REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

DECEMBER, 1905, TO OCTOBER, 1906

F. W. AMES
REPORTER

VOLUME 15

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OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS

HON. D. E. MORGAN, Chief Justice.
HON. N. C. YOUNG, Judge.[2]
HON. EDWARD ENGERUD, Judge.[3]
HON. JOHN KNAUF, Judge.[4]

F. W. AMES, Reporter.
R. D. HOSKINS, Clerk.

[2] Resigned August 15, 1906.

[3] Resigned January 10, 1907.

[4] Appointed August 1, 1906, to fill vacancy by resignation of Judge Young, effective August 15, 1906.

CONSTITUTION OF NORTH DAKOTA

Section 101. Where 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 reason 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 reason for his dissent in writing over his signature.

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

CASES REPORTED IN THIS VOLUME

TABLE OF DAKOTA CASES CITED IN OPINIONS.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH DAKOTA

JAMES N. BROWN v. C. C. NEWMAN, E. J. HODGSON, MARY S. HODGSON, ET AL.

Opinion filed December 15, 1905.

Quieting Title — Adjudication as of Date of Judgment.

1. In actions to determine adverse claims to real estate, the adjudication should dispose of the conflicting claims arising under the pleading as of the date of the judgment.

Same — Review Upon Findings and Judgment.

2. Where, in such an action, the trial court has, without satisfactory reason disclosed by the record, limited its adjudication to the commencement of the action, and a review is had in this court upon the findings and judgment and not upon the evidence, the judgment will be reversed and a new trial ordered.

Appeal from District Court, Sargent county; *Lauder*, J.

Action by James N. Brown against Mary S. Hodgson. Judgment for defendant, and plaintiff appeals.

Reversed.

Slattery & Slattery and *Purcell, Bradley & Divet*, for appellants.

Question upon the correctness of the court's conclusion from the findings may be reviewed without a statement of the case. Schneller v. Plankinton et at., 12 N. D. 561, 98 N. W. 77.

The court cannot ignore the issues and facts presented and enter judgment with conditions attached, not justified by the pleadings

and facts, leave the controversy open and further litigation necessary to determine the identical questions presented. Quint v. McMullin, 37 Pac. 381.

A judgment should adjust the rights at the date of its entry. Randall v. Brown, 2 How. 406, 11 L. Ed. 318; Peck v. Godberlett, 16 N. E. 350.

The court will not notice changes taking place pending the action. Mechanics Bank v. Selton, 1 Pet. 297, 7 L. Ed. 152.

When title is shown in a certain person, it is presumed to continue there until it otherwise appears. 1 Jones on Evidence, sections 52-53; Weeks v. Cranmer et al., 101 N. W. 32; Kidder v. Sterns, 60 Cal. 414; Colman v. Rice, 31 S. E. 424; Currier v. Gale, 9 Allen, 522; Magee v. Scott, 9 Cush. 148, 55 Am. Dec. 49.

Where the court fails to incorporate a fact in its findings, it is presumed to have been found against him having the burden of proof. Meeker et al. v. Shanks et al., 13 N. E. 712; Western Union Tel. Co. v. Brown, 8 N. E. 171; 46 Cent. Dig. Col. 2226-27.

Chas. E. Wolfe, J. E. Bishop and *C. D. Austin,* for respondent.

The court will not confer its equitable relief upon the party seeking its aid unless he has conceded all the equitable rights belonging to the adverse party. De Walsh et ux. v. Braman, 43 N. E. 597; Booth et al. v. Hoskins, 17 Pac. 225; Edward v. Helm, 5 Ill. 143; I. Pom. Eq. Jur., section 388; 16 Cyc. 483; Walden et al. v. Bodley et al., 14 Pet. 155, 10 L. Ed. 398; Bliss v. Rice, 17 Pick. 39.

YOUNG, J. The plaintiff appeals from a judgment in an action to determine adverse claims to real estate. His complaint is in the statutory form. Mary S. Hodgson alone answered. Her answer, in addition to a general denial, sets forth a claim of absolute ownership arising from a purchase of the premises on February 9, 1898, at a tax judgment sale under chapter 67, p. 76, Laws 1897, by C. D. Matteson, and the subsequent assignment to her of the tax sale certificate. The trial court found that the land was patented to one Norris; that Norris conveyed to the plaintiff Brown, and that the latter had never conveyed the same; that on February 9, 1898, the premises were regularly sold to one C. D. Matteson, under a tax judgment duly rendered under chapter 67, p. 76, Laws 1897; that on January 15, 1902, the certificate of sale was duly assigned to the defendant, Mary S. Hodgson, and that there has

been no redemption from said sale; that none of the defendants have any interest in the premises "except the estate or interest of said Mary S. Hodgson under or growing out of the said certificate of sale under said tax judgment." As conclusions of law the court found that, as to all of the defendants except Mary S. Hodgson, the plaintiff was the owner in fee simple and entitled to immediate possession; that, as to Mary S. Hodgson, the plaintiff was, on March 12, 1904, which was the date of the commencement of this action, the owner in fee simple and entitled to possession, but that said Mary S. Hodgson had a valid lien under her certificate for $266.54; that she was entitled to her costs; that the plaintiff is entitled to judgment, but "limited in its operation and effect, so far as it touches the right of the defendant, Mary S. Hodgson, under the sheriff's certificate of tax judgment sale to their rights as they existed on the 12th day of March, 1904."

The plaintiff has not brought the case to this court for a trial de novo upon the evidence. His assignments are upon the judgment roll proper. His counsel contend that error appears upon the face of the judgment roll, in this, that the trial court determined the rights of the parties as of the date of the commencement of the action instead of the date of the judgment. In our opinion, the contention is sound and must be sustained. In actions to determine adverse claims to real estate, such as this, the adjudication should dispose of all conflicting claims arising under the pleadings as of the date of the judgment. If this is not done, the purpose of the action is not accomplished, and the conflicting rights of the parties are not in fact determined. It was the duty of the court under the pleadings in this case to determine the character and extent of the conflicting claims as of the date of the judgment. This was not done. The findings of fact, conclusions of law and judgment, it will be noted, are limited to the date of the commencement of the action. It is possible that facts may sometimes arise which would make it proper to limit the adjudication, but the judgment roll in this case discloses no such facts. The defendant has attempted to bring before this court in an amended abstract certain matters which he claims warranted the court in limiting its adjudication. We agree with counsel for appellant, on his motion to strike out the amended abstract, that the matters therein contained could only be made a part of the judgment roll by being settled in a statement of case. This not having been done, they cannot therefore be considered. This appeal does not present the

and facts, leave the controversy open and further litigation necessary to determine the identical questions presented. Quint v. McMullin, 37 Pac. 381.

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question of the necessity for amended pleadings, where an interest or estate is acquired after the commencement of the action, and we express no opinion upon that point. The error which is patent upon the face of the judgment roll, and which requires us to reverse the judgment and order a new trial, is that the questions of law and fact arising under the pleadings as they stand were not determined.

The appellant's request that this court modify the judgment so as to make it effective in form and substance as rendered, but as of the date of its rendition, instead of granting a new trial, cannot be granted. This would require us to find upon the issues of fact subsequent to the commencement of the action which the trial judge omitted to find upon. The case is here for review only upon the judgment roll proper. There has been no determination of the issues between the commencement of the action and the date of the judgment, and they cannot be determined except upon the evidence. Had the appellant brought the case here for trial de novo upon the evidence, he would be in a position to urge, as he does, that the title will be presumed to be in the same condition at the date of the judgment as it was when the action was commenced. In the absence of countervailing evidence, the presumption would prevail, and would sustain a finding such as appellant, in effect, asks us to make. See Jones on Evidence, sections 52, 53. The case, however, is not here for trial anew. It is here upon the findings, conclusions and judgment, which fairly show that the issues of fact and of law as to the defendant Mary S. Hodgson were only determined by the trial court as of the date of the commencement of the action. It is clear we cannot determine the state of the title thereafter, in the absence of an appeal bringing up the evidence for a trial anew.

