be sent also to any and every county in which there is any legal presumption the defendant in execution has property. If a person resides and does business in the same county, it is legally presumed that he has property there, liable to execution, for ownership is presumed from possession, and insolvency is exceptional, and must always be proved." The question will be found quite fully discussed in this case from Illinois. It has sometimes been held that the existence of insolvency on the part of a debtor

precludes the necessity of the issuance of execution. *Payne* v. *Sheldon*, 63 Barb. 169; *Turner* v. *Adams*, 46 Mo. 95. There was an allegation of insolvency in the complaint in this case. The complaint was verified by an attorney on information and belief. The allegations of insolvency were in direct terms denied in the answer verified by an officer of the defendant. The admission of the judgment and the issuance and return of the execution as stated in the complaint would not necessarily show an insolvency, even under the definition of insolvency found in § 4661, Comp. Laws. We must therefore hold that, under the pleadings as they stood, the allegations of insolvency were successfully overcome.

We are clear that the court was not authorized in making the order from which the appeal was taken. A *fortiori*, was it without authority to make the original *ex parte* order. But the order making the receivership permanent terminated and extinguished the *ex parte* order, and the order making the receivership permanent is reversed, but without prejudice to another application for a receiver, should plaintiff be so advised. The District Court will direct the receiver to return to defendant all property of every character received by him as such receiver, and, when all property is thus accounted for, the receiver will be discharged.

Reversed. All concur.

(62 N. W. Rep. 594.)

In re ROBERT A. EATON.

Opinion filed February 5th, 1895.

Disbarment of Attorney—Grounds For.

Where the statute enumerates grounds for the disbarment of an attorney, no other grounds can be considered by the court.

Evidence Insufficient to Sustain Findings.

Evidence in this case considered, and *held* insufficient to warrant the finding of any fact that is ground for disbarment under the statute in force in this state.

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

Robert A. Eaton, an attorney at law, having been disbarred by proceedings for that purpose, appeals.

Reversed.

Cochrane & Feetham and *N. C. Young*, for appellant.

R. M. Carothers and *J. B. Wineman*, for the proceedings.

BARTHOLOMEW, J. This was a proceeding for the disbarment of a duly licensed attorney at law residing and practicing his profession at Grand Forks, in the First District. Four specific charges were made against defendant in the District Court of Grand Forks County. It appears that defendant, as attorney for the receivers of the National Cordage Company (hereafter we will not mention the receivers,) brought an action aided by attachment against Mast, Buford & Burwell Company, a Minnesota corporation, to recover a large sum of money. The papers and correspondence in the case are signed "Eaton & Higbee," but Mr. Higbee, as we understand, resided in another district, and had no personal relation whatever to the case, and we shall not connect him with it further. The defendant in the action, by Messrs. Bangs & Fisk its attorneys, served notice of a motion to discharge the attachment. Hon. C. F. Templeton, Judge of the First District, issued the order for hearing on the motion, but he was subsequently taken sick, and the motion was heard at the

office of Bangs & Fisk, in Grand Forks, before Hon. D. E. Morgan, Judge of the Second District, acting for Judge Templeton. All the charges are connected with the hearing of this motion, and, briefly stated, are as follows: 1. That on January 13, 1894, at Grand Forks, etc., the defendant, Robert A. Eaton, committed falsehood in the court, and before a judge thereof, by stating that he did not know the whereabouts of a certain affidavit pertaining to the motion then on hearing, which statement he well knew to be false; (2) that at the same time and place the defendant was guilty of practicing deceit upon the court, and falsifying evidence to be produced before the court, by seeking to establish his standing in court by an affidavit of service made by one Squires, of St. Paul, Minn., which affidavit stated, among other things, that the complaint in the action of the *Cordage Company* v. *Mast, Buford & Burwell Company* had been served upon the defendant in said action, when in fact said complaint had not been served, and said Eaton well knew it had not been served; (3) that the defendant was further guilty of deceit upon the court in that at the said date, and at Grand Forks, the defendant took from the files of the office of the clerk of the court an affidavit of service in the case before mentioned, which affidavit had been regularly filed with the said clerk, and substituted another and different affidavit, some of the allegations of which he well knew to be untrue, particularly the allegation concerning the service of the complaint as mentioned in the preceding charge; (4) that said Eaton is guilty of willfully destroying, defacing, altering, falsifying, and fraudulently removing and secreting a paper filed and deposited in a public office, to-wit, the affidavit of service which was removed from the files of the clerk of the court, as stated in the third charge. These charges, when presented to the court, were based exclusively upon the joint affidavit of Mr. Bangs and Mr. Fisk, and an affidavit of George C. Squires and L. K. Hassell, the clerk of the court. Mr. Squires is an attorney, who originally held the claim against Mast, Buford & Burwell Company, and who placed it in

the hands of a collection agency, by whom it was sent to Mr. Eaton, at Grand Forks. When these charges were presented, the court, as we understand the record, ordered their prosecution in due form.

The proceeding is special, but highly criminal in its nature. Section 473, Comp. Laws, reads as follows: "The following are sufficient causes for revocation or suspension: 1. When he has been convicted of a felony, or of a misdemeanor involving moral turpitude, in either of which cases the record of conviction is conclusive evidence. 2. When he is guilty of a willful disobedience or violation of the order of the court, requiring him to do or forbear an act connected with, or in the course of, his profession. 3. For a willful violation of any of the duties of an attorney or counselor as hereinbefore prescribed. 4. For doing any other act to which such a consequence is by law attached, or upon conviction for any of the offenses mentioned in sections 6400, 6403, 6410 and 6411 of the Penal Code." An examination of the charges in this case discovers that they can come only under subdivision 3 of that sction. Under subdivision 3 of section 465, a portion of the duties of an attorney are declared to be "to employ for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never to seek to mislead the judges by any artifice or false statement of law or fact." The statutory proceedings for disbarment or suspension will be found in the section following (section 473.) The trial is by the court. The answer is "guilty" or "not guilty." An acquittal in the trial court is final, but upon conviction in the lower court the defendant may appeal to the Supreme Court. In the trial court all the evidence must be reduced to writing, and filed and preserved; and in case of an appeal it all goes to the Supreme Court, to be "there considered and finally acted upon." We think the reasons which induced the legislature to make this proceeding an exception to the general rule, and require the Supreme Court to pass upon the facts, are readily discovered. Disbarment proceedings always attract local interest, and arouse

local feelings and prejudices. The sacred character of the trust confided to an attorney, as well as the nature of the oath that he takes, fully justify the average judgment of mankind in demanding and expecting of him an exceptionally high standard of personal and professional integrity. A suspicion, much more a sworn allegation, of professional misconduct on the part of an attorney, at once makes him an object of dislike, reprobation, and contempt in the community in which he lives. The public pulse is extremely sensitive on that point, and we would not have it otherwise. The legislature doubtless concluded that cases might arise when the ends of justice would require that the facts be reviewed by a tribunal where local prejudices, all the more dangerous when unperceived and unrecognized, could by no possibility affect the result.

While the result of a conviction is cases of this nature, in so far as the defendant is concerned, is purely punitory, yet the purpose of the proceeding is the protection of the court and the high character of the bar. Hence we should not invoke the strict rules of evidence in criminal cases, that require all material facts to be established beyond reasonable doubt. Further, learned counsel for the prosecution having raised the question in this court that, in so far as the statute authorized a hearing *de novo* in this court, it is inconsistent with the appellate character of this court as fixed by the subsequently adopted constitution, and hence no longer in force, we shall, without deciding the point raised, treat this case as an ordinary appeal in a case tried by the court when there are exceptions to the findings of fact, which counsel admits we can properly do on the record as it stands. Thus taking the case, counsel invokes, in support of the judgment below, the rule so often discussed, that requires us to affirm in cases when the findings are supported by any legal evidence. The rule established by this court is, perhaps, somewhat broader than the general rule. Under our statutes we have declared it to be our duty to reverse a finding, based upon written evidence, when it reasonably appears that the finding is against the weight of

the evidence; and when the finding is based upon parole evidence we will reverse the same when, after supplementing the evidence, with all the inferences and impressions that may legitimately be drawn from personal observation of the witness, it yet appears that the finding is clearly against the preponderance of the evidence. The fact that there may be some evidence to support the finding, is not conclusive in this jurisdiction. *Jasper* v. *Hazen*, 4 N. D. 1, 58 N. W. 454. And we certainly think these rules should apply in a case when a judgment adverse to defendant deprives him of the right to exercise his profession, which is to him a personal and property right (*In re Houghton*, [Cal.] 8 Pac. 57,) and demolishes a reputation and standing that has been earned by years of application and probity.

There was in this case a finding of fact upon each charge, the findings being identical in effect, and largely identical in language, with the charge. Each finding was excepted to as not being warranted by the evidence. It is to the credit of the defendant that counsel for the prosecution frankly admits in oral argument that the personal character of defendant, is so far as counsel knows, above reproach; thus fortifying the legal presumption of good moral character with which the law clothes every man, with a solemn admission. The defendant in his capacity as a witness, stands before the court as one entitled to credence, and whose testimony may not be disregarded, unless contradicted by some other witness or witnesses, or by some admitted or established fact in the case. We have carefully considered the evidence, and reach the conclusion that there is no contradiction in it. Excluding the instances where witnesses swear to legal conclusions, instead of probative facts, and where their testimony is hearsay merely, there is nothing in the testimony of either party that is inconsistent with the testimony of the other. Our task, then, is simply to discover what facts are established by the testimony that was given. What the case was called for hearing, the witnesses for the prosecution not being present, defendant stipulated that the witnesses, if present, would

swear as in their affidavits attached to the charges as presented to the court, that such affidavits might be read in evidence. It thus happens that nearly all the evidence for the prosecution is in the form of affidavits. The first finding of fact relates to the admission of defendant to the bar, and its correctness is not questioned. The second responds to the first charge, and is as follows: "That on the 13th day of January, A. D. 1894, in the City of Grand Forks, County of Grand Forks, and State of North Dakota, the said Robert A. Eaton did commit a falsehood in this court, and before a judge thereof, by stating that he did not know the whereabouts of a certain affidavit, in the matter then and there being heard by this court; which statement he then knew to be false and untrue." Is it warranted by the evidence? As much of the same evidence bears upon all the charges, it will be convenient to summarize it briefly as a whole. Mr. Bangs and Mr. Fisk, in their joint affidavit, state their residence and their business, and their acquaintance with the defendant. State their employment by Mast, Buford & Burwell Company in the action already mentioned, and that one Hurd was secretary of said company. They state the issuance of the warrant of attachment in said action, and the levy thereof upon certain property of Mast, Buford & Burwell Company. Mr. Bangs states, on information obtained through conversation with Mr. Squires, the St. Paul attorney, that certain papers, to-wit, the summons, sheriff's return thereon, affidavit and order for publication of summons, warrant of attachment, and sheriff's return on said warrant, were sent to him by Mr. Eaton for service, and served by him upon Mr. Hurd, the secretary, and that Mr. Squires made an affidavit of service accordingly. Affiants further show that subsequently they caused to be served upon Mr. Eaton an affidavit and application and order to show cause why said attachment should not be dissolved, and the action dismissed. They then set forth the hearing of said motion before Judge Morgan, as hereinbefore stated, on January 13, 1894, and allege that upon the said date they had secured the original files in the case from the clerk of

the court, for the purpose of investigating the same; that prior to January 13, 1894, Eaton had obtained the files from their office, saying he wished to copy the affidavit of Mr. Squires, and would return the files to affiants; that he did not return them, and at said hearing before said judge Mr. Bangs asked Mr. Eaton for said files, and Mr. Eaton thereupon handed him certain papers, remarking, "Here they are;" that upon examination of the papers Mr. Bangs discovered that the original affidavit of service was gone, and another affidavit of Mr. Squires substituted therefor, and that said substituted affidavit stated that the complaint had been served upon Mr. Hurd; that, upon making the discovery, Mr. Bangs demanded of Eaton to know where the original affidavit was, and that Mr. Eaton remarked that it was all right, that he had just substituted another affidavit, whereupon Mr. Bangs declared that he desired the original affidavit, as that was the one upon which the motion was based. Mr. Eaton then stated to the court that the substituted affidavit was practically the same; that he had made the substitution by an understanding with the clerk; and that his object in so doing was to show that Mr. Squires knew Mr. Hurd to be the secretary of Mast, Buford & Burwell Company, and for no other reason. Mr. Bangs then called attention to the fact that the original affidavit contained no allegation of the service of the complaint. Mr. Eaton asked if he was sure of that, and both affiants stated that they were, because upon that fact was based one of their principal grounds for dissolution of the attachment. Mr. Eaton then asked if they were sure that no complaint had been served, and, upon being informed that affiants had received from Mr. Hurd all papers served upon him, and that there was no complaint contained among them, and upon motion that the court order the production of the original affidavit, said Eaton offered to allow the word "complaint" to be stricken out of the substituted affidavit. This offer was rejected, and the production of the original affidavit insisted upon. Bangs asked Eaton where the original affidavit was, and Eaton replied that he did not know and stated that the

substitution had been made a half hour previous; and upon being told that in that case he ought to know where the original was, he replied that he thought he left it on the clerk's table. The clerk was then called by telephone, and he stated that Mr. Eaton had placed the original in his pocket, and taken it away with him. The judge then stated to Mr. Eaton that he must have it in his pockets, whereupon Mr. Eaton made search, and failed to find it. Said Eaton again said to Mr. Bangs, in answer to a statement made by him that he (Eaton) did not know where the affidavit was, that he did not see the use of making so much fuss about it, as affiants (the attorneys) were not entitled to it, but that he had an abstract of it, which he would allow them to use. Affiants refused the abstract, and again applied to the judge to compel the production of the original. The judge then stated to Mr. Eaton: "You must have put the affidavit with some papers in your office. You had better go and see if you can find it." Eaton then left the office of Bangs & Fisk, and, after an absence, returned, and told the judge that the affidavit could not be produced. The judge then asked him, "Do you know where you put it?" He replied, "Yes." The judge asked, "Where?" and Eaton replied, "In the waste basket," and, being asked if he tore or destroyed the affidavit, he replied that he did. Thereupon the court directed the production of the pieces, and Mr. Eaton brought them in, and pasted them upon another piece of paper, and a copy is attached to the affidavit. There is nothing further in the affidavit of importance, except certain legal conclusions, which, of course, establish no fact.

The affidavit of Mr. Squires shows his connection with the case of *Cordage Company* v. *Mast, Buford & Burwell Company* and how it came to the hands of Mr. Eaton, and states that on October 7, 1893, he received a letter from Mr. Eaton, inclosing certain papers in the case, which he served upon Mr. Hurd, and returned the original, with affidavit of service, to Mr. Eaton. (A copy of the letter and affidavit are attached.) On December 31, 1893, affiant received another letter, inclosing another affidavit of service. He

examined the affidavit, and found it fuller than first one, but did not compare, to see if papers enumerated were the same. He verified the affidavit, and returned it. It was not until in February following that he learned that the last mentioned affidavit stated that the complaint had been served, as well as the papers mentioned in the first affidavit of service, or that any point had been made by reason of failure to serve said complaint. Affiant further states that he wished to explain the matter to the District Court of Grand Forks County, but was assured by Mr. Bangs that it was not necessary.

The first letter, inclosing papers for service was as follows:

"Office of Eaton & Higbee, Attorneys, Grand Forks, North Dakota, October 6th, 1893. Mr. George C. Squires, St. Paul, Minn.,—Dear Sir: We inclose you herewith original summons, sheriff's return thereto, in the case of the *Cordage Co.* v. *Mast, Buford & Burwell Co.* Please see that personal service is gotten upon the defendant to-morrow, the 7th inst, without fail. Have proper return made of the proceedings, and return to us by first mail. We inclose copy for service and your files. Yours, truly, Eaton & Higbee."

The first affidavit of service was as follows:

"State of Minnesota, County of Ramsey—ss.: George C. Squires, of St. Paul, in said county, being duly sworn, says: That he served the attached papers in the case of G. Weaver Loper and Edward F. C. Young, receivers of the property of the National Cordage Company, a corporation organized under the laws of the State of New Jersey, plaintiffs, against Mast, Buford & Burwell Company, a corporation organized and existing under and by virtue of the laws of the State of Minnesota, defendant, now pending in the District Court for the County of Grand Forks, viz. the summons, sheriff's return thereon, affidavit and order for publication of summons, warrant of attachment, and sheriff's return on said warrant, upon the said defendant, Mast, Buford & Burwell Company, at said St. Paul, on the 7th day of October, 1893, by then and there handing to and leaving with J.

D. Hurd, the secretary of said defendant, true and correct copies of said papers, and each of them. Affiant further says that at the same time and place he also served upon said defendant a copy of the affidavit of R. A. Eaton for the writ of attachment in said action, and a copy of the undertaking on said attachment, by then and there handing said last mentioned copies to said Hurd, and leaving same with him. George C. Squires."

"Subscribed and sworn to before me this 7th day of October, A. D. 1893. Fitzhugh Burns, Notary Public, Ramsey County, Minnesota. [Notarial Seal."]

From the letter of December 30, 1893, inclosing the second affidavit of service, we quote: "Dear Sir: We inclose you herewith a blank form of affidavit in the Cordage case against Mast, Buford & Burwell Company, which we would thank you to execute and return to us. The defendant by its attorneys, Bangs & Fisk, appeared specially, objected to the jurisdiction of the court, and moved to set aside the attachment. In thus 'moving' they of course submit themselves to the jurisdiction of the court, and waive all objections that they make, except the following: (1) That the affidavit of attachment does not state facts sufficient to constitute a cause of action, and (2) that the surety on the undertaking is a practicing attorney. They also allege that no service of summons has ever been made upon the defendant, upon any of its officers, managing agents, or other persons upon whom service may be made as provided by law. As your affidavit is not explicit in some particulars, we have concluded to ask for the one submitted, to have on hand in case it is needed." The letter then proceeds to discuss the points raised by the motion, and, among others, the point as to the insufficiency of an attorney as surety, on an attachment bond. (Mr. Eaton was the surety in that case.) On this point the letter cites *Towle* v. *Bradley*, (S. D.) 50 N. W. 1057, "which is a pat case against us, and we have no doubt the attachment will fail if this case is presented."

The affidavit of Mr. Hassell, the clerk of the court, set forth that Mr. Eaton came to him at his house about noon of said

January 13th, and requested affiant to go with him to affiant's office. On reaching there, Eaton had the files in the Cordage Company Case, and said he wished to substitute another affidavit of service. The clerk told him that would be irregular, and that he would not be responsible for the consequences. Eaton said he would be responsible, and removed the old affidavit, and attached another one, which was marked filed on that date, and entered upon the register of actions. Mr. Hassell was also sworn at the hearing, but added but little to his affidavit, and stated that he did not know whether the original affidavit of service was marked "Filed" or not, but it was attached to the package of papers which was filed.

With an admission that Mr. Eaton was a member of the bar, the evidence for the prosecution closed. We have given it quite fully. The evidence for the defense can be stated more briefly. One W. L. Miller, an attorney, was employed in Mr. Eaton's office during the time of the transactions involved in this case. He was present in the office of Bangs & Fisk when the motion to discharge the attachment was heard. He testified by affidavit, and his testimony covers many points not brought out in the affidavit of Mr. Bangs and Mr. Fisk. Mr. Eaton, and Mr. Dresden, his stenographer, were also sworn for the defense. From the testimony of these witnesses the following undisputed facts appear: The time for answering in the Cordage Company Case had expired, and the papers were prepared for judgment for want of an appearance and answer, but, when presented to Judge Templeton, he refused to sign the order for judgment, stating that he had just signed the order to show cause why the attachment should not be discharged, and the case dismissed; and that he understood that the claim would be made that the complaint had not been served. While Mr. Eaton was absent from the office on this business, the order to show cause was left with Mr. Miller, who refused to accept service. When Mr. Eaton returned, they went through the objections, and failed to find nonservice of the complaint alleged as one of them; and Eaton remarked that

it must be a mistake, as he was sure the complaint had been sent to Squires, but that it made no difference, as they had not raised the point. Subsequently Mr. Eaton desired more time before the hearing of the motion to discharge the attachment, and asked it as a favor of Bangs & Fisk, but was refused, whereupon he served notice of an application to the judge, based on affidavit, for more time for the hearing. This affidavit, it seems, contained some aspersions upon the courtesy of Bangs & Fisk, and at the hearing of the application some sharp language passed between Mr. Bangs and Mr. Eaton. Mr. Eaton had been admitted to practice in 1891, and had but little experience on questions of practice. Mr. Miller had still less, having been admitted in 1893. Mr. Eaton was counseling with Mr. Cochrane, an experienced attorney, in the Cordage Company Case. Mr. Cochrane pronounced the affidavit of service made by Mr. Squires insufficient, for the reason that it did not show that Mr. Squires knew Mr. Hurd, upon whom the papers were served, to be the secretary of the defendant corporation. It was for that reason principally that a new affidavit was required. All the persons connected with Mr. Eaton's office believed at this time that a copy of the complaint had been sent to Mr. Squires, and that its ommission in the return was an oversight. The original affidavit of service was attached to the files by Mr. Miller without any instructions from Mr. Eaton. Just how the files were returned to the clerk's office is not clear, as all the persons employed in Mr. Eaton's office disclaim returning them. Mr. Eaton swears that he knew nothing about the affidavit of service being attached until he went to make up the papers for judgment, that he never ordered it filed, it was not marked "Filed," and he did not consider it filed. As to what transpired at the hearing before Judge Morgan, there is but little difference between the witnesses, except the witnesses for the defense give Mr. Eaton's explanation of the substitution of affidavits more in full, and state more of the conversation that passed between the attorneys, showing some warmth of feeling. They also state that the judge, when directing Mr. Eaton to pro-

duce the pieces of the affidavit that had been torn up, stated that he had no doubt of Mr. Eaton's good faith. The defendant also introduced the application to the court for the order discharging the attachment in the Cordage Company Case, and dismissing the case. There are five grounds stated in the application. The first is an attack upon the affidavit upon which the warrant of attachment was based. The second is an attack upon the attachment bond, because signed by Mr. Eaton, an attorney, as surety. The third is an attack upon the affidavit for the order of publication, and the fourth is upon the order itself. The last asserts: "That no service of the summons in the above entitled action has ever been made on the defendant corporation, or on the president or other officer, managing agent, or other person on whom the service of summons may, under the provisions of the laws of this state, be made, either personally or by publication," and that no appearance has been made, except a special one, and no publication of summons commenced. The order of the court on the application directed the Cordage Company to show cause why the attachment should not be discharged, and the action dismissed, for the reason particularly set forth in said application." The defendant also introduced a letter written by Mr. Eaton to Mr. Squires on January 3, 1894, wherein, in speaking of the defect in the attachment bond, Mr. Eaton says, "We haven't a leg to stand on." But he takes the position that the appearance of Bangs & Fisk was a general appearance, and the case could be pressed to personal judgment, and this the evidence shows was the position taken by him on the hearing of the application to dismiss.

We have given the substance of all the evidence having any bearing on the issues, and we return now to the second finding, which declares the defendant guilty of committing falsehood in the court, and before a judge thereof, in stating that he did not know the whereabouts of the first affidavit of service made by Mr. Squires. The evidence shows that as soon as attention was called to the fact that the original affidavit was gone, and a new one substituted, Mr. Eaton at once explained when it was done.

A heated colloquy followed between Mr. Bangs and Mr. Eaton. Mr. Bangs insisted upon having the original, Mr. Eaton insisted that counsel was not entitled to it, and stated, in answer to an inquiry from Mr. Bangs, that he did not know where it was. We think he did not know where it was, although that is not certain from the evidence. If he did, his denial was inexcusible, from a moral standpoint. But that allegation was not made to the court, or in response to any inquiry by the court. It was directed to Mr. Bangs exclusively. When the court asked that the affidavit be produced, Mr. Eaton, after visiting his office, promptly informed the court that it had been torn up, and thrown in the waste basket. The evidence does not warrant the finding if the finding intends to convey the idea that the assertion of Mr. Eaton was made to the court, or for the purpose of in any manner misleading or deceiving the court; and, unless so made, it does not come within the statute. Mr. Eaton's statement was rash, inconsiderate, and improper, but in mitigation we must not close our eyes to the surroundings as disclosed by the evidence. The court in *Re Eldridge*, 82 N. Y. 167, thus speaks of an attorney: "His professional life is full of adversaries. Always in front of him there is an antagonist, sometimes angry and occasionally bitter and venomous." The facts shown by the evidence in this respect furnish no cause for disbarment or suspension under the statute.

The third finding is as follows: "That on the 11th day of January, A. D. 1894, in said City of Grand Forks, the said Robert A. Eaton did, with intent to deceive this court, and a judge thereof, offer to establish his standing in court in an action then pending in this court wherein G. Weaver Loper and Edward F. C. Young, receivers of the National Cordage Company, were plaintiffs, and Mast, Buford & Burwell Company, a corporation, was defendant, and for such purpose presented to the court as proof of service a certain affidavit by him prepared, and subscribed and sworn to by one George C. Squires, a part of the allegations of which affidavit the said Robert A. Eaton then knew to be false and untrue in this: that in said affidavit by the said Eaton

prepared it was alleged that the complaint in the said action was duly served upon the defendant, when as a matter of fact no such complaint was ever served by the said Eaton, or by any one in his behalf or at his instance." We notice first, it nowhere appears by any proper evidence that the complaint was not served. Mr. Bangs and Mr. Fisk so state on information and belief, but show their source of information to be the unsworn statements of third parties. This does not prove the fact. Mr. Squires swears he did serve it, and in a subsequent affidavit, made, as he swears, at the request of the prosecution in this case, he does not retract or modify his former sworn statement. Mr. Hurd, on whom the service was made, was easily accessible, but he does not testify by affidavit or otherwise. The fact of nonservice of the compaint, if it be a fact, was vital to this part of the case, and was so easily susceptible of proof that the absence of all proof is very suggestive. But, be that as it may, after a most careful consideration of the evidence, we are clear that Mr. Eaton had good reason to believe that the complaint had been served. The original files were sent to Mr. Squires. There is no claim that the complaint was not in the files. Mr. Eaton, Mr. Miller, and Mr. Dresden all testify that they thought the complaint was sent. An argument is sought to be made against Mr. Eaton's good faith in the matter because the complaint is not named in the letter of transmissal of October 6, 1893; but reference to the original affidavit of service shows that several papers were served that were not mentioned in the letter, thus conclusively showing that the letter did not name all the papers transmitted. Another argument is based upon the fact that in his letter transmitting the second affidavit to Mr. Squires no mention is made of the fact that the word "complaint" had been inserted. But that was not the only or most important change from the first affidavit. The letter said: "As your affidavit is not explicit in some particulars, we have concluded to ask for the one submitted, to have on hand in case it is needed." Thus the attention of Mr. Squires was directly called to the fact that the second affidavit differed from the first, and we have no

right to assume that Mr. Eaton expected it would be sworn to without the differences being noticed. The evidence does not warrant the third finding of fact.

The fourth finding is as follows: "That on or about the 13th day of January, A. D. 1894, in the city, county, and state aforesaid, the said Robert A. Eaton took from the files of the office of the clerk of this court a certain affidavit, which had been regularly filed and deposited with said clerk in the said case of G. Weaver Loper and Edward F. C. Young, receivers of the National Cordage Company, a corporation, for which he substituted another and different affidavit, one of the allegations of which said last named affidavit said Eaton then knew to be false and untrue; that in the said substituted affidavit it was stated that a copy of the complaint in said action had been upon a certain date served upon defendant, when in fact no such service had been made." What we have already said disposes of that portion of this finding which declares that Mr. Eaton knew that the allegation in the substituted affidavit as to service was untrue. Mr Eaton frankly admits that he substituted one affidavit of service for another. The change was made at the clerk's office, and the affidavit that was removed was attached to the papers in the case. It was not marked "Filed." The papers in the case were not at that time in the possession of the clerk. Mr. Eaton had them, and he obtained them from Bangs & Fisk. He had never authorized the affidavit to be attached or to be filed. If no proof of service had been filed, Mr. Eaton, of course, had a right to file the amended or second affidavit. If proof of service had been filed, the court would, on application, permit amended proof as of course; but such amended proof should not be filed, or the former proof withdrawn, without leave. In this case the original papers were fastened together, and marked "Filed" on the wrapper. Subsequently they were withdrawn from the files, and while so withdrawn the first affidavit of service was attached. If thereafter the papers were delivered to the clerk of the court

with intent to have the affidavit of service filed, then, legally, it would be filed, although not so marked; but, if not so delivered, it was not filed, and Mr. Eaton's act was proper. Whether the affidavit was technically on file is not material in this case. It was removed openly, and under such circumstances as precluded any possibility of deceiving anyone. The second affidavit was marked filed on that date, although Mr. Eaton knew the first had been in the hands of opposite counsel. When the change was suggested, he promptly avowed it, and gave the reasons therefor. The record shows that he deemed it of but little importance He thought the attachment must go down for another reason, and that the appearance had been such as to cure all defects in the service. If he made a mistake in thinking the first affidavit had not been filed, it was an innocent mistake, honestly made, and harmed no one. The judge declared at the time that he did not doubt Mr. Eaton's good faith. The mistake, if such it be, must be charged to youth and inexperience, and, standing by itself, does not come within the letter or the spirit of our disbarment statute.

The fifth finding is as follows: "That on the 13th day of January, A. D. 1894, in said city, county, and state, the said Robert A. Eaton, after taking from the files of the clerk of said court the affidavit first mentioned in the last preceding finding, did mutilate and destroy said affidavit, the same having been previously regularly filed and deposited in the office of the clerk of said court." The fact that Mr. Eaton destroyed the affidavit stands admitted. All the other statements in the finding have been sufficiently discussed. All that can be claimed from the record is that it shows that Mr. Eaton made a false statement to another attorney, but in the presence of the court, and that he innocently removed a paper from the files of the court, and destroyed the same. These acts are reprehensible, and deserving of censure, but they furnish no ground, under our statute for, disbarment or suspension.

In discussing the evidence we have treated it in all respects in

the manner most favorable to the prosecution, and this case must not be regarded as indicating the manner in which similar cases will be treated hereafter. The uniform current of authority requires the charges in cases of this character to be established by a clear and undoubted preponderance of testimony. Weeks, Attys. 175, 176, and cases cited in note; *People* v. *Harvey*, 41 Ill. 277; *In re O*———(Wis.) 42 N. W. 221. The judgment of the District Court is reversed, and that court directed to dismiss the disbarment proceedings.

Reversed.

CORLISS, J., did not sit on the case, or take part in its decision.

WALLIN, C. J. (concurring.) Inasmuch as the court sitting in this proceeding consisted of but two judges, I deem it proper to avow my personal views in express terms. I do not wish to amplify upon the views of my associate as embodied in the principal opinion in the case; but do desire to say that I fully concur in what is said in that opinion. The evidence in the record impresses me with the fact that the appellant, at most, has been guilty of only a degree of indiscretion and rashness which can be fully accounted for by his lack of professional experience in court practice. Aside from this one matter the excellence of the appellant's moral character was conceded upon the argument in this court by the able and reputable counsel who conducted the prosecution. In the disbarment case, even if the scale were doubtful, I should consider a previous good character as being a makeweight of capital importance. To an attorney the disastrous consequences of a disbarment from practice can hardly be exaggerated. A great jurist has said: "It would often entail poverty upon himself and destitution upon his family. Surely the tremendous power of inflicting such a punishment should never be permitted to be exercised unless absolutely necessary to protect the court and the public from one shown by the clearest legal proof to be unfit to be a member of an honorable profession." See dissent of Mr. Justice Field in *Ex parte* Wall, 107 U. S. 318, 2 Sup. Ct. 569.

(62 N. W. Rep. 597.)

N. SWENSON *vs.* F. GREENLAND.

Opinion filed February 5th, 1895.

Lien for Personal Property Taxes—When Attaches.

A lien for taxes upon personal property arising under § 90, Ch. 132, Laws 1890, does not attach until after a tax has been assessed and levied; nor until "after the time the tax books are received by the county treasurer" of the county where such tax is assessed and levied.