Judgment reversed and new trial ordered. All concur.

(105 N. W. 941.)

ROBERT B. BLAKEMORE, AS EXECUTOR, AND LAURA B. KEDNEY, AS EXECUTRIX, OF THE LAST WILL AND TESTAMENT OF LOUIS A. KEDNEY, DECEASED, AND ROBERT B. BLAKEMORE AND WILLIAM C. MACFADDEN, AS TRUSTEES UNDER SAID LAST WILL AND TESTAMENT, AND LAURA B. KEDNEY AND FRED S. KEDNEY, HARRY S. KEDNEY AND LOUIS S. KEDNEY, MINOR CHILDREN OF SAID LOUIS A. KEDNEY, DECEASED, BY LAURA B. KEDNEY, THEIR GENERAL GUARDIAN, v. JOHN COOPER AND GEORGE MCCAULEY ET AL.

Opinion filed December 18, 1905. Rehearing denied January 25, 1906.

Jury Trial.

1. The issues in this case are purely equitable, and the case was properly tried to the court without a jury under section 5630, Rev. Codes 1899.

Tax Deed — Executors are "Assigns."

2. Executors are the "assigns" of their testator within the meaning of section 110, c. 100, p. 271, Laws 1891, which authorizes the issuance of a tax deed to "the purchaser, his heirs or assigns."

Constitutional Law — Legislature Cannot Impair Evidentiary Character of Tax Deed.

3. The assurance held out by the state to purchasers at tax sales by the revenue laws of 1890, as amended in 1891, that the tax sale certificates and tax deeds issued to them would be prima facie evidence of the regularity of the tax proceedings, although relating to the remedy, constituted a substantial inducement to the purchase, entering into the contract with the state, and so materially affecting its value that it cannot be taken away by subsequent legislation without impairing its obligation. Fisher v. Betts, 12 N. D. 197, 96 N. W. 132, followed and approved.

Redemption — Repeal of Statute Cannot Impair Accrued Right.

4. The right to redeem from a tax sale made under chapter 132, p. 376, Laws 1890, was a "right accrued," and was perpetuated as it existed under that act, including the provisions for terminating and exercising the right by the saving provisions contained in section 2686, Rev. Codes 1895, notwithstanding the repeal of the 1890 revenue laws by the Revised Codes of 1895.

Repeal of Revenue Laws — Prospective Operation Thereof.

5. The general rule of construction applicable to repeals and revisions of revenue laws is that they are to have a prospective operation only, unless the intent of the legislature to the contrary clearly appears.

Same — Redemption — Retroactive Operation of Statute.

6. The provisions of the Revised Codes of 1895, and of chapter 126, p. 256, Laws 1897, and of chapter 166, p. 221, Laws 1901, relating to redemption from tax sales, are prospective, and do not apply to certificates issued under former statutes.

Same.

7. The provisions of chapter 132, p. 376, Laws 1890, which required the service of notice in order to terminate the right of redemption is still in force as to sales made under that chapter, and deeds issued without such notice are void.

Same — Notice of Sale — Sufficiency of Publication.

8. A notice of tax sale published in a newspaper, legally designated and otherwise qualified to make such publication, is not illegal because of the failure of the owner or manager to file with the county auditor an affidavit setting forth its qualifications as required by section 2, c. 120, p. 346, Laws 1890.

Same — Evidence — Description of Property.

9. The evidence offered by defendants to prove that the notice of sale did not describe the property *held* insufficient.

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

Action by Robert B. Blakemore, as executor, and others, against John Cooper and another. Judgment for plaintiff, and defendants appeal.

Modified.

J. E. Robinson, for appellant.

A tax title is purely technical as distinguished from a meritorious one, and depends for its validity upon a strict compliance with all the provisions of the statute. Black on Tax Titles, section 409; Kern v. Clark, 59 Minn. 70, 60 N. W. 809; Bendixon v. Fenton, 31 N. W. 685; Haller v. Blaco, 10 Neb. 36, 4 N. W. 362; Salmer et al. v. Lathrop et al., 10 S. D. 216-225, 72 N. W. 573; Hiles v. Atlee et al., 90 Wis. 72, 62 N. W. 940; Cooley on Taxation (3d Ed.), 914, 915, 916; Farrington v. N. E. Investment Co. et al., 1 N. D. 102, 45 N. W. 191; Power v. Bowdle, 3 N. D. 107, 54 N. W. 404; Power v. Larabee, 2 N. D. 141, 49 N. W. 724; O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434; Swenson v. Greeland, 4 N. D. 532, 62 N. W. 603; Roberts v. First National Bank et al., 8 N. D. 504, 79 N. W. 1049; Lee v. Crawford, 10 N. D. 482, 88 N. W.

97; Security Imp. Co. et al. v. Cass County, 9 N. D. 553, 84 N. W. 477; Dever v. Cornwell et al., 10 N. D. 123, 86 N. W. 227.

The defendants were entitled to a trial by jury and the court erred in denying it. Section 5420, Rev. Codes 1899; Grandin et al. v. La Bar, 2 N. D. 206, 50 N. W. 151.

Sales are void, as notices of sale were not published in a legal newspaper. Galbraith v. Payne, 12 N. D. 164, 96 N. W. 258; Melchior v. McCarty, 31 Wis. 252, 254; Wyman v. Baker, 86 N. W. 432.

Also because they did not contain a list of the lands, amount of taxes and penalty due. Laws of 1890, section 68; Laws of 1891, section 273; Dever v. Cornwell, supra.

No legal redemption notices were served. They fail to describe the lands and to state the amount required to redeem. Rev. Laws 1890, section 78; Midland County v. Eby, 93 N. W. 707; White v. Smith, 25 N. W. 115.

When an estate is sold subject to redemption, the time to redeem can neither be lengthened nor shortened by subsequent legislation. Merrill v. Deering, 32 Minn. 479, 21 N. W. 721; Gaston v. Merriam et al., 33 Minn. 271, 22 N. W. 614; Nelson v. Central Land Co., 29 N. W. 121; Cooley on Taxation (3d Ed.), 1034; Moody v. Hoskins, 64 Miss. 468; Blackwell on Tax Titles, section 729.

Redemption and notice thereof are governed by the statute under which the sale was made. Fisher v. Betts et al., 12 N. D. 197, 96 N. W. 136; Kipp v. Johnson, 73 Minn. 34, 75 N. W. 736; Cole v. Lamm, 84 N. W. 329; Roessler v. Romer et al., 99 N. W. 800, 822; Darling v. Purcell, 100 N. W. 726.

Subsequent legislation may provide for redemption notice on prior tax sales if it does not necessarily extend the time to redeem. Curtis v. Whitney et al., 13 Wallace, 68, 80 U. S. 68, 20 L. Ed. 513; Coulter v. Stafford, 56 Fed. Rep. 564; Oullahan v. Sweeney, 79 Cal. 537, 21 Pac. 960; State v. Hundhausen, 24 Wis. 196; Curtis v. Morrow et al., 24 Wis. 664.

The tax deeds are not made to the purchaser, his heirs or assigns, and are void on their face and not prima facie evidence of title. Laws of 1891, page 271, section 7; Alexander v. Savage, 90 Ala. 383, 8 So. 93.

When a deed is only prima facie evidence, the purchaser takes it subject to the right to overcome this presumption by proof. The matter being open to investigation, the legislature may regulate it,

and shift the burden to the purchaser. 30 Fed. Rep. 587; Gage et al. v. Caraher, 17 N. E. 777, 779; Hickox v. Tallman, 38 Barb. 608; Strode v. Washer et al., 16 Pac. 926; Emeric et al. v. Elvarado, 27 Pac. 356, 368; Cooley on Taxation (2d Ed.) 297; Cooley on Con. Lim. (6th Ed.) 450, 451; Burbank v. Rumsey, 90 Ill. 555.

Newman, Holt & Frame, for respondent.

This cause was not triable by jury. People, etc., v. Center et. al., 66 Cal. 465, 6 Pac. 487; Reichelt et al. v. Perry et al., 91 N. W. 459; O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434; Polack v. Gurnee, 5 Pac. 229.

The plaintiffs as executor and executrix are the assigns of the deceased tax purchaser. Blakemore et al. v. Roberts, 12 N. D. 394, 96 N. W. 1029; Bouvier Law Dict. (Rawle's Revision) page 182; 4 Cyc. 288; Brown v. Crookston Agri. Ass'n., 26 N. W. 907; Williams on Executors, 559.

Repeal of a statute requiring notice of redemption does not impair the obligation of contract. Black on Tax Title, 350; Robinson v. Howe, 13 Wis. 381, 342; Cooley on Taxation (1st Ed.), page 364; Merrill v. Sherburne, 1 N. H. 199, S. C. 8 Am. Dec. 52; Cooley on Con. Lim. (6th Ed.) 438; Butler v. Palmer, 1 Hill, 324; Smith v. Packard et al., 12 Wis. 414; Baldwin v. Ely et al., 28 N. W. 392, 398; People v. Livingston, 6 Wend. 526.

A law is not retrospective unless such construction is essential to its effect, or its terms are so explicit as to preclude any other interpretation. Caston v. Merriam, 22 N. W. 619; Cooley on Taxation, supra; Roberts v. First National Bank, supra.

Proper notice of tax sale will be presumed. Laws of 1890, ch. 132, section 72; Fisher v. Betts, supra.

YOUNG, J. The plaintiff brought this action under chapter 5, page 9, Laws 1901, to determine adverse claims to the north 50 feet of lot 6, in block 37, Keeney & Devitt's second addition to the city of Fargo. The plaintiff's interest therein was acquired through purchase at three separate tax sales, to wit, the sales for the 1890, 1892, and 1893 taxes, and upon which tax deeds were issued in 1902. The sales were made to Louis A. Kedney, and tax sale certificates issued to him. The deeds were issued to "Robert B. Blakemore, executor, and Laura B. Kedney, executrix." The complaint alleges that Louis A. Kedney died in 1898; that in his

last will and testament he named Robert B. Blakemore as executor, and his widow, Laura B. Kedney, executrix; that the persons so named duly qualified and have not been discharged; that the said Louis A. Kedney devised his entire estate, real, personal and mixed to Robert B. Blakemore and William C. Macfadden in trust for the use and benefit of his wife, Laura B. Kedney, during her widowhood, the remainder to his children per stirpes when they shall have attained the age of 22 years; that Laura B. Kedney was duly appointed guardian of the persons and of the estate of the three children, who are all minors. All of the persons above named are joined as plaintiffs, and allege that they have "an estate and interest in and incumbrance upon" the property above described, and that the defendant claim "certain interests in or estates in or liens or incumbrances upon said premises adverse to these plaintiffs." The prayer is in the statutory form, except that neither possession nor compensation for the use are asked for. The defendants, John Cooper and George McCauley, answered jointly, and expressly deny that the plaintiffs have any right, title or interest in or lien upon the land in question, and allege that in May, 1903, McCauley was the owner in fee of said land and under a patent from the United States government, that he conveyed the same to his co-defendant Cooper, and that the latter is now the owner in fee simple and in possession. When the case was called for trial counsel for defendants demanded a trial by jury, stating that the action is in effect an action in ejectment. The request was denied and the case was tried under section 5630, Rev. Codes 1899. The findings of the trial judge were in all respects favorable to the plaintiff, and judgment was entered thereon quieting and confirming plaintiff's title, and adjudging that the adverse claims of the defendants are null and void and enjoining them from further asserting them, and for costs. Defendants have appealed from the judgment, and demand a review of the entire case in this court under the above section.

The preliminary question urged by counsel for defendants in his brief, that the defendants were entitled to a trial by jury, does not merit or require discussion. This contention is inconsistent with their attitude upon the record which they have prepared and presented to this court. They have demanded a trial anew under section 5630, Rev. Codes 1899. This section does not authorize retrials in jury cases. In demanding a retrial they necessarily as-

sume that the action is not properly triable to a jury. It is entirely clear, however, that the relief sought in this case is purely equitable and that the case was properly tried under section 5630, supra. The plaintiffs rested their case upon the tax sale certificates and tax deeds. It is urged by counsel for the defendants that the deeds are void because they are issued to "Robert B. Blakemore, executor, and Laura B. Kedney, executrix," instead of Blakemore and Macfadden, who are named in the will as devisees in trust for the benefit of the widow and children. This contention cannot be sustained. Section 110, Laws 1890, as amended by chapter 100, page 266, Laws 1891, in addition to providing a form of deed, authorized the issuance of the same to "the purchaser, his heirs or assigns." We are of the opinion that the executor and executrix are the assigns of the testator within the meaning of the above section. An assign or assignee is "one to whom an assignment has been made. Assignees are either assignees in fact or assignees in law. An assignee in fact is one to whom an assignment has been made in fact by the party having the right. An assignee in law is one in whom the law vests the right, as an executor or administrator." Bouvier's Law Dictionary, "Assignee." "An executor may be deemed an assignee, in law, of the testator. Dyer, 5. That is, he takes without any oppointment of the person, but by operation of law. The testator names the individual as executor, but it is the law makes him the assignee of the property." Hight v. Sackett, 34 N. Y. 451. The word "assignee" is applied most frequently to assignees in fact, but it is also applied to assignees in law, and we are of opinion that it must be considered as used in its most comprehensive sense in the above statute, including, as applied to this case, the executor and executrix. Blakemore v. Roberts, 12 N. D. 394, 96 N. W .1031; Douglas v. Hennessy, 15 R. I. 272, 3 Atl. 213; Brown v. Crookston Agl. Co. (Minn.) 26 N. W. 907.

It is also contended that the introduction of the certificates and deeds did not make out a prima facie case. This contention is likewise untenable. It is true that "in the absence of an enabling statute, it is incumbent upon any person who claims title to land derived from a sale thereof for taxes to prove affirmatively and by proper evidence that every mandatory provision of the law under which the sale was effected was strictly complied with; that each step in the proceedings from the assessment of the taxes to the execution of the deed was formally and regularly taken by

the officers or persons thereto legally authorized, and that he or his grantor was the purchaser at the sale. And this obligation is not met, in the absence of an enabling statute, by the mere production of the tax deed. The deed of conveyance would not stand for this evidence. It would prove its own execution, nothing more." Black on Tax Titles, sections 443, 444; 2 Cooley on Taxation (3d Ed.) 1004. The common-law rule of proof was abrogated by the statute under which the sales in question were made. The several sales were made in 1891, 1893 and 1894, under chapter 132, page 376, Laws 1890, as amended by chapter 100, page 266, Laws 1891. Section 71 of the 1890 act prescribed a form of certificate to be delivered to the purchaser, and section 72 of that act provided that "such certificate shall in all cases be prima facie evidence that all the requirements of the law in respect to the sale have been duly complied with and that the grantee named therein is entitled to a deed therefor after the time for redemption has expired." The 1890 revenue law made no provision for the issuance of a tax deed. The amendatory act (chapter 100, page 266, Laws 1891) cured this defect, and, among other things, provided for the issuance of deeds, "which shall vest in the grantee an absolute estate in fee simple * * * which shall be conclusive evidence of the truth of all the facts therein recited, and prima facie evidence of the regularity of the proceedings from the valuation of the land by the assessor up to the execution of the deed." All of the sales were made under the statute as amended.