Action to Foreclose Lien—Complaint.

In an action brought to foreclose an alleged lien for such taxes there were no averments in the complaint that the tax claimed to be a lien was ever assessed or levied, and no averment that the treasurer of the county in question ever received the tax books in the years in question. *Held*, that such complaint is insufficient. In such actions the general presumption that public officers have done their duty will not supply the place of material averments of fact which are omitted from the complaint.

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

Action by N. Swenson against F. Greenland. From an order overruling a demurrer to the amended complaint, defendant appeals.

Reversed.

J. E. Robinson, for appellant.

In the complaint no attempt was made to state facts showing a valid tax. *O'Neil* v. *Tyler*, 3 N. D. 47; *Miller* v. *Hurford*, 12 N. W. Rep. 832; *Brown* v. *Corbin*, 40 Minn. 508, 42 N. W. Rep. 481; *Weiner* v. *Porter*, 42 Mich. 569.

David Bartlet, for respondent.

Contended that the validity of the tax, the levy and tax warrant is presumed until the contrary is alleged and proven.

WALLIN, C. J. The plaintiff, by his amended complaint, states his cause of action as follows: "*First.* That on the 2d day of December, 1892, George L. Virgo made, executed, and delivered to Henry Retzlaff his two promissory notes, $100 each, payable February 1, 1893, and, to secure the payment

of the same, executed and delivered to the said Retzlaff a chattel mortgage upon all his household goods and furniture. *Second.* That afterwards said notes and mortgage were, for value, transferred to Taylor Crum, who is now the owner and holder thereof; that said Crum did on the———day of———, 1894, place said mortgage in the hands of defendant, Greenland, for foreclosure, the same being in default; that said Greenland, as the agent of said Crum, took possession of said mortgaged property, and advertised, foreclosed, and sold the same in accordance with law. *Third.* That after said Greenland, as the agent of said Crum, took possession of said property, and prior to the sale thereof, this plaintiff, as the treasurer of Griggs County, N. D., caused said property to be levied upon for the sum of $52.71, said amount being the unpaid personal property taxes of said Virgo for the years 1892 and 1893, the taxes for 1892 being $44.98, and the taxes for 1893 being $7.73; that $15 of said sum was for taxes levied against the identical property then in the hands of defendant, Greenland; that the balance of said sum was for taxes levied against other personal property of said Virgo; that out of the proceeds of the sale of said property said Greenland retained and now holds the sum of $52.71, subject to the determination of the rights of the plaintiff thereto. Wherefore plaintiff prays that he may have judgment against the defendant for the sum of $52.71, and for his costs." Defendant demurred to the amended complaint, on the ground that it does not state facts sufficient to constitute a cause of action. The District Court overruled the demurrer, and defendant appeals from the order.

We are of the opinion that the learned trial Court erred in overruling the demurrer. It is difficult to understand from the language of the complaint just what the purpose of the action is, but it seems to be the plaintiff's purpose to foreclose an alleged lien for taxes arising under § 90, Ch. 132, Laws 1890, which provides: "The taxes assessed upon personal property shall be a lien upon the personal property of the person assessed from and after the time the tax books are received by the county

treasurer." Section 51 of the same chapter provides: "The county auditor shall deliver the lists of the several districts of the county to the county treasurer, on or before the first day of December in each year, taking his receipt therefor, and such lists shall be full and sufficient authority for the county treasurer to receive and collect taxes thereon levied." It appears by the terms of the statute (section 90) that the lien does not arise at or upon any specified date or time, dut does arise upon the occurrence of an event which is specified in terms, *i. e.* "from and after the time the tax books are received by the county treasurer." It will be noticed that the lien claimed by the plaintiff is for the taxes of 1892 and 1893, but nowhere in the complaint is it alleged that the tax books of Griggs County were delivered to or received by the county treasurer of that county in said years, or in either of said years. We think the omitted averments are essential. The complaint fails to show that the tax books were delivered to the treasurer prior to the execution and delivery of the mortgage, or at any time; hence it fails to aver the condition or the event upon which alone the statutory lien can arise. The respondent's counsel claims in the brief submitted to this court that "the question of the validity of the tax, the levy, or the tax warrant cannot be considered in this action. This is presumed until the contrary is alleged or proven." We are aware of no such presumption in a case like this. It is true that there is a general legal presumption that public officers have done their duty, but this presumption is never strong enough to supply an omitted allegation of any substantive fact. *U. S.* v. *Ross*, 92 U. S. 281. In tax cases, especially where the proceedings are invitum, the presumption that officers have performed their duty is not available in favor of a party who is seeking to enforce a disputed tax. On the contrary, in such cases all the essential steps leading up to a valid tax must be alleged and proven by the party who is seeking to enforce the tax. The statutory presumptions in favor of the validity of a tax deed are not available to the plaintiff in this case. There is no tax deed. See *O'Neil* v. *Tyler*, 3 N. D. 47, 53 N. W. 434.

As we have stated, the fact of the treasurer's receiving the tax books is made a condition of any tax lien upon personal property. This condition is therefore essential, and cannot be presumed. The point is, in our opinion, fatal to the complaint. But other facts quite as material are omitted. There is an entire absence of any allegations showing or tending to show that any taxes were ever "assessed," and no sufficient averment that a tax was levied in Griggs County in the year 1892 or 1893. A tax must be such before it becomes a lien. The statute says: "The taxes assessed upon personal property shall be a lien," etc. Section 90, *supra*. The complaint fails to state that taxes of 1892–93 were assessed, or attempted to be assessed; nor is there any property allegation of a levy or an attempted levy. It is well settled that, in an action to recover a tax or enforce a tax lien, all the material steps upon which a valid tax depends must be stated in the complaint. This court had occasion to apply this doctrine in *O'Neil* v. *Tyler*, 3 N. D. 47, 53 N. W. 434. See opinion, pages 66, 67, 3 N. D., and page 440, 53 N. W., and cases there cited; also, 25 Am. & Eng. Enc. Law, p. 320; also, Id. p. 321, and notes 1 and 2. It is conceded that the defendant, as agent of the mortgagee, is legally entitled to the proceeds of the sale, unless such proceeds may be taken from him to pay an alleged tax, which, if it exists, is a burden upon the property. In such a case all steps essential to the validity of the tax must be alleged. The plaintiff has the *onus probandi*. None of the essential facts are alleged.

It follows that the demurrer to the amended complaint was well taken, and should have been sustained, and that the order overruling the demurrer was error. The order must be reversed, and the trial court will be directed to reverse the same, and enter an order sustaining the demurrer. All concur.

(62 N. W. Rep. 603.)

CHARLES BISHOP *vs.* CHICAGO, MILWAUKEE AND ST. PAUL RY. CO.

Opinion filed February 7th, 1895.

Conflicting Evidence—Verdict Undisturbed.

Where the evidence is conflicting upon a question of negligence, the verdict will not be set aside on the ground of the insufficiency of the evidence. Evidence examined, and *held*, the evidence being conflicting, that the verdict will not be set aside in this case upon such ground.

Stock Killing—Private Crossing.

In an action against a railroad company for negligently killing an animal at a private crossing, put in by the defendant for the plaintiff's use in passing from one part of his farm to another, the question of negligence is usually a question for the jury. *Held*, under the evidence in this case, that the question of negligence was properly submitted to the jury.

Care Commensurate With Danger.

A colt belonging to the plaintiff was turned loose to feed upon the plaintiff's land, and, while attempting to pass across the railroad track upon such crossing, was killed by defendant's cars. *Held*: *First*, that such animal was not, when killed, a trespassing animal, but was lawfully upon the crossing; *second*, that defendant in running its trains, was bound to exercise due care in approaching and passing over such private crossing, and is bound to anticipate that animals and persons may be rightfully upon its right-of-way at the point of crossing. The care must be commensurate with the danger reasonably to be apprehended at the point of intersection.

Improper Evidence Favorable to Objecting Party.

Certain testimony was allowed to go before the jury against defendant's objection thereto. Such evidence examined, and found to be wholly favorable to the defendant. *Held*, that, if the evidence was improperly admitted, the ruling admitting the same was error without prejudice.

Evidence Withdrawn from Jury's Consideration.

In its instructions to the jury the trial court pointed out certain testimony which had been admitted against defendant's objection thereto, and distinctly informed the jury that, for reasons which were stated, such testimony was withdrawn from the case, and must not be considered at all by the jury. *Held*, under the circumstances of this case, that the error, if error there was, in admitting such evidence, was cured by such instructions to the jury. Whether such withdrawal would cure the error in all cases not decided.

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

Action by Charles Bishop against the Chicago, Milwaukee &

St. Paul Railway Company. Plaintiff had judgment and defendant appeals.

Affirmed.

John H. Perry, for appellant.

James M. Austin, for respondent.

WALLIN, C. J. This action was brought to recover damages. The averments of the complaint are, in substance, that the defendant negligently killed the plaintiff's colt, of the value of $100, by running one of its trains over said colt. Defendant answered the complaint, denying the negligence charged in the complaint, and admitting the killing, and the value of the colt, as stated in the complaint. Certain concomitant facts are uncontroverted, and may be stated as follows: It is conceded that defendant's railroad passes over and divides the plaintiff's farm. That plaintiff's house and stable are located about eight rods from the crossing hereafter mentioned, and upon the east side of the track. Upon the west side of the track a part of the plaintiff's land is cultivated, and upon the day of the killing certain of the plaintiff's straw stacks were standing about 40 rods from the track and crossing. Long prior to the killing, and at plaintiff's request therefor, the defendant had constructed a private crossing over its railroad for plaintiff's use, and to enable the plaintiff to pass and repass and to drive his stock from one part of his land to another; and others besides the plaintiff were in the habit of driving over such crossing. The colt in question was killed upon the crossing, and when killed was in the act of running from the west to the east side of the track. The colt was killed some time near the middle of the day. In the morning of that day the plaintiff's horses, several in number, including the colt, were let out of the plaintiff's stable, and turned loose by the plaintiff. The horses were turned loose to enable them to cross over the railroad and feed near the stacks on the west side of the track, upon wheat which had been left uncut. As has been seen, the answer admitted the killing, and the alleged value of the colt.

Such admissions, under § 5501, Comp. Laws, operated to make out a case of constructive negligence against the railroad company. *Hodgins* v. *Railroad Co.*, 3 N. D. 382, 56 N. W. 139. To rebut the *prima facie* case so made out the defendant put the engineer and fireman who were managing the engine which did the killing upon the stand as witnesses. Their testimony was substantially the same upon vital points, and was to the effect that the danger of the colt was first discovered by the engineer at a time when the train was approximately distant from the crossing between 300 and 400 feet, and was moving at the rate of 20 or 25 miles an hour towards the crossing. The distance of the colt from the crossing when its peril was first discovered by the engineer was, according to the testimony of the engineer and fireman, between two and three hundred feet. The train consisted of the engine and three cars, one of which was a passenger car. The train was behind time, and running faster than usual. The engineer testified: "Immediately on discovering the peril of the animal, I reversed the engine, and blew the alarm signal, and done all that might be done to stop the engine on my part, before I struck the animal. I did this immediately on discovering the danger of the animal. * * * As soon as I saw the animal, I reversed the engine; that is, to give it the full pressure on the front end,—that is to stop the engine just as quick as you can. I sounded the alarm, and tried to stop just as quick as you can. The train was running on a forward motion at the time: I reversed the engine, and pulled the throttle wide open. I pulled the throttle clear out, so as to give the full pressure of the boiler on the back motion. That has the effect of stopping the train. * * * I have been in the railroad business quite a number of years. The train could not be stopped between the time I first discovered the animal and the time of striking it. * * * The animal was running quite fast." The fireman testified: "I rang the bell after the engineer gave the alarm to set brakes. He gave several blasts of the whistle. I rang the bell after he gave the alarm. I rang the bell until after we crossed the crossing;

until after we struck the horse. The animal when I first discovered it, was from 100 to 300 feet from the track. The animal was opposite the crossing. It was running like, on the gallop, towards the track at the crossing. At the time, we were from 200 to 300 feet from the crossing." The testimony of the engineer and firemen apparently made out a case tending strongly to show due care in operating the train at and just before the colt was struck by the train, but the plaintiff put upon the stand a number of witnesses whose testimony bears directly upon the question of due care. It will serve no good purpose to reproduce the plaintiff's testimony here. It must suffice to say that there was a conflict of evidence as to the time when the engineer discovered the peril of the colt, as evidenced by the ringing of the bell; also a conflict as to when the alarm whistle first sounded to scare the colt away from the track; also as to whether or not the engime was reversed at all, as testified to by the engineer. There being a conflict in the evidence upon these features of the principal question at issue,—the question of negligence,—we are clear that the trial court did not err in denying the motion to direct a verdict for the defendant. Negligence, except in the case of constructive negligence arising upon the statute above cited, is generally, and almost always, a question of pure fact. Where the evidence is conflicting, it becomes the province of the jury to consider the evidence, and determine the facts from the evidence. There being conflicting evidence in this case upon the question of negligence, the point that the verdict is not supported by the evidence, which is also assigned as error, must be overruled.

The charge of the learned trial court was pertinent to the facts in issue, and no exception was taken thereto. We are unable to see wherein the jury disregarded the law as laid down to them in the court's charge. Hence the error assigned by the defendant, that the verdict is "against law," must be overruled. Among other things, the court instructed the jury as follows: "In cases of crossings where persons have a right to be on the railroad track, it is the duty of the railway company to keep a more care-

ful lookout, take greater pains, exercise greater precaution, to avoid the injury; and therefore, if you find from this case that the the animal was killed on the crossing, and the animal was using the crossing for the purpose of passing back to Mr. Bishop's barn, then you will require of the railway company greater caution than if the animal was a mere trespasser. I will instruct you further: That even upon the crossing the railway company has the better right to use the track. The right of the railway company is a superior right. A person who has a private crossing over railroad tracks, and he is aware of the times when trains pass, in using the crossing for the purpose of driving stock back and forth there is a duty also upon him to take care that his stock does not interfere with the trains, and he must do the best he can to guard against injury." These instructions, we think, state the law correctly. The colt, when killed, could not be regarded as a trespassing animal, nor were the plaintiff's horses unlawfully at large. It follows that the train men, in approaching the crossing, were not at liberty to assume in advance that animals would not be upon its tracks at the crossing. On the contrary, the fact that they were approaching a crossing devolved upon the men in charge of the train the duty of keeping a special lookout to avoid a collision with persons or animals that might be lawfully upon such crossing. The care should be commensurate with the danger to be reasonably apprehended. This general rule imposes upon railroads the duty of exercising exceptional care at all crossings, because upon a crossing there is a greater reason than at other places to apprehend danger from collisions with persons and domestic animals. The rule that no duty is laid upon trainmen to anticipate that a trespassing animal will come upon the track, as laid down in *Palmer* v. *Railroad Co.*, (Minn.) 33 N. W. 707, and cited by defendant's counsel, does not apply to the facts in this record. See 4 Am. & Eng. Enc. Law, pp. 915, 916, and authorities cited. Whether a railroad company exercises due care in approaching a private crossing is usually a question of fact for the jury. Id.

Against defendant's objection, the following question was asked the engineer on cross-examination: "You were keeping a good lookout?" The witness answered, "Yes sir." The ruling on the admission of this testimony is assigned as error. We are clear that the question was properly asked. It was clearly competent, as bearing upon the question of due care in approaching a private crossing, where the danger of collision with persons and animals was enhanced. But, if the question had been improper, the testimony elicited but was wholly favorable to the defendant, and was therefore entirely nonprejudicial. The engineer was asked, "Was there any air brakes upon this train at the time?" and answered, "There was not." He was then asked, "If there had been air brakes on this train at that time, in what distance could you have stopped the train?" The witness answered, "About 400 feet." This testimony was objected to on the grounds that it was immaterial and irrelevant to the issues in the case. The issue being tried was that of negligence or want of due care in operating the train which caused the injury. We think it was proper to show what the appliances for controlling the train were, and whether such appliances were in common use, and were promptly and efficiently set in motion to control the train as soon as the danger was discovered. It would be true also that the defendant could properly show that air brakes which are used on some trains are not an appliance in common use on trains like that in question. If the latter fact should appear by the evidence, it would, of course, be the duty of the court to charge the jury that the absence of air brakes did not constitute negligence in operating the train in question. In the case before us, however, in the opinion of the trial court the evidence fell short of showing that air brakes were an appliance in common use upon trains like that in question, and accordingly withdrew from the consideration of the jury all the evidence relating to air brakes. The court instructed the jury as follows: "In the first place, gentlemen, I wish to say that all the testimony that has been offered here with reference to air brakes, and in reference to the distance in which a

train may be stopped with air brakes, is withdrawn. That is stricken out, and in determining your verdict you will not consider it. It is not in this case. You will consider this case as though no such testimony had been offered. Plaintiff's Counsel: The engineer of the company, as a witness in this case, showed that he was an expert, and also that the train might have been stopped in less time than with ordinary hand brakes. By the Court: The ruling of the court is based upon the ground that the testimony was not followed up by satisfactory evidence that the air brake is an appliance in common use. The court cannot take judicial notice that the air brake is an ordinary appliance in railroad management." This instruction, of course, was favorable to the defendant. The point does not involve the mere withdrawal of evidence by counsel. There is a conflict of authority as to whether the explicit withdrawal of evidence, when done by the court in charging the jury, will operate to cure an error which may be involved in its admission. *Prima facie*, and under the prevailing rule, such withdrawal does cure the error. Thomp. Trials, § § 723, 351, and cases cited in the notes. Also, Id. § 2354, and *State* v. *McGahey*, 3 N. D. 293, 55 N. W. 753. We think no inflexible rule need be laid down in this case. In the case under consderation the verdict has ample support in the evidence, aside from the evidence relating to air brakes which was withdrawn. We are of the opinion that under the circumstances existing in this case the admission of the evidence, followed by its subsequent withdrawal by the court, could not have operated to prejudice the substantial rights of the defendant.

Finding no prejudicial error in the record, the judgment will be affirmed. All concur.

(62 N. W Rep. 605.)

LOUISIANA E. MOORE *vs.* LEWIS E. BOOKER, *et al.*

Opinion filed September 11th, 1894.
On Rehearing February 25th, 1895.

Depositions—Notice of Street and Number of Notary Before Whom Taken.

In the absence of any showing of prejudice, it is not error to refuse to suppress a deposition, taken in another state on notice, because the notice did not locate the office of the notary before whom such deposition was to be taken by street and number.

Certificate to Deposition—What to Contain.

It is not error to refuse to suppress a deposition for the reason that it does not appear in the certificate of the officer taking the deposition or elsewhere that the officer was not a relative of either party, or otherwise interested in the action. Such fact, if it exist, must be made to appear affirmatively. Our statute does not require the certificate to speak upon that point.

Assumption of Mortgage by Grantee.

Where a grantee of real property assumed the payment of an incumbrance thereon, such contract of assumption is an original undertaking on his part, distinct from the contract of purchase. It may be contained in the conveyance, or it may be by separate writing, or it may rest entirely in parol.

Pleadings Amended to Correspond with Proof.

The original complaint alleged a purchase by R., for and as the agent of B., of certain realty, and that B., through said agent, promised and agreed to pay the incumbrances thereon. In an action to foreclose such incumbrances both B. and R. were made parties defendant, and a personal judgment for deficiency asked against them. All of plaintiff's testimony supported the original complaint, but the testimony of defendant R. disclosed that the purchase was for the joint benefit of B. and R. The court found such joint purchase, and ordered the complaint amended accordingly. *Held*, no abuse of discretion.

Finding of Fact Construed to Support Conclusion of Law.

In construing an ambiguous finding of fact made by the trial court, it is proper for the appellate court to consider all the findings, in order to determine what was intended; and it is the duty of the appellate court, when it can be done without violence to the language used, to so construe a finding as to support a conclusion of law that follows.

Agent When Personally Bound by Agreements.

When a party, purporting to act as the agent of another, makes certain promises and agreements on behalf of his principal, if such party was at the time acting in his own interest, or in a matter in which he and his alleged principal were jointly interested, then such person will be personally bound upon such promises and agreements.

Amendment of Record on Appeal—How Made.

ON REHEARING.

When, upon appeal from the District Court, the original papers are sent to the Supreme Court, and when the case has been fully argued and submitted in this court upon such record, the trial court has thereafter no authority or power to amend or correct such record, unless, upon application to this court, the record is remanded for such purposes.

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

Action by Louisiana E. Moore against Lewis E. Booker, George W. Ryan, and others to foreclose mortgages. Plaintiff had judgment, and defendants Booker and Ryan appeal.

Reversed.

W. J. Kneeshaw, for appellants.

The court erred in denying defendants motion to suppress depositions—the notice not specifying the place or office at which the depositions were to be taken. *Lucas* v. *Richardson*, 10 Pac. Rep. 183; *Williams* v. *Chadbourne*, 6 Cal. 559. It does not appear by the certificate of the notary or elsewhere that the notary taking the depositions was not a relative of either party, or otherwise interested in the action. Section 5287, Comp. Laws; *Dye* v. *Bailey*, 2 Cal. 383; *Thompson* v. *Clay*, 27 N. W. Rep. 699; *Gartside Coal Co.* v. *Maxwell*, 20 Fed. Rep. 187; *Donahue* v. *Roberts*, 19 Fed. Rep. 863; *East Tenn. V. & G. R. Co.* v. *Arnold*, 12 S. W. Rep. 439. The certificate should show that the deposition was first read to or by the witness before he signed it. *Ball* v. *Sykes*, 30 N. W. Rep. 929; *Sabine, etc. Ry. Co.* v. *Broussard*, 7 S. W. Rep. 374. A vendee by accepting a conveyance subject to a prior mortgage does not thereby become personally liable for the debt represented by such mortgage. *Lewis* v. *Day*, 5 N. W. Rep. 753. Parole evidence is inadmissable to prove the understanding of the parties as to the meaning of words in a contract which are neither obscure nor technical. *Bullock* v. *Consumers Lumber Co.*, 31 Pac. Rep. 367; *Halston Salt Co.* v. *Campbell*, 16 S. E. Rep. 274. Preliminary negotiations are merged in the subsequent writing and cannot be proved to vary it. *Hardin* v. *Kelley*, 15 S. E. Rep. 894; *R. R. Co.* v. *Shomo*, 16 S. E. Rep. 220; *Persson*

v. *Arkenberg*, 12 N. Y. Supp. 555; *Taylor* v. *Davis*, 52 N. W. Rep. 756; *Jacob* v. *Shenon*, 29 Pac. Rep. 44; *Fisburne* v. *Smith*, 13 S. E. Rep. 525; *Casselberry* v. *Warren*, 40 Ill. App. 628; *Nuttenacht* v. *Slevin*, 22 N. Y. Supp. 131; *Rigdon* v. *Conley*, 30 N. E. Rep. 1060; *Packer* v. *Roberts*, 29 N. E. Rep. 668; *Ladd* v. *Farrar*, 17 S. W. Rep. 55; *Plano Mfg. Co.* v. *Root*, 3 N. D. 165; *Spurr* v. *Andrews*, 88 Mass. 420. It was an abuse of discretion for the court after trial to order the complaint amended to correspond with the proof and finding because the amendment changed substantially plaintiff's claim. Section 4938, Comp. Laws; *Hallelan* v. *Roughan*, 22 N. W. Rep. 163; *Raw* v. *Minn. Val. R. Co.*, 13 Minn. 442; *N. C. & S. C. Co.* v. *Kidd*, 37 Cal. 282.

E. W. Conmy, (*N. C. Young* and *Cochrane & Feetham*, of counsel,) for respondent.

The notice to take depositions sufficiently described the place. *Britton* v. *Berry*, 30 N. W. Rep. 254; *Ketsher* v. *Ayers*, 46 Cal. 82; *Sayles* v. *Stewart*, 5 Wis. 8; *Vawter* v. *Hultz*, 20 S. W. Rep. 690. The statute does not require the deposition to be read over to a witness before he signs it. *Britton* v. *Berry*, 30 N. W. Rep. 254. It will be presumed that the notary is not interested or of kin to either party to the action until the contrary is shown. *Gregg* v. *Mallett*, 15 S. E. Rep. 936; *Welborne* v. *Downing*, 11 S. W. Rep. 501; *Sheriff* v. *Hull*, 37 Ia. 174; *Turner* v. *Hardin*, 45 N. W. Rep. 758; *Cook* v. *Shorthill*, 48 N. W. Rep. 84. It will be presumed that sufficient ground was laid for the introduction of depositions in the absence of an affirmative showing to the contrary. *Cal. Gold Mining Co.* v. *Noonan*, 3 Dak. 189. The consideration named in a deed is not conclusive evidence of the true consideration, but parole evidence is admissable to show that a different kind or amount was agreed upon. 5 Am. & Eng. Enc. Law, 436. Testimony otherwise competent, taken upon commission is not to be rejected because not responsive to the interrogatory. *Fassin* v. *Hubbard*, 55 N. Y. 471; *St. Anthouy* v. *Eastman*,

20 Minn. 277, 159. The court did not abuse its discretion in amending the complaint to correspond with the proofs and findings. *Caledonia Gold Mining Co.* v. *Noonan*, 3 Dak. 189; *Bowers* v. *Thomas*, 22 N. W. Rep. 710; *Flanders* v. *Cottrell*, 36 Wis. 564; *Stiller* v. *Ry. Co.*, 49 Wis. 613; *Marchrietz* v. *Wright*, 50 Wis. 175; *Canton* v. *Shepard*, 1 N. W. Rep. 205; *Evarts* v. *Smucker*, 26 N. W. Rep. 596; *Ault* v. *Wheeler & Wilson Mfg. Co.*, 11 N. W. Rep. 554. A verbal promise to assume and pay a mortgage is valid and may be enforced in equity not only by the grantor but by the holder of the mortgage. 3 Pom. Eq. Jur, 1206; 1 Jones on Mort. 750. The contract of assumption is independent of the deed. The verbal agreement is additional thereto, it does not vary the terms of the contract and is not merged therein. *Canfield* v. *Sheare*, 13 N. W. Rep. 605; *N. Y. Life Ins. Co.* v. *Atkin*, 4 N. Y. 879; *Society of Friends* v. *Hames*, 25 N. E. Rep. 119. If the amount of the mortgage debt formed part of the consideration to be paid by the vendee he is estopped from refusing responsibility. *Cooper* v. *Foss*, 19 N. W. Rep. 506; *Shamp* v. *Myer*, 29 N. W. Rep. 379; *Keedle* v. *Flack*, 44 N. W. Rep. 34. The purchaser of mortgaged property may by agreement assume the debt and make himself personally liable. The agreement to assume the debt may be a verbal or written contemporaneous agreement and evidence may be introduced to explain the contract. Greenl. on Ev. § 286; *Ely* v. *Wright*, 30 How. Pr. 97; *Merriman* v. *Moore*, 90 Pa. St. 78; *Putney* v. *Farnham*, 27 Wis. 187; *Bowen* v. *Kurtz*, 37 Ia. 239. Where the mortgagor sells the mortgaged property subject to the mortgage and the amount of the mortgage debt is deducted from the price, the purchaser is personally bound to pay off the mortgage. *Ferris* v. *Crawford*, 2 Denio, 595; *Smith* v. *Trustow*, 84 N. Y. 660; *Ely* v. *McNight*, 30 How. Pr. 97; *Techenor* v. *Dodd*, 4 N. J. Eq. 454; *Townsend* v. *Ward*, 27 Conn. 610; *McMahon* v. *Stewart*, 23 Ind. 590; *Reed* v. *Vreeland*, 30 N. J. Eq. 591; *Thayer* v. *Torrey*, 37 N. J. L. 339; *Bristol Sav. Bk.* v. *Stigert*, 53 N. W. Rep. 265.

BARTHOLOMEW, C. J. This was an action brought to foreclose

two real estate mortgages upon the same property, and the prayer asked for a personal judgment for deficiency. Louisiana E. Moore, the respondent was the original mortgagee. The defendant Barbara J. Webb, who is the daughter of respondent, was the mortgagor, and the appellants, Booker and Ryan, were charged as subsequent grantees of Webb. It was against them that the personal judgment was asked. They resisted on the ground that they never assumed the payment of the mortgages. The trial court found the issues against them. All the evidence for plaintiff, not documentary, was in form of depositions, all of which were taken at Spokane Falls, in the State of Washington, upon one notice, before one notary, and on the same day. The first assignment of error relates to the refusal of the court to exclude these depositions. At the proper time, and in the proper manner, Booker and Ryan moved to suppress the depositions, for the following reasons: "(1) That the notice does not sufficiently state the place or office at which such depositions will be taken; (2) that it does not appear, by the certificate of the notary or elsewhere, in said deposition, that the notary taking said deposition was or is not a relative of either party, or otherwise interested in the above action; (3) that it does not appear in said deposition, by certificate or otherwise, that the person who wrote said deposition was a disinterested person." Other reasons are urged in argument, but no others were assigned in the motion, and obviously no others can be now considered.

The notice of taking the depositions stated they would be taken "by and before J. B. Wood, Esq., a notary public of the State of Washington, at his office in the City of Spokane Falls, in the County of Spokane, and State of Washington." The point urged is that the notice does not specify the street or number where the office of the notary is located. But there is nothing before the court to show that the streets of Spokane Falls are named, or the buildings thereon numbered. We are not charged with judicial knowledge of the condition of all the cities of other states, or the number of inhabitants therein. *Britton* v. *Berry*, 20

Neb. 325, 30 N. W. 254. Were it otherwise, until these defendants make some showing that they desired to attend or be represented at the taking of the depositions, or make some effort to attend, or were in some manner prejudiced by the indefiniteness of the notice, we should hestitate to exclude depositions upon such a technicality.

Nor is there merit in the second objection. Section 5287 of the Compiled Laws, provides: "The officer before whom depositions are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding." The officer's certificate in this case is silent upon that point, but we do not think this raises a presumption that the statute has been violated. The presumption is the other way. If the statute has been violated, that fact must be made to affirmatively appear. *Turner* v. *Hardin*, 80 Iowa, 691, 45 N. W. 758; *Gregg* v. *Mallett*, (N. C.) 15 S. E. 936; *Colgin* v. *Redman*, 20 Ala. 650. Our statute does not require the certificate to speak upon that point.

The third objection arises from a misapprehension. The certificate states: "That the foregoing deposition of each of said witnesses was reduced to writing by Grant J. Bowan, a suitable and proper person for that purpose, in my presence, and in the presence of each of said witnesses." That is a full compliance with the statute which requires the officer to state in his certificate "that the deposition was reduced to writing by some proper person, naming him." The depositions were properly admitted.

The learned counsel for the appellants contends that the court erred in refusing to exclude from the depositions, upon his application, all parole evidence tending to prove that appellants assumed and promised to pay the mortgages existing on the real estate at the time of the sale. Counsel's argument is based, as we understand it, upon the fact that the deed by which the property was transferred contains no assumption upon the part of the grantee of the existing mortgages, the only reference thereto being in the covenant of warranty, wherein the grantor covenants that the land is free of all incumbrances except the two

mortgages here involved. Counsel cites numerous authorities illustrative of the very elementary propositions that a written contract cannot be varied, contradicted, or added to by parol; and that, when parties have deliberately put their contract in writing, such writing, in the absence of mistake or fraud, is the sole depository of their agreement, and that no evidence can be received of prior or contemporaneous conversations or understandings. The difficulty lies in the fact that these principles have no application in this case. It was entirely proper that the existing mortgages should be excepted from the covenant of warranty. But the fact does not show that the grantee did or did not assume the payment of such mortgages. The contract by which a grantee assumes the payment of existing incumbrances is separate and distinct from the conveyance. It may be, and often is, embodied in the deed; but it may be by separate writing, or it may rest entirely in parol. In either case, where, as is claimed in this instance, the amount of the incumbrance is deducted from the purchase price, and the balance only paid to the grantor, the contract to assume the incumbrance is an original promise on the part of the grantee to pay his own debt in a particular manner; and the holder of the incumbrance can take advantage of this promise, in a court of equity, and obtain a personal judgment for deficiency against the grantee. *Wright* v. *Briggs*, 99 Ind. 563; *Merriman* v. *Moore*, 90 Pa. St. 78; *Lamb* v. *Tucker*, 42 Iowa, 118; *Winans* v. *Wilkie*, 41 Mich. 264, 1 N. W. 1049; *Bolles* v. *Beach*, 22 N. J. Law, 680; *Wilson* v. *King*, 23 N. J. Eq. 150; *Johnson* v. *Harder*, 45 Iowa, 677; *Ross* v. *Kennison*, 38 Iowa, 396; *Thompson* v. *Bertram*, 14 Iowa, 476; *Vrooman* v. *Turner*, 69 N. Y. 280; *Douglass* v. *Wells*, 18 Hun. 88; *Crowell* v. *Hospital of St. Barnabus*, 27 N. J. Eq. 650; *Conover* v. *Brown*, 29 N. J. Eq. 510. And in many courts this promise to assume and pay an incumbrance may be enforced in actions at law. See Jones, Mortg. § 758, and case cited in notes.