The deeds, however, were not issued until 1902. The revenue law under which the sales were made was expressly repealed in 1895, and it is contended that the assurances made to purchasers by the former statute as to the evidential force of certificates and deeds, is, therefore, not available. This contention was urged in Fisher v. Betts, 12 N. D. 197, 207, 96 N. W. 132, and was overruled. It was contended in that case that because of the repeal of the revenue laws of 1890 and 1891 in 1895, a tax deed issued thereafter had no force as evidence that the tax proceedings were regular, and that the regularity of all acts of all of the taxing officers must be affirmatively established. It was claimed that the repeal in this respect related solely to the remedy, and that the legislature has a right to change existing remedies. We denied that the repeal had the effect contended for, in the following language: "The contention would not be disputed if the change referred to

the remedy only, but if the change of remedy or change in the rules of evidence goes further in its results, and affects contract rights, such changes are inhibited. The legislature will not be permitted, under the guise of changing a remedy or a rule of evidence, to impair a vested right under an existing contract; and the presumption that all requirements of law with respect to the sale have been complied with, raised by the delivery of the tax certificate, was raised in favor of the tax purchaser by the law in force at the time of his purchase. This presumption was perpetuated by the deed, was a vested matter of right, and could not be taken away by a repeal of these laws. Cooley on Const. Lim. 347. Speaking of section 1639 of the Compiled Laws of 1887, which was practically the same as the section under consideration, this court said, in Roberts v. Bank, 8 N. D. 504, 79 N. W. 1049: 'This statute entered into the contract of purchase, and became a part thereof.'"

Counsel for defendants vigorously challenges the soundness of the above decision, contending that the statute stated a mere rule of evidence, relating to the remedy, and that remedies are always under legislative control. It has been held in a number of cases that "rules of evidence are at all times subject to modification and control by the legislature, and changes thus made may be made applicable to existing causes of action," and that the repeal of a statute under which purchasers at tax sales have been made effectually deprives the purchaser of the assurances contained in it as to the evidential effect of the deed. The following cases so hold: Hickox v. Tallman (N. Y.) 38 Barb. 608; Howard v. Moot, 64 N. Y. 262; Roby v. City of Chicago, 64 Ill. 447; Gage v. Caraher (Ill.) 17 N. E. 777; Gibbs v. Gale, 7 Md. 76; Strode v. Washer (Or.) 16 Pac. 926; Marx v. Hanthorn (C. C.) 30 Fed. 579, 587. We have no quarrel with the rule, and it is a general rule, that the legislature may control remedies, but the rule is subject to the exception, which is as firmly fixed as the rule itself, that the legislature cannot, by a repeal or change of remedies, impair the obligation of a contract. The protection against the impairment of the obligation is absolute, and all legislative acts which work that result, whether by directly changing its terms or indirectly by rendering it ineffective, and of less value through a change of remedies, are prohibited. This is well stated in 2 Story on the Constitution (5th Ed.) section 1385: "It is perfectly clear that any law which enlarges, abridges, or in any manner changes the intention of the

parties, resulting from the stipulations in the contract, necessarily impair it. The manner or degree in which this change is effected can in no respect influence the conclusion, for whether the law affect the validity, the construction, the duration, the discharge or the evidence of the contract, it impairs its obligation, though it may not do so to the same extent in all supposed cases."

The views of the Supreme Court of the United States upon this question are clearly set forth in the language of Mr. Justice Swayne, in Edwards v. Kearzey, 96 U. S. 595, 24 L. Ed. 793: "The constitution of the United States declares that: 'No state shall pass any * * * law impairing the obligation of contracts.' A contract is the agreement of minds, upon a sufficient consideration, that something specified shall be done, or shall not be done. The lexical definition of 'impair' is 'to make worse; to diminish in quantity, value, excellence or strength; to lessen in power; to weaken; to enfeeble; to deteriorate.' Webster, Dic. 'Obligation' is defined to be 'the act of obliging or binding; that which obligates; the binding power of a vow, promise, oath, or contract,' etc. Webster, Dic. * * * The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those 'imperfect obligations,' as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. 'Want of right and want of remedy are the same thing.' * * * It is also the settled doctrine of this court that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge and enforcement. Van Hoffman v. Quincy, 4 Wall. 535, 18 L. Ed. 403; McCracken v. Hayward, 2 How. 608, 11 L. Ed. 397. In Green v. Biddle, 8 Wheat. 1, 5 L. Ed. 547, this court said, touching the point under consideration: 'It is no answer that the acts of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they overturned his rights

and interests.' 'One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not by the Constitution to be impaired at all. This is not a question of degree, or manner, or cause, but of encroaching in any respect on its obligation—dispensing with any part of its force.' Planters' Bank of Mississippi v. Sharp, 6 How. 301, 12 L. Ed. 447. It is to be understood that the encroachment thus denounced must be material. If it be not material, it will be regarded as of no account. These rules are axioms in the jurisprudence of this court. We think they rest upon a solid foundation. * * * The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution, and is, therefore, void."

Again, in United States v. Quincy, 71 U. S. 535, 18 L. Ed. 408, Mr. Justice Swayne, speaking for the court, said: "It is also settled that the laws which subsist at the time and place of the making of a contract, * * * enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement. * * * It is competent for the states to change the form of remedy, or to modify it otherwise as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the act is within the prohibition of the constitution, and to that extent void."

The question then is, not whether the repeal related to the remedy, but whether it impaired the obligation of the purchaser's contract with the state, by making it less effective and less valuable. In Fisher v. Betts, supra, we hold that it did, and we are still of the same opinion. The state was one of the contracting parties. It promised to those who would purchase the lands of tax debtors at its sales that it would give to them deeds which would be prima facie evidence of their title. Under this assurance the purchasers parted with their money. If the proceedings were in

fact regular, the prima facie effect of the deed was an unassailable assurance of title in the grantee and his successors forever. But if the purchaser be deprived of this assurance the deed evidences nothing. Neither he nor his successors are in that event protected by the fact that the proceedings were regular. They must be prepared to furnish (sometimes an impossible thing) the actual evidence of regularity whenever their title is challenged. That this change goes to the very life and value of the contract is, we think, apparent; and we cannot believe either that the legislature intended that its promises should be meaningless, or that purchasers did not in fact rely upon it as a strong, if not controlling, inducement to part with their money.

The necessity which gave rise to statutes like this is well stated in Black on Tax Titles, at section 448, in the following language: "The application of the common-law rule, casting the burden of proving every step upon the claimant under a tax title, was found to operate very much to the disadvantage of purchasers at tax sales. Aside from the difficulty of the undertaking—to prove every item in a long and technical course of proceedings—it was an arduous task to collect and preserve all the necessary fragments of evidence. Many of these were of a perishable nature, subsisting only in the files of newspapers, or fugitive documents; and the lapse of a considerable number of years, from the time of the first assessment, frequently put it beyond the power of the purchaser to fortify his claim with the evidence that was required of him. This fact, taken in conjunction with the strict and minute compliance with the statutory directions that was demanded of all the officers concerned, and with the extreme probability that some flaw, some slight omission or irregularity, could be detected in the proceedings, tended to make tax sales entirely nugatory. It became proverbial that a tax title was no title at all. And, indeed, transactions of this character came as near being an outright mockery as was possible for anything having the sanction of the law."

In our opinion the statute in question entered into, and was a substantial part of, contracts of purchase. It was framed to be relied upon by purchasers. To permit the state to repeal it would be to impair its obligation to the purchaser. This it cannot do. In our opinion it is within the mischief which the constitution was intended to prohibit. We must decline, therefore, to follow those courts which have sustained such repeals upon the ground

that the change effected was merely a rule of evidence. It follows from what has been said that the burden was upon the defendants to overcome the prima facie case made by the introduction of the tax sale certificates and tax deeds. Have they sustained that burden? We are of opinion that they have as to the tax deeds, but not as to the tax certificates.