The appellants ask to eliminate from the depositions all evidence by which it was sought to establish that appellant Ryan

was the agent of appellant Booker, based upon the statements of Ryan, made at the time of the transaction. This was refused, and the refusal was clearly error, as an agents authority, or the agency itself, cannot be established by the declarations of the alleged agent. But in the final disposition made of the case this error become entirely immaterial. At the close of plaintiff's testimony appellants moved that the case be dismissed as to them on the ground that there was no proof of authority on the part of Ryan to assume incumbrances, and no ratification of such act. The motion was denied, but appellants did not see proper to stand upon the motion, but proceeded to introduce their testimony; therefore, on the authority of *Bowman* v. *Eppinger*, 1 N. D. 21, 44 N. W. 1000, and cases therein cited, we cannot review the ruling. At the close of the testimony, appellants renewed their motion, and it was again denied. But we think the subsequent action of the court renders that ruling immaterial also. The original complaint, after alleging the execution of the notes and mortgages by Barbara J. Webb to Mrs. Moore, set up that "the defendant Barbara J. Webb, sold and conveyed to the defendant Lewis E. Booker the mortgaged premises subject to said mortgage, and the said Lewis E. Booker, through his agent, George W. Ryan, one of the defendants herein, covenanted and agreed that they would assume said mortgage, and pay off and discharge the same." That is to say, Booker, the principal, through Ryan, the agent, covenanted that the principal and the agent should do certain things. That is, of course, an impossible statement, as the principal, through the agent, cannot contract for the agent. That would be to make the principal the agent and the agent the principal. If there was any contractual obligation resting on Ryan, he made it himself. But there was no pretense in the original complaint that he contracted for himself. The only liability that could rest upon Ryan under that complaint would arise from his misrepresentations as to his agency, and that would be a liability of which respondent, Moore, could take no advantage. So far the complaint showed, Ryan was improperly in the case.

But the second finding of facts reads: "Found, that the defendant George Ryan purchased from defendant Barbara J. Webb the estate described in the complaint for the joint benefit of himself and the defendant Lewis E. Booker, and that the title to said property was taken in the name of the defendant Booker, and said Booker accepted said conveyance." The court also ordered the complaint to be amended to correspond with the findings. This was done, and the amended complaint, instead of charging a purchase by Booker, through Ryan, as agent, charged a purchase by Ryan for the joint benefit of himself and Booker; thus making, in connection with the other averments, a cause of action against Ryan as well as Booker. It is urged upon us with much force that there is no warrant in our statutes for this action of the court, or, if warranted by law, still it was an abuse of discretion. Doubtless the trial court acted under § 4938, Comp. Laws, which reads: "The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." It is first urged that the evidence does not establish the fact which the court found, and with which the pleading was made to conform. We think otherwise. In the first place, the joint answer of the appellants to the original complaint states: "Defendants admit the purchase of the property set forth and described in plaintiff's complaint from Barbara J. Webb, and admit that they purchased the same subject to the mortgage against said property." This, standing alone, in view of the peculiar language of the complaint, might not be conclusive upon appellants; but Mr. Ryan went upon the stand as a witness for himself and Mr. Booker, and in his testimony he clearly states that he bought property for himself and Mr. Booker. He claims that he had no antecedent authority from Mr. Booker; that he made the purchase on his

own responsibility; took the deed in Booker's name; that Booker accepted the deed; and, when the matter was explained to him, he was fully satisfied. This evidence clearly sustains the findings, and it comes from appellants.

Did the amendment change substantially the claim or defense? The claim in the original complaint, so far as the appeal involves it, was for a personal judgment for deficiency against appellants. Under the amended complaint it is not different, and under either complaint the claim grows out of the same transaction. The defense that the incumbrances were not assumed is as complete to one complaint as the other. The amendment was a matter entirely within the sound discretion of the trial court, and we cannot say that such discretion was abused. The court found as follows: "Found, that as a part of the purchase price of said property the defendant Ryan agreed to pay the debts secured by the mortgages described in the complaint; that said defendants, Booker and Ryan, have not paid the said debts, nor any part thereof." If the judgment against Mr. Booker can be sustained, it must be upon this finding. Upon its face, the language would rather appear to exclude any promise by or in behalf of Mr. Booker. But the finding is fragmentary and ambiguous. All the findings should be construed together. From the second finding it appears that Ryan was the party who carried on and concluded the negotiations for the purchase, but that the purchase was for the joint benefit of himself and Booker. It may be only fair, then, to say that when, in the next finding, the court says that Ryan promised, it was speaking of him in the capacity in which the former finding showed him to be acting—*i. e.* in his own behalf, and as agent for Booker. It is our duty, also, in this connection, to remember that these findings are followed by a conclusion of law to the effect that plaintiff was entitled to a personal judgment for deficiency against these defendants. Without a finding of a promise to pay or assume the incumbrance, binding upon Mr. Booker, this conclusion would be clearly and palpably unwarranted. These considerations lead my associates to the conclu-

sion that what the court intended to find and what it did in fact find was that Ryan, for himself and as agent for Booker, promised, etc. It is constantly urged upon us that there is no evidence that Ryan had any authority from Booker to assume the mortgages. This was not necessary. Ryan himself testified to the purchase by him for their joint benefit; that he took the conveyance in Mr. Booker's name, and forwarded it to him; that he drew upon the bank of which Mr. Booker was president for the cash payment of $2,000, and that his draft was honored, and that Mr. Booker was well satisfied with the arrangements. He also testified that at the same time, and as a part of the same deal, he purchased from the same grantor, and for the joint benefit of himself and Mr. Booker, several other parcels of realty, and as part payment therefor he assumed certain debts of the grantor, which were subsequently paid by the grantees. These facts establish an agency broad enough in its terms to warrant the agent in assuming these mortgages. In so doing the agent simply provided for payment in a manner that required less ready money to close the transaction. See *Schley* v. *Fryer*, 100 N. Y. 71, 2 N. E. 280.

The findings are sufficient to warrant the judgment, if they are supported by the evidence, and this is the only remaining question. The original complaint charged a purchase by Booker, through Ryan as agent. The complaint was in that condition when the testimony was taken, and all the evidence on the part of plaintiff tended to support the complaint. There is no claim of any individual promise on the part of Mr. Ryan. He simply claimed to be representing Mr. Booker; but if he was in fact representing himself alone, or jointly with another, he would be personally bound by any promise he made on behalf of his fictitious or assumed principal. The evidence of a joint purchase came from defendants' witness, and they cannot complain that the court so found. Plaintiff's witnesses testified only to the representations of Mr. Ryan. Their evidence upon that point may be entirely true, and yet the purchase may have been in fact for the joint benefit of these defendants. But four witnesses for plaintiff

testify with more or less directness that Ryan promised to assume and pay off these incumbrances. This Mr. Ryan contradicts unqualifiedly, and there are many facts and circumstances in the case that seem to corroborate him, but it is too clear for hesitation that in this condition of the testimony we cannot say that the finding of the trial court was against the clear preponderance of the evidence, and consequently the judgment below must in all things be affirmed.

ON REHEARING.

On the petition of appellants a rehearing was ordered in this case, mainly upon the point hereinafter discussed, and which has been fully argued by counsel for the respective parties. After the case had been argued and submitted upon the former hearing, and without any application to this court, or leave of this court in any manner obtained or requested, the respondent, on notice to appellants, applied to the Judge of the District Court to have the bill of exception in the case amended and corrected. At the appointed time counsel appeared before the Judge of the District Court, and urged the same objections against any action by that official that are urged here, which are, in effect, although in many forms, that such judge was without power or right, in the then condition of the case, to in any manner change the record. These objections were overruled, and the amendment or correction ordered, the appellants saving an exception. The amendment having been made, respondent applied to a judge of this court, under Rule 37, and obtained an order directing the clerk of the District Court to transmit the amendment to this court. This was done, and the amendment was in this court and treated as a part of the record when the former opinon was handed down. It appears that at the trial below, the plaintiff, who is respondent here, offered in evidence what purported to be a letter written by the defendant Booker to the plaintiff. The record, as it originally came to us, showed that the defendants objected to the introduction of the letter, for the reasons that the same was "incompetent, irrelevant, and immaterial, and no proper

foundation laid for its introduction." The objection was overruled, and the letter received. This, we understand, is in accord with the stenographer's notes, and appellants claim in accord with the facts. The amendment makes the record show that when the objection as above stated was made to the letter, counsel for the defendants at the same time admitted the signature to the letter to be the genuine signature of the defendant Booker. The letter is as follows: "Pembina, Dak., Sept. 14th, 1891. Mrs. L. E. Moore, San Jose, Cal.—Dear Mrs. Moore: I am just in receipt of yours written Aug. 28th, and held at your office for postage. In reply, I will not pay off the mortgage, as I only expected to get the rent of the property for the taxes I paid on the house. Now, you may have the deed of the property for your mortgages, only I want the money I paid for taxes. I did not assume the payment of the mortgages, and do not expect to pay it. You have the same protection you had before I bought the property, hence you cannot think that I am doing you any injustice. Rather than have you think so, I would lose one-half of the amount. I paid taxes, and give you a deed. Mr. Ryan bought the property, put it in my name in order to secure the money advanced, and I was to have ½ interest in the profit if anything was made upon the investment. I do not want the property myself at any reasonable price, as it is too good to rent, and is running down every day, with that Irish family in it, and there is no one here able to buy it to live in. My uncle made Mr. Ryan an offer for it, but I hardly think he wants it now, as his wife has concluded the weather is too cold here. With kindest regards and best wishes, I am, sincerely your friend, L. E. Booker." It is at once apparent that, if the letter was in fact the letter of Mr. Booker, it is competent, and quite material; and, if the signature was admitted, then the letter was properly received in evidence. On the other hand, if the signature was not admitted, and if the objection was broad enough to cover that point, the letter was improperly received. Hence the materiality of the amendment. We are all agreed that, under the circum-

stances as they existed, the trial judge could not amend or correct the bill of exceptions. As we have stated, there was no application to this court, no suggestion here of a diminution or imperfect record. Under our practice statutes, when an appeal is taken, unless the trial court expressly orders otherwise, the original papers and record in the case are transmitted to this court. No such order was made in this case, consequently the original record came to this court, and was the record of this court at the time the amendment was made. There was no record in the trial court to be amended or corrected. There is not entire uniformity in the decisions touching the power of the trial court to make orders in a case while it is pending on appeal in a higher court. In *Levi* v. *Karrick*, 15 Iowa, 444, the Supreme Court of that state said: "The simple matter of fact is that when an appeal is taken all power of the court below over the parties and the subject matter of the controversy is lost until the cause or some part thereof, is remanded back, by order of this court, for its further action." And this was reaffirmed in *Carmichael* v. *Vandeburr*, 51 Iowa, 225, 1 N. W. 477, which was an appeal from an order of the trial court refusing to entertain a motion in a case pending on appeal. In *Perry* v. *Breed*, 117 Mass. 155, the court say at page 164: "In strictness, after a bill of exceptions has been once allowed, and has been entered in this court, this court has exclusive jurisdiction of it, and the judge below cannot alter it without the authority of this court." But it is said to be the common practice in that state, on motion of either party before argument, and on cause shown, to postpone the hearing, and authorize an application to the trial court to correct the bill. See, also, *Penrice* v. *Wallis*, 37 Miss. 172; *Keyser* v. *Farr*, 105 U. S. 265; *State* v. *Jackson* (N. C.) 16 S. E. 906. The record was amended in *State* v. *Town Board*, 69 Wis. 264, 34 N. W. 123, but it was based exclusively upon the fact that the record still remained in the trial court, not even a transcript having been sent to the supreme court, although the appeal had been perfected. But see *Rehmstedt* v. *Briscoe*, 55 Wis. 616, 13 N. W. 687. In *National City Bank*

v. *New York Gold Exchange Bank*, 97 N. Y. 645, the court of appeals held that the supreme court had power to amend its record after appeal. While it is not so stated, yet it is evident that the record amended remained in the supreme court. In Elliott, App. Proc. § 205, it is said: "We have elsewhere pointed out the difference between the record of the trial court and the record on appeal, and have shown that the difference is an important one, inasmuch as over the one record power remains in the trial court, while over the other it resides exclusively in the appellate court." From these authorities it appears that, while in some jurisdictions the record remaining in the trial court may be amended or corrected by the trial court after an appeal is perfected, yet the prevailing doctrine would seem to deny any power in the trial court to change the record in any manner that would affect the disposition of the case in the appellate court, without an application to the appellate court to have the record remanded for amendment or correction. The facts of this case require us to go to no greater length than to hold that when, upon an appeal to this court, the original papers are sent up, and when the case has been argued and submitted upon the record as thus sent to this court, the trial court has thereafter no power to amend or correct the bill of exceptions as contained in the record, unless, upon application to this court, the bill is remanded for that purpose. Any other holding would be attended with great confusion, uncertainty, and delay, and ought not to be tolerated. See, also, *Chesley* v. *Boom Co.*, 39 Minn. 83, 38 N. W. 769; *Spensley* v. *Insurance Co.*, 62 Wis. 443, 22 N. W. 740.

With the amendment eliminated, the appellants insist that it was error to admit the letter in evidence over objections. Respondent claims that the objections are insufficient to raise a question on the signature. We think otherwise. The letter purported to be written by one of the defendants. Its contents related to the subject-matter in controversy. Plaintiff had a legal right to the benefit of any admissions made by Mr. Booker concerning the matter in dispute. There was but one prerequisite,—such admiss-

ions must be shown to be the defendant's admissions. If in writing, and signed, the signature must be proven. When the objection was made that "no proper foundation had been laid," it could refer only to the fact that the signature had not been proven, as no other foundation was required. Neither court nor opposing counsel could have been misled. It follows that the admission of the letter in evidence was error. Was it prejudicial error? Respondent insists that it was not, but we are unable to so hold. Error once established, prejudice will be presumed, unless it clearly appears that prejudice could not have resulted. *Comaskey* v. *Railroad Co.*, 3 N. D. 276, 55 N. W. 732; *Hegar* v. *De Groat*, 3 N. D. 354, 56 N. W. 150. The letter unmistakably conveys the impression that Ryan was interested in the property, and the court so found, although the original complaint charged a purchase by Booker, through Ryan as agent, and all of the witnesses for respondent so testified. In the absence of the alleged letter, the court might have so found. Had the court so found, it is far from certain that it could have further found that Ryan was ever authorized by Booker to make the purchase and assume the incumbrances, or that Booker ever ratified the acts of Ryan with knowledge of the facts. We think the error was prejudicial, and requires a reversal, and we reach this conclusion with less reluctance by reason of the unsatisfactory condition of the pleadings upon which the case was tried, and the difficulty we have experienced in ascertaining just what the trial court intended to find, and the basis of its conclusions. The District Court will reverse its judgment, and order a new trial.

Reversed. All concur.

CORLISS, J. (concurring). This case was tried on one theory, and decided on another some time after it had been finally submitted, and the pleadings were then ordered amended to conform to this new theory of the action. The letter, which we hold should not have been admitted in evidence, because of the failure of plaintiff to show that it was the letter of defendant Booker, appears to have been a very important factor in determining the

action of the learned trial judge in changing the whole theory of the case,—if, indeed it was not decisive in influencing his mind to make such a radical change. The findings are very ambiguous. There is no express finding that Booker ever agreed to assume the mortgage; nor does it clearly appear from the findings that he originally authorized Ryan to make the purchase, or that he ratified the same with knowledge of the fact that Ryan had agreed to assume these mortgages. These considerations alone would not, however, constrain us to reverse the judgment for the reasons stated in the opinion of Judge Bartholomew. But they would be sufficient to turn the scale, even if we were in doubt whether the defendants had been prejudiced by the reception in evidence of this letter. Moreover, a reversal would only lead to a new trial, on which the issues can be tried as now framed, and the findings on this trial will doubtless clearly disclose the theory on which the defendants are held liable, should the judgment be against them. As plaintiff's evidence is substantially in the form of depositions which can be used on the new trial, such trial will not be attended by much inconvenience or expense to her.

(62 N. W. Rep. 607.)

GARR, SCOTT & CO. *vs.* W. B. CLEMENTS.

Opinion filed February 5th, 1895.

Mechanic's Lien—Priority to Mortgage.

Chapter 88 of the Laws of 1890 gives a person who performs labor upon or furnishes the materials for a threshing engine at the request of the owner thereof a lien thereon prior to the lien of a mortgage thereon, duly filed, although such mortgage lien existed at the time such work was done or such materials were furnished, provided such person perfects such lien as required by the statute. Such lien is valid.

Appeal from District Court, Pembina County, *Lauder*, J.

Action in claim and delivery by Garr, Scott & Co. against W. B. Clements. Defendant had judgment, and plaintiffs appeal.

Affirmed.

Young & Monnet, for appellant.

The mechanic's lien law of 1890 under which the defendant claims ownership is unconstitutional. *Getchell* v. *Allen*, 34 Ia. 559; *Equitable Life Insurance Co.* v. *Slye*, 45 Ia. 615; *Meyer* v. *Berlandi*, 40 N. W. Rep. 513; *Dennison* v. *Shuler*, 11 N. W. Rep. 402; *Laird* v. *Noonan*, 20 N. W. Rep. 354.

Wm. J. Kneeshaw and *M. Brynjolfson*, for respondent.

The mechanic's lien law of 1890 was in force when the mortgage in question was executed by defendant, and the mortgage was taken with reference to the statutory law in force in the jurisdiction at the time it was made. Cobby on Chat. Mtgs., 463, 466; *Smith* v. *Stevens*, 31 N. W. Rep. 55; *Conning* v. *Ashley*, 4 N. Y. Supp. 255. The laws which subsist at the time and place of making a contract and where it is to be performed, enter into and form a part of it as if they were expressly referred to and incorporated in its terms. 3 Am. and Eng. Enc. Law, 751; *Von Hoffman* v. *Quincy*, 4 Wall. 535. A seed lien can be given priority over a chattel mortgage executed subsequent to the passage of the act. *Joslyn* v. *Smith*, 49 N. W. Rep. 382, 2 N. D. 53.

CORLISS, J. The object of this action was to recover the possession of a threshing engine. The defendant was successful in the trial court. He there obtained judgment for the return to him of the property in question, the plaintiffs having taken it under claim and delivery proceedings in the action. The plaintiffs claimed the right to the possession of the engine under a mortgage thereon executed and delivered to them by Daniels & Sullivan, to whom the plaintiffs had sold the property; the mortgage having been given to secure the purchase price thereof. This mortgage was filed in the proper office. Subsequently the defendant, who was a mechanic, boiler maker, and engineer, at the request of Daniels & Sullivan, reflued the boiler of the engine. His reasonable charges therefor were not paid. Claiming a lien under the statute (Laws 1890, Ch. 88,) he took the necessary steps to perfect such lien, and then foreclosed the same, and on the sale bought in the property. It is on this title that he rests

his defense. The plaintiffs have, under the terms of their chattel mortgage, an undoubted right to the possession of the engine, unless the sale on foreclosure of defendant's lien destroyed the lien of such chattel mortgage. Whether such sale had this effect depends on the priority of defendant's lien for the repairing of the engine. The statute under which defendant claims such priority provides as follows, so far as the question of priority is concerned: "Said lien shall have priority over all other liens or incumbrances upon said threshing engine or separator created subsequent to the passage and approval of this act, if filed within ten days from the day upon which said labor was performed or materials were furnished." See Laws 1890, Ch. 88, § 2. It is undisputed that defendant filed his lien within the statutory time. It cannot admit of doubt that the statute in terms made such a lien superior to a chattel mortgage on the property at the time the property is repaired, provided the mortgage was executed after the law took effect. The mortgage in this case was executed after this law was enacted. Hence it is obvious that, if the statute is to stand as it reads, defendant's lien was prior to that of the mortgage, and his title to the property derived from the foreclosure of that lien would therefore be unincumbered by such mortgage. But the plaintiff's assail as unconstitutional that portion of the law which gives such a lien priority over a mortgage on the property, executed, delivered, and filed before the lien was created. It is urged that there is only one ground on which a lien can lawfully be given such priority, and that that is the implied assent of the mortgagee to the creation of the lien. It is contended that, unless the owner can be regarded as the agent of the mortgagee for that purpose, his rights cannot be impaired by anything the owner may do. We will assume this position to be sound, but we are unable to deduce from it the conclusion that the statute is unconstitutional. This statute, in legal effect, informs every mortgagee in every mortgage thereafter executed that by leaving the mortgaged property in the possession of the

owner he thereby makes the owner his agent for the purpose of having necessary repairs made, the cost of which will be a first lien upon the property. Such agency has been implied from the circumstances of the case, and priority of lien given to the one who has made the repairs, without any statute giving his lien priority, or giving him a lien at all, where the circumstances are very similar to those which characterize this case. *Williams* v. *Allsup*, 10 C. B. (N. S.) 417; *Hammond* v. *Danielson*, 126 Mass. 294; *Watts* v. *Sweeney*, 127 Ind. 116, 26 N. E. 680; *Scott* v. *Delahunt*, 5 Lans. 372, on appeal; 65 N. Y. 128; Herm. Chat. Mortg. p. 308; Jones, Chat. Mortg. § § 474, 535; Browne, Civ. & Adm. Law, p. 204; Jones, Liens, § 744. See, also, *Meyer* v. *Berlandi*, (Minn.) 40 N. W. 513, 516; *White* v. *Smith*, 44 N. J. Law, 105. So far from being a radical departure from the course of the common law, this statute appears to us to be in perfect harmony with common law principles. It in terms declares a priority which the common law gave under facts similar to the facts of this case. Should such priority be given by statute to a livery stable keeper or an agister, an innovation would be made, for at common law neither had any lien whatever in the absence of an express contract for a lien. But it by no means follows that such a statute would be void because it created a lien, and gave it priority in cases where the common law recognized no lien whatever. However this may be, there is a marked difference between the mere feeding of stock, which in no way augments their value, and the repairing of a defective article of personal property, which directly adds to its value. It was because of this difference that the common law gave a lien in the latter case and withheld it in the former. The refluing of a leaky boiler is as much a benefit to the mortgagee thereof as to the owner. It increases the value of the property, and enables the owner to earn by use of the same the money with which to discharge the mortgage lien. By leaving the property in the possession of the owners, the mortgagee in this case must be deemed to have assented to the making of the necessary repairs, and to have, therefore, bound

their mortgage interest by the lien which both the common law and the statute gave to the mechanics who did the work and furnished the materials, especially in view of the fact that when they took their mortgage the statute distinctly informed them that such consequence might flow from a retention of possession by the mortgagors. The language of ERLE, J., in *Williams* v. *Allsup*, 10 C. B. (N. S.) 417, is very pertinent to this case. He says: "I put my decision on the ground that, the mortgagee having allowed the mortgagor to continue in the apparent ownership of the vessel, making it a source of profit and a means of earning wherewith to pay off the mortgage debt, the relation so created by implication entitled the mortgagor to do all that may be necessary to keep it in an efficient state for that purpose. The vessel has to be kept in a state to be available as a security for the mortgagee." There are decisions sustaining the validity of statutes similar to the one on which defendant relies to support his claim to priority. *Case* v. *Allen*, 21 Kan. 217; *Corning* v. *Ashley*, (Sup.) 4 N. Y. Supp. 255; *Smith* v. *Stevens*, 36 Minn. 303, 31 N. W. 55. See, also, *Allred* v. *Haile*, 84 Ga. 574, 10 S. E. 1095; *Jackson* v. *Kasseall*, 30 Hun. 231. The opinion in *Meyer* v. *Berlandi*, (Minn.) 40 N. W. 513, does not overrule the prior decision of the same court in *Smith* v. *Stevens*, but distinguishes the case before the court from the Smith Case. We think that the decision is a sound one. We are unable to discover a single adjudication holding void such a statute as the one in question. An unbroken line of authority, a settled rule of the common law, sound principle and a due regard for business convenience, all join to sustain this statute. It would be intolerable to require a mechanic in some remote part of the country, far from the county seat, to refrain from making necessary repairs to a threshing engine, in the very height of the threshing season, until he could search the records to ascertain whether the property was incumbered, if he did not wish to run the risk of having the fruits of his toil and the very material he should add to the property absorbed by a mortgagee who would be benefited by what the mechanic had done.

The statute in question is seriously defective. Under it the mortgagee may be divested of all interest in the property without notice that the repairs had been made, or that a lien is claimed therefor, or that the same is about to be foreclosed. In the case at bar the mortgagees do not appear to have known that a lien had been filed or foreclosed until it was too late to protect their interests. The statute should he so amended as to protect the rights of mortgagees. Many cases can be found which hold that the lien of a prior chattel mortgage is paramount. But these decisions all rest upon the construction of statutes. See *Wright* v. *Sherman*, (S. D.) 52 N. W. 1093, where such cases are collated. By pausing to interpret the statutes, instead of pushing on to the ground that it was not within legislative competence to confer priority on the lien of the mechanic or agister or livery stable keeper, the courts in these cases seem to incline to our view that such legislation is valid.

It is urged that the lien is defective in two particulars. The statute provides that to entitle a person to a lien under it he must make and file "an account in writing stating * * * the amount of labor or materials so made or furnished." The account which the defendant made and filed in this case was in the following language: "Cavalier, N. D., Sept. 26th, 1892. Messrs. Daniels & Sullivan to W. B. Clements, Dr. Cavalier Engine Works. 1892, Sept. 26th. To reflueing boiler, 24 tubes furnished new, $65.00." We hold that this is a compliance with the portion of the statute we have quoted. See, as sustaining our decision on this point. Phil. Mech. Liens, § 353; 15 Am. & Eng. Enc. Law, pp. 139, 140, and cases in note 1 on page 140. The statute further declares the account shall contain "the name of the person or persons for whom the said labor was performed or materials furnished." The account actually filed, as the copy we have set forth discloses, contained the names of Daniels & Sullivan as if they were copartners. Their Christian names were not mentioned. There was evidence showing that in the ownership and operation of this engine they were partners. In such case it is sufficient to use the

partnership name. Phil. Mech. Liens, § § 346, 348. No other objection to the lien is made.

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

(62 N. W. Rep. 640.)

EMMA TIERNEY, *et al vs.* PHOENIX INSURANCE CO.

Opinion filed February 7th, 1895.

Insurance—Insured's Interest—Evidence.

In an action on an insurance policy, defendant having proved a divestiture, before the loss, of plaintiff's interest in the insured property by virtue of foreclosure proceedings, regular and legal on their face, followed by a deed purporting to convey all defendant's interest in the property, *held*, it was error to receive in evidence as against defendant a judgment, annulling such foreclosure proceedings, in an action commenced subsequently to the loss (to which action defendant herein was not a party, and of which it had no notice,) for the purpose of establishing the fact that such foreclosure proceedings were void, and thus defeat the defense that the insured had no insurable interest in the property at the time of the loss.

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

Action on a policy of insurance by Emma Tierney and Charles A. Morton against the Phoenix Insurance Company of Brooklyn, N. Y. Plaintiffs had judgment, and defendant appeals.

Reversed.

Kitchel, Cohen & Shaw and *O. W. Francis*, for appellant.

Under the policy in suit the rights of the mortgagee were subject to be defeated by any act which defeated the rights of the mortgagor. Section 4104, Comp. Laws; *Grosvenor* v. *Atlantic F. Ins. Co.*, 17 N. Y. 395. The endorsement "Loss if any payable to Edwin Morris mortgagee as his interest may appear" is not an assignment of the policy, nor a contract to insure the mortgagees interest, but only entitles the mortgagee to payment of what the mortgagor is entitled to recover. *Continental Ins. Co.* v. *Holman*, 92 Ill. 154; *Loring* v. *Manufacturers Ins. Co.*, 8 Gray, 28; *Hale* v. *Ins. Co.*, 6 Gray, 172; *Fogg* v. *Ins. Co.*, 10 Cush. 346; *Franklin*

Savings Institute v. *Ins. Co.*, 119 Mass. 240; *Brunswick Savings Institute* v. *Ins. Co.*, 68 Me. 314; *Perry* v. *Ins. Co.*, 61 N. Y. 217. Such a clause does not in any manner waive the provision of the policy, which avoids it in case the mortgage is foreclosed. *Titus* v. *Ins. Co.*, 81 N. Y. 417; *Quinlan* v. *Ins. Co.*, 133 N. Y. 362; *Meadows* v. *Ins. Co.*, 62 Ia. 391; *Merchants Ins. Co.* v. *Brown*, 25 At. Rep. 992. The foreclosure followed by a delivery of the sheriff's deed was a clear change of title. *Lay* v. *Home Ins. Co.*, 24 Minn. 315; § 5428, Comp. Laws. And this change of interest avoided the policy.

Ball & Watson, for respondent.

CORLISS, J. Defendant, to reverse the judgment appealed from, summons to its aid the general rule of law that a judgment is, as against strangers, only evidence of its own existence; that it can never be used, as against them, to prove any other fact. Plaintiff challenges the right of defendant to invoke this rule under the facts of this controversy, claiming that it is inapplicable to this case. These two conflicting contentions present the issue we must meet and decide.

The action was upon an insurance policy issued by defendant to the plaintiff Emma Tierney upon her house in the City of Fargo, in this state. Upon this property one Edwin Morris held a mortgage. The policy contained the usual provision that the loss, if any, should be paid to the mortgagee as his interest might appear. The plaintiff Charles A. Morton claims an interest in this policy, as the assignee of this mortgage, subsequent, however, to the foreclosure and sale hereinafter mentioned. There is no controversy touching the fact of the loss by fire, or the extent of that loss, or the furnishing of proper proofs of loss. Two defenses were relied on, but only one of them need be adverted to in this opinion. Among other conditions, the policy contained the following: "The entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * * if any change,

other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants, without increase of hazard) whether by legal process or judgment, or by voluntary act of the insured." Upon trial, defendant proved that the mortgage already referred to had been foreclosed by advertisement, and the property sold, and that, after the expiration of the statutory period allowed for redemption, the foreclosure proceedings, no redemption having been made, were consummated by a deed to the purchaser, who was Edwin Morris, the then owner of the mortgage. This was before the fire which caused the loss. It is undisputed that these foreclosure proceedings are regular on their face; nor is it contended that they did not *prima facie* establish the loss by the plaintiff Emma Tierney of all insurable interest in the insured property. The defendant had therefore established a defense to the action, both under the terms of the policy and independently of them. Even in the absence of any provision in the contract against change of interest, the underwriter is exonerated from all liability if at the time of the loss the insured has no interest whatever in the insured property. Comp. Laws, § 4112; May, Ins. § 264. The loss having occurred after the foreclosure proceedings had culminated in the delivery of a deed, the defendant was not liable unless as a matter of fact these proceedings were void. The plaintiffs, fully realizing this, sought to carry the destructive force of this blow at their right to recover by an effort to establish that the foreclosure was a nullity. The evidence which they adduced for that purpose, and which the court received over defendant's objection, is here assailed on the ground that it was not competent, as against the defendant, to prove the invalidity of the foreclosure. This evidence was a judgment annulling the foreclosure proceedings, in an action to which defendant was not a party, and of which it had no notice. After the fire, the plaintiff Emma Tierney instituted an action against Edwin Morris, who was the purchaser at the foreclosure sale, and was also the owner of mortgage foreclosed at the time of the fore-

closure thereof, to secure a decree adjudging such foreclosure to be void. In that action a decree was entered annulling the foreclosure on several grounds. It was this decree that the court permitted the plaintiff to use as evidence against the defendant, a stranger to the action in which it was rendered, to prove the fact that the foreclosure proceedings were void. No other evidence was offered for that purpose. Indeed, no other evidence was necessary, according to the view of the plaintiffs' counsel; for they insist that such judgment conclusively settled this fact, as against the defendant in this action, as well as against the defendant in the action in which the judgment was rendered. If this evidence was not competent to prove this fact as against the defendant herein, then the judgment appealed from must be reversed, not only for the error committed in receiving such evidence, but also for the further reason that there was no evidence to warrant the finding that the foreclosure was void, no other evidence having been offered to prove this fact. We are agreed that such judgment proves nothing, as against the defendant, except its own existence, although the question is not free from doubt. This is the general rule. Beyond the small circle which contains parties and privies, a judgment in personam is evidence only of the fact that such a judgment has been rendered. It cannot be used to prove any other fact which it establishes as between the parties to the judgment. 2 Black, Judgm. § 600. No further citation is necessary in support of a doctrine so elementary. The rule is salutary. Nay, it is indispensable to the administration of justice. The contrary doctrine would be subversive of the fundamental principle, recognized by all civilized nations, that every one is entitled to a hearing before being affected in his person or property by the judgment of a court. As a general rule, a stranger to a litigation has no knowledge of its pendency. If by chance he learns of it, he is yet powerless to appear in it. He has no right to offer evidence or cross-examine witnesses. He cannot be heard in argument on either the law or the facts. He cannot move for a new trial. He has no right to appeal. He is utterly without voice in the proceedings.

We are unable to find any decision to support the contention of the plaintiffs, nor can we discover any reason why this case should be taken out of this elementary and wise rule. A few considerations will disclose the importance of rigidly enforcing it in a case like the one before us. The fact which alone will render defendant liable is not the judicial annulment of these foreclosure proceedings, but their actual invalidity. It is possible that they were valid, despite the decree adjudging them to be void. The court in that case may have erred as to the law, and because of this error may have adjudged void a perfectly regular and legal foreclosure. One of the grounds on which the court based its conclusion that the foreclosure was void was the failure sufficiently to advertise the property for sale. The decree does not disclose what facts were found with respect to the publication of notice of sale. There is only a general finding that the notice of foreclosure sale was not published once each week for six successive weeks. How many publications were actually made, and upon what dates, does not appear from the decree. It is true the statute requires the publication should be made once each week for six successive weeks. But how many insertions of the notice in the paper must be made, and at what times they must be made with respect to one another, and at what time the last publication must be made with reference to the day of sale, to constitute a compliance with such a requirement, is a somewhat mooted question. We have no means of ascertaining whether the court did not adjudge, in the action in which the judgment received in evidence was rendered, a publication to be insufficient which we would hold to be perfectly good. Indeed, according to plaintiff's contention that the judgment conclusively settles, as against defendant herein, the invalidity of the foreclosure, we would be compelled to hold the defendant liable, although the judgment disclosed on its face that the court had erred in holding the publication insufficient, and in annulling the foreclosure proceedings on that account; and that, as a matter of fact, the foreclosure was valid, and did pass to the purchaser the title of

the insured to the property. Had the defendant in this action been heard in the other action on the various grounds on which the foreclosure was annulled, an entirely different judgment might have resulted. In fact, no one appears to have been actually heard in that case in way of defense. The judgment was rendered on default. The complaint was unverified. There was no answer, nor was there any trial of any issue. The plaintiff in that case had a deep interest in setting aside the foreclosure. It would give her further time to save her land, which was lost to her if the foreclosure was valid. It would give her the right to possession until a new foreclosure could be made and the year for redemption should expire. In the event of the judgment annulling the foreclosure being held conclusive as against the insurance company, the plaintiff would be able to pay the mortgage debt out of the insurance money, and have a balance left for herself, besides regaining unincumbered the land she had utterly lost if the foreclosure proceedings were valid and were to stand. The defendant, also, in that action may have had an interest in the annulment of the foreclosure if the judgment therein would be effectual to settle, as against the insurance company, the fact that the foreclosure was void. The property which he bought in for the amount of his mortgage and the expenses of the foreclosure—a sum less than $1,000—may have become so lessened in value by the destruction by fire of a house thereon worth over $1,000 that he could not get out of the property, so stripped of its building, the money he had put in the property, unless he could collect the insurance money. It is certain that he did not defend the suit, and it is also true that the action was not brought until after the house had been burned. These facts and considerations are adverted to, not to show that there was collusion in the case in which the judgment was rendered, for defendant's counsel disclaims any purpose to urge the fact of collusion against this judgment, but they are referred to as affording illustrations of the wisdom of the general rule which we apply in this case, and the great danger of ignoring it in a litigation presenting

the features which this case does. If a judgment rendered under the circumstances to which we have alluded is evidence against a stranger of any fact which the judgment establishes as between the parties to it, such stranger may easily be made the victim of unprovable collusion which may accomplish its purpose without a syllable of perjury. An unverified complaint may be followed by an answer putting in issue all of its allegations. On the trial, defendant may admit in open court that all the averments of the complaint are true. A verdict will follow, culminating in a judgment which, upon the face of the record, will appear to be the result of a *bona fide* contest, but which in reality is no more than the echo of an admission of the defendant in his own interest, the interest he has of settling a fact in his own favor as against one who is powerless to prevent the judgment. To prove collusion under such circumstances, or, indeed, in any case, is extremely difficult, and in many instances it will be impossible to prove it. To protect strangers to an action against the machinations of those who would seek collusively to bind him by the judgment therein, the only safe course is to adhere rigidly to the general rule that the judgment proves, as against such stranger, merely its own existence. And, aside from this consideration, it is contrary to the spirit of modern civilization to deny a litigant the right to be heard on all questions of law and fact that affect his interests.

We are referred to the case of *Insurance Co.* v. *Sampson*, 38 Ohio St. 672, as being an express authority for plaintiffs. That case is clearly distinguishable from the case at bar. In that case it appears that, after a sale of the insured property had been confirmed by the court, the fire occurred; and thereafter, but at the same term, the order confirming the sale were set aside, and another sale of the property ordered. The court held that the facts showed that the insured had not lost all insurable interest at the time of the fire. There was no provision in the policy relating to a change of interest in the property, but the question was whether the insured had before the fire lost all insurable interest

in the property, as it is only a total extinction of all interest before loss which will work a destruction of the underwriter's liability when the policy is silent on the subject. That which would divest the insured in that case of all interest was a confirmation of the sale by the court. It is true that an order confirming the sale had been entered previous to the fire, and had not been set aside at the time the fire occurred. But the sale had not been finally confirmed at that time. During the same term the order might be set aside. As a matter of fact, it was set aside during such term. The common law touching the power of the court over its orders and judgments while the term lasts prevailed in Ohio at this time. Until the term at which the order of confirmation was made had come to an end, that order was in the breast of the court, and might be set aside, even without notice to the parties. The sale had been tentatively, but not finally, confirmed. When the order of confirmation was vacated, it was as though it had never been made. In legal contemplation, the sale had never been confirmed. The question there was not whether a valid sale had been made, for a valid sale alone would not divest the insured of all interest in the property, but the vital inquiry was whether that sale had been confirmed, for without confirmation the insured would still retain an insurable interest in the premises. The order vacating the order of confirmation was received in evidence, not to prove that the sale was invalid, but to show that the sale had never, in legal contemplation, been confirmed. The only competent evidence of this fact—indeed, the only evidence which could possibly be procured—was the order itself, which, under a settled rule of practice, established that the prior order of confirmation, in the eye of the law, had never had any existence. It is upon this ground that the court held that the insured had not lost his interest in the property, and that the insurance company was therefore liable. The question before us was not involved in that case, was not discussed in the opinion, nor do we find any allusion to it in the briefs of counsel.

It is urged that the case falls within the rule that a judgment is

always evidence against a stranger when relied upon by any person as a muniment of title. This rule is well settled. *Barr* v. *Gratz's Heirs*, 4 Wheat. 213; 1 Greenl. Ev. § 539; 1 Whart. Ev. § 821; Freem. Judgm. § 416. But the facts of this case do not bring it within this rule. The utmost scope of the doctrine is that a person establishing his title may offer in evidence a judgment in the chain of title, although neither the plaintiff nor the defendant in the action in which such judgment is offered in evidence was a party thereto. But such judgment can never be used as evidence when the same is hostile to the claim of the other party. It cannot be received as proof against the title of the one by whom it is offered. The plaintiff, to make out his right in ejectment, must affirmatively prove his own title. To do this he may use any judgment in the chain of his title, the same as a conveyance. But the moment he attempts by means of such judgment to cut off the right of the defendant—to oppose to his claim of title an adjudication inimical to such claim—the general rule applies that the judgment is evidence of its own existence, and no more. To illustrate this distinction, we will take the case of a contest between two persons claiming remotely, under different conveyances, from a common grantor. The plaintiff, to establish his *prima facie* title, may put in evidence all judgments in his claim of title subsequent to the deed under which he claims. These judgments in no manner affect the defendant or prejudice his rights. His contest reaches back to a period antedating them all. He attacks the deed from the common grantor under which plaintiff claims, and that alone. The plaintiff merely uses the subsequent judgments to show that he has succeeded to the interest of the grantee in the deed so assailed. He puts them in evidence the same as any ordinary conveyance. See *Barr* v. *Gratz's Heirs*, 4 Wheat. 213–220; Freem. Judgm. § 416. But an entirely different case would be presented, and one calling for the application of a radically different principle, if the plaintiff should seek to defeat the original deed from the common grantor under which defendant claims, by a judg-

ment annulling such deed, in an action to which defendant was not a party, rendered after defendant had bought the property. In such a case the defendant, being neither a party nor a privy, would not be bound by such judgment, and it could not be received in evidence to destroy his title. To allow it the effect to cut off the defendant's rights would be to accord to it a wider operation than the mere establishment of plaintiffs' title. It would in such a case not only be a muniment of plaintiffs' title, but also a conclusive barrier to defendant's claim to the property. The statement by Judge Story in *Barr* v. *Gratz's Heirs*, 4 Wheat. 213, at page 220, of this rule invoked by counsel for respondents, accords with the views we have just expressed. He says: "Another error alleged is that the court allowed a decree of the circuit court in the chancery suit between Michael Gratz and John Craig and others to be given in evidence to the jury. In our opinion, this record was clearly admissable. It is true that, in general, judgments and decrees are evidence only in suits between parties and privies. But the doctrine is wholly inapplicable to a case like the present, where the decree is not introduced as *per se* binding upon any rights of the other party, but is an introductory fact to a link in the chain of the plaintiffs' title, and constituting a part of the muniments of his estate. Without establishing the existence of a decree, it would be impossible to establish the legal validity of the deed from Robert Johnson, to the lessors of plaintiffs, which was made under the authority of that decree; and, under such circumstances, to reject the proof of the decree would be in effect to declare that no title derived under a decree in chancery was of any validity except in a suit between parties and privies, so that in a suit by or against a stranger it would be a mere nullity. It might with as much propriety be argued that the plaintiff was not at liberty to prove any other title deeds in this suit, because they were *res inter alios acta*." In the case at bar the judgment was not offered for the mere purpose of establishing a link in a chain of title in a contest over the title to land. In fact, there was not contest between two persons, each claiming

title to the property in question. The judgmcnt was used by the plaintiff, with the sanction of the court, "as *per se* binding upon the rights of the other party," *i. e.* the insurance company, which was neither a party to the judgment nor in privity with any party thereto. And it was used for the sole purpose of establishing conclusively the fact that the forclosure was void.

In stating the general doctrine that a judgment is not evidence as against strangers, except in a qualified way, we have hitherto omitted an important element from our statement of the doctrine. This was done that we might consider this element by itself. The doctrine is not that a judgment is evidence against strangers of its own existence merely, but that it is also evidence against a stranger of the legal consequences resulting from the fact that such a judgment was rendered. Mr. Greenleaf says that a judgment is "the only proper legal evidence of itself, and is conclusive evidence of the fact of the rendition of the judgment, and of all the legal consequences resulting from that fact, whoever may be the parties to the suit in which it is offered in evidence." 1 Greenl. Ev. § 538. See, also, Whart. Ev. § 823; 2 Black, Judgm. § 604; Freem. Judgm. § 416; 7 Am. & Eng. Enc. Law, p. 76. As broadly stated by Mr. Greenleaf, the rule would embrace this case. The legal consequence of the judgment received in evidence was that, as between the parties to that action, the foreclosure was adjudged to be void. But when we examine the cases cited to sustain this doctrine we find none which will warrant the sweeping statement made by Mr. Greenleaf in enunciating the rule. Such a statement would carry the rule so far as seriously to impair the value of the general rule to which it is an exception. An illustration will suffice to show this. B., it is claimed, has at the point of a pistol wrested from A. a conveyance of his property. Immediately thereafter, B. sells the property to C., who buys in good faith and for value. A. promptly moves to protect his alleged rights. A. secures a decree adjudging his deed to be void from the time of delivery. The legal consequence of this decree is to destroy B.'s title under the deed; to show that it

never existed. A. now sues C. for possession of the property, and offers in evidence the judgment in the case against B. as conclusively establishing the invalidity of the deed to B., and hence the invalidity of the deed to C., who could not obtain title from a person who had no title. If the rule is correctly stated by Mr. Greenleaf, the judgment settles this question of B.'s title as against C., although a stranger to the judgment, for the legal consequence of that judgment is that B. never had any title to the property at all. But it is obvious that this judgment would not conclude C. on this question, he not having been made a party to the action, unless the courts are prepared to throw away the substance of the rule that one must be heard on a question before it is conclusively settled against him. Certain legal consequences which flow from a judgment are established by it as against a stranger, but these are never consequences which directly affect the substantial rights of such stranger, but only such as incidentally touch them. In an action to set aside a deed as fraudulent as to creditors of the grantor, a judgment against the grantor conclusively establishes the relation of creditor and debtor between the parties to the judgment, even as against the grantee in the action to set aside the transfer to him. 2 Black, Judgm. § 605. Whether the plaintiff is a creditor of the grantor only remotely affects the grantee. This fact gives him the status which will enable him to attack the conveyance if fraudulent, but the question still remains whether it is fraudulent, and that question the grantee has a right to insist shall be tried in the action against him; and, if the judgment in the action by the creditor against the grantor should attempt to settle it, that judgment would be ineffectual, to that extent, as against the grantee. If the legal consequences of a judgment, when pushed to their extreme logical position, will directly affect the rights of a stranger to the judgment, such judgment is not evidence against the stranger in that respect. No case can be found holding the contrary. See *Maloney* v. *Finnegan*, (Minn.) 41 N. W. 979, 980.

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

(62 N. W. Rep. 642.)

STATE *vs.* MYRON R. KENT.

Opinion filed March 20th, 1895.

Prejudice of Judge—"May" Construed as "Must."

When a person on trial for felony presents to the judge of the district in which the indictment is pending his affidavit stating that he cannot have an impartial trial, by reason of the *bias* and prejudice of such judge, it is the absolute duty of such judge to call in another judge to try the case. For him to refuse to do so is error. The word "may," in the statute (§ 7312, Comp. Laws,) must be construed as "must," under a familiar rule of construction.

Nonresident Attorney Assisting Prosecution.

It is not error for the trial judge to permit an attorney who is neither a resident nor a member of the bar of this state, but is a nonresident of this state, and who is employed solely by relatives of the person for whose murder the accused is being tried, to assist the prosecuting attorney on the trial, the latter having requested the judge that such counsel be permitted to aid him in the case.

One Who Directs a Murder is Principal.

Under § 7260, Comp. Laws, it is proper to charge as principal in the homicide one who counsels and directs a murder, and who therefore would have been an accessory before the fact at common law. The information or indictment may aver that he himself fired the fatal shot, which was in fact fired by the one he instigated to commit the crime.

Latitude of Cross-examination—Accomplice.

Great latitude should be allowed in the cross-examination of an accomplice. Hence, it was error for the court to refuse to allow counsel for the accused to ask the accomplice, who had, by his own testimony, made out a case of murder against himself, whether he expected to be hung.

Credibility of Accomplice—Inquiry as to Prosecution.

Held, further, that it was error to refuse to permit counsel for the accused to prove, as bearing upon the credibility of the accomplice, that no proceedings whatever had been instituted against him for the murder he had confessedly committed, although several months had elapsed since he had confessed his connection with the crime.

Corroboration of Accomplice.

In this state, no person can be convicted on the uncorroborated testimony of an accomplice. Comp. Laws, § 7384. The corroboration must come from some source independent of the accomplice. But it is not necessary that the corroborating evidence should be sufficient in itself to support a conviction. It is enough of it tends to connect the accused with the commission of the offense.

It must, however, tend to connect the accused with the commission of the crime. Evidence corroborating the accomplice as to the fact that a crime has been committed, or with respect to the fact that the accomplice is guilty thereof, will not satisfy the requirements of the statutes.

Evidence of Written Instructions to Accomplice.

Instructions given by the accused to the accomplice touching the story the latter was to tell in explanation of the killing may be sworn to by the accomplice; and it is not error for the court to receive in evidence a book in which such instructions were written down by the accomplice, when the latter swears he wrote them down as they were given to him by the accused, and under his direction.

Witness May Translate His Own Memoranda of Instructions.

Nor was it error for the court to allow the accomplice, who was a Bohemian, to translate into English these written instructtons, which he himself had written in the book in the Bohemian dialect, he having testified to his ability to make the translation correctly.

Error to District Court, Morton County; *Winchester*, J.

Myron R. Kent, having been convicted of murder, brings error. Reversed.

M. A. Hildreth, *J. E. Campbell* and *J. G. Perrault*, for plaintiff in error.

The word "may" as used in the last clause of § 7312, Comp. Laws, is mandatory. *State* v. *Henning*, 54 N. W. Rep. 536; *State* v. *Palmer*, 57 N. W. Rep. 490; *Goldsby* v. *State*, 18 Ind. 147; *Merhan* v. *State*, 44 Ind. 598; *Manley* v. *State*, 52 Ind. 215; *Dinginnis* v. *State*, 66 Ind. 350; *State* v. *Nerumn*, 49 Conn. 233; *Kane* v. *Forth*, 70 Ill. 587; *Com.* v. *Smith*, 111 Mass. 407; Potters Dwarris on Stats. 220; Endlich on Int. of Stats. 416. Permitting F. M. Nye to appear as private prosecutor with the states attorney was illegal. 1 Bish. Cr. Pro. § 988; *Miester* v. *People*, 1 Am. Cr. Repts. 91; *State* v. *Russell*, 53 N. W. Rep. 441. The sheriff was a witness for the prosecution and the special venire issued to him should have been set aside on defendants motion. *Peo.* v. *Coyodo*, 40 Cal. 592; *Peo.* v. *Welsh*, 49 Cal. 174. Kent is charged with having killed deceased, the evidence showed that he only advised it. If there is a variance between the allegation and the proof, this is usually fatal. *Green* v. *State*, 1 Am. Cr.

Repts. 645; *Boyd* v. *Com.*, 4 Am. Cr. R. 145; *Peo.* v. *Durman*, 106 N. Y. 502; *State* v. *Vorey*, 43 N. W. Rep. 324; 1 Chitty Cr. L. 168, 171; *State* v. *Fallon*, 2 N. D. 510. It was necessary to charge Kent, with having advised, aided and abetted the commission of the homicide. *Peo.* v. *Swartz*, 32 Cal. 160; *Peo.* v. *Trim*, 39 Cal. 75; *Peo.* v. *Campbell*, 40 Cal. 129; *Com.* v. *Mulligan*, 8 Cr. L. Mag. 639; *Peo.* v. *Thrall*, 50 Cal. 415. Admission of improper evidence is reversible error, even though the other evidence in the case was sufficient to sustain a conviction. *Queen* v. *Gibson*, 7 Am. Cr. R. 171; *Somerville* v. *State*, 6 Tex. App. 433. Any statement of Swedensky, not a part of the criminal enterprise and made after the homicide was consummated was inadmissable. *Peo.* v. *Stone*, 13 Hun. 265; 3 Rice on Ev. 902. Before the acts and declarations of the confederate could be proved against Kent, it was necessary to prove *prima facie* that he Kent had conspired with this confederate to murder deceased. 1 Greenl. on Ev. 3; *Peo.* v. *Bennett*, 49 N. Y. 144. It was therefore error to permit Swedensky to testify as to the book and to translate it. *Armsby* v. *Peo.*, 53 N. Y. 472; *McKenzie* v. *State*, 25 S. W. Rep. 426; *Brown* v. *U. S.*, 150 U. S. 93; *State* v. *Green*, 18 S. E. Rep. 933; *State* v. *Beaucleigh*, 4 S. W. Rep. 666; *Wylie* v. *State*, 3 S. W. Rep. 570; *State* v. *Melrose*, 12 S. W. Rep. 250; *Peo.* v. *Pavlik*, 3 N. Y. Supp. 232; *Peo.* v. *Sharp*, 14 N. E. Rep. 319; *Lewis* v. *Com.*, 11 S. W. Rep. 444. It was competent to show that no steps had been taken looking to the prosecution of Swedensky. Abbott's Cl. Bf. 384; *Peo.* v. *Whipple*, 9 Cow. 708; *Peo.* v. *Langtree*, 64 Cal. 256.

H. G. Voss and (*John F. Cowan*, Atty Gen'l,) for defendant in error.

The word "may" as used in § 7312, Comp. Laws, means permissible only. *Territory* v. *Smith*, (Mss.;) *Gould* v. *Hahes*, 19 Ala; 492; *Turnpike Co.* v. *Miller*, 5 Johns Ch. 113; *Kane* v. *Fort*, 70 Ill. 582. It was proper for counsel to assist the states attorney in the prosecution. *Polin* v. *State*, 16 N. W. Rep. 898; *Bradshaw* v. *State*, 22 N. W. Rep. 363; *State* v. *Crafton*, 56 N. W. Rep. 257;

State v. *Shreves*, 47 N. W. Rep. 899; *Com.* v. *Williams*, 2 Cush. 582; *Gardner* v. *State*, 26 At. Rep. 30; 5 Am. & Eng. Enc. Law, 718. One who at common law would be an accessory before the fact, must now be indicted, tried and punished as a principal, and no additional facts need be alleged in any indictment against such accessory than are required in an indictment against his principal. *Peo.* v. *Blevin*, 112 N. Y. 79; *Campbell* v. *Com.*, 84 Pa. 187; *State* v. *Hessin*, 12 N. W. Rep. 77; *State* v. *Phelps*, 59 N. W. Rep. 471; *Peo.* v. *Rozelle*, 20 Pac. Rep. 36; *State* v. *Duncan*, 35 Pac. Rep. 117; *Peo.* v. *Anteveras*, 48 Cal. 19.

CORLISS, J. The plaintiff in error was convicted of the crime of murder. The jury, under the statute, decided that he should suffer death. Comp. Laws, § 6449. Having been sentenced to be hung, he obtained a writ of error, and the whole case is now before us for review.

The first point we will consider relates to the information. In it the accused is charged as principal. The information alleges that he himself held and discharged the gun by which the victim was killed. It contains no averment that he counseled and directed any third person to commit the crime. The undisputed fact is that the murdered person, who was Kent's own wife, was shot and killed by another, and that Kent's connection with the homicide, if any, was as the instigator of the accomplice. At the time the fatal shot was fired, Kent was many miles away. At common law, Kent would have been an accessory before the fact. He could not legally have been indicted as principal. Under such an indictment he could not, at common law, be convicted. This rule, however, was purely technical, and was limited in its scope to felonies. In cases of misdemeanors all the guilty persons were, at common law, principals,—as well those who counseled and directed the crime as those who personally committed the offense. 1 Bish. Cr. Law, § § 681, 685, 686. There was a single exception to this rule in cases of felonies, in that there were no accessories in cases of high treason. An accessory after the fact could not be convicted in advance of the convic-

tion of the principal, and he could not be indicted as a principal. The specific facts showing his subsequent connection with the traitorous project must have been set forth in the indictment. Id. § 701. In misdemeanors and high treason the pleader was always at liberty to charge the accessory as principal in the indictment. It was, however, entirely proper to set forth that the accused had counseled or directed the commission of the crime by another, but this was not necessary. As the law regarded all who were implicated as principals, they might all be proceeded against as principals. Id. § § 681, 685. This distinction between misdemeanors and treason, on the one hand, and felonies, on the other, with respect to the allegations of the indictment and the necessity of first trying the actual principal, never had any substantial foundation in principle. Id. § 673. There is, therefore, no reason why we should hestitate in giving to our statute, to which we will now refer, a construction which will place felonies in the same category with misdemeanors and treason, as far as these questions are concerned. The statute provides that "the distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, must hereafter be indicted, tried, and punished as principals, and no additional facts need be alleged in any indictment against such an accessory than are required in an indictment against his principal." Comp. Laws, § 7260. The language of this statute is too explicit to leave room for doubt as to the intent of the law-making power. The purpose it was framed and passed to accomplish was the abrogation of this purely arbitrary distinction between felonies and other offenses, and the placing of all criminal as well as civil pleading under the same general rule, which, regarding the act of the agent as the act of the principal himself, permits the averment to be made against him that he himself did what in fact was done by his agent for him. See 1

Bish. Cr. Law, § 673. The authorities are numerous which hold that under the same or similar statutes the one who would at common law be a mere accessory before the fact may be indicted as principal, as though he himself fired the shot, or administered the poison, or struck the fatal blow. Some of the statutes which have been so construed are by no means so explicit in their language as section 7260. *Hronek* v. *People*, 134 Ill. 139, 24 N. E. 861; *People* v. *Bliven*, 112 N. Y. 79, 19 N. E. 638; *Baxter* v. *People*, 3 Gilman, 368; *Dempsey* v. *People*, 47 Ill. 323; *Spies* v. *People*, (Ill. Sup.) 12 N. E. 865–915; *People* v. *Outeveras*, 48 Cal. 19; *State* v. *Hessian*, (Iowa,) 12 N. W. 77; *State* v. *Duncan*, (Wash.) 35 Pac. 117; *People* v. *Rozelle*, (Cal.) 20 Pac. 36; *Griffith* v. *State*, 90 Ala. 583, 8 South. 812. See, also, *State* v. *Phelps*, (S. D.) 59 N. W. 471.

This section, it is urged, is unconstitutional. We discover no provision of our constitution which it violates. Our organic law does not require that the accused shall be informed of the nature and cause of the accusation. The federal constitution does. Article 6 of the amendment to the constitution. But this provision of the constitution of the United States does not relate to proceedings in the state courts. Cooley, Const. Lim. (5th Ed.) p. 26. We are referred to §§ 7241, 7242, Comp. Laws, as being repugnant to 7260. If they were repugnant they would, to that extent, have to yield to the latter section. But we are unable to find in these two sections anything which forbids the indicting of an accessory as if he were principal. Under them it would be proper to charge an accessory before the fact, in the case of a misdemeanor, as though he were principal, had section 7260 never been enacted. This latter section merely places felonies in the same class. Section 7241 declares that the indictment must contain "a statement of the acts constituting the offense in ordinary and concise language and in such manner as to enable a person of common understanding to know what is intended." What are the acts constituting the offense? They are the shooting of the deceased with a gun, with the premeditated design to affect her death, and the killing of her by such instrumentality, used with

such a motive. Counseling and directing this criminal enterprise is not a part of the crime itself. By proof of such counseling and direction, the plaintiff in error is so connected with the criminal act that, in contemplation of law, he himself, performed it. But the crime itself is entirely distinct from his connection with it. The killing of Mrs. Kent would have been murder, if Kent had never participated in it at all. He is charged with having himself performed these acts, and this charge can be made good by evidence that he counseled and directed the murder, because such conduct on his part makes him, in the eye of the law, a participant in the physical act of taking the human life, the same as if he had himself fired the fatal shot. The fact that he counsels and directs is an evidential fact, whose utmost scope is to establish that the accused was a principal in the crime. It in no manner tends to prove the crime itself. Evidential facts should never be pleaded, as a general rule. It is certainly not necessary to plead them. All the pleader need do is to aver the ultimate fact which the evidential fact may be proved to establish. That ultimate fact, in this case, was the connection of the accused with this murder, as a principal in the crime. That was pleaded, and could be proved by evidence that he fired the shot, or hired an assassin to fire it. Our statute imposes upon the criminal pleader no more onerous duty in framing an indictment than did the common law. And yet, with respect to treason and misdemeanors, it has always been regarded as proper pleading to aver that the accessory before the fact committed the crime himself. Such form of pleading has been universally considered as amply protecting the accused from surprise on the trial. Indeed, as we have seen, there was no reason why felonies should not have been included in the general rule. Our statute merely abrogates a distinction that had no foundation in reason. The argument that the accused will not be fairly apprised of the charge against him has been considered of no force, with respect to treason and misdemeanors, for centuries; and, indeed, as is asserted by the court in *People* v. *Bliven*, 112 N. Y. 79, 19 N. E. 638, and as is

satisfactorily established by the reasoning of the court in *State* v. *Duncan*, (Wash.) 35 Pac. 117, the argument is more "fanciful than real." We therefore hold that it was proper to charge Kent, in the information, as principal.

We now approach a very interesting question. The state's attorney was assisted on the trial by Mr. Nye,—a citizen of Minnesota, and a member of the bar of that state. He was retained by the brothers of the murdered woman to assist in the prosecution. He stated to the trial judge that while he had been paid nothing by his clients, and had had no talk with them on the subject of fees, he presumed that they would compensate him for his services in the case. He was not employed by the County of Morton, in which the crime was committed, or by the state's attorney of that county, to assist in the prosecution; but the latter stated in open court that he desired to have Mr. Nye assist him, for the reason that he (the state's attorney) was unable, because of physical ailments, to stand the labor and strain of the case, without aid. Mr. Nye was allowed, despite the objection of the counsel for the accused, to assist in the trial of the case, taking a very active part therein. Counsel for the accused insists that this was prejudicial error. There are two grounds on which he assails the action of the trial judge in permitting Mr. Nye to participate in the trial: *First*, that he was employed by private persons, and not by the public; *second*, that he was neither a resident nor a member of the bar of this state. We will discuss these two points in the order in which they are stated.