The invalidity of the deeds is established by proof that no sufficient notice of the expiration of the redemption period was given. The property in question is the "north 50 feet of Lot 6, in Block 37, in Keeney & Devitt's Second Addition to Fargo." One of the notices described it as "Lot 6, Block 37, Keeney & Devitt's Second Addition to Fargo" (failing to describe the part of the lot). Another described it as the "north 50 feet of Lot 6, Block 37, Keeney & Devitt's Addition to Fargo" (instead of "Second Addition to Fargo"). The third notice did not describe the part of the lot or correctly describe the addition in which the property is situated. The notices were clearly insufficient because of their failure to correctly describe the property. The three notices referred to are set out in full in the abstract which is presented as a basis for our decision. True, they are notices which were personally served upon the defendant. They are, however, notices prepared under the hand and seal of the county auditor, and we cannot disregard them and assume, for the purpose of sustaining the tax deeds, that the county auditor prepared and served, either personally or by publication, other notices which were sufficient.

Counsel for plaintiff contend finally that no notice was necessary, and that the validity of the deeds is therefore not affected by the insufficiency of the notices. This presents a question of some difficulty. The sales were made under chapter 132, page 376, Laws 1890. All sales under that act were subject to redemption. The purchaser's lien could ripen into title only after service of notice of the expiration of the redemption period, and the owner's title could not be divested or his right of redemption terminated until the statutory notice was given. The purchaser could, by a timely service of the notice, limit the right of redemption to three years. By failing to serve it the period was extended and the right preserved until sixty days after such notice was given. Chapter 132, page 376, Laws 1890, was expressly repealed by section 12 of repeals, Rev. Codes 1895, which took effect on January 1, 1896. Section 1264 of the revenue laws contained in the Revised Codes

of 1895 fixed the redemption period at two years from the date of sale, and did not require notice of expiration. Two of the sales in question were made more than two years before the 1895 Code took effect. If the repeal was effective in terminating the purchaser's obligation to give notice, and the landowner's right to notice under the 1890 law and the provisions of the Revised Codes fixing the redemption period at two years are applicable to these certificates, it is clear that the purchaser became entitled to a deed upon two of the certificates upon demand and without redemption notice when the Revised Codes took effect, for in each case more than two years had elapsed since the date of sale; and as to the third certificate, the right of redemption expired on December 4, 1896, and without notice. Plaintiff's counsel contend that the repeal had this effect. We are unable to agree with this contention. It is true, chapter 132, page 376, Laws 1890, was expressly repealed. But it does not follow that all the provisions of the repealed act were abrogated as to rights which had accrued under them. As to a purchaser at a tax sale, it is well settled that the statute in force at the time of the sale becomes a part of his contract, and it is beyond the power of the legislature to sweep it away to his disadvantage by subsequent legislation. Roberts v. Bank, 8 N. D. 504, 79 N. W. 1049; Fisher v. Betts, 12 N. D. 198, 96 N. W. 132. In Minnesota it has been held, and apparently for the same reason, that the redemptioner's rights are also governed by the statute under which the sale was made. In Merrill v. Dearing, 32 Minn. 479, 21 N. W. 721, that court said: "The right of property acquired by the purchaser at this sale, and the right of redemption remaining to the owner, must both be governed by the law in force at the time of sale. Neither, in our judgment, could be abridged or enlarged by subsequent legislation. This is unquestionably so as to the rights of the purchaser. The same rule ought to apply in favor of the owner as against any statute shortening the time to redeem, and it is equally unjust to legislate against the owner of the land as in his favor. State v. McDonald, 26 Minn. 145, 1 N. W. 832; Hillibert v. Porter, 28 Minn. 496, 11 N. W. 84; Fleming v. Roverud, 30 Minn. 273, 15 N. W. 119; State v. Foley, 30 Minn. 350, 15 N. W. 375; Cooley on Taxation, 350." See, also, Gaston v. Merriam, 33 Minn. 271, 281, 22 N. W. 614; Kipp v. Johnson, 73 Minn. 34, 75 N. W. 736.

Other courts point out that the tax debtor has no contract with the state for any definite period in which to redeem; that the state has the power to sell his land without any right of redemption, and that the right to redeem and the time for exercising it are accorded as a matter of grace and not of right, and conclude, for these reasons, that the legislature has the power to reduce the redemption period and to otherwise modify the right in substantial particulars by subsequent legislation. Negus v. Yancey, 22 Iowa, 57; Muirhead v. Sands (Mich.) 69 N. W. 826; Baldwin v. Ely, 66 Wis. 171, 28 N. W. 392; Black on Tax Titles, section 353; 25 Am. & Eng. Enc. of Law, 410; Robinson v. Home, 13 Wis. 341, 342.

We do not find it necessary to express an opinion upon these conflicting views at this time, for we are of opinion that the legislature, in enacting the Revised Codes of 1895, saved the right of redemption as it existed under chapter 132, page 376, Laws 1890. The effect of the repeal by the Code of 1895 must be considered in connection with the general saving provisions contained in section 2686 of that Code, which read as follows: "No action or proceeding commenced before this Code takes effect, and no right accrued, is affected by its provisions, but the proceedings therein must conform to the requirements of this Code so far as they are applicable." This section preserves "actions" which had been commenced; "proceedings" which had been commenced; and "rights" which had accrued when the Revised Codes of 1895 took effect. The proceedings were thereafter required to conform to the provisions of the 1895 Code "so far as its provisions are applicable." We are agreed that the right of redemption, as it existed under chapter 132, page 376, Laws 1890, was a "right accrued," and was preserved by the above section. The saving provisions contained in this section, while general in terms, are such as usually accompany a revision of revenue laws. 1 Cooley on Taxation (3d Ed.) 499, 500, 501, and cases cited. And they are generally held to perpetuate pre-existing laws so far as they are necessary to protect and enforce the right of the tax debtor as well as the purchaser. For cases in point, see Fletcher v. Post, 104 Mich. 424, 62 N. W. 574; Matter of Munn, 165 N. Y. 149, 59 N. E. 881; also Greensboro v. McAdoo, 112 N. C. 359, 369, 17 S. E. 178; City v. Cronley, 122 N. C. 388, 30 S. E. 9; Puget Sound Bank v. County (C. C.) 62 Fed. 546; City v. Morris (Ind. App.) 58 N. E. 510.

In the recent case of Hagler v. Kelly, 13 N. D. 218, 13 N. W. 629, my associates were of opinion that the lien of a tax judgment

in favor of the state was a "right accrued," and was preserved by the above section, notwithstanding the repeal of the statute which created it. I expressed no opinion upon the point. My doubt rested upon the belief that the lien was a remedy, and not a right As to the present case there can be no doubt, and I fully agree with my associates that the right of redemption as it existed under chapter 132, page 376, Laws 1890, was a "right accrued," and was perpetuated through the saving clause, notwithstanding the repeal. It is equally clear that the provisions of the 1890 law, regulating the termination of the right of redemption by the purchaser—i. e., by notice of expiration, and the manner of effecting redemption by the tax debtor—were also continued in force, and govern in this action, unless they have been superseded by other subsequent provisions which are applicable. This is true under the language of the saving clause and also under the general rule of construction applicable to a revision or repeal of revenue laws, which is that the repeal or revision is to have a prospective operation only unless the intent of the legislature to the contrary clearly appears. Smith v. Humphrey, 20 Mich, 398; Clark v. Hall, 19 Mich. 356; Auditor General v. Supervisors, 36 Mich. 70; Thomas v. Collins, 58 Mich. 64, 24 N. W. 553; Hall v. Perry, 72 Mich, 202, 40 N. W. 324; City v. Whipple, 44 Cal. 303; Smith v. Kelly, 24 Or. 464, 33 Pac. 642; 1 Cooley on Taxation (3d Ed.) 2681, and cases cited.

This rule of construction is expressly made applicable to the Revised Codes of 1895. Section 2681 of that Code reads as follows: "No part of this Code is retroactive unless expressly so declared." There is nothing in section 1264 of that 1895 Code which will authorize us to hold that it relates to redemptions under former sales. It clearly relates to redemptions from sales made under the 1895 revenue law, of which it is a part. The same rule of construction also requires us to hold that section 106, chapter 126, page 295, Laws 1897 (section 1289, Rev. Codes 1899), and chapter 166, page 221, Laws 1901, are prospective, and do not apply to certificates issued under previous statutes. The statutes in force when the sales here in question were made, relating to redemption, required notice of expiration as a condition to obtaining a deed. No such notice has been given. The deeds are therefore invalid.

The defendants also attack the validity of the tax sales: First, upon the ground that the owner or manager of the newspaper in which the notices were published failed to file the affidavit with

the county auditor, required by chapter 120, page 346, Laws 1890; second, because of the alleged insufficiency of the notices published. Neither of these contentions can be sustained. Chapter 120, page 346, Laws 1890, consists of three sections. The first prescribes the qualifications of a newspaper which may do public printing and publish legal notices. Section 2 makes it the duty of the "owner or manager" of a newspaper, before it can be awarded a contract, to file with the county auditor a statement setting forth its qualifications. Section 3 subjects the person or corporation publishing notices or doing printing without filing such statement to a fine of not less than twenty-five nor more than one hundred dollars, and also a "forfeiture of all pay for any such printing, * * *" It is not claimed that the newspaper was not in all respects qualified under section 1 of this act. The only objection is that the owner did not make a sufficient affidavit. It is apparent that this failure did not invalidate the publication. Section 3 designates the consequences for such failure, namely, a fine and forfeiture visited upon the person or corporation owning the newspaper which is at fault, and names no other consequences. We find no warrant for holding that the legislature intended to declare notices void which are published in a newspaper which is qualified in fact, because the owner or manager fails to file the affidavit. On the contrary, we think the effect of such failure is that prescribed by section 3, to wit, liability to fine and forfeiture, and nothing more.

It is also claimed that the notices of sale did not contain a sufficient description of the property, and were therefore void. No proof of any kind was offered as to the notice of sale for 1894, and as to the other years the evidence does not show that the notices were insufficient. The notices of sale for the years 1891 and 1892 were published in the Fargo Republican. Defendants' counsel took the stand in their behalf and offered in evidence, over objection, two printed slips of paper, which he testified were cut from newspapers in his possession purporting to have been published on November 1, 1891, and November 1, 1893, respectively. These clippings contain only a small part of the tax sale notices. The descriptions are not as intelligible as they would be if the entire notice had been offered in evidence, and it is very doubtful whether a sufficient foundation was laid for the introduction of this evidence; a question we need not decide, for we are agreed that the description contained in each of the papers offered is sufficient. In each,

underneath the headlines: "Name, description, lot, block," the following appears: "G. W. McCauley, N. 50 ft. 6—37," and on each the foregoing description follows the general heading, printed in large letters: "Keeney & Devitt's Second Addition to Fargo." The objection is based upon the fact that between the general heading and the rest of the description of the property in question, i. e., the name, lot and block, certain other headings appear; on one: "Magill's Subdivision of Lot 1 and 2, Block 33;" on the other; "Bond's Subdivision of lots 6 and 7, Block 30." A casual inspection shows that these notices do not contain a misdescription or a misleading description. The heading just described do not include "Block 37 of Keeney & Devitt's Second Addition to the City of Fargo," in which the lot in question is situated. On the contrary, they cover the other blocks in this addition, which are designated by number, expressly excluding block 37. Apparently some of the blocks in this addition have been subdivided and appropriate subheads were inserted designating those which were subdivided. Upon their face, the subheads do not apply to the property in question, the description of which, concededly otherwise sufficient, appears under the heading "Keeney & Devitt's Second Addition to Fargo."

It follows that the attack upon the sales must fail, and the certificates must be held valid. The district court is directed to modify its judgment to correspond with the conclusions herein set out. Appellants will recover their costs on this appeal. All concur.

(106 N. W. 566.)

ANNIE KINNEY v. BROTHERHOOD OF AMERICAN YEOMEN. 66.

Opinion filed December 19, 1905.

Appeal — Notice — Appeals from Judgment and Order.

1. It is proper and commendable practice to include in a single notice an appeal from a judgment and an appeal from an order made after judgent denying a motion for judgment notwithstanding the verdict or for a new trial. Certain language in Prondzinski v. Garbutt, 83 N. W. 23, 9 N. D. 239, and in State v. Gang, 87 N. W. 5, 10 N. D. 331, disapproved.

Pleading — Objections — Waiver.

2. Where by failing to object to the admission of evidence of matters in avoidance of a defense, the defendant has tacitly consented to the trial of an issue, which could, and should properly, have been litigated

without a reply, he cannot urge as grounds for a directed verdict that the plaintiff, by voluntarily interposing a reply which only denied new matter pleaded in the answer, was thereby precluded from showing matter in avoidance of the defense.

Appeal — Review — Questions of Fact — Necessity of Setting Out Evidence.

3. The sufficiency of the evidence to support the finding of the jury on any question in dispute will not be reviewed, when the printed abstract does not contain all the evidence relating to that question.

Accord and Satisfaction — Insufficient Payment.

4. If the sum of money paid to plaintiff by the defendant to satisfy an alleged accord was not the amount agreed upon in the accord, the retention of the money, even though there was no fraud on defendant's part, would not estop the plaintiff to deny that the accord had been executed.

Same — Rights of Creditor.

5. If the sum paid by defendant was not sufficient to satisfy the accord, the plaintiff might disregard the accord, and either return the payment and sue for the amount of her original claim, or treat the sum received as a partial payment of her original claim and sue for the balance.

Appeal — Question of Facts.

6. Where the record shows that the plaintiff relied upon two propositions of fact, either of which, if true, would defeat the defense pleaded, and the record does not show how the questions were submitted to the jury, or which of the propositions the jury found to be true, we cannot disturb the verdict, unless it clearly appears that neither proposition was true.

Same — Record Proper — Contents.

7. Neither the instructions to the jury, requests for instructions, nor exceptions to the giving or refusal to give instructions in a civil action, are parts of the judgment roll, unless made so by including them in the statement of the case.

Witnesses — Examination — Rebuttal.

8. A question to a witness called in rebuttal, which does not call the witness' attention to some particular statement or fact and demand a denial or explanation thereof, is improper in form.

Insurance — Action on Life Policy — Burden of Proof.

9. In an action by the beneficiary upon a life insurance policy which provides that no recovery can be had on the policy, unless the insured,

at the time of his death, was a member in good standing of the defendant fraternal order, and had paid all dues and assessments, such loss of membership or default in payments are defenses, which must be pleaded and proved by the defendant.

Same — Pleading.

10. Allegations in the complaint, asserting generally that the insured was a member in good standing and had paid all dues and assessments, are mere surplusage, and do not relieve the defendant of the necessity of pleading and the burden of proving a default in those respects.

Same — Evidence — Failure to Pay Assessments — Foundation.

11. It was not error to decline to admit testimony that the insured had failed to pay an assessment, when there was no proof or offer to prove that an assessment had in fact been levied, which the insured was bound to pay.

Appeal — Admission of Error — Necessity of Showing Error.

12. Although certain testimony was admitted on cross-examination which, standing alone, appears to have come within the rule against hearsay testimony, yet the admission of the testimony cannot be held reversible error when the previous testimony of the witness does not appear, and, so far as the record discloses, the testimony could not prejudice the defendant, even if objectionable as hearsay.

Insurance — Cause of Death — Evidence.