In England, criminal prosecutions were as a rule generally carried on by individuals interested in the punishment of the accused, and not by the public. The private prosecutor employed his own counsel, had the indictment framed and the case laid before the grand jury, and took charge of the trial before the petit jury. 1 Chit. Cr. Law, 9, 825. This system does not prevail in this state. Here, in each county, there is a public prosecutor, called the "state's attorney" for that county. It is his duty to prosecute all criminal offenses triable in that county. He is paid a salary for that

purpose out of the public funds. He is not allowed to receive any fee or reward from or on behalf of an prosecutor or other individual for services in any prosecution or business to which it is his official duty to attend, nor be concerned as attorney or counsel for either party other than for the state or the county, in any civil action depending on the same state of facts upon which any criminal prosecution commenced, but undetermined, shall depend. Section 427, 433, Comp. Laws. We do not think that this change in policy indicates a purpose to exclude the counsel for interested persons from all participation in the prosecution. Such counsel cannot initiate the proceedings, or conduct them. The control of criminal prosecution has been taken from private hands, and transferred to public functionaries chosen for that express purpose. But there is nothing in the statute to justify the conclusion that counsel employed by interested persons may not assist the public prosecutor, in case he and the trial judge deem this course proper. The fact that the state's attorney who controls criminal cases is not allowed to receive any compensation from private prosecutors for the prosecution of a criminal case does not warrant the conlcusion that no counsel paid by private persons shall be permitted to assist in the trial of such a case. It is one thing to have the prosecution entirely in the hands of one who may be influenced, because of a retainer, by the strong desire of his client to secure a conviction; but it is an entirely different thing to allow such an interested counsel to aid in the prosecution one who stands affected by no other motive than that of securing the punishment of guilt, and who has absolute control over the case. The law has removed criminal prosecutions from the control of private interests, but it has not excluded such interests from all participation therein. If no error is committed on the trial, we fail to see how an accused can be prejudiced by the fact that those personally interested have employed private counsel to aid the public prosecutor. Certainly, he should not be heard to complain of the zeal of the private counsel, if such counsel has not allowed his zeal to hurry him into error. The

best mode of reaching the truth is by the strenuous contentions of opposing counsel, each animated by the conviction that the cause he has espoused is just. The public have some interests at stake in a criminal prosecution. May all the zeal be displayed on one side, and none be tolerated on the other? The public interests demand that a prosecution should be conducted with energy and skill. While the prosecuting officer should see that no unfair advantage is taken of the accused, yet he is not a judicial officer. Those who are required to exercise judicial functions in the case are the judge and the jury. The public prosecutor is necessarily a partisan in the case. If he were compelled to proceed with the same circumspection as the judge and the jury, there would be an end to the conviction of criminals. Zeal in the prosecution of crimimal cases is therefore to be commended, and not condemned. It is the zeal of counsel in the court room, alone, of which the accused can complain. No decision can be found which questions the right of the prosecuting officer to consult with, and receive all manner of aid, even during the trial, from counsel for private parties, outside of the court room. And if such zeal in the court room, on the trial, does not result in error, what conceivable difference can it make whether such assistant was employed by the public, or by private persons? May not cross-examination of witnesses be conducted, and arguments to the court and jury be made, by one who is as much convinced of the guilt of the accused as his counsel is persuaded of his innocence? The manner of conducting the case in the court room cannot work legal prejudice to the accused, without resulting in error for which the conviction will be set aside. It is therefore of no legal importance what inspires the zeal of the attorney who assists in the trial. Whatever is done to the injury of the prisoner by private counsel, for which he can have no redress, is done out of court; for instance, by concealing or fabricating evidence. At just this point, where the zeal of counsel employed by private parties may be deadly to the accused, no kind of safeguard is or can be thrown around him. The prose-

cuting officer may consult with, and be entirely governed by the advice of, such private counsel; and yet the accused has no remedy, if the private counsel does not participate in the trial. If he does so participate, his zeal works no more prejudice to the accused than the zeal of any other equally able counsel who may be employed by the public. The cases all agree that an assistant hired by the public may engage in the trial without giving the prisoner any legal cause for complaint. Of course, the latter may think he is prejudiced because of being compelled to confront an exceptionally able and experienced prosecutor, but this furnishes no legal ground for overthrowing the conviction. The question can be placed in a clear light by the following statement of it: Can a defendant in a criminal case, who is obliged to submit to the zeal of an assistant prosecutor employed by the public insist that the zeal of an assistant counsel employed by interested parties, shall not be displayed against him, although it results in no error on the part of the prosecution in the management of the case? We think there is only one answer to this question, and that is against the right of the accused to complain in either case, so long as no error has been committed by the assistant on the trial. The rule is different, however, in Michigan and Massachusetts, under statutes very similar to ours. *Meister* v. *People*, 31 Mich. 99; *Sneed* v. *People*, 38 Mich. 251; *People* v. *Hurst*, 41 Mich. 328, 1 N. W. 1027; *People* v. *Bemis*, (Mich.) 16 N. W. 794; *Com.* v. *Gibbs*, 4 Gray, 146. The reasoning of Judge Campbell in *Meister* v. *People*, while very plausible, does not convince us that there should be interpolated into the statute an implied prohibition against counsel employed by interested parties assisting in the prosecution. We are enable to discover in the statute any other policy than that of transferring the control of criminial prosecutions from private to public hands. We think that the control of the public prosecutor over the proceedings is a sufficient guaranty that the accused will not be made the innocent victim of overzealous prosecution by private persons. While aware that Judge Campbell has made out a strong case in

support of his view, we cannot discover in the legislation of this state the evidence of a policy hostile to the quite general practice of allowing the prosecuting officer to be assisted by counsel retained by those having a personal interest in the prosecution distinct from that of the general public. In support of our ruling on this point, we cite the following cases: *State* v. *Helm*, (Iowa,) 61 N. W. 246; *Keyes* v. *State*, (Ind. Sup.) 23 N. E. 1097; *Polin* v. *State*, (Neb.) 16 N. W. 899; *State* v. *Bartlett*, 55 Me. 220; *State* v. *Fitzgerald*, 49 Iowa, 260; *State* v. *Wilson*, 24 Kan. 189; *Burkard* v. *State*, 18 Tex. App. 599–618; *Gardner* v. *State*, 55 N. J. 17, 26 Atl. 30; *Benningfield* v. *Com.*, (Ky.) 17 S. W. 271; *People* v. *Tidwell*, (Utah,) 12 Pac. 61; 1 Bish. Cr. Proc. § 281; Whart. Cr. Pl. & Prac. § 555. See, also, *People* v. *Powell*, (Cal.) 25 Pac. 481; *Jackson* v. *State*, (Wis.) 51 N. W. 89; *U. S.* v. *Hanway*, 2 Wall. Jr. 139, Fed. Cas. No. 15,299. See, particularly, the reasoning of Judge Elliott in *Keyes* v. *State*, (Ind. Sup.) 23 N. E. 1097, and Judge Brewer in *State* v. *Wilson*, 24 Kan. 189. The decision of the Wisconsin Supreme Court in *Biemel* v. *State*, 37 N. W. 249, sustaining the Michigan and Massachusetts doctrine, appears to be based upon legislation in that state authorizing the trial judge to appoint an assistant whenever he thinks the public interests require it, and providing that such assistant shall be paid out of the public funds. See pages 248 and 249. The case of *Lawrence* v. *State*, (Wis.) 7 N. W. 343, is distinguished in the Biemel Case on the ground that it was decided before the new statute was passed, giving the trial judge power to appoint an assistant to be paid out of the public treasury. The Lawrence Case is more in harmony with, than opposed to our views. We hold that it was not error to permit Mr. Nye to assist in the prosecution, at the request of the state's attorney, because of his having been employed by the brothers of the murdered woman.

Does the fact that he was not a member of the bar of this state render him an improper person to participate in a ciminal prosecution? This precise question was decided in favor of the contention of counsel for the accused in Wisconsin. *State* v. *Russell*,

(Wis.) 53 N. W. 441. But the decision was founded on the wording of the statute of that state authorizing the trial judge to appoint counsel to assist in the prosecution. The court held that the word "counsel" meant a member of the bar of that state. We have no such statute in this state. On the contrary, our legislation seems to voice a different policy. The act which regulates the admission of attorneys to practice provides that "any member of the bar of another state actually engaged in any case or matter pending in any court of this state may be permitted by such court to appear in and conduct such case or matter while retaining his residence in another state without being subject to the foregoing provision of this act." Laws 1891, Ch. 119, § 7. Our legislation, so far from being inimical to the employment of nonresident counsel to assist in criminal prosecutions, seems to place them on the same footing in this respect as resident attorneys. The statute, in express terms, dispenses with the necessity of the foreign counsel's taking any oath. Therefore, one of the main arguments against allowing a foreign attorney to assist the prosecution in a criminal trial, put forth by the court in the Russell Case, does not have any application in this state, with its policy, as shaped by legislation, of permitting foreign counsel to try cases without taking any oath. Whether such counsel does or does not take an oath is practically of little moment to the accused. Every attorney of high character is acting under the restraint of a more sacred oath than that which is formally administered to him in court,—the oath which, through his whole career, he constantly administers to himself in secret, before the solemn tribunal of his own conscience. A mere formal, liputtered oath will never control the conduct, unless it is the echo of an oath taken within. The fact that the foreign attorney is not amenable to the court before which he appears, as is a resident attorney cannot prejudice the rights of the accused. The trial judge can always, at any stage of the prosecution, refuse to permit him longer to remain in the case; and, if the judge considers that his conduct has been prejudicial

to the accused, he can always grant the accused a new trial. It is safe to leave these matters to the sound judgment of an impartial magistrate.

We come now to what we regard as a fatal error. Section 7312 of the Comp. Laws, provides as follows: "A criminal action, prosecuted by indictment, may, at any time before trial is begun, on the application of the defendant, be removed from the court in which it is pending; if the offense charged in the indictment be punishable with death, or imprisonment in the territorial prison, whenever it shall appear to the satisfaction of the court by affidavits, or if the court should so order by testimony, that a fair and impartial trial cannot be had in such county or subdivision, in which case the court may order the person accused to be tried in some near or adjoining county, in any district where a fair and impartial trial can be had; but the party accused shall be entitled to a removal of the action but once, and no more, and if the accused shall make an affidavit that he cannot have an impartial trial, by reason of bias or prejudice of the presiding Judge of the District Court where the indictment is pending, the judge of such court may call any other Judge of a District Court to preside at said trial, and do any other act with reference thereto, as though he was presiding Judge of said District Court." On the very threshold of the trial the counsel for the accused presented to the court an affidavit, sworn to by the accused, stating that he could not have a fair and impartial trial, by reason of the bias, prejudice, and partiality of Judge Winchester, who was the judge of the district in which the indictment was pending; and thereupon counsel for the accused moved, under the above quoted section of the statute, that Judge Winchester call in another Judge of the District Court to preside at the trial. This motion was denied. In so doing the learned trial court erred. The error is fundamental, and because of it we are obliged to reverse the conviction. It is true that the statute declares that the trial judge "may" call in another judge. But permissive language is often construed as mandatory. If a comprehensive survey of a

statute leads to the conclusion that the legislative purpose was to confer authority on one for the benefit of another, then the donee of such power has no discretion about exercising it. Said Chief Justice Dixon in *Cutler* v. *Howard*, 9 Wis. 309, at page 312; "The cases fully establish the doctrine that, when public corporations or officers are authorized to perform an act for others which benefit them, then the corporations or officers are bound to perform the act. The power is given to them, not for their own, but for the benefit of those in whose behalf they are called upon to act; and such is presumed to be the legislative intent. In such cases they have a claim *de jure* to the exercise of the power." Mr. Sutherland, in his work on Statutory Construction, at page 597, says that permissive words are "peremptory, when used to clothe a public officer with power to do an act which ought to be done for the sake of justice, or which concerns the public interest, or the rights of third persons." In *Supervisors* v. *U. S.*, 4 Wall. 435, the court says, at pages 446 and 447: "The conclusion to be deduced from the authorities is that where power is given to public officers in the language of the act before us, or in equivalent language, whenever the public interests or individual rights call for its exercise the language used, though permissive in form, is in effect peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to its aid, and who would otherwise be remediless. In all cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose a positive and absolute duty." In the light of the rule which the foregoing authorities recognize,—a rule thoroughly settled,—we will proceed to construe the statute in question. For whose benefit was it enacted? Obviously, for the sole benefit of those accused of crime, that they might be protected against even the unconscious leaning of a biased judge in favor of the prosecution. By

expressions of countenance, by tone of voice, by gesture,—in a multitude of ways,—a prejudiced judge may unwittingly suffer his feeling against the prisoner to so express itself in conduct that the bias of the magistrate passes into the minds of the jury, thus depriving the accused of a fair trial before an impartial tribunal. When this prejudice exists the law intends that another judge shall try the case. It cannot admit of doubt that the act we are interpreting was passed to give the prisoner the right to insist on a trial before a different judge, when the judge of the district in which the indictment is pending is biased. From this proposition there flows the corollary that, on the presentation of an affidavit stating such bias, the right of the accused to have another judge called in to try the case is absolute. If not, then the judge who is so attacked for prejudice sits in judgment on the question of own bias. It is true that no property interests of his own are involved. Neither is his life or his liberty at stake. But the mind that cannot decide that it is biased without at the same time admitting by such decision that it was willing, in that condition, to enter on the trial of the man against whom the prejudice is entertained, without disclosing such bias, and that it would have carried on such trial to its close, conscious that it was not impartial,—a mind placed in a position where a decision against its own freedom from bias will bring it such humiliation,—is not that free, calm, disinterested mind, with respect to that question, which the law requires, and the honest administration of justice demands. This consideration renders it impossible for us to impute to the legislature the purpose to permit the judge so assailed to pass upon his own bias. The language of the statute confirms our view that he is not to try this question. This section contains two distinct provisions,—one relating to a change of venue on the ground that a fair and impartial trial cannot be had in the county in which the criminal action is pending, and the other referring to a change of judges because of the bias or prejudice of the judge of the court in which the indictment is pending. The question whether a fair and impartial trial cannot

be had in the county in which the action is triable must be settled by the judge. It must be made to appear to his satisfaction, by affidavit, that a fair and impartial trial cannot be had in that county. Having no interest in the question, the law very properly leaves it to him for decision. That he may decide it, the statute provides that affidavits may be used before him to prove or disprove this fact. The judge, in his discretion, may hear testimony on this subject. But, when we come to that branch of the statute which relates to his own bias, nothing is said about his being satisfied of it, nor is there any provision made for the use on the application for a change of judges of any other affidavit than that of the accused, stating that, by reason of the bias and prejudice of the judge, he cannot have an impartial trial. Neither does the statute call for or permit the use of any other evidence than such affidavit. These considerations make it clear that the judge is not to try the question of his own bias. The accused need not prove it to "the satisfaction" of the judge. He is not even allowed to introduce evidence on that point, aside from his own affidavit. Although he might have a score of witnesses to whom the judge had stated his prejudice, he (the prisoner) is powerless to use on this application the testimony of one of them. These observations lead us inevitably to the following conclusions touching the rights, under this statute, of a defendant in a criminal action: When the judge of the court in which the indictment is pending is biased, the defendant may insist that another judge shall be called to try the case. The judge so attacked cannot try the question of his own bias. Unless, therefore, the right to a change of judges is absolute on making the statutory affidavit, the protection of this salutary law is lost to the defendant, and its enactment was an idle deed. The nature of the power vested in the trial judge to call in another judge to try the cause; the circumstances under which it is to be exercised; the fact that its exercise is beneficial to one accused of crime; the principle that no one shall decide a question in which he is

interested; and, finally, the very language of the statute itself, aside from the word "may,"—these all unite to bring this law within the scope of that established rule which transmutes the permissive word "may" into the imperative word "must." The Supreme Court of South Dakota has reached the same conclusion under the same statute. *State* v. *Henning*, 54 N. W. 536; *State* v. *Palmer*, 57 N. W. 490. A single sentence in the opinion of the court in *Hungerford* v. *Cushing*, 2 Wis. 292, will suffice to show that that decision turned on the language of a statute radically different from the one we are construing. Said the court: "It will be seen by a reference to the statute that the prejudice of the judge is classified with the other facts of the existence of some one of which the judge must be satisfied in order to justify him in changing the venue." We might pause here, as our conclusion on this point leads us to a reversal. But we deem it our duty to settle certain questions which are sure to arise on another trial, and some of which, we are of opinion, were erroneously decided by the trial court. The murder that was committed was so atrocious in its character that it is to be hoped that the accused, if again found guilty of instigating it, will not be in position to secure a third trial because of errors occurring on a second trial.

On the trial the theory of the prosecution was that the murdered woman was slain in pursuance of a conspiracy in which her husband, the accused, figured as the originator of the criminal scheme, and the instigator of the homicide, and a Bohemian named Swedensky played the part of a venal tool. This theory the testimony of the accomplice fully supported. He told the story of this conspiracy from the time that the accused first unfolded it to him, about a month before the murder, to its horrible consummation in the death of the unsuspecting wife. He testified that when Kent first broached the subject he refused to aid him, because of fear; but that Kent was persistent in his importunities, constantly dangling before the eyes of the Bohemian the wages he could earn by executing for Kent his fell purpose. The price Swendensky was to be paid for this deed was, according to

his testimony, the sum of $18,000. Finally, about four days before the fatal shot was fired, Swedensky says that he yielded; being assured by Kent that there was no danger, that he could claim that the shooting was accidental, and that after being in jail for a few days he would be liberated. To give the semblance of truth to his story that the killing was unintentional, he testified, in substance, that Kent told him what course to pursue. He was to awaken Mrs. Kent in the night, and tell her that there was some one outside the house, looking in the window. Kent stated to him that the boy (the son of the accused and the murdered woman, about 10 years of age) would think that he saw somebody around the house, that he would see some one in every window, and that he would be Swedensky's best witness that his story about burglars was true. He further instructed Swedensky that when Mrs. Kent, in going about the house, from room to room, endeavoring to see some one outdoors, should get in a certain position, he (Swedensky) was to shoot her in the head, and be sure to kill her. He was to tell people that there were burglars around the house, and that Mrs. Kent had told him to get the gun and shoot through the window; that the gun went off accidentally, and in that way he shot her. Swedensky further testified that Kent dictated to him a story to tell before the coroner's jury; that he wrote it down in a book, as Kent told him what to write. On the trial this book was offered in evidence by the state, and was received in evidence, despite the objection of counsel for the accused. In this there was no error. The book contained nothing connecting Kent with the homicide. It was not an unsworn narrative of past events implicating the accused. Behind every word of it was the oath of the accomplice. His testimony was that what he had set down in that book fell from the lips of the prisoner, and that he wrote it there at his dictation. Certainly, what Kent said to him he might testify to. Had nothing been written in the book, and had Swedensky been able to remember the story Kent told him to tell, his testimony narrating that story would have been competent. It cannot be any the less competent

to prove what Kent said to Swedensky, by a written memorandum of it, so long as the latter swears that that memorandum does in fact set forth the explanation of the killing, as dictated to him by Kent. The counsel for the accused treats the book as containing a mere declaration by Swedensky, unsupported by his oath, whereas in fact every word which this book contains has the oath of the witness behind it. He swears that the story written in this book was written there before the homicide, and is the very story which Kent dictated to him to write. In allowing this book to be received in evidence in connection with Swedensky's testimony, the court merely permitted the state to prove by the latter just what Kent said to him in connection with, and in furtherance of, the criminal scheme. If the fact that this story was written down by Swedensky before the murder tends to corroborate his testimony, it will not be because of his declaration or act that he is corroborated, but for the reason that it is improbable that he could write this story without the aid of Kent. If, for instance, it contains facts which Swedensky could not have known in advance without receiving information of them from Kent, then the fact that he knew such matters before the murder is a very pertinent fact, and one that it is entirely competent to prove. One way of proving it is by showing that the witness had written down such facts before the murder. If, on the other hand, the story is one which Swedensky could have fabricated himself without the aid of Kent, then the mere fact that it was reduced to writing will not prejudice him any more than proving it by the lips of Swedensky without any writing. The jury may regard it as a fabrication of his own, and may look upon his evidence that Kent told him to write it as perjury. If the fact that Swedensky wrote this before the murder lends any support to his testimony touching the alleged conspiracy to kill the woman, and Kent's connection therewith, it is not because of any unsworn declaration of the accomplice, but because the circumstances of the case make improbable that he could have known of facts stated therein unless Kent had told him of them. We fully agree with

counsel for the accused that the accomplice cannot corroborate himself by his own words or deeds. The corroboration, to satisfy the statute, must come from some independent source, and must tend to conneet the accused with the crime. Mere corroboration as to immaterial matters testified to by the accomplice, or as to the fact that a crime had been committed; or as to the connection of the accomplice therewith, or as to all these combined, will not suffice. The rule is very accurately stated in *People* v. *Plath*, 100 N. Y. 590, 3 N. E. 790: "There must be some fact deposed to, independently altogether of the evidence of the accomplice, which, taken by itself, leads to the inference, not only that a crime has been committed, but that the prisoner is implicated therein." It is not necessary that such corroborating evidence be sufficient, of itself, to warrant a conviction. The requirements of the statute making it necessary to corroborate the testimony of an accomplice are met if the evidence tends to connect the prisoner with the commission of the crime. Said the court in *People* v. *Everhardt*, 104 N. Y. 591, 11 N. E. 62: "The law is complied with if there is some evidence fairly tending to connect the defendant with the commision of the crime, so that the conviction will not rest entirely upon the evidence of the accomplice." See, also, *People* v. *Cloonan*, 50 Cal. 449; *State* v. *Van Winkle*, (Iowa,) 45 N. W. 388; *State* v. *Hicks*, (S. D.) 60 N. W. 66, and cases cited; *State* v. *Russell*, (Iowa,) 58 N. W. 890; *State* v. *Townsend*, (Or.) 23 Pac. 968. The language of our statute is so plain that no room is left for interpretation. It provides that "a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely show the commission of the offense, or the circumstances thereof." Comp. Laws, § 7384.

It was objected that the accomplice was allowed to translate the story he had himself written in Bohemian in this book at the dictation of Kent, as he claims. His evidence shows him to have

been qualified by his knowledge of the English language to make the translation. The translation itself confirms his testimony in this respect. It was originally given to him in English, and by him set down in Bohemian. Certainly, he is qualified to translate it back into English. The fact that he was an accomplice might affect the weight to be given to his translation, but the danger of deception from a false translation of a writing is slight, when compared with the danger of deception from allowing an interested person to act as interpreter of words spoken on the witness stand in a foreign tongue, which leave behind them no fixed record by which the untruth of the interpreter's rendering of the testimony of the witness can be determined. And yet it has been held not to be error to permit a person sustaining quite close relations with one side of the case to interpret for a witness who was sworn on the same side of the cause. *Swift* v. *Applebone*, 23 Mich. 252. See, also, *Railroad Co.* v. *Shenk*, (Ill. Sup.) 23 N. E. 436; *Com.* v. *Kepper*, 114 Mass. 278. The defense had the right to prove that Swedensky's translation was not correct. Any qualified person might have been called for that purpose.

On the cross-examination of the accomplice, Swedensky, counsel for the accused asked him whether he expected to be hung for his crime. This question being objected to by counsel for the state, the court sustained the objection. In this the court committed error. One who is on trial for his life should be allowed great latitude in the cross-examination of the witness who, by his own confession, can have no hope of escaping the death punishment save through the indulgence of those who, under the law, have his life in their hands. An accomplice, in such a case, in implicating another with him in guilt, is under the influence of the most powerful motive that can shape human conduct. For this reason the law looks with such distrust on his testimony that, as a general rule, it will not suffer another to be convicted on his evidence, in the absence of corroboration. True, the principle has often been stated that one may be convicted on the uncorroborated testimony of an accomplice. But this princi-

ple has been regarded with such disfavor that, even in the absence of a statute, courts have generally cautioned juries against convicting where the story of the accomplice stood unsupported by other evidence. Sometimes they have advised the jury to acquit, and in some instances they have directed an acquittal. After conviction, new trials have been granted because the accomplice was uncorroborated. The practice has not been uniform, but the whole trend of it shows unmistakably that the law regards the testimony of the accomplice with distrust. See 1 Am. & Eng. Enc. Law, p. 76, and note 2, note to *Com.* v. *Price*, 71 Am. Dec. 671; *Com.* v. *Holmes*, 127 Mass. 424. In many jurisdictions, because of statutory enactments, the accomplice must be corroborated by evidence that tends to connect the accused with the crime. Testimony coming from such an untrustworthy source should be thoroughly sifted. The rule is to allow great latitude in the cross-examination of the accomplice. Whart. Cr. Ev. § 444; 1 Am. & Eng. Enc. Law, 78; *Lee* v. *State*, 21 Ohio St. 151. Certainly, he who is on trial for life may inquire of the accomplice who has sworn against him whether the testimony is not given with the hope of escaping death. The only object of proving that the accomplice has or has not been promised total or partial immunity is to strengthen or weaken his credibility by showing that his testimony is given possibly without hope, or that in giving it he may be influenced by an expectation of total or partial exemption from punishment, as a reward for such testimony. Even if no express promise of immunity is made, the accomplice may be led to believe by something in the conduct or speech or tone of voice of some one connected with the prosecution that nevertheless his testimony involving another in guilt with him will earn him some consideration at the hands of those who control his fate. We are therefore clear that, even when all the positive evidence is against the proposition that any express promise has been made, it is competent to ask the accomplice, as affecting his credibility, whether he expects to have full punishment meted out to him. Even when the accomplice has nothing

in the way of word or conduct from any one connected with the prosecution on which to build an assurance, he may have some expectation—leading all the way from a faint glimmer of hope to confident belief—that, if his testimony results in the conviction of another, he himself will reap some reward. One whose life he is swearing away has a right to discover, if he can, by the admission of the accomplice himself, that his testimony is given under a hope of life, which he cannot entertain unless he looks for indulgence. The accused has a right to have such fact laid before the jury on the question of the accomplice's credibility. Whether he is justified in cherishing such hope is immaterial. The only evidence in the case that Swedensky had not been promised immunity was his own., Counsel for accused offered to prove that no complaint had ever been made against him for this murder, that he had had no preliminary examination on such charge, and that no information had been filed against him to put him on trial for this offense. This evidence was excluded. In this the court erred. It bore directly on the question whether he was not testifying under hope. Without any express promise, he might infer from the fact that no proceedings had been taken against him, but that the whole strength of the prosecution was directed against Kent alone, that he was to be the recipient of some favor. So long a period had elapsed at the time of the trial, since Swedensky had confessed,—three months,—that the failure to preceed against him might cause him to expect indulgence. In ruling out this evidence the trial judge made a statement that must have been prejudicial to the accused. He said: "It is evident from the record in this case that the witness Swedensky is a criminal, and it would be the duty of the judge of this court to see that he is prosecuted." Such a remark might well lead a jury to believe that they were to look upon the testimony of Swedensky as the testimony of a man swearing without hope, and therefore not to be distrusted as the evidence of a person who expected to gain some personal advantage by giving it. At the time this remark was made by the court, Swedensky had

already testified. In weighing his credibility the jury were to consider, not the fact that the court said he would be punished, at a time when the remark could have no effect on his testimony, but the actual hope which he himself entertained at the time he gave his testimony. The prejudicial effect of this error must have been augmented by what the trial judge stated to the jury on this subject in his charge. He said, "The witness Swedensky is not on trial, and the fact that he is or is not on trial should not influence you, in the least degree, in passing upon the guilt or innocence of this defendant whom you have in charge." The case of *People* v. *Hare*, (Mich.) 24 N. W. 843, is a direct authority on the point that excluding this evidence was error.

The accused interposed a challenge to the panel of the special jury summoned by the sheriff under a special venire issued by the court after the regular panel had been exhausted. The ground of the challenge was the bias of the sheriff. It was made under § 7347, Comp. Laws, which provides as follows: "When the panel is formed from persons whose names are not drawn as jurors a challenge may be taken to the panel on account of any bias of the officer who summoned them which would be good ground of challenge to a juror. Such challenge must be made in the same form and determined in the same manner as if made to a juror." The test of the sheriff's qualification to summon such special jury is whether he would be qualified to sit as a juror in the case. It has been so held in California under the same statute. *People* v. *Coyodo*, 40 Cal. 592; *People* v. *Welsh*, 49 Cal. 174. On his examination under this challenge the sheriff testified that he had expressed to others his opinion that the accused was guilty, and it is apparent that this opinion was very strong. It would seem that it was derived from statements made to him by the accomplice, Swedensky. If so, it is very doubtful whether the sheriff would have been competent as a juror in the case, notwithstanding the fact that he testified that, if summoned as a juror, he would give the accused a fair and impartial trial according to the law and the evidence. *Greenfield* v. *People*, 74 N. Y.

277; *Jackson* v. *Com.*, 23 Grat. 919; *Armistead* v. *Com.*, 11 Leigh, 657; *Black* v. *State*, 42 Tex. 378; *Goodwin* v. *Blachley*, 4 Ind. 438; *Frazier* v. *State*, 23 Ohio St. 551; *Woods* v. *State*, (Ind. Sup.) 33 N. E. 901; *People* v. *Wells*, (Cal.) 34 Pac. 718; *Walker* v. *State*, 102 Ind. 502, 1 N. E. 856; Comp. Laws, § 7361. It is, however, unnecessary for us to settle this question, as the person who was sheriff at the time this case was tried is no longer sheriff of Morton County.

The judgment and order are reversed, and a new trial is ordered. All concur.

(62 N. W. Rep. 631.)

INDEX.

ACCEPTANCE OF BENEFIT.

1. A party does not waive his right to appeal from a judgment by accepting a benefit thereunder, if the benefit is one to which he is so absolutely entitled that a reversal of the judgment will not effect his right to it. Neither is his right to appeal lost by accepting anything under a judgment, when the appellate court has power to modify the judgment so as to make it more favorable to appellant without reversing it or interfering with the provisions in his favor of which he accepted the benefit. But in such case he must appeal from only the portion of the judgment which is adverse to him. *Tyler* v. *Shea*, 377.

2. The judgment appealed from declared that respondents would be entitled to a deed of certain land from appellant provided they paid appellant a sum of money and delivered to him a note and mortgage for a further sum within 90 days after date of the decree. In case of their failure so to do, their rights were to be barred, and the appellant was to be immediately entitled to the exclusive possession of the property. Appellant applied to the court for an order awarding him execution to put him in possession of the land, claiming that respondents were in default. His application having been denied, he appealed to this court. *Held* that, by thus accepting a benefit under the judgment, *i. e.* the right to be heard whether he was entitled to possession thereunder, he had waived his right to appeal from the judgment for the purpose of having the case tried anew in this court. *Tyler* v. *Shea*, 377.

ACCOMPLICE. See HOMICIDE, EVIDENCE.

1. Great latitude should be allowed in the cross-examination of an accomplice. It was error to refuse to allow counsel for the accused to ask the accomplice, who had by his own testimony made out a case of murder against himself, whether he expected to be hung. *State* v. *Kent*, 577.

2. It was competent for the accused to prove as bearing upon the credibility of the accomplice that no proceedings whatever had been instituted against him for the murder he had confessedly committed. *State* v. *Kent*, 577.

3. No person can be convicted on the uncorroborated testimony of an accomplice. The corroboration must come from some source independent of the accomplice. But it is not necessary that the corroborating evidence should be sufficient in itself to support a conviction. It is enough if it tends to connect the accused with the commission of the crime. *State* v. *Kent*, 577.

4. Instructions given by the accused to the accomplice touching the story the latter was to tell in explanation of the killing may be sworn to by the accomplice. A book in which said instructions were written down by the accomplice, when given him by the accused may properly be received. *State* v. *Kent*, 577.

ACCOMPLICE—Continued.

5. It was not error to permit the accomplice, a Bohemian to translate into English these written instructions which he himself had written in the book in the Bohemian dialect, he having testified to his ability to make the translation correctly. *State* v. *Kent*, 577.

ACTION PENDING.

After an order dismissing an appeal the action is still pending until final judgment is entered. *In re Weber*, 119.

ADEQUATE LEGAL REMEDY. See ATTACHMENT, 319.

AGENCY. See PRINCIPAL AND AGENT, 182, 251, 272.

ALTERATION OF INSTRUMENTS. See NEGOTIABLE INSTRUMENTS, 391.

AMENDMENTS. See PLEADING AND PRACTICE.

1. A summons may be amended to show the true names of defendants, sued in partnership name. *Gans* v. *Beasley*, 140.
2. There is not authority in law for the amendment of an affidavit for attachment in matter of substance. *Gans* v. *Beasley*, 140.
3. Pleadings may be amended to correspond with the proofs. *Moore* v. *Booker*, 543.
4. When, upon appeal from the District Court, the original papers are sent to the Supreme Court, and when the case has been fully argued and submitted in this court upon such record, the trial court has thereafter no authority or power to amend or correct such record, unless, upon application to this court, the record is remanded for such purposes. *Moore* v. *Booker*, 543.

ANSWER. See PLEADING AND PRACTICE.

1. An answer is frivolous which contains no new matter, and which attempts to deny material allegations in the complaint only as follows: "Defendant says that it has not information sufficient to form a belief," etc. A denial in this form must negative both knowledge and information sufficient to form a belief. Comp. Laws, § 4914. *Sigmund* v. *Bank*, 164.
2. In moving for judgment upon the ground that the answer served is frivolous, the motion is based upon the pleadings, and need not be supported by proof of extrinsic facts. *Sigmund* v. *Bank*, 164.

APPEAL.

1. Findings of fact will upon appeal, be presumed correct and will not be disturbed unless error is made clearly to appear. *Jasper* v. *Hazen*, 1.
2. When an appeal is dismissed for want of jurisdiction, a judgment for costs should be entered. *In re Weber*, 119.
3. Where the plaintiff in attachment appeals from an order vacating the attachment, he may by compliance with § 5228, Comp. Laws, secure a continuance of the life of the attachment. *State* v. *Rose*, 320.
4. Where appellant makes no assignments of error as required by court rule, his appeal will be dismissed. *O'Brien* v. *Miller*, 308; *Hostetter* v. *Brooks Elevator Co.*, 357.