13. A document signed by the coroner, stating what appeared to him to be the cause of the death was not admissible as evidence.

Same — Opinion of Physician.

14. The opinion of a physician is not admissible as to the cause of death, unless the facts upon which the opinion is based are in evidence..

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

Action by Annie Kinney against the Brotherhood of American Yeomen. From a judgment for plaintiff, defendant appeals. Affirmed.

F. B. Lambert and *H. N. Morphy* (*E. C. Corey* of counsel), for appellant.

Purcell, Bradley & Divet, for respondent.

ENGERUD, J. This is an action by the beneficiary to recover $2,000 on a policy of insurance on the life of Marland D. Kinney. The plaintiff is the widow of the insured. The defendant is a

fraternal and mutual organization, which insured the lives of its members and is incorporated under the laws of the state of Iowa. The policy was issued in April, 1902, and the insured died in May, 1903. The complaint, besides alleging the making of the insurance contract and the death of the insured, the submission of due proofs of death, and the refusal of the defendant to pay, further alleges that Marland D. Kinney "did pay or cause to be paid to the said defendant all dues and assessments thereafter [after the issuance of the policy] properly chargeable against him on account of his membership in and insurance upon his life by the said defendant corporation, and did continue a member thereof in good standing up to the time of his death." The answer admits the corporate capacity of the defendant and the making and delivery of the policy of insurance, but denies generally all other allegations of the complaint. It specifically denies that the deceased was a member of the defendant order in good standing at the time of his death, or that he has paid all assessments due under the terms of his membership. The answer also sets forth that according to the terms of the insurance contract the defendant, if liable at all, can be held only for the sum of $1,627.50 and interest. The defendant also pleads that it is not liable on the policy because the insured, in his application, falsely stated that he did not drink intoxicating liquor of any kind, except beer, which he drank to the extent of only one glass per week, and the truth was that the insured was then and thereafter during the remainder of his life, addicted to the excessive use of all kinds of intoxicating liquor to such an extent as to become frequently intoxicated, and that his use of it was such as to impair his health and shorten his life expectancy. It is further alleged that the excessive indulgence in alcoholic liquor was the cause of the death of the insured. It is alleged that the contract contained provisions by virtue of which it became void if the foregoing allegations were true. The answer finally pleads an accord and satisfaction. It is alleged that the defendant disputed plaintiff's claim for the insurance for the reasons stated in the answer, and thereupon, on July 15, 1903, a compromise was effected, by which the defendant paid, and the plaintiff accepted in full of all claims, "such an amount as would have been due had the deceased had a valid certificate of membership in said order in the sum of $500, other conditions being the same, to wit, the sum of $365.90."

Although the answer contained no counterclaim, the plaintiff voluntarily served and filed a reply thereto, denying the new matter alleged in the answer, and averring that the plaintiff was fraudulently induced to agree to accept $500 in full settlement of the claim; that the defendant did not pay plaintiff said sum, or offer to do so, but offered to pay $379.35, which offer plaintiff refused; and, subsequently discovering the falsity of the representations made to induce the compromise, she rescinded the agreement. The trial resulted in a verdict in plaintiff's favor for $1,718, that being the amount which it is conceded the plaintiff is entitled to if she can recover at all. Judgment was entered for the amount of the verdict, and costs, on June 25, 1904. Thereafter a statement of the case was settled, upon which the defendant moved for judgment notwithstanding the verdict or for a new trial. The motion was denied December 3, 1904. The defendant thereupon served a notice of appeal and the required undertaking. The notice states that the defendant appeals from the order denying the motion for judgment and for a new trial, and also from the judgment.

Respondent contends that a party cannot include in a single notice an appeal from the judgment and an appeal from an order made after judgment denying a motion for a new trial, and moves to dismiss this appeal for that reason. Respondent cites and relies on the numerous decisions in Wisconsin in which it was held that a single appeal could not be taken from two or more appealable orders, or from a judgment and one or more appealable orders. The same rule was announced in Hackett v. Gunderson, 1 S. D. 479, 47 N. W. 546, and in Anderson v. Hultman, 12 S. D. 105, 80 N. W. 165. These cases were cited with approval in Prondzinski v. Garbutt, 9 N. D. 239, 244, 83 N. W. 23, and the same point was referred to again in State v. Gang, 10 N. D. 331, 335, 87 N. W. 5. The reference to the subject in Prondzinski v. Garbutt was clearly obiter. In State v. Gang the motion was denied, because when the appeal was taken the time for appeal from the only appealable order made before judgment had expired. It was stated, however, that the objection to the appeal would have been well taken if the previous orders referred to in the notice of appeal had been appealable and the time for appeal therefrom had not expired. It will be observed that in both these cases the previous appealable orders mentioned in the notice of appeal were reviewable on appeal from the judgment, and it was held that the mere fact of

mentioning them in the notice of appeal from the judgment was good ground for dismissal. We think these views were erroneous, and hereby expressly disapprove them. They are in accord with some earlier Wisconsin decisions which were extremely technical. The Supreme Court of Wisconsin subsequently recognized the unnecessary strictness of these earlier cases, and expressly modified them in the case of Ballou v. Railway Co., 53 Wis. 150, 10 N. W. 87, decided in 1881. In that case the court said: "In American Button Hole Co. v. Gurnee, 38 Wis. 533, and perhaps in other cases, it was held that an appeal would be dismissed for duplicity in the notice of appeal, although double only in form. We are now satisfied that this rule is unnecessarily technical and harsh, and should be modified. The court takes this occasion to announce that hereafter no appeal will be dismissed for duplicity unless it is double in fact; that is to say, unless it includes two appealable matters." The legislature of that state in 1883 still furthur mitigated the rule adopted by the court by providing that any number of appealable orders in a single action could be brought before the appellate court by a single appeal. Sanborn & B. Ann. St. Wis. sections 3042, 3042a. If it was intended by the language used in Ballou v. Railway Co. to adhere to the earlier decisions, to the effect that the inclusion in the notice of a statement that the appellant appealed from the judgment and also from one or more appealable orders made in the action before judgment rendered the appeal double both in form and fact, although the previous orders were reviewable on appeal from the judgment alone, then we think that the modified rule in that case is still too technical and harsh. If the previous orders are reviewable on appeal from the judgment alone, it is clearly nothing but surplusage to state in the notice that the appellant desires such review. Such a statement in the notice is manifestly a mere unnecessary formal demand for that which the appellant was entitled to without asking for it in the notice. Granger v. Roll, 6 S. D. 611, 61 N. W. 970. Although our appeal law is said to have been borrowed from Wisconsin, and we should therefore follow the decisions of that state, we will not adhere to that rule where no doubtful question of interpretation of language is involved, and where the decisions of the foreign jurisdiction are clearly erroneous. Morgan v. State, 51 Neb. 672, 71 N. W. 788; Dwyer v. Bank, 30 Colo. 315, 70 Pac. 323; Oleson v. Wilson, 20 Mont. 544, 52 Pac. 372.