APPEAL—Continued.

5. Service of notice of appeal upon the clerk of the court from which the appeal is taken is jurisdictional, and where the record fails to show such service the court cannot hear the case. *Hoffman* v. *Bank of Minot*, 473.

6. When upon appeal from the District Court, the original papers are sent to the Supreme Court and when the case has been fully argued and submitted in this court upon such record, the trial court has thereafter no authority or power to amend or correct such record, unless upon application to this court the record is remanded for such purposes. *Moore* v. *Booker*, 544.

7. The right to appeal from a judgment is waived by accepting the benefits under it. *Tyler* v. *Shea*, 377.

8. When the right to appeal is not waived by accepting the benefits under the judgment appealed from. *Tyler* v. *Shea*, 377.

10. When a party appeals for a new trial of a case in the appellate tribunal, the whole case is open to investigation, and not merely that portion of the judgment which is adverse to the appellant. *Tyler* v. *Shea*, 377.

11. The appeal in this case having been dismissed for failure to file the transcripts within the time prescribed by Rule 9, the court holds, on motion to reinstate such appeal, that appellants have not excused their default. See opinion for facts urged to excuse failure to comply with the rule. *Woods* v. *Heidel*, 427.

12. When an appeal from Justice Court is dismissed by order of the District Court. Such order dismissing the appeal is not an appealable order. *In re Weber*, 119.

13. In an action on an undertaking given on appeal to this court, *held*, under circumstances set forth in the opinion, that the word "judgment" could not be expunged from the undertaking, and the word "order" inserted in its place, as a clerical error. There was no attempt to reform the undertaking on the ground of mistake. *Traveler's Ins. Co.* v. *Weber*, 135.

APPELLATE COURT. See APPEAL.

1. In construing an ambiguous finding of fact made by the trial court, it is proper for the appellate court to consider all the findings, in order to determine what was intended; and it is the duty of the appellate court, when it can be done without violence to the language used, to so construe a finding as to support a conclusion of law that follows. *Moore* v. *Booker*, 543.

2. When evidence which is competent to establish a fact is admitted, the court on appeal will not assume that the trial court considered the evidence in finding another fact which it was not legally competent to prove, when the latter fact is fully supported by other evidence. *Dows & Co.* v. *Glaspel*, 251.

3. Where assignments of error in this court do not refer to the abstract, they are insufficient assignments, under Rule 15 of the rules of this court; and such assignments of error will not be considered unless, for reasons satisfactory to the court, said rule is relaxed, in furtherance of justice, and on such terms as may be deemed just. *Hostetter* v. *Brooks Elevator Co.*, 357.

4. Where exceptions to findings of fact do not specify wherein such findings are not justified by the evidence, this court will not explore the record to ascertain whether or not the finding is supported by the evidence. *Hostetter* v. *Brooks Elevator Co.*, 357.

APPELLATE COURT—Continued.

5. Where the bill of exceptions contained no specifications of errors of law, such errors, if they exist, will not be considered in this court, in reviewing the case. This established and statutory rule applies to cases of trials to the court, where no motion for a new trial is made below, the same as in other cases. Laws 1891, Ch. 121; Sup. Ct. Rule No 13. *Hostetter* v. *Brooks Elevator Co.*, 357.

6. Appellant's counsel having failed to assign errors in this court, the judgment of the court below is affirmed, under Sup. Ct. Rule No. 15. *O'Brien* v. *Miller*, 308.

7. On *certiorari* this court has power to order restitution of everything taken from the relator under the void proceeding which is annulled. *State* v. *Rose*, 319.

8. The judgment on *certiorari* in entered in this court. No mandate is sent to the inferior tribunal to render judgment. For this reason, and because the District Court is utterly without jurisdiction in the matter, and therefore has no jurisdiction to order restitution, the judgment in this case annulling the order will contain a direction that a writ of restitution issue out of this court to restore to the sheriff the property taken from him under the order. *State* v. *Rose*, 319.

9. A court of equity, in furtherance of justice, has power to modify a judgment in a particular not affecting the merits of the case, but merely relating to the mode of carrying into effect the decision of the court. *Tyler* v. *Shea*, 378.

10. Where a time is prescribed within which money must be paid to entitle a party to the benefit of the judgment, the court may, even after such time has expired, extend it by a modification of the judgment in furtherance of justice; and it may modify a judgment directing payment to be made to a party by providing that the payment may be made to the clerk of the court for the benefit of such party. *Tyler* v. *Shea*, 378.

APPEARANCE.

An appearance which is in terms a special appearance will operate as a general appearance, and confer jurisdiction over the person, if the court is requested to determine questions touching the merits, and not relating to the jurisdiction. *Gans* v. *Beasley*, 140.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. An assignment for the benefit of creditors does not place property *in custodia legis*. *State* v. *Rose*, 319.

2. An insolvent debtor may pay or secure one creditor in preference to another, except in cases where he executes an assignment for the benefit of his creditors. *Cutter* v. *Pollock*, 205.

3. Such a debtor, in this case, executed three chattel mortgages on substantially all of his property, securing certain creditors to the exclusion of others. The mortgagees at once took possession, and commenced foreclosure of the mortgages. *Held*, even assuming that the debtor himself knew that the consequence of giving the mortgages would be to prevent his continuing his business, that such transactions did not constitute an assignment for the benefit of creditors, within the meaning of § 4660, Comp. Laws, rendering void all preferences contained in such an assignment. *Straw* v. *Jenks*, 43 N. W. 941, 6 Dak. 414, overruled. *Cutter* v. *Pollock*, 205.

ASSIGNMENT OF ERRORS. See APPEAL, 308, 357; INSTRUCTIONS, 391.

ATTACHMENT.

1. The affidavit for attachment stated, in effect, that there was an existing cause of action, in favor of the plaintiff and against the defendants, in the sum of $10,000 and interest, based upon a promissory note, which was set out at length, and which was payable to plaintiff, and purported to be signed by the defendants. The District Court directed the affidavit to be amended, alleging that the note was executed and delivered to plaintiff by the defendants, and was wholly unpaid. *Held*, construing the affidavit, that the amendment was superfluous, and hence that the order directing the amendment, if error, was error without prejudice. *Gans* v. *Beasley*, 140.

2. In an action commenced by attachment, and where there was no personal service of summons, and where the affidavit for attachment stated, as the only ground therefor, "that the defendant is not a resident of the State of North Dakota, or has departed therefrom," *held*, that the court acquired no jurisdiction. *Birchall* v. *Griggs*, 305.

3. Property having been attached in the hands of the assignee, the District Judge of the district in which such assignment was executed made an order directing the sheriff forthwith to surrender possession thereof to the assignee on the theory that the property was in custody of the court. Such order was not made in any action or special proceeding pending in court. It was granted upon the mere affidavit of the assignee, without hearing the sheriff or the plaintiff in the attachment suit, and without notice to them, or either of them. *Held*, that the order was absolutely void, and should be set aside on *certiorari*. *Held*, further, that the plaintiff in the attachment suit was the person beneficially interested, within the meaning of § 5508, Comp. Laws, and could therefore sue out the writ. *State* v. *Rose*, 320.

4. *Held*, further, that the right of the plaintiff to hold the sheriff responsible for the property attached, for the reason that he could not justify surrender of the property under a void order, was neither an adequate nor a speedy remedy, within the meaning of § 5507, Comp. Laws, which forbids the issue of the writ of *certiorari* when the relator has such a remedy. *State* v. *Rose*, 320.

5. Where the plaintiff in attachment appeals from the order vacating his attachment, he may by compliance with § 5228, Comp. Laws, secure a continuance of the life of the attachment. *State* v. *Rose*, 320.

ATTORNEYS AT LAW. See PRINCIPAL AND AGENT.

1. Defendants, having collected $369 for plaintiff on a note owned by her, telegraphed her local attorneys to ascertain whether she would take $100 and they $25, without disclosing how much had been collected, or that any collection had been made at all. Plaintiff and her local attorneys accepted the offer to pay the $125, in ignorance of the fact that the collection had been made, and the money was paid them by the defendants. Discovering the facts, this suit was brought to recover the balance, less a reasonable fee for collection. *Held*, that the action could be maintained; that defendants were guilty of a fraud in entrapping plaintiff into the acceptance of $100 by concealing from her the fact that they had already collected $369. *Riegi* v. *Phelps*, 272.

ATTORNEY AT LAW—Continued.

2. An attorney or agent who has made a collection owes to his client or principal the duty of a full disclosure of all the facts, in settling with the client or principal. Any concealment of a material fact is fraudulent. *Riegi* v. *Phelps*, 272.

3. A nonresident attorney, not a member of the bar of the state and employed by relatives of the person for whose murder the accused is being tried, to assist the prosecuting attorney, may be permitted to assist in the prosecution. *State* v. *Kent*, 577.

4. Where the statute enumerates grounds for disbarment of an attorney, no other grounds can be considered by the court. *In re Eaton*, 514.

ATTORNEY FEES. See NEGOTIABLE INSTRUMENTS, 391.

BILL OF EXCEPTIONS.

Unless the bill of exceptions contains specifications of error, any errors existing will not be reviewed. *Hostetter* v. *Brooks Elevator Co.*, 357.

BILLS AND NOTES. See NEGOTIABLE INSTRUMENTS.

BIAS. See JURY, SHERIFF, 577.

BONA FIDE PURCHASER. See NEGOTIABLE INSTRUMENTS.

1. The commissioner's power to cancel an entry is not affected by the fact that the property has been transferred or mortgaged to a purchaser or mortgagee who parts with value, in good faith, without knowledge of the facts because of which the entry is canceled. But *quaere* whether such purchaser or mortgagee is debarred from proving the *bona fides* of the entry by proceedings in the land department, culminating in a cancellation of the entry, when he has no knowledge of such proceedings. *Parsons* v. *Venzke*, 452.

2. The purchaser of municipal bonds providing for the payment of exchange in addition to principal and interest is not protected against the defense of want of consideration the bonds being non-negotiable. *Flagg* v. *School Dist.*, 30.

3. Where a record of proceedings prior to issuance of bonds was required to be kept, and it was made the duty of the county clerk to examine the records and when satisfied that all statutory pre-requisites had been complied with and that the bonds were authorized to be issued as provided by the act, to register the bonds and indorse upon each of them his certificate in the form prescribed by the statute, a purchaser of such bonds for value before maturity, without notice to the contrary has a right to rely upon the certificate of the county clerk as finally settling all these preliminary questions. *Flagg* v. *School District*, 30.

4. The right of a *bona fide* purchaser of municipal bonds to rely upon a recital or certificate as to facts which the person making the same had authority to determine, does not depend upon the bond being a negotiable instrument. It exists in the case of a *bona fide* purchaser of a non-negotiable bond as well. *Flagg* v. *School District*, 30.

5. The statute declared that a committee should audit the claims against the district, and determine the amount of indebtedness to be funded. *Held*, that the auditing by the committee of claims against the district, and the vote of the district to bond to pay such claims, and the issue of bonds accordingly, would

BONA FIDE PURCHASER—Continued.

preclude an inquiry as to the validity of such claims as a consideration for such bonds, as against a *bona fide* purchaser of such bonds; that as against such purchaser, the district could not show, to prove a want of consideration between the original parties, that the bonds were in fact paid for by the one to whom they were originally issued by the district, by the surrender of void claims held by him against the district, provided such claims had in fact been audited and canceled, and bonds voted and issued under the provisions of the statute. *Flagg* v. *School District*, 30.

BOND ON APPEAL. See APPEAL, 135.

BONDS OF SCHOOL DISTRICT. See MUNICIPAL BONDS, 30.

BRIDGES.

Township is not liable for injury caused by neglect of township officers to keep bridges in repair. *Vail* v. *Township of Amenia*, 239.

BURDEN OF PROOF. See EVIDENCE.

1. In actions in equity to have tax proceedings annulled, the burden is on plaintiff to show the illegality of which it seeks to avail itself. *N. P. R. Co.* v. *McGinnis*, 494.

2. In an action against the guarantors of commercial paper, the burden is upon plaintiff of showing as a condition precedent to recovery that they had prosecuted their legal remedies with reasonable diligence to collect the claim of the original debtors, and to realize upon their collateral. *Roberts, Throp & Co.* v. *Laughlin*, 167.

3. When one sues his agent for moneys received by the agent for his use, he has the burden of proof to show the amount received and not accounted for. *Anderson* v. *Bank*, 182.

4. In such cases the agent has the burden of accounting for all moneys which he admits he received. *Anderson* v. *Bank*, 182.

CARE. See NEGLIGENCE.

A railroad company in running its trains is bound to exercise due care in approaching and passing over private crossings. The care must be commensurate with the danger reasonably to be apprehended at the point of intersection. *Bishop* v. *C. M. & St. P. R. Co.*, 536.

CASES OVERRULED AND MODIFIED.

1. Language in *Paulson* v. *Ward*, 4 N. D. 104, to the effect that the return of an execution *nulla bona* is a purely formal condition precedent to a creditor's bill is modified and explained. *Minkler* v. *U. S. Sheep Co.*, 507.

2. *Straw* v. *Jenks*, 6 Dak. 414, 43 N. W. Rep. 941, is overruled. *Cutter* v. *Pollock*, 205.

CAVEAT EMPTOR.

The rule of *caveat emptor* does not apply to a sale of personal property, where the purchaser relied upon representations of the seller, and the representations were false and intended to deceive. *Fargo Gas & Coke Co.* v. *Fargo Gas & Elec. Co.*, 219.

CERTIORARI.

1. A void order of the District Court will be set aside on *certiorari*. *State* v. *Rose*, 319.
2. The plaintiff in an attachment suit, whose attachment has been vacated by a void order of the District Court, is the person beneficially interested within the meaning of § 5508, Comp. Laws, and can sue out the writ. *State* v. *Rose*, 319.
3. On *certiorari* the Supreme Court has power to order restitution of everything taken from the relator under the void proceeding which is annulled. *State* v. *Rose*, 319.
4. The judgment on *certiorari* is entered in the Supreme Court. No mandate is sent to the inferior tribunal to render judgment. *State* v. *Rose*, 319.
5. It is only when it is clear beyond all doubt, that relator can derive no benefit from *certiorari*, that the writ will be denied. *State* v. *Rose*, 319.

CHATTEL MORTGAGES.

1. The execution by an insolvent debtor of chattel mortgages on his entire stock, securing certain of his creditors to the exclusion of others does not constitute an assignment for the benefit of creditors. *Cutter* v. *Pollock*, 205.
2. A chattel mortgage may be given upon an unplanted crop, and the filing of it before the crop is sown is a compliance with the statute. *Hostetter* v. *Brooks Elevator Co.*, 357.
3. Chapter 88, of the Laws of 1890 gives a person who performs labor upon or furnishes the materials for a threshing engine at the request of the owner thereof a lien thereon prior to the lien of a mortgage thereon, duly filed, although such mortgage lien existed at the time such work was done or such materials were furnished, provided such person perfects such lien as required by the statute. Such lien is valid. *Garr, Scott & Co.* v. *Clements*, 559.
4. The description of a threshing engine in chattel mortgage held legally sufficient, so that parole evidence to identify the engine in question as the one that was mortgaged could be received. *Russel & Co.* v. *Amundson*, 112.

CLAIM AND DELIVERY. See EVIDENCE, PLEADING AND PRACTICE, CHATTEL MORTGAGE.

1. In an action to recover the possession of an engine, plaintiff claimed title and took possession under a chattel mortgage pleaded, but not set out by copy in the complaint. The engine was described in the complaint as follows: "One 13 horse S. S. S. B. engine, complete, No. 3,784, manufactured by the plaintiff." Defendant answered: "And now comes said defendant, and, for answer to plaintiff's complaint, denies generally and specifically each and every allegation contained in plaintiff's complaint, except that the said engine is now in the possession of this defendant, which said denial is made upon the defendant's best information and belief." *Held*, that the answer is in effect a general denial, and that it puts in issue all material facts averred in the complaint, except that the defendant admitted that he was in the possession of the particular engine described in the complaint. *Russel & Co.* v. *Amundson*, 112.
2. Plaintiff's evidence tended to show that he had sold a certain engine in May, 1889, to one A., in the State of Wisconsin, and taken notes therefor, secured by a chattel mortgage upon the engine from A. to plaintiff. The mortgage was

CLAIM AND DELIVERY—Continued.

put in evidence, and it embraced a description of the engine in the precise words in the description set out in the complaint, and above quoted, except that the description in the mortgage omitted the words "No. 3,784." *Held*, that the description as contained in the mortgage, when construed in connection with the description set out in the complaint and the denial in the answer, did not, as a mere matter of legal construction, identify the engine in question as the engine described in the mortgage. *Russel & Co.* v. *Amundson*, 112.

COMMISSIONER OF GENERAL LAND OFFICE.

1. A mistake of the commissioner in matters of law, will be corrected by a court of equity. *Parsons* v. *Venzke*, 452.
2. The determination of matters of fact by the commissioner when properly before him is final and binding upon the courts. *Parsons* v. *Venzke*, 452.
3. Commissioner has power to cancel entry. *Parsons* v. *Venzke*, 452.
4. The presumption is that officers of the land department have properly exercised their powers. *Parsons* v. *Venzke*, 452.
5. Disregard of the rules of the department by the commissioner, which does not result in a denial of the right or in the loss of an opportunity to be heard will not affect the binding force of a decision. *Parsons* v. *Venzke*, 452.
6. The courts will not disturb the decision of the commissioner because of errors relating to the burden of proof, the competence of evidence or the weight of evidence. *Parsons* v. *Venzke*, 452.
7. The commissioners power to cancel an entry is not affected by the fact that the property has been transferred or mortgaged to a purchaser or mortgagee who parts with value in good faith without knowledge of the facts because of which the entry is cancelled. *Parsons* v. *Venzke*, 452.

COMPROMISE OF CONTROVERSY. See CONSIDERATION, 18.

CONSTRUCTION OF STATUTES. See STATUTES.

The construction placed upon a statute by the courts of the state from which the statute was borrowed will control here. *Jasper* v. *Hazen*, 4.

CONSIDERATION.

1. The failure or want of consideration for municipal bonds may be proved as a defense thereto as against a purchaser thereof before maturity and for value, when the bonds provide for the payment of exchange in addition to principal and interest. *Flagg* v. *School Dist.*, 30.
2. Want of consideration cannot be proved as a defense to municipal bonds in the hands of a *bona fide* purchaser thereof where the bonds were certified and indorsed as required by the statute authorizing their issue. *Flagg* v. *School Dist.* 30.
3. The compromise of a controversy is a good consideration for a promissory note. *McGlynn* v. *Scott*, 18.
4. The settlement of an unfounded claim not made in good faith is no sufficient consideration to support a promise. *McGlynn* v. *Scott*, 18.

CONSTITUTIONAL LAW.

1. A statute was entitled "An act to provide for establishing, constructing and maintaining drains in this state." Laws 1893, Ch. 55. It provided, *inter alia*, for the appointment of a drain commission, and vested in it the powers of the act. It provided for levying special assessments to pay for the cost of constructing drains. It provided for the issuance of county bonds to meet such expenses, and for the creation of a sinking fund to pay such bonds. *Held* not vulnerable to the constitutional objection that the bill embraced more than one subject, or that the subject was not expressed in the title. *Martin* v. *Tyler*, 278; *Bye* v. *Stafford*, 304.
2. Creating such drain commission, and vesting in it the powers of the act, did not violate § 172 of the constitution, which declares that the "fiscal affairs" of the county shall be transacted by a board of county commissioners. *Martin* v. *Tyler*, 278.
3. Under § 14, Art. 1, of the constitution of North Dakota, which reads: "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation, other than municipal, until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived,"—*held*: That private property cannot be taken for public use for right-of-way without just compensation in money being first made to, or paid into court for, the owner, even though it is sought to be taken by a municipal corporation. *Martin* v. *Tyler*, 278.
4. Payment by an order drawn by the drain commissioners upon the drainage fund, which order the statute declares "shall be deemed a sufficient security for the amount thereof," was not such payment as the constitution required. *Martin* v. *Tyler*, 278.
5. Further, that since the statute failed to provide compensation, as required by the constitution, the power of eminent domain could not be exercised under the statute; and, shorn of the provisions relating to the exercise of the right of eminent domain, the statute becomes so incomplete and ineffectual that we cannot presume that the legislature would have passed it as thus emasculated; hence the entire statute would fail. *Martin* v. *Tyler*, 278.
6. Further, that a provision in the statute that the warrant for damages, in case the owner was unknown, should be deposited with the county auditor for his use, was a violation of the constitutional provision that required compensation to be paid into court. *Martin* v. *Tyler*, 278.
7. Further, that, when a municipal corporation sought to take plaintiff's property for public use, he was not entitled to have the compensation ascertained by a jury. *Martin* v. *Tyler*, 278.
8. The drainage statute provides that the cost of the drain shall be apportioned by the drain commissioners between the cities and townships and property benefited by the drain, and provides, further, that such cost, so apportioned, shall be entered upon the tax list, and collected in one year; but the county commissioners may issue bonds of the county, running not more than 20 years,

CONSTITUTIONAL LAW—Continued.

in sufficient amount to cover costs of drains in such county, the proceeds of the bonds to go direct to the drain fund, to pay the costs of such drains. In that event the assessment must be divided into as many parts as the bonds have years to run, and one part only be collected in each year, the collections so made to constitute a sinking fund to reimburse the county for the principal and interest paid on such bonds. *Held*, that such transaction constitutes a loan of the credit of the county to the corporations and individuals primarily and ultimately liable, and, as such, is a violation of § 185 of the constitution, and the law is to that extent void. *Martin* v. *Tyler*, 278.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE, 348.

CONTRACTS. See ULTRA VIRES, 66.

1. Under a contract for sale of land where the purchase price is not paid the vendor retains the legal title as security for the purchase price. *Roby* v. *Bank*, 156.
2. A contract of a teacher with school district officers to teach, when teacher has not proper certificate is void. *Hosmer* v. *School District*, 197.

COUNTIES. See MUNICIPAL CORPORATIONS.

1. Where a justice of the peace files his sworn report, containing an itemized account of his fees in criminal cases, with the board of county commissioners of the proper county, and such board fails to take any action thereon within a reasonable time, the justice may bring suit against the county for such fees, and he is not required to compel such board by mandamus to act upon such claim. *Barrett* v. *Stutsman Co.*, 175.
2. No liability rests upon a county, as such, to pay the fees, of a justice of the peace in criminal cases, unless such liability is created by statute; but it is not necessary that the statute should in direct terms require the county to pay such fees if it clearly and unmistakably appears from what has been enacted that such was the legislative intent. *Barrett* v. *Stutsman Co.*, 175.
3. A county cannot plead *ultra vires* against county warrants void when issued, but validated by subsequent legislation. *Erskine* v. *Nelson Co.*, 66.

COUNTY WARRANTS. See COUNTIES, 66; COUNTY COMMISSIONERS.

1. County warrants issued for an amount sufficient so that when sold the contract price for certain labor could be realized thereon, warrants being sold at a discount from their face value—are void. *Erskine* v. *Steele Co.*, 339.
2. County warrants are non-negotiable paper, and a good faith purchaser takes them subject to all defenses against the same in the hands of the original parties. *Erskine* v. *Steele Co.*, 339.
3. The act of the legislature passed March 13th, 1885, so far validated void county warrants, theretofore issued that the plea of *ultra vires* could not thereafter be interposed as a defense thereto. *Erskine* v. *Nelson Co.*, 66.

COUNTY COMMISSIONERS.

1. When the county commissioners refuse or fail to audit and allow a justice's report. An action may be brought against the county for the recovery of his fees by the justice, and he need not proceed by mandamus. *Barrett* v. *Stutsman Co.*, 175.

COUNTY COMMISSIONERS—Continued.

2. A contract by county commissioners for services to be rendered the county, and for the payment therefore in county warrants with discount added into the warrants, without legislative authority therefore is *ultra vires* and void. *Erskine* v. *Steele Co.*, 339.

COSTS.

1. The expenses of a receiver should be examined and adjusted by the court, and are not *per se* taxable as costs against the unsuccessful party to the litigation. *Cutter* v. *Pollock*, 205.

2. Unless the plaintiff is entitled to costs, the defendant recovers costs as a matter of course in the District Court. Nor is his right affected by the fact that he set up a counterclaim which he failed to sustain. *Dows* v. *Glaspel*, 251.

COUNTERCLAIM. See PLEADING AND PRACTICE.

1. Defendant sought to recover as a counterclaim moneys he had paid plaintiffs as margins in gambling transactions. *Held*, that he could not recover. *Dows* v. *Glaspel*, 251.

2. In an action to recover unpaid portion of the purchase price of a gas plant, a counterclaim for damages sustained because of deceit of plaintiff in making the sale, is proper. *Fargo Gas & Coke Co.* v. *Fargo Gas & Elec. Co.*, 219.

3. Defendants counterclaimed in an action upon a note, for moneys paid upon other notes given at the same time, and which had been fraudulently altered after delivery to the payee, and were paid without knowledge of the alteration. *Held*, that the counterclaim could not be sustained there being no allegation therein that the notes paid were without consideration. *First Nat. Bank* v. *Laughlin*, 391.

COURT RULES. See APPEAL.

Rules of court are strictly enforced. *O'Brien* v. *Miller*, 308; *Hostetter* v. *Brooks Elevator Co.*, 357; *Wood Harvester Co.* v. *Heidle*, 427; *First Nat. Bank* v. *Laughlin*, 391.

CREDITORS BILL. See PLEADING AND PRACTICE, RECEIVER, FRAUDULENT CONVEYANCES.

1. A complaint in equity which alleges that the grantors in a certain conveyance were insolvent, and were being pushed by their creditors, and that such conveyance was without consideration, and wholly voluntary, and made with intent to hinder, delay, and defraud the creditors of the grantors, sufficiently sets forth the facts constituting the fraud. *Paulson & Co.* v. *Ward*, 100.

2. Equity clearly recognizes an action in aid of a legal process, which action, while closely allied to a creditor's bill proper, is clearly distinct therefrom, and in such action it is not necessary that an execution be issued, and returned *nulla bona*. As the purpose of the action is to procure the removal by a court of equity of obstructions that hinder the enforcement of the legal process, the execution should be levied upon the property, and remain outstanding until equity removes the impediments. *Paulson & Co.* v. *Ward*, 100.

3. In order to set aside a conveyance of land, as a fraud upon creditors, is is not sufficient to show that the grantors intended by the conveyance to hinder,

CREDITORS BILL—Continued.

delay, and defraud their creditors, or that the grantee knew of such intent on the part of the grantors, or knew that such must be the necessary result of the conveyance, when the sole object of the grantee was to secure an honest indebtedness owing to him from the grantors. *Paulson & Co.* v. *Ward*, 100.

CRIMINAL LAW AND PRACTICE.

1. County is liable for justice's fees in criminal cases. *Barrett* v. *Stutsman Co.*, 175.
2. In a prosecution for embezzlement under our statute, it is necessary to allege the ownership of the property embezzled, and prove the same as alleged. *State* v. *Collins*, 433.
3. In an indictment under section 13 of the prohibition statute, which declares all places to be common nuisances where intoxicating liquors are sold or kept for sale in violation of the provisions of the act, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, it is not necessary, when it is charged that intoxicating liquors were so sold, to state the names of the parties to whom such sales were made. *State* v. *Dellaire*, 312.
4. That section requires that the liquors should be sold or kept for sale in violation of the provisions of that act, and the indictment should so state. It is not enough to state generally that the acts were done contrary to the statute in such case made and provided. An indictment under that section charges no offense unless it states that the prohibited acts or some of them, were done or permitted in the building during the time that it is charged the defendant kept the same; but indictment in this case *held* sufficiently definite and certain in this respect. *State* v. *Dellaire*, 312.
5. A nonresident attorney, employed by relatives of the person for whose murder the accused is being tried may assist the prosecuting attorney upon the trial in a homicide case. *State* v. *Kent*, 577.
6. Great latitude should be allowed in the cross-examination of an accomplice. It is competent for counsel for accused to ask the accomplice who had by his own testimony made out a case of murder against himself, whether he expected to be hung. *State* v. *Kent*, 577.
7. When a person on trial for felony presents to the judge of the district in which the indictment is pending his affidavit stating that he cannot have an impartial trial by reason of the *bias* and prejudice of such judge, it is the absolute duty of such judge to call in another judge to try the case. For him to refuse to do so is error. The word "may" in the statute (§ 7312 Comp. Laws) must be construed as "must" under a familiar rule of construction. *State* v. *Kent*, 577.
8. Under § 7260, Comp. Laws, it is proper to charge as principal in the homicide one who counsels and directs a murder. The indictment may aver that he himself fired the fatal shot, which was in fact fired by the one he instigated to commit the crime. *State* v. *Kent*, 577.
9. It was competent for the accused to prove as bearing upon the credibility of the accomplice that no proceedings had been instituted against him for the murder he had confessedly committed. *State* v. *Kent*, 577.
10. No conviction can be had on the uncorroborated testimony of an accomplice. But it is not necessary that the corroborating evidence should be sufficient in itself to support a conviction. *State* v. *Kent*, 577.

CRIMINAL LAW AND PRACTICE—Continued.

11. Instructions given by the accused to the accomplice touching the story the latter was to tell in explanation of the killing, may be sworn to by the accomplice, and it is not error for the court to receive in evidence a book in which said instructions were written down by the accomplice, when the latter swears he wrote them down as they were given to him by the accused and under his direction. *State* v. *Kent*, 577.

12. If the sheriff would be disqualified as a juror because of *bias*, a challenge on that ground may be made to a special jury panel selected by him under § 7347, Comp. Laws. *State* v. *Kent*, 577.

13. It was not error for the court to allow the accomplice, who was a Bohemian, to translate into English these written instructions, which he himself had written in the book in the Bohemian dialect, he having testified to his ability to make the translation correctly. *State* v. *Kent*, 577.

CURATIVE LEGISLATION. See COUNTIES, COUNTY WARRANTS, 66.

DAMAGES.

The measure of damages for deceit, in sale of personal property is the difference between what the property would have been worth if as represented and what it actually was worth at the time of sale. *Fargo Gas & Coke Co.* v. *Fargo Gas & Elec. Co.*, 219.

DECEIT.

1. Ordinarily, one who buys property has a right implicitly to rely upon representations of the seller; and if they were false and made with intent to deceive the purchaser, the seller will not be allowed to urge that the buyer, by investigation, could have discovered their falsity. *Fargo Gas & Coke Co.* v. *Fargo Gas & Electric Co.*, 219.

2. In an action to recover the unpaid portion of the purchase price of a gas and electric light plant sold by plaintiff to defendant, defendant set up, as a counterclaim, damages sustained by it because of the deceit of plaintiff in making the sale. The alleged false representations related to the physical condition of the plant, its wires, poles, gas mains, and fixtures, and also the amount of its earnings the year previous to the sale, and the prices charged customers for gas and electric light. *Held*, that defendant was under no obligation to investigate the truth of such representations, and that, therefore, it was error for the court to charge the jury that, if the means were at defendants hands to discover the truth or untruth of plaintiff's statements with respect to these matters, defendant must be presumed to have had knowledge of the actual facts, the only means at defendant's hands to discover the truth or falsity of the statements made being an investigation of such matters. *Held*, further, that, in actions for damages because of deceit in the sale of property, the measure of damages is the difference between what the property would have been worth if as represented and what it actually was worth at the time of sale. *Fargo Gas & Coke Co.* v. *Fargo Gas & Elec. Co.*, 219.

DEED.

1. In a sheriff's deed under foreclosure proceedings by advertisement, the grantee

DEED—Continued.

was named and described as "Globe Investment Company formerly Dakota Mortgage Loan Corporation." *Held*, that such recital was no evidence that the Globe Investment Company had succeeded to the rights of the Dakota Mortgage Loan Corporation. *Hannah* v. *Chase*, 351.

2. Where a grantee of real property assumed the payment of an incumbrance thereon, such contract of assumption is an original undertaking on his part, distinct from the contract of purchase. It may be contained in the conveyance, or it may be by separate writing, or it may rest entirely in parol. *Moore* v. *Booker*, 543.

DE FACTO OFFICER.

A mere intruder claiming to hold over until his successor is elected and qualified is not a *de facto* officer when his successor has qualified as the law directs. *State* v. *Callahan*, 481.

DEPOSITIONS. See EVIDENCE.

1. In the absence of any showing of prejudice, it is not error to refuse to suppress a deposition, taken in another state on notice, because the notice did not locate the office of the notary before whom such deposition was to be taken by street and number. *Moore* v. *Booker*, 543.

2. It is not error to refuse to suppress a deposition for the reason that it does not appear in the certificate of the officer taking the deposition or elsewhere that the officer was not a relative of either party, or otherwise interested in the action. Such fact, if it exist, must be made to appear affirmatively. Our statute does not require the certificate to speak upon that point. *Moore* v. *Booker*, 543.

DISTRICT JUDGE. See CERTIORARI, 319; CRIMINAL LAW AND PRACTICE, 577.

1. One judge has no power to review on the same facts the decision of another judge of co-ordinate jurisdiction. *Enderlin Bank* v. *Jennings*, 228.

2. The District Judge has no power to make *ex parte* orders effecting property, without hearing or notice of hearing. *State* v. *Rose*, 319.

3. When a person on trial for felony presents to the Judge of the District Court, in which the indictment is pending, his affidavit stating that he cannot have an impartial trial by reason of the *bias* and prejudice of such judge, it is the absolute duty of such judge to call in another judge to try the case. *State* v. *Kent*, 577.

DISBARMENT.

Where the statute enumerates grounds for disbarment of an attorney no other grounds can be considered by the court. *In re Eaton* 514.

DIRECTION OF VERDICT. See VERDICT.

DRAINAGE STATUTE. See CONSTITUTIONAL LAW, 278.

EMBEZZLEMENT. See CRIMINAL LAW AND PRACTICE.

EQUITY. See CREDITORS BILL, 100; RECEIVER, 507.

1. A court of equity, in furtherance of justice, has power to modify a judgment in a particular not affecting the merits of the case, but merely relating to the mode of carrying into effect the decision of the court. *Tyler* v. *Shea*, 377.

2. Where a time is prescribed within which money must be paid to entitle a party to the benefit of the judgment, the court may, even after such time has expired, extend it by a modification of the judgment in furtherance of justice; and it may modify a judgment directing payment to be made to a party by providing that the payment may be made to the clerk of the court for the benefit of such party. *Tyler* v. *Shea*, 377.

3. When it has been exercised under a mistake as to the law to the injury of the rightful claimant, a court of equity will correct the error, and compel the holder of the patent to convey to the one who but for such mistake would have obtained the patent himself. *Parson* v. *Venzke*, 452.

ERROR.

1. Error in immaterial matters is harmless. *Daeley Bros.* v. *M. & N. Elevator Co.*, 269.

2. Error in charge when harmless. *Daeley Bros.* v. *M. & N. Elev. Co.*, 269.

3. It is reversible error to admit evidence in support of an illegal counterclaim. *First Nat. Bank* v. *Laughlin*, 391.

4. Certain testimony was allowed to go before the jury against defendant's objection thereto. Such evidence examined, and found to be wholly favorable to the defendant. *Held*, that, if the evidence was improperly admitted, the ruling admitting the same was error without prejudice. *Bishop* v. *C. M. & St. P. Ry. Co.*, 536.

5. In its instructions to the jury the trial court pointed out certain testimony which had been admitted against defendant's objection thereto, and distinctly informed the jury that, for reasons which were stated, such testimony was withdrawn from the case, and must not be considered at all by the jury. *Held*, under the circumstances of this case, that the error, if error there was, in admitting such evidence, was cured by such instructions to the jury. Whether such withdrawal would cure the error in all cases not decided. *Bishop* v. *C. M. & St. P. Ry. Co.*, 536.

ESTOPPEL. See WAIVER.

1. When one gives his agent ambiguous instructions, which the latter executes in good faith, according to a reasonable interpretation of them, the principal is estopped to say that he intended them to be construed otherwise. *Anderson* v. *Bank*, 182.

2. One who buys property has a right implicitly to rely upon representations of the seller and if they were false and made with intent to deceive the purchaser, the seller will not be allowed to urge that the buyer by investigation could have discovered their falsity. *Fargo Gas & Coke Co.* v. *Fargo Gas & Elec. Co.*, 219.

EVIDENCE. See DEPOSITIONS, PRESUMPTIONS.

1. After two of the notes were due, plaintiff took of C. (one of the original debtors,) and one P., other notes secured by a chattel mortgage. The new

EVIDENCE—Continued.

notes and mortgage were executed and delivered solely as collateral to the first series of notes. The first series was not paid or surrendered, nor was the time of payment thereof extended. No action was ever brought against C. and S. upon the original notes, nor was the first mortgage ever foreclosed. Suit was not commenced upon any of the collateral notes for a period of over three years after the maturity of the first original note, and more than two years after the maturity of the first collateral note. The mortgage given with the collateral paper was not foreclosed until long after action was brought on such paper. The action is upon the guaranty. Plaintiffs had the burden of showing, as a condition precedent to recovery, that they had prosecuted their legal remedies, including the remedy of foreclosure, with reasonable diligence to collect the claim of the original debtors. Upon the facts stated, *held*, that plaintiff's cannot recover. The laches of the plaintiffs in pursuing their legal remedies against the debtors operates to exonerate the guarantors. *Roberts, Throp & Co.* v. *Laughlin*, 167.

2. Recitals in sheriffs deed of certain jurisdictional facts held no evidence of the facts recited. *Hannah* v. *Chase*, 351.

3. The presumption that a public officer has done his duty, will not warrant the court in presuming the existence of an independent jurisdictional fact of which there is no other evidence. *Hannah* v. *Chase*, 351.

4. Evidence held sufficient to justify the verdict. *Roberts, Throp & Co.* v. *Laughlin*, 167.

5. Evidence supports the findings. *Jasper* v. *Hazen*, 1; *Hostetter* v. *Brooks Elev. Co.*, 357; *Paulson & Co.* v. *Ward*, 100; *Bissonette* v. *Barnes*, 311.

6. When evidence which is competent to establish a fact is admitted, the court on appeal will not assume that the trial court considered the evidence in finding another fact which it was not legally competent to prove when the latter fact is fully supported by other evidence. *Dows & Co.* v. *Glaspel*, 251.

7. When one sues his agent for moneys received by the agent for his use, he has the burden of proof to show the amount received and not accounted for. *Anderson* v. *Bank*, 182.

8. In such cases the agent has the burden of accounting for all moneys which he admits he received. *Anderson* v. *Bank*, 182.

9. When one acts on instructions given after communications on the same subject have passed between him and his principal, all such communications are admissable in evidence to explain the instructions. *Anderson* v. *Bank*, 182.

10. When one gives his agent ambiguous instructions, which the latter executes in good faith, according to a reasonable interpretation of them, the principal is estopped to say that he intended them to be construed otherwise. *Anderson* v. *Bank*, 182.

11. Evidence held insufficient to sustain findings. *In re Eaton*, 514.

12. Where the evidence is conflicting the jury's verdict will not be set aside on the ground of insufficiency to sustain the verdict. *Bishop* v. *C. M. & St. P. R. Co.*, 536.

13. The evidence must be clear, convincing and satisfactory to support a finding that a deed absolute in form was intended as a mortgage only. *Jasper* v. *Hazen*, 1.

EVIDENCE—Continued.

14. Evidence held sufficient to sustain finding that a deed in form was intended as a mortgage only. *Jasper* v. *Hazen*, 1.

15. Evidence held insufficient to show that a compromise was intended to be made. *McGlynn* v. *Scott*, 18.

16. The certificate of the county clerk that municipal bonds are authorized to be issued and that all preliminary proceedings to their issue have been duly had, made in the form required by the statute authorizing the bonds is sufficient evidence that the law has been complied with, to protect a *bona fide* purchaser for value before maturity relying thereon. *Flagg* v. *School District*, 30.

17. Evidence in this case *held* sufficient to sustain a finding that the grantee participated in the fraudulent intent to hinder, delay, and defraud the creditors of the grantors. *Paulson & Co.* v. *Ward*, 100.

18. A judgment *in personam* is evidence only of the fact that such judgment has been entered except as to parties and privies. *Tierney* v. *Phoenix Ins. Co.*, 565.

19. An accomplice who by his own testimony, made out a case of murder against himself, may properly be asked whether he expected to be hung. *State* v. *Kent*, 577.

20. It is error to refuse defendant the privilege of proving as bearing on the credibility of an accomplice that no proceedings had been instituted against the accomplice. *State* v. *Kent*, 577.

21. Evidence corroborating the accomplice as to the fact that a crime has been committed or with respect to the fact that the accomplice is guilty thereof, will not satisfy the statute. *State* v. *Kent*, 577.

22. Instructions given by the accused to the accomplice, as to the account the latter should give of the killing may be sworn to by the accomplice. *State* v. *Kent*, 577.

23. It was not error for the court to receive in evidence a book in which the accomplice testified the instructions given him by the accused were written down, at the time the instructions were given and under direction of accused. *State* v. *Kent*, 577.

24. Accomplice may interpret into English contents of his private memorandum book, where pertinent, and he gives evidence of his ability to make the translation. *State* v. *Kent*, 577.

EXCEPTIONS.

1. Exceptions to findings of fact must specify wherein the finding is not supported by the evidence. *Hostetter* v. *Brooks Elev. Co.*, 357.

2. An erroneous and misleading charge to the jury will not avail for a new trial unless an exception is reserved and error assigned thereon. *First Nat'l Bank* v. *Laughlin*, 391.

EXEMPTIONS.

An action will lie against an officer for the unlawful seizure and sale of exempt personal property. *Bissonette* v. *Barnes*, 311.

EXECUTION. See CREDITORS BILL, 100; PLEADING AND PRACTICE; RECEIVER, 507.

FALSE REPRESENTATIONS, See SALE, 219.

FEES.

1. Fees of receiver, how taxed. *Cutter* v. *Pollock*, 205.
2. Justice of the peace may sue the county and recover his fees in criminal cases. *Barrett* v. *Stutsman Co.*, 175.

FINDINGS OF FACT.

1. Findings sustained by the evidence. *Hostetter* v. *Brooks Elev. Co.*, 357; *Bissonette* v. *Barnes*, 311; *Jasper* v. *Hazen*, 1; *Paulson & Co.* v. *Ward*, 100; *Roberts, Throp & Co.* v. *Laughlin*, 167; *Bishop* v. *C. M. & St. P. R. Co.*, 536.
2. Findings not supported by the evidence. *In re Eaton*, 514.
3. In construing an ambiguous finding of fact made by the trial court, it is proper for the appellate court to consider all the findings, in order to determine what was intended; and it is the duty of the appellate court, when it can be done without violence to the language used, to so construe a finding as to support a conclusion of law that follows. *Moore* v. *Booker*, 543.
4. Where exceptions to findings of fact do not specify wherein such findings are not justified by the evidence, this court will not explore the record to ascertain whether or not the finding is supported by the evidence. *Hostetter* v. *Brooks Elev. Co.*, 357.
5. Findings of fact are presumed to be correct and will not be disturbed unless error is made clearly to appear. *Jasper* v. *Hazen*, 1.
6. A finding of fact with evidence to support it will cure a defect in the pleading, in not alleging this essential fact. *Paulson & Co.* v. *Ward*, 100.

FORECLOSURE OF MORTGAGES. See MORTGAGES, 351.

FRAUDULENT CONVEYANCES. See CREDITOR'S BILL, PLEADING AND PRACTICE, 100. ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. In order to set aside a conveyance of land, as a fraud upon creditors, it is not sufficient to show that the grantors intended by the conveyance to hinder, delay and defraud their creditors, or that the grantee knew of such intent on the part of the grantors, or knew that such must be the necessary result of the conveyance, when the sole object of the grantee was to secure an honest indebtedness owing to him from the grantors. *Paulson & Co.* v. *Ward*, 100.
2. Evidence in this case *held* sufficient to sustain a finding that the grantee participated in the fraudulent intent to hinder, delay, and defraud the creditors of the grantors. *Paulson & Co.* v. *Ward*, 100.

FRAUD AND DECEIT. See ATTORNEYS AT LAW, 272. DECEIT, 219.

SALES. FRAUDULENT CONVEYANCES, 100.

1. Concealment of any material fact is fraudulent, on the part of one holding a fiduciary relation. *Riegi* v. *Phelps*, 272.

FRIVOLOUS PLEADING. See PLEADING AND PRACTICE, 164.

FUNDING BONDS. See MUNICIPAL BONDS, 30.

GAMBLING CONTRACTS.

1. An agent cannot recover for commissions or for moneys advanced for his principal in an illegal enterprise. *Dows & Co.* v. *Glaspel*, 251.

2. Moneys advanced by defendant for margins upon wheat options cannot be recovered back. *Dows & Co.* v. *Glaspel*, 251.

GRANTOR AND GRANTEE.

Where the grantee of real property assumed the payment of an incumbrance thereon, such contract of assumption is an original undertaking on his part distinct from the contract of purchase. It may be contained in the conveyance or it may be by separate writing, or it may rest entirely in parole. *Moore* v. *Booker*, 543.

GROSS EARNINGS LAW. See TAXATION, 494.

GUARANTY.

1. Three promissory notes payable to the plaintiffs were executed and delivered to plaintiffs by C. and S., and secured by chattel mortgage. Before the notes were delivered, the defendants indorsed upon each note a guaranty of collection, as follows: "For value received, we hereby guaranty the collection of the within note. Laughlin, Palmer & Co." *Held* construing § 4280, Comp. Laws, that by this form of guaranty the defendants undertook only that the makers of the notes were solvent when the guaranty was entered into, and that the notes were "collectible by the usual legal proceedings, if taken with reasonable diligence." *Roberts, Throp & Co.* v. *Laughlin*, 167.

2. After two of the notes were due, plaintiff took of C. (one of the original debtors,) and one P., other notes secured by a chattel mortgage. The new notes and mortgage were executed and delivered solely as collateral to the first series of notes. The first series was not paid or surrendered, nor was the time of payment thereof extended. No action was ever brought against C. and S. upon the original notes, nor was the first mortgage ever foreclosed. Suit was not commenced upon any of the collateral notes for a period of over three years after the maturity of the first original note, and more than two years after the maturity of the first collateral note. The mortgage given with the collateral paper was not foreclosed until long after action was brought on such paper. The action is upon the guaranty. Plaintiffs had the burden of showing, as a condition precedent to recovery, that they had prosecuted their legal remedies, including the remedy of foreclosure, with reasonable diligence to collect the claim of the original debtors. Upon the facts stated, *held*, that plaintiffs cannot recover. The laches of the plaintiffs in pursuing their legal remedies against the debtors operates to exonerate the guarantors. *Roberts, Throp & Co.* v. *Laughlin*, 167.

3. Insolvency of the principal debtors after the maturity of notes will not excuse plaintiffs laches in not foreclosing the first mortgage, nor their protracted delay in prosecuting their legal remedies upon collateral securities. *Roberts, Throp & Co.* v. *Laughlin*, 167.

HOMICIDE. See CRIMINAL LAW AND PRACTICE.

Under § 7260, Comp. Laws, it is proper to charge as principal in the homicide one who counsels and directs a murder. The indictment or information may aver that he himself fired the fatal shot, which was in fact fired by the one instigated to commit the crime. *State* v. *Kent*, 577.

HOMESTEAD.

A mortgage of the homestead for unpaid purchase money is good although not signed by the husband, and this is true although the mortgage also secures other indebtedness of the husband. *Roby* v. *Bank*, 156.

HUSBAND AND WIFE. See HOMESTEAD, 156.

IGNORANCE OF FACT.

Where a note which had been fraudulently altered after its delivery, was paid by the makers without knowledge of the alteration. *Held*, that the money could not be recovered back in the absence of an allegation that the note was without consideration. *First Nat'l Bank* v. *Laughlin*, 391.

INDICTMENT. See CRIMINAL LAW AND PRACTICE, 312, 577.

1. One who counsels and directs a homicide may be charged in the indictment as having himself fired the fatal shot. *State* v. *Kent*, 577.
2. An indictment for maintaining a liquor nuisance, it is not necessary to state the names of the parties to whom sales were made. *State* v. *Dellaire*, 312.
3. Indictment must allege that the acts charged as a nuisance were done or permitted in the building, named during the time the defendant kept the same. *State* v. *Dellaire*, 312.

INSOLVENCY. See CREDITOR'S BILL, 100. ASSIGNMENT FOR BENEFIT OF CREDITORS, 205.

1. The insolvency of makers of notes will not excuse delay in prosecuting legal remedies upon collaterals where it is sought to hold guarantors. *Roberts, Throp & Co.* v. *Laughlin*, 167.

INSTRUCTIONS TO JURY. See PLEADING AND PRACTICE.

1. Erroneous instructions will not avail for new trial unless properly excepted to and error assigned thereon. *First Nat. Bank* v. *Laughlin*, 391.
2. In its instructions to the jury the trial court pointed out certain testimony which had been admitted against defendant's objection thereto, and distinctly informed the jury that, for reasons which were stated, such testimony was withdrawn from the case, and must not be considered at all by the jury. *Held*, under the circumstances of this case, that the error, if error there was, in admitting such evidence, was cured by such instructions to the jury. Whether such withdrawal would cure the error in all cases not decided. *Bishop* v. *C. M. & St. P. R. Co.* 536.
3. Judgment reversed for error in charging the jury that liability of defendant depended solely upon freedom of plaintiff from contributory negligence, the defendant's negligence not being established by the evidence as a matter of law. *Bennett* v. *N. P. R. Co.*, 348.
4. An error in the charge of the court to the jury which in no manner injured appellant is no ground for reversal. *Daeley Bros.* v. *M. & N. Elev. Co.*, 269.

INSTRUCTIONS TO JURY—Continued.

5. It is not error to refuse instructions requested that are correct in law and applicable to the case where the charge already given fairly and properly covers every point presented in the rejected instructions. *Daeley Bros.* v. *M. & N. Elev. Co.*, 269.

6. At the close of the testimony, the trial court instructed the jury to return a verdict for the defendant. *Held*, that the instruction was proper. No testimony being offered to establish the identity of the engine, and the identity not being made out as a matter of legal construction from the description in the mortgage, considered with reference to the pleadings, there was a total failure on plaintiff's part, *i. e.* a failure to show that his mortgage covered the property in controversy in the action. *Russel & Co.* v *Amundson*, 112.

INSURANCE.

1. In an action on an insurance policy, defendant having proved a divesture, before the loss, of plaintiff's interest in the insured property by virtue of foreclosure proceedings, regular and legal on their face, followed by a deed purporting to convey all defendant's interest in the property, *held*, it was error to receive in evidence as against defendant a judgment, annulling such foreclosure proceedings, in an action commenced subsequently to the loss (to which action defendant herein was not a party, and of which it had no notice,) for the purpose of establishing the fact that such foreclosure proceedings were void, and thus defeat the defense that the insured had no insurable interest in the property at the time of the loss. *Tierney* v. *Phoenix Ins. Co.* 565.

INTOXICATING LIQUOR. See CRIMINAL LAW AND PRACTICE, 312.

JUDGMENTS.

1. A judgment is only evidence of the fact that judgment has been rendered against all persons except parties and privies. *Tierney* v *Insurance Co.* 565.

2. A judgment to become such in the statutory sense must be entered in the judgment book. *In re Weber*, 119.

3. An order dismissing appeal is not a judgment even if entered in the judgment book. *In re Weber*, 119.

4. Judgment may be had on the pleadings where the answer is frivolous. *Sigmond* v. *Bank*, 164.

5. The decisions of the land department so far as they relate to matters of fact, where the parties have been heard or have an opportunity to be heard, are final. *Parsons* v. *Venzke*, 452.

6. Where certain irregularities, are fatal to tax proceedings, but not to the taxes themselves in equity, judgment will be directed to enter for the amount of the taxes, interest and penalties and the tax proceedings will be set aside. *Railroad Co.* v. *McGinnis*, 494.

JURY TRIAL.

1. In condemnation proceedings. *Martin* v. *Tyler*, 278.

2. A special jury summoned by the sheriff will be discharged upon challenge because of the bias of the officer selecting them, if the sheriff himself would be disqualified as a juror because of bias. *State* v. *Kent*, 577.

JURISDICTION. See DISTRICT JUDGE.

JUSTICE OF THE PEACE. See APPEAL, JUDGMENT, ORDER, PLEADING AND PRACTICE.

A justice of the peace can recover his fees in criminal actions from the county. *Barrett* v. *Stutsman Co.*, 175.

LACHES.

1. Laches in pursuing debtor is not excused by the insolvency of the original debtor, where there is mortgage security which can be foreclosed upon or other collateral on which to realize. *Roberts, Throp & Co.* v. *Laughlin*, 167.
2. Laches in pursuing legal remedies against debtors operates to exonerate guarantors. *Roberts, Throp & Co.* v. *Laughlin*, 167.

LIENS.

1. Where the purchase of real estate is evidenced by contract only, and the purchase price is not paid, and the vendor retains the legal title as security for the unpaid purchase price, he holds a lien upon the property by virtue of the contract, and not simply the vendor's lien that exists in equity where the vendor has parted with the legal title without payment. *Roby* v. *Bismarck Nat'l Bank*, 156.
2. A lien for taxes upon personal property arising under § 90, Ch. 132, Laws 1890, does not attach until after a tax has been assessed and levied; nor until "after the time the tax books are received by the county treasurer" of the county where such tax is assessed and levied. *Swenson* v. *Greenland*, 552.
3. In an action brought to foreclose an alleged lien for such taxes there were no averments in the complaint that the tax claimed to be a lien was ever assessed or levied, and no averment that the treasurer of the county in question ever received the tax books in the years in question. *Held*, that such complaint is insufficient. In such actions the general presumption that public officers have done their duty will not supply the place of material averments of fact which are omitted from the complaint. *Swenson* v. *Greenland*, 552.
4. Chapter 88 of the laws of 1890, gives a person who performs labor upon or furnishes the materials for a threshing engine at the request of the owner thereof a lien thereon prior to the lien of a mortgage thereon. Such lien is valid.. *Garr, Scott & Co.* v. *Clements*, 559.

MANDAMUS.

1. A justice of the peace can sue the county for his fees in criminal actions where payment is refused by the county commissioners and he is not required to *mandamus* the board to act on his claim. *Barrett* v. *Stutsman Co.*, 175.
2. In *mandamus* against a county officer holding over after the expiration of his term; brought by a relator having a certificate of election, and who has duly qualified for the office by taking the oath and giving the required bond, the realator's *prima facie* title to the office cannot be defeated by an answer which admits the *prima facie* title, but contains averments of fact which involve the ultimate title of the relator to such office. Such an answer is demurrable if it contains only such facts as would, if established, defeat the relators's ultimate title, in a proper proceeding to try title. *State* v. *Callahan*, 481.

MANDAMUS—Continued.

3. In this case it appears by the averments in the alternative writ that the relator has such *prima facie* title to the office of county superintendent of schools of Cass County, and has demanded possession of the defendant. Defendant's answer to the writ admits the facts constituting such *prima facie* title, and alleges as new matter, that the relator, when his term commenced, and for some time prior thereto, did not have or hold the educational certificate prescribed by statute (§ 34, Ch. 62, Laws 1890,) or its equivalent. The trial court sustained relator's demurrer to the answer. *Held*, that such ruling was proper. *Held*, further, that the new matter in the answer had reference only to the relator's ultimate title to the office, and such title cannot be litigated in this proceeding, which involves only the right of present possession. In such cases the relator cannot be driven out of court by the mere fact that the incumbent pleads facts in his answer which call for a determination of the relators's ultimate title to the office, and only that title. *State* v. *Callahan*, 481.

4. The prevailing rule of law is that the title to an office will not be tried by *mandamus*. Some states hold otherwise. *State* v. *Callahan*, 481.

5. As a general rule the writ of mandamus issues to admit in office a candidate holding a valid certificate of election, who has qualified by taking the official oath, furnishing the prescribed official bond, and who has demanded possession of the incumbent. *State* v. *Callahan*, 481.

MISTAKE. See COUNTERCLAIM, 391.

Equity will correct a mistake. *Parsons* v. *Venzke*, 452.

MORTGAGES. See CHATTEL MORTGAGES.

1. Under § 5424, Comp. Laws. the sheriff, after making a foreclosure sale by advertisement, where a surplus remains in his hands arising upon such sale, is required to pay over such a surplus on demand "to the mortgagor, his legal representatives or assigns." *Held*, where it appears that the mortgage under which the sale was held was executed by two parties as mortgagors, that one of such parties cannot, as mortgagor, maintain an action for any surplus arising on the sale, without alleging that the entire right to the surplus had been transferred to the party bringing the action. *Clyde* v. *Johnson*, 92.

2. To support a finding that a deed absolute on its face was intended as a mortgage only, the evidence must be clear, convincing, and satisfactory, and of such a character as will leave in the mind of the chancellor no hesitation or substantial doubt. In reviewing questions of fact upon appeal, in this class of cases, the same strict rule must be applied by the appellate court. *Jasper* v. *Hazen*, 1.

3. Where it was alleged in the complaint that the title to the mortgaged premises was, after the mortgage was executed, transferred by one of the mortgagors to the other, but it did not appear when such transfer was made with reference to the date of foreclosure sale, that the complaint is demurrable for insufficiency. The omission to aver the date of the transfer of title was fatal, because the time was essential to the right of action. If the transfer was made subsequent to the foreclosure sale, such transfer would not itself operate to assign to the grantee the right to the surplus which vested in the mortgagors jointly on the day the sale occurred. Mere transfer of title after sale will give no right of action for the surplus to the grantee. *Clyde* v. *Johnson*, 92.

MORTGAGES—Continued.

4. Where realty purchased is used as a homestead, and subsequently, at the request of the purchaser, the vendor executes and delivers to the wife of such purchaser a warranty deed to the land, and the wife, at the same time, and as a part of the same transaction, executes and delivers to the vendor a mortgage on the land, to secure the unpaid purchase money, such mortgage is valid, although not signed by the husband. *Roby* v. *Bismarck Nat'l Bank*, 156.

5. The fact that said mortgage also secures other indebtedness of the husband to the grantee in the mortgage does not invalidate this mortgage so far as it secures the unpaid purchase money of the homestead. *Roby* v. *Bismarck Nat'l Bank*, 156.

6. Foreclosure by advertisement. Effect of recitals in sheriffs deed. *Hannah* v. *Chase*, 351.

7. Where a grantee of real property assumed the payment of an incumbrance thereon. Such contract of assumption is an original undertaking. *Moore* v. *Booker*, 543.

MOTION. See PLEADING AND PRACTICE.

The specification of particular grounds for motion excludes all other grounds. *Bank* v. *Laughlin*, 392; *Minn. Thresher Mfg. Co.* v. *Lincoln*, 410.

MUNICIPAL CORPORATIONS. See JUSTICE OF THE PEACE, 175.

1. A city established a system of water works which did not include lateral service pipes. These and the expenses of putting them in were to be paid for by the one who connected with the water main in the street. *Held*, that such lateral pipe was owned and must be kept in repair by the one who made the connection, and not by the city, and that the city was justified in severing such connection where the owner refused to pay the expenses of repairing a break in such lateral service pipe in the street a short distance from the main pipe, although he had paid his water rates for a period running beyond the time when said connection was severed. *Jackson* v. *Ellendale*, 478.

2. A contract duly executed between the proper officers of a school district and another person, by the terms of which said person is employed as a teacher in a public school in said district, is void where such person, at the time of making the contract, holds no certificate of authority to teach in the county where the district is located. *Hosmer* v. *School Dist.*, 197.

3. The subsequent procurement of such certificate will not enable such person to recover against the district, damages for the breach of such contract. *Hosmer* v. *School Dist.*, 197.

4. Townships are not liable for neglect of its officers, in failing to keep bridges in repair. *Vail* v. *Town of Amenia*, 239.

5. County is liable for fees of a justice of the peace in criminal actions. *Barrett* v. *Stutsman Co.*, 175.

6. A municipal bond providing for the payment of exchange in addition to principal and interest is non-negotiable. *Flagg* v. *School Dist.*, 30.

7. Bonds of municipality registered and certified as legal under the statute are not open to question in the hands of a *bona fide* purchaser. *Flagg* v. *School Dist.*, 30.

MURDER. See HOMICIDE, 577; CRIMINAL LAW AND PRACTICE.

NEGOTIABLE INSTRUMENTS. See GUARANTY, 167.

1. Laches in pursuing legal remedies against the makers will operate to exonerate the guarantors. *Roberts, Throp & Co.* v. *Laughlin*, 167.
2. Insolvency of the makers of a negotiable note will not excuse plaintiffs laches in not foreclosing upon his mortgage security, nor protracted delay in prosecuting their legal remedies upon collateral securities. *Roberts, Throp & Co.* v. *Laughlin*, 167.
3. County warrants are non-negotiable instruments. *Erskine* v. *Steele Co.*, 339.
4. A provision in a note for the payment of the expenses of collection including reasonable attorneys fees, destroys its negotiability. *First Nat'l Bank* v. *Laughlin*, 391.
5. The erasure of a material part of a note after its delivery, without the consent of the makers if fraudulently done, extinguishes the note as a legal obligation, and the debt evidenced by it. *First Nat'l Bank* v. *Laughlin*, 391.
6. The compromise of a controversy is a good consideration for a promissory note. *McGlynn* v. *Scott*, 18.
7. A provision for the payment of exchange in addition to principal and interest in a municipal bond, destroys its negotiability. *Flagg* v. *School Dist.*, 30.
8. The purchaser of a non-negotiable bond is protected by recitals of facts contained in a certificate thereto, made by a person authorized to determine the facts and make the certificate. *Flagg* v. *School Dist.*, 30.

NEGLIGENCE.

1. A charge which in effect informs the jury that they must find the defendant negligent if plaintiff was not himself careless, is bad. *Bennett* v. *N. P. R. Co.*, 350.
2. Where the evidence is conflicting upon a question of negligence, the verdict will not be set aside on the ground of the insufficiency of the evidence. Evidence examined, and *held*, the evidence been conflicting, that the verdict will not be set aside in this case upon such ground. *Bishop* v. *C. M. & St. P. R. Co.*, 536.
3. In an action against a railroad company for negligently killing an animal at a private crossing, put in by the defendant for the plaintiff's use in passing from one part of his farm to another, the question of negligence is usually a question for the jury. *Held*, under the evidence in this case, that the question of negligence was properly submitted to the jury. *Bishop* v. *C. M. & St. P. R. Co.*, 536.
4. A colt belonging to the plaintiff was turned loose to feed upon the plaintiff's land, and, while attempting to pass across the railroad track upon such crossing, was killed by defendant's cars. *Held*: *First*, that such animal was not, when killed, a trespassing animal, but was lawfully upon the crossing; *second*, that defendant in running its trains, was bound to exercise due care in approaching and passing over such private crossing, and is bound to anticipate that animals and persons may be rightfully upon its right-of-way at the point of crossing. The care must be commensurate with the danger reasonably to be apprehended at the point of intersection. *Bishop* v. *C. M. & St. P. R. Co.*, 536.

NUISANCE. See CRIMINAL LAW AND PRACTICE, 312.

ORDER. See PLEADING AND PRACTICE.

1. An order dismissing an appeal is not a final judgment. *In re Weber*, 119.
2. An order of the District Court dismissing an appeal from Justices Court is not an appealable order. *In re Weber*, 119.
3. An order dismissing an appeal authorized the clerk to enter a judgment from which an appeal could be taken. *In re Weber*, 119.

OPTION CONTRACTS. See GAMBLING, 251.

PARTIES. See CERTIORARI, 319.

In an action for surplus upon a mortgage foreclosure, all mortgagors in the mortgage are necessary parties. *Clyde* v. *Johnson*, 92.

PERSONAL PROPERTY EXEMPTIONS.

An action will lie against an officer for the seizure and sale of exempt personal property. *Bissonette* v. *Barnes*, 371.

PLEADING AND PRACTICE. See CLAIM AND DELIVERY, CREDITOR'S BILL.

1. Where an agent sued for commissions and for moneys advanced for his principal in a gambling deal, the principal counterclaimed for moneys advanced the agent as margins, *held*, that neither party could maintain his contention. *Dows & Co.* v. *Glaspel*, 251.
2. Upon an action by seller for purchase price of a gas and electric plant, the defendant sustained a counterclaim for damages for deceit of the seller in making the sale. *Fargo Gas & Coke Co.* v. *Fargo Gas & Elec. Co.*, 219.
3. Where defendant sought to counterclaim for moneys paid upon a promissory note fraudulently altered after its delivery, but where the moneys were paid in ignorance of the alteration, *held*, that there being no allegation that the note which was paid was given without consideration, no recovery could be had thereon. *First Nat'l Bank* v. *Laughlin*, 391.
4. To entitle a judgment creditor to an order appointing a receiver of his debtors property, it must be made to appear that the creditor has in good faith exhausted his remedies at law. *Minkler* v. *U. S. Sheep Co.*, 507.
5. In an action brought for the foreclosure of a lien for personal property taxes, the complaint must contain averments that the tax claimed to be a lien was properly assessed and levied and that the treasurer received the tax book in the year in question. *Swenson* v. *Greenland*, 532.
6. Want of consideration for municipal bonds may be plead against a purchaser for value before maturity, when the bonds call for the payment of exchange in addition to principal and interest. *Flagg* v. *School Dist.*, 30.
7. Where it appears that the mortgage under which a sale was made was executed by two parties as mortgagors, one of such parties cannot as mortgagor maintain an action for any surplus arising on the sale, without alleging that the entire right to the surplus had been transferred to the party bringing the action. *Clyde* v. *Johnson*, 92.

PLEADING AND PRACTICE—Continued.

8. Time when essential to the cause of action or defense must be alleged, and the omission of the time renders the pleading insufficient on demurrer. *Clyde* v. *Johnson*, 92.

9. Where it was alleged in the complaint that the title to mortgaged premises was after the mortgage was executed, transferred by one of the mortgagors to the other, but it did not appear when such transfer was made with reference to the date of the foreclosure sale, the complaint held vulnerable to demurrer. *Clyde* v. *Johnson*, 92.

10. A complaint in equity which alleges that the grantors in a certain conveyance were insolvent, and were being pushed by their creditors, and that such conveyance was without consideration, and wholly voluntary, and made with intent to hinder, delay, and defraud the creditors of the grantors, sufficiently sets forth the facts constituting the fraud. *Paulson & Co.* v. *Ward*, 100.

11. When a complaint is defective by reason of the omission of a certain allegation, not jurisdictional, but is not objected to on that ground, and evidence of the omitted fact is introduced without objection, and the court finds that such omitted fact existed, the defect in the complaint cannot be urged in the appellate court for the first time. *Paulson & Co.* v. *Ward*, 100.

12. A denial upon information and belief is authorized by the code. *Russell & Co.* v. *Amundson*, 112.

13. In cases where a party is legally presumed *prima facie* to possess knowledge, he will not be permitted to deny on his mere information and belief. *Russel & Co.* v. *Amundson*, 112.

14. All material facts must be stated in each cause of action or counterclaim. A material fact cannot be supported by any statement elsewhere made in the pleading unless the same is incorporated by suitable and apt words of reference. *First Nat'l Bank* v. *Laughlin*, 391.

15. Where a pleading is served too late, the irregularity in the service is waived by the retention and non return of the copy delivered. *Clyde* v. *Johnson*, 92.

16. When a paper is served by mail the time of such service is the date of mailing, and service by mail cannot be converted into personal service by showing the actual date at which the paper was taken from the post office by the party to whom it is addressed. *Clyde* v. *Johnson*, 92.

17. Equity clearly recognizes an action in aid of a legal process, which action, while closely allied to creditor's bill proper, is clearly distinct therefrom, and in such action it is not necessary that an execution be issued, and returned *nulla bona*. As the purpose of the action is to procure the removal by a court of equity of obstructions that hinder the enforcement of the legal process, the execution should be levied upon the property, and remain outstanding until equity removes the impediments. *Paulson & Co.* v. *Ward*, 100.

18. Where the identity of the property described in a chattel mortgage was not established by pleadings or proofs, a verdict was properly directed for defendant. *Russell & Co.* v. *Amundson*, 112.

19. A final judgment has no force or effect until entered by the clerk in the judgment book. *In re Weber*, 119.

PLEADING AND PRACTICE—Continued.

20. An order of dismissal will authorize the clerk of court to enter final judgment, but is not a final determination or judgment. *In re Weber*, 119.

21. A motion made upon specified grounds, excludes all grounds not enumerated therein. *First Nat'l Bank* v. *Laughlin*, 391.

22. The power of the court to authorize the amendment of an attachment affidavit in matter of substance, doubted. *Gans* v. *Beasley*, 140.

23. A summons, otherwise in due form, in which the defendants are designated only by their firm name, is irregular, but not absolutely void, and may be amended in the trial court so as to show the names of the partners. Such a summons, when issued, is sufficient to sustain an attachment. *Gans* v. *Beasley*, 140.

24. An appearance which is in terms a special appearance will operate as a general appearance, and confer jurisdiction over the person, if the court is requested to determine questions touching the merits, and not relating to the jurisdiction. *Gans* v. *Beasley*, 140.

25. The affidavit for attachment stated, in effect, that there was an existing cause of action, in favor of the plaintiff and against the defendants, in the sum of $10,000 and interest, based upon a promissory note, which was set out at length, and which was payable to plaintiff, and purported to be signed by the defendants. The District Court directed the affidavit to be amended, alleging that the note was executed and delivered to plaintiff by the defendants, and was wholly unpaid. *Held*, construing the affidavit, that the amendment was superfluous, and hence that the order directing the amendment, if error, was error without prejudice. *Gans* v. *Beasley*, 140.

26. In moving for judgment upon the ground that the answer served is frivolous, the motion is based upon the pleadings, and need not be supported by proof of extrinsic facts. *Sigmond* v. *Bank*, 164.

27. An answer is frivolous which contains no new matter, and which attempts to deny material allegations in the complaint only as follows: Defendant says that it has not information sufficient to form a belief." etc. A denial in this form must negative both knowledge and information sufficient to form a belief. Comp. Laws, § 4914. *Sigmond* v. *Bank*, 164.

28. A penalty of 10 per cent. on the face of the judgment adjudged for delay in prosecuting the appeal. Comp. Laws, § 5187. *Sigmond* v. *Bank*, 164.

29. Where the uncontradicted proof shows such laches on plaintiffs part as to exonerate the defendants sued as guarantors on commercial paper, a verdict should be directed for defendants. *Roberts, Throp & Co.* v. *Laughlin*, 167.

30. An affidavit for attachment in the alternative is void. *Birchall* v. *Griggs*, 305.

31. An order for sheriff to release attached property to an assignee under a voluntary assignment made without hearing or notice is void. *State* v. *Rose*, 319.

32. In an action pending in one judicial district, a motion was made to set aside an attachment issued in the action, and was denied. Thereafter, the case having been transferred to another judicial district, the same motion was made, on the same facts, before another judge, who was the judge of such latter judicial district. No claim of suprise, or that new evidence had been discovered, was made on the second motion, nor was any reason assigned for the renewal

PLEADING AND PRACTICE—Continued.

of the first motion. The judge who denied the first motion did not grant defendant leave to renew it. The second motion was entertained and granted by the other judge. *Held* error, for the reason that one judge has no power to review, on the same facts, the decision of another judge, of co-ordinate jurisdiction.

Whether the judge who decided the original motion could have entertained such second motion on the same state of facts, not decided. *Enderlin State Bank* v. *Jennings*, 228.

33. When evidence which is competent to establish a fact is admitted, the court on appeal will not assume that the trial court considered the evidence in finding another fact which it was not legally competent to prove, when the latter fact is fully supported by other evidence. *Dows & Co.* v. *Glaspel*, 251.

34. Unless the plaintiff is entitled to costs, the defendant recovers costs as a matter of course in the District Court. Nor is his right affected by the fact that he set up a counterclaim which he failed to sustain. *Dows & Co.* v. *Glaspel*, 251.

35. Exceptions to findings of fact how taken and preserved. *Hostetter* v. *Brooks Elev. Co.*, 357.

36. It was error for the trial court to strike out a part of defendants answer, in which were allegations of fact as to oral representations made prior to the written contract in suit. *Hazelton Boiler Co.* v. *Fargo Gas & E. Co.*, 365.

37. Evidence having been introduced tending to show a breach of the fuel saving clause of the warranty, and damages resulting therefrom, it was error to exclude such evidence from the case, and to direct a verdict for the plaintiff, despite the fact that defendant did not claim a breach of that part of the warranty relating to the evaporate capacity of the boiler sold. *Hazelton Boiler Co.* v. *Fargo Gas & E. Co.*, 365.

38. Where the bill of exceptions contained no specifications of errors of law, such errors, if they exist, will not be considered in this court, in reviewing the case. This established and statutory rule applies to cases of trials to the court, where no motion for a new trial is made below, the same as in other cases. Laws 1891, Ch. 121; Sup. Ct. Rule No. 13. *Hostetter* v. *Brooks Elev. Co.*, 357.

39. Where assignments of error in this court do not refer to the abstract, they are insufficient assignments, under Rule 15 of the rules of this court; and such assignments of error will not be considered unless, for reasons satisfactory to the court, said rule is relaxed, in furtherance of justice, and on such terms as may be deemed just. *Hostetter* v. *Brooks Elev. Co.*, 357.

40. The objection that the matters alleged in an answer do not constitute a counterclaim, is waived if not taken by demurrer. *First Nat. Bank* v. *Laughlin*, 392.

41. The right to appeal from a judgment is waived by accepting a benefit thereunder, unless the benefit is one to which appellant is entitled even in case of a reversal of the judgment. *Tyler* v. *Shea*, 377.

42. A court of equity, in furtherance of justice, has power to modify a judgment in a particular not affecting the merits of the case, but merely relating to the mode of carrying into effect the decision of the court. *Tyler* v. *Shea*, 377.

43. Where a time is prescribed within which money must be paid to entitle a party to the benefit of the judgment, the court may, even after such time has expired,

extend it by a modification of the judgment in furtherance of justice; and it may modify a judgment directing payment to be made to a party by providing that the payment may be made to the clerk of the court for the benefit of such party. *Tyler* v. *Shea*, 377.

44. To entitle a judgment creditor to an order appointing a receiver of his debtor's property it must be made to appear that the creditor has in good faith exhausted his remedies at law; and to that end it must appear, unless special circumstances are shown to excuse it, that execution has been issued upon the judgment to the sheriff of the county of defendant's residence, and been returned unsatisfied in whole or in part. *Minkler* v. *U. S. Sheep Co.*, 507.

45. The prevailing rule of law is that the title to an office will not be tried by *mandamus*. Some states hold otherwise. *State* v. *Callahan*, 481.

46. In this state the title to a county office may be tried either by the statutory mode of contest, as provided by §§ 1489–1501, Comp. Laws; or by a civil action in the nature of *quo warranto*, initiated by an official representative of the county, as provided by § 5345 *et seq*, Comp. Laws. *State* v. *Callahan*, 481.

47. In *mandamus* against a county officer holding over after the expiration of his term; brought by a relator having a certificate of election, and who has duly qualified for the office by taking the oath and giving the required bond, the relator's *prima facie* title to the office cannot be defeated by an answer which admits the *prima facie* title, but contains averments of fact which involve the ultimate title of the relator to such office. Such an answer is demurrable if it contains only such facts as would, if established, defeat the relators ultimate title, in a proper proceeding to try title. *State* v. *Callahan*, 481.

48. In this case it appears by the averments in the alternative writ that the relator has such *prima facie* title to the office of county superintendent of schools of Cass County, and has demanded possession of the defendant. Defendant's answer to the writ admits the facts constituting such *prima facie* title, and alleges, as new matter, that the relator, when his term commenced, and for some time prior thereto, did not have or hold the educational certificate prescribed by statute (§ 34, Ch. 62, Laws 1890,) or its equivalent. The trial court sustained relator's demurrer to the answer. *Held*, that such ruling was proper. *Held*, further, that the new matter in the answer had reference only to the relator's ultimate title to the office, and such title cannot be litigated in this proceeding, which involves only the right of present possession. In such cases the relator cannot be driven out of court by the mere fact that the incumbent pleads facts in his answer which call for a determination of the relator's ultimate title to the office, and only that title. *State* v. *Callahan*, 481.

49. A lien for taxes upon personal property arising under § 90, Ch. 132, Laws 1890, does not attach until after a tax has been assessed and levied; nor until "after the time the tax books are received by the county treasurer" of the county where such tax is assessed and levied. *Swenson* v. *Greenlaud*, 532.

50. In an action brought to foreclose an alleged lien for such taxes there were no averments in the complaint that the tax claimed to be a lien was ever assessed or levied, and no averment that the treasurer of the county in question ever received the tax books in the years in question. *Held*, that such complaint

PLEADING AND PRACTICE—Continued.

is insufficient. In such actions the general presumption that public officers have done their duty will not supply the place of material averments of fact which are omitted from the complaint. *Swenson* v. *Greenland*, 532.

51. The original complaint alleged a purchase by R., for and as the agent of B., of certain realty, and that B., through said agent, promised and agreed to pay the incumbrances thereon. In an action to foreclose such incumbrances both B. and R. were made parties defendant, and a personal judgment for deficiency asked against them. All of plaintiff's testimony supported the original complaint, but the testimony of defendant R. disclosed that the purchase was for the joint benefit of B. and R. The court found such joint purchase, and ordered the complaint amended accordingly. *Held*, no abuse of discretion. *Moore* v. *Booker*, 543.

52. When, upon appeal from the District Court the original papers are sent to the Supreme Court, and when the case has been fully argued and submitted in this court upon such record, the trial court has thereafter no authority or power to amend or correct such record, unless, upon application to this court, the record is remanded for such purposes. *Moore* v. *Booker*, 543.

53. In the absence of any showing of prejudice, it is not error to refuse to suppress a deposition, taken in another state on notice, because the notice did not locate the office of the notary before whom such deposition was to be taken by street and number. *Moore* v. *Booker*, 543.

54. It is not error to refuse to suppress a deposition for the reason that it does not appear in the certificate of the officer taking the deposition or elsewhere that the officer was not a relative of either party, or otherwise interested in the action. Such fact, if it exist, must be made to appear affirmatively. Our statute does not require the certificate to speak upon that point. *Moore* v. *Booker*, 543.

55. Before a receiver is discharged he should be required to pass his accounts, and proper provision should be made for his compensation. *Hoffman* v. *Bank of Minot*, 473.

PREFERENCE BY INSOLVENT.

An insolvent debtor may pay or secure one creditor in preference to another, except in cases where he executes an assignment for the benefit of his creditors. *Cutter* v. *Pollock*, 205.

PROMISSORY NOTES. See NEGOTIABLE INSTRUMENTS.

PRINCIPAL AND AGENT.

1. When a party, purporting to act as the agent of another, makes certain promises and agreements on behalf of his principal, if such party was at the time acting in his own interest, or in a matter in which he and his alleged principal were jointly interested, then such person will be personally bound upon such promises and agreements. *Moore* v. *Booker*, 543.

2. When one acts on instructions given after communications on the same subject have passed between him and his principal, all such communications are admissable in evidence to explain the instructions. *Anderson* v. *Bank*, 182.

PRINCIPAL AND AGENT—Continued.

3. An attorney or agent who has made a collection owes to his client or principal the duty of full disclosure of all the facts in settling with the client or principal. Any concealment of a material fact is fraudulent. *Riegi* v. *Phelps*, 272.

4. An agent cannot recover for commissions or advances made by him for the principal in his agency for the furtherance of the principals gambling deals in wheat. *Dows & Co.* v. *Glaspel*, 251.

5. When one gives his agent ambiguous instructions, which the latter executes in good faith according to a reasonable interpretation of them, the principal is estopped to say that he intended them to be construed otherwise. *Anderson* v. *Bank*, 182.

PRINCIPAL AND SURETY.

It is no defense to an action against sureties on an appeal undertaking that the plaintiff holds security amply sufficient to pay the claim for which the sureties have become bound, and that plaintiff has refused on demand to resort to such security for payment, there being no proof that the sureties were prejudiced by such refusal. *Bingham* v. *Mears*, 437.

PUBLIC OFFICER. See DE FACTO OFFICER, PLEADING AND PRACTICE, MANDAMUS.

1. Where a *de facto* officer is exercising official functions under color of right, the writ of *mandamus* does not issne to dispossess him; but where an incumbent is holding over after the expiration of his term, and until a successor is elected and qualified, and has no other claim to the office, he is not such *de facto* officer, as against a candidate who holds the proper certificate of election, and has qualified for the office in manner and form as the law directs. Such incumbent is a mere intruder, as against such relator. *State* v. *Callahan*, 481.

2. In this state the title to a county office may be tried either by the statutory mode of contest, as provided by §§ 1489–1501, Comp. Laws; or by a civil action in the nature of *quo warranto*, initiated by an official representative of the county, as provided by § 5345 *et seq*, Comp. Laws. *State* v. *Callahan*, 481.

PUBLIC LANDS. See COMMISSIONER OF GENERAL LAND OFFICE, 452; TAXATION, 494.

PURCHASE MONEY MORTGAGE. See HOMESTEAD; 156.

QUO WARRANTO. See PUBLIC OFFICERS, 481.

RAILROAD CROSSING. See NEGLIGENCE, 536.

RAILROAD LAND GRANT. See TAXATION, 494.

RAILROAD TAXATION. See TAXATION, 494.

REAL ESTATE. See COMMISSIONER OF GENERAL LAND OFFICE.

RECEIVER.

1. It is not error for the trial court to refuse an application to discharge a receiver, even where both parties to the record consent to such discharge. Before the receiver is discharged, he should be required to pass his accounts, and proper provision made for his compensation. *Hoffman* v. *Bank*, 473.

RECEIVER—Continued.

2. Where parties to an action in which a receiver has been appointed subsequently consent to a judgment of dismissal of the action, without making any provision for the settlement of the accounts of the receiver, or for his compensation, it is not error on the part of the court, on the application of the receiver, to set aside the order dismissing the case. *Hoffman* v. *Bank*, 473.

3. To entitle a judgment creditor to an order appointing a receiver of his debtor's property, it must be made to appear that the creditor has in good faith exhausted his remedies at law; and to that end it must appear unless special circumstances are shown to excuse it that execution has been issued upon the judgment to the sheriff of the county of defendants residence and been returned unsatisfied in whole or in part. *Minkler* v. *U. S. Sheep Co.*, 507.

4. When a receiver is appointed in an action, and continues to act as receiver down to the time of final judgment, the court should embody in its decision and final judgment all matters relating to the receiver's fees and expenses; how they should be paid,—whether out of the funds in his hands, or by the parties to the action; and whether, if paid out of the funds in the hands of the receiver belonging to one party, the other should not be compelled to make good this depletion of the fund in whole or in part. *Held* error for the court, without investigating and settling such matters, to direct that all of the receiver's fees and expenses should be taxed as costs against the unsuccessful party to the suit. *Cutter* v. *Pollock*, 205.

RECITALS IN DEED.

When not evidence of the facts recited. *Hannah* v. *Chase*, 351.

REMEDY AT LAW. See CERTIORARI, 419.

Where the court ordered the sheriff to turn over to an assignee under a general assignment, property which he had attached—the order being void because made upon an erroneous conception of the law without notice or opportunity to the sheriff to be heard. It is no answer to *certiorari* sued out by the plaintiff in attachment suit, that conversion against the sheriff would be an adequate legal remedy—Such a remedy against the sheriff is not a remedy at all, for the reason that the remedy referred to in § 5507, Comp. Laws, is one which like an appeal or writ of error will enable relator to annul the proceeding complained of as void. *State* v. *Rose*, 319.

RES JUDICATA. See DISTRICT JUDGE, 228; MUNICIPAL BONDS, 30.

RULES OF COURT. See COURT RULES.

Will be relaxed in furtherance of justice. *First Nat. Bank* v. *Laughlin*, 392.

SALES. See WARRANTY, DECEIT.

1. At a time when the defendant owned and operated a horizontal tubular steam boiler, plaintiff sold defendant an upright steam boiler, and gave the defendant a written warranty, which contained the following language: "We hereby guaranty that the boiler in regular practice, properly managed, shall evaporate ten pounds of water from one pound of good coal at 212 Fahrenheit, which we guaranty to be a saving of at least twenty per cent. in fuel over any horizontal tubular boiler." *Held* (construing the language quoted,) that the last clause,

SALES—Continued.

viz: "Which we guaranty to be a saving of at least twenty per cent. in fuel over any horizontal tubular boiler,"—is a definite warranty of the fuel saving capacity of the boiler sold, when compared with the horizontal tubular boiler. Said last clause is legally binding, and is not a mere expression of opinion or "puffing" on the part of the vendor. *Hazelton Boiler Co.* v. *Fargo Gas & Elec. Co.*, 365.

2. Under the contract of sale of a separator, the purchaser was to return the machine if it failed to comply with the warranty, after two days trial, and after plaintiff had attempted to remedy the defect without success. A failure to return the machine as stipulated in the contract was a waiver of all claims arising upon a breach of the warranty. *Minnesota Thresher Mfg. Co.* v. *Lincoln*, 410.

3. A purchaser has a right to rely upon representations of the seller of personal property, and if he does rely thereon and the representations prove false and were made with intent to deceive; the seller cannot urge lack of investigation in defense. *Fargo Gas & Coke Co.* v. *Fargo Gas & Elec. Co.*, 219.

4. In an action to recover the unpaid portion of the purchase price of a gas and electric light plant sold by plaintiff to defendant, defendant set up, as a counterclaim, damages sustained by it because of the deceit of plaintiff in making the sale. The alleged false representations related to the physical condition of the plant, its wires, poles, gas mains, and fixtures, and also the amount of its earnings the year previous to the sale, and the prices charged customers for gas and electric light. *Held*, that defendant was under no obligation to investigate the truth of such representations, and that, therefore, it was error for the court to charge the jury that, if the means were at defendants hands to discover the truth or untruth of plaintiff's statements with respect to these matters, defendant must be presumed to have had knowledge of the actual facts, the only means at defendant's hands to discover the truth or falsity of the statements made being an investigation of such matters. *Held*, further, that, in actions for damages because of deceit in the sale of property, the measure of damages is the difference between what the property would have been worth if as represented and what it actually was worth at the time of sale. *Fargo Gas & Coke Co.* v. *Fargo Gas & Elec. Co.*, 219.

5. A sale under a power contained in a mortgage, when foreclosed by advertisement, may be made by any person named in the power for that purpose. *Hannah* v. *Chase*, 351.

SCHOOL DISTRICT. See MUNICIPAL CORPORATIONS.

1. The employment of a teacher by school district officers is void where the person employed at the time of making the contract, holds no certificate of authority to teach in the county where the district is located. *Hosmer* v. *School Dist.*, 197.

2. The subsequent procurement of a certificate will not enable such person to recover for breach of contract. *Id.*, 197.

SERVICE BY PUBLICATION. See PLEADING AND PRACTICE, 92.

SHERIFF.

1. The test of a sheriff's qualification to summon a special jury, when challenged

SHERIFF—Continued.

under § 7347, Comp. Laws is, whether he would be qualified to sit as a juror in the case. *State* v. *Kent*, 601.

2. Recitals in a sheriffs deed upon foreclosure by advertisement are not evidence of the facts recited. *Hannah* v. *Chase*, 351.

SPECIFICATIONS OF ERROR. See APPEAL.

STATUTES.

1. Statutes validating void evidences of municipal indebtedness must express that intent, or the purpose to validate must be deducible from the statute by necessary implication. *Erskine* v. *Nelson Co.*, 66.

2. "May" in statute construed as "must." *State* v. *Kent*, 577.

3. Statute relating to appeals, *held*, not to apply to cases decided prior to its passage. *Hostetter* v. *Brooks Elev. Co.*, 357.

4. Unless liability of a county to pay the fees of a justice of the peace in criminal cases is created by statute, none exists. But it is not necessary that the statute should in direct terms require the county to pay such fees if it clearly and unmistakably appears from what has been enacted that such was the legislative intent. *Barrett* v. *Stutsman Co.*, 175.

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STOCK KILLING. See NEGLIGENCE, 536.

SURETY. See PRINCIPAL AND SURETY, 437.

SUPREME COURT. See APPELLATE COURT.

SUMMONS.

A summons in which the defendants are designated by their firm name is irregular not void, is sufficient to sustain an attachment and may be amended. *Gans* v. *Beasley*, 140.

TAXATION.

1. Chapter 99 of the Laws of 1883, commonly known as the "Gross Earnings Law," was repugnant to § 1925 of the Revised Statutes of the United States, and void. *N. P. R. Co.* v. *McGinnis*, 494; *N. P. R. Co.* v. *Benson*, 506.
2. The exemption of the plaintiff's land grant thereunder falls with the statute, and such lands are therefore taxable. *Id.*, 494.
3. The payment by the plaintiff of the gross earnings tax under the gross earnings law, and the acceptance of the same by the territory (said payment being made before the admission of North Dakota as a state,) do not bar the right of the different counties in which plaintiff's land grant is situated to levy taxes against such land. *Id.*, 494
4. Said land grant was not exempt from taxation, because the question of its non-mineral character had not been finally settled. *Id.*, 494.
5. Unsurveyed portions of plaintiff's land grant are exempt from taxation where the survey fees have not been paid, under the rule laid down in *Northern Pac. R. Co.* v. *Traill County*, 115 U. S. 600, 6 Sup. Ct. 201, as the act of congress providing that said land grant shall be taxable despite the non-payment of survey fees is by its terms declared to be inapplicable to unsurveyed lands. *Id.*, 494.
6. Plaintiff cannot avail itself of that provision of this act which excepts lands in unorganized counties, for the reason that it has failed to allege that the lands in question were situated in an unorganized county at the time the taxes were levied. The action being in equity to have tax proceedings annulled, the burden is on plaintiff to show the illegality of which it seeks to avail itself. *Id.*, 494.
7. Certain irregularities *held* fatal to the validity of the tax proceedings, but not the taxes themselves in equity. They are the same as are set forth in the opinion in *Railroad Co.* v. *Barnes*, 2 N. D., at p. 389, *et seq.*, 51 N. W. 386. Judgment is therefore directed to be entered for the amount of such taxes, interest, and penalties, under § 1643, Comp. Laws, and the tax proceedings are set aside. *Id.*, 494.
8. A lien for taxes upon personal property arising under § 90, Ch. 132, Laws 1890, does not attach until after a tax has been assessed and levied; nor until "after the time the tax books are received by the county treasurer" of the county where such tax is assessed and levied. *Swenson* v. *Greenland*, 532.
9. In an action brought to foreclose an alleged lien for such taxes there were no

TAXATION—Continued.

averments in the complaint that the tax claimed to be a lien was ever assessed or levied, and no averment that the treasurer of the county in question ever received the tax books in the years in question. *Held*, that such complaint is insufficient. In such actions the general presumption that public officers have done their duty will not supply the place of material averments of fact which are omitted from the complaint. *Swenson* v. *Greenland*, 532.

TEACHERS CERTIFICATE. See SCHOOL DISTRICT, 197; MANDAMUS, 481.

TITLE TO OFFICE.

1. Not tried by *mandamus*. *State* v. *Callahan*, 481.
2. Triable by *quo warranto* proceeding. *State* v. *Callahan*, 481.
3. Triable by statutory action. *Id.*, 481.

TITLE TO LAND. See COMMISSIONER OF GENERAL LAND OFFICE.

TOWNSHIPS.

Townships in this state are not liable for the negligence of officers in not keeping bridges and highways in repair. *Vail* v. *Town of Amenia*, 239.

ULTRA VIRES.

1. The act of March 13th, 1885, authorizing the county commissioners of Nelson County, D. T., to fund outstanding indebtedness, so far validated void county warrants theretofore issued as to prevent the plea of *ultra vires* from being interposed as a defense thereto. *Erskine* v. *Nelson Co.*, 66.
2. The county commissioners of Steele County contracted with an employee to do certain service at the agreed price of $2,010.00 in cash. It was further agreed that a county warrant should issue sufficient in amount when sold at the prevailing discount to realize the contract price. Contract held *ultra vires*. *First*, because the commissioners had no legislative authority either general or special to make the contract for this particular employment; *second*, that the discount part of the warrant was void. *Erskine* v. *Steele Co.*, 339.

VERDICT.

1. Verdict justified by the evidence. *Roberts, Throp & Co.* v. *Laughlin*, 167.
2. It is error to direct a verdict when there is evidence in the case tending to show a breach of warranty and damages therefrom. *Hazelton Boiler Co.* v. *Fargo Gas & Elec. Co.*, 365.
3. Where it clearly appeared from the evidence that plaintiff had been guilty of such laches in pursuing their legal remedies against the makers of promissory notes that the guarantors thereof, would be as a matter of law exonerated upon their contract of guaranty. It became the duty of the court to instruct a verdict for the defendant guarantors. *Roberts, Throp & Co.* v. *Laughlin*, 167.
4. Where plaintiff in claim and delivery action, for possession of a certain engine, failed to identify the engine as the one covered by his mortgage, a verdict for defendant was properly directed. *Russel & Co.* v. *Amundson*, 113.

WAIVER.

1. An appearance which is in terms a special appearance will operate as a general appearance, and confer jurisdiction over the person, if the court is requested to determine questions touching the merits and not relating to the jurisdiction. *Gans* v. *Beasley*, 140.

2. The objection that the facts stated do not constitute a counterclaim, can not be first taken to proof offered under the pleading, this objection can only be taken by demurrer. *First Nat. Bank* v. *Laughlin*, 391.

3. A party making a motion upon grounds specified therein, waives all grounds not so specified. *First Nat. Bank* v. *Laughlin*, 391; *The Minnesota Thresher Mfg. Co.* v. *Lincoln*, 410.

4. The failure to return a machine according to the terms of the warranty is a waiver of all claims for damages by reason of the breach of the warranty. *The Minnesota Thresher Mfg. Co.* v. *Lincoln*, 410.

5. When a pleading has not been served in proper time the irregularity is waived by retaining the copy, and not returning the same. *Clyde* v. *Johnson*, 92.

6. Accepting the benefit under a judgment, is a waiver of the right to appeal from it, unless the benefit is one of absolute right. *Tyler* v. *Shea*, 377.

WARRANTY. See SALE, WAIVER.

1. When by the terms of a warranty upon the sale of a threshing machine, the purchaser is to return the machine or defective part if it fails to fill the warranty, all claim for damages is waived by a failure to so return the machine on discovery of defects according to the terms of the contract of warranty. *Minn. Thesher Mfg. Co.* v. *Lincoln*, 410.

2. A purchaser of personal property has a right to rely upon the representations of the seller and if they were false and made with intent to deceive the purchaser, the seller will not be allowed to urge that the buyer by investigation could have discovered their falsity. *Fargo Gas & Coke Co.* v. *Fargo Gas & Elec. Co.*, 219.

3. The measure of damages for false warranty is the difference between what the property would have been worth if as represented, and what it actually was worth at the time of sale. *Fargo Gas & Coke Co.* v. *Fargo Gas & Elec. Co.*, 219.

4. Warranty upon the sale of a steam boiler construed as a definite warranty of the fuel-saving capacity of the boiler—and not a mere "puffing" on the part of the vendor. *Hazelton Boiler Co.* v. *Fargo Gas & Elec. Co.*, 365.

WATERMAINS.

Lateral service pipes put in at private expense and not included in the general system of water works belong to the private owner and must be kept in repair by him. *Jackson* v. *Ellendale*, 478.

WHEAT OPTIONS. See GAMBLING, 251.

WRIT AND PROCESS. See SUMMONS, 140; ATTACHMENT, 140.