As to the soundness of the general rule announced in Hackett v. Gunderson, 1 S. D. 470, 47 N. W. 546, and in the Wisconsin cases which that decision follows, to the effect that two or more orders in the same action cannot be brought up for review by one notice of appeal, we express no opinion, because we are agreed that, whether that is a correct statement of the general rule or not, it ought not to apply to a case like this. No case has been cited, and we have found none wherein it has been held, under laws similar to ours, that an appeal from a final judgment and from a subsequent order denying a motion for a new trial is objectionable for duplicity. We can conceive of no good reason for condemning such a practice, unless we regard the general rule, as broadly declared in Hackett v. Gunderson, to be an inflexible one, to which there is no exception. Notwithstanding the decision in Hackett v. Gunderson, the Supreme Court of our sister state held that it was proper to combine in one notice an appeal from the judgment and an appeal from a subsequent order denying the motion for a new trial. Hawkins v. Hubbard, 2 S. D. 631, 51 N. W. 774. That practice has been uniformly followed and approved in California. Carpentier v. Williamson, 25 Cal. 154; Winter v. McMillan, 87 Cal. 256, 25 Pac. 407, 22 Am. St. Rep. 243; Chester v. Association, 64 Cal. 42, 27 Pac. 1104. It seems to us the practice is one which ought to be commended, rather than condemned. Errors of law can be reviewed on appeal from the judgment without a motion for a new trial; but the statute forbids us to examine into the sufficiency of the evidence to support the verdict, unless the trial court has had an opportunity on a motion for a new trial to remedy the jury's erroneous decision of the facts. If the jury has taken an erroneous view of the evidence, it is an error at the trial which necessarily affects the judgment; and, although the trial court after judgment may refuse to grant a new trial, and thus commit error after judgment by refusing to rectify the error which the jury committed before, the fact remains that the inquiry on appeal as to the sufficiency of the evidence is in reality a review of an error before judgment. The trial court's ruling is merely a condition precedent to the right of the appellate court to examine into and remedy the error which the jury is alleged to have committed. Clearly, if the defeated party challenges the propriety of the judgment on the ground that there was error of law or fact in the proceedings which resulted in the judgment, he ought to

be required to present all the reasons he assigns for reversing the judgment in a single proceeding, unless there is some good reason for not doing so. The motion to dismiss is, therefore, not well taken.

The most important assignments of error relate to the rulings of the court with respect to the defense of accord and satisfaction. If that defense was conclusively established, as defendant claims, then the defendant is entitled to judgment notwithstanding the verdict, and it is unnecessary to discuss other assignments of error. We shall therefore dispose of the assignments relating to that defense first. The appellant, we think, has misconceived both the pleadings and the evidence relating to this defense. The substance of the pleadings on this subject have already been set forth. It will be seen therefrom that the defendant pleaded that the terms of the accord were that the plaintiff was to accept and the defendant pay the sum of $365.90. This is the accord which the defendant in his plea asserts that he executed. The reply specifically denies that the terms of the accord were as stated in the answer, and also denies that any accord was ever executed. These specific denials in effect were the same as a general denial, because it is merely stating a truism to say that an accord without satisfaction is no defense; and it is also manifest that if the attempted execution did not comply with the terms of the accord there could be no satisfaction. The specific denials in the reply denied both of the two necessary elements which the defendant must prove in order to make good his plea, viz., the terms of the accord and the execution of the accord according to its terms. Analysis of the remainder of the reply will show that the effect of these denials was not modified or limited except as to the fact of an accord, by any of the subsequent averments of that pleading. The plaintiff undertook to state specifically what the terms of the accord were. She, of course, thereby admitted that there was an accord; but she alleges that its terms were different from those alleged by defendant, and she again asserts that there never was any satisfaction. She also states that she abrogated this accord for fraud, thereby quite unnecessarily giving a reason why an attempted satisfaction would have been unavailing. It was unnecessary to give reasons for rescinding an accord, because, until satisfaction, it is revocable at the pleasure of either party without giving reasons. This part of the reply was mere surplusage. It will be seen, then, that, notwithstanding the reply, the defendant was in practically the

same position, so far as proving his alleged defense was concerned, as he would have been in if the plaintiff had been content to stand on the statute, which dispenses with the necessity for reply to new matter not constituting a counterclaim. The defendant, notwithstanding the reply, had the burden of proving the accord it alleged and a complete execution of it. Had the reply admitted the accord and satisfaction pleaded by the defendant, and set up fraud or some other grounds for avoiding the effect of it, then, perhaps the plaintiff would have been bound to prove the affirmative matter which she unnecessarily assumed the burden of proving. See, however, Lumber Co. v. Keefe, 6 Dak. 160, 41 N. W. 743. The question, therefore, as to this defense is simply one of the fact on the evidence. Was the adverse finding of the jury warranted by the evidence? If the plea was conclusively established by the proof, defendant is entitled to judgment notwithstanding the verdict. If the verdict is merely against the clear preponderance of the evidence, the defendant is entitled to a new trial only.

It appears from the evidence in the record that the plaintiff relied on two propositions to defeat the plea now in question: First, she denied that she agreed to settle for the sum alleged by defendant; second, she asserted that, if the amount paid to her by defendant was a satisfaction of accord, then the transaction was voidable for fraud, and she had rescinded it for that reason. It is a question which we are not required to decide in this case whether the unnecessary interposition of a reply merely denying the new matter pleaded as a defense would preclude the plaintiff, if timely objection had been made, from showing matters in confession and avoidance of the defense. See, however, Lumber Co. v. Keefe, 6 Dak. 160, 41 N. W. 743. That question does not arise in this case, because, for reasons hereafter stated, we must assume that the jury were warranted in finding that there was no executed accord, and because the parties without objection litigated the question as to whether the accord and satisfaction, as claimed by defendant, was fraudulently effected. The evidence on the latter subject was not objected to, when offered, on the ground that it was inadmissible by reason of the allegations or lack of allegations in the reply. The defendant cannot take advantage of the want of a reply after the evidence is all in without objection. Power v. Bowdle, 3 N. D. 107, 54 N. W. 404, 21 L. R. A. 328, 44 Am. St. Rep. 511. Much less can a defendant take advantage of any in-

formality or insufficiency in such a pleading by a motion for a directed verdict after he has, by failing to object, tacitly consented to the trial of an issue which could and should properly have been litigated without a reply.

The abstract of the evidence as to the terms of the accord discloses on its face that it is fragmentary and incomplete on that point. Enough appears, however, to show that there was substantial conflict of testimony as to the terms of the accord, and we cannot review the sufficiency of the evidence to support a finding on a disputed question when all the evidence as to that question is not before us. Collins v. Breen (Wis.) 44 N. W. 769. Nor will we go outside of the printed abstract and explore the original statement to look for more evidence. We must assume that the appellant has included in the printed abstract all material parts of the original record upon which it relies to show error. McLain v. Nurnberg (just decided) 105 N. W. .... There being a substantial conflict of evidence as to whether the amount paid by defendant was the sum which the plaintiff had agreed to accept in satisfaction of her claim, the motion for a directed verdict in defendant's favor, on the ground that the accord and satisfaction was undisputed and no rescission or right to rescind had been shown, was properly denied. If the sum paid was not sufficient to satisfy the accord, the retention of the money paid, even though there was no fraud, would not estop the plaintiff to assert that there had been no executed accord. In such a case the plaintiff could retain the money as a partial payment and sue for the balance of her original claim, disregarding the accord, or she could, as in this case, return the amount paid and sue for the entire amount of her original claim. Spruneberger v. Dentler, 4 Watts (Pa.) 126. Of course, the receipt and retention of the money would ordinarily be evidence to corroborate the defendant's assertion that the sum paid was the sum agreed upon. Its weight, however, as such evidence, would depend upon the surrounding circumstances.

The question of fraud in the accord was immaterial, unless the jury found, or the fact was admitted, that the sum paid was a full satisfaction of the accord as claimed by defendant. There was no special finding with respect to this defense. Neither the instructions, requests to instruct, nor exceptions to instructions were incorporated in the statement of the case, and were stricken from the abstract and record on respondent's motion for that reason.

These matters are not part of the record in a civil action, unless made so by the statement of the case. Pielke v. Railway Co., 6 Dak. 444, 43 N. W. 813; Kleinschmidt v. McDermott (Mont.) 30 Pac. 393; Collins v. Breen (Wis.) 44 N. W. 769. The record does not, therefore, show what questions with respect to this defense were submitted to the jury, or what the jury found. We must assume that the issues arising on this defense were properly submitted to the jury, and that the jury heeded the instructions. Consequently, if there was a substantial conflict of testimony either as to the defendant's allegation of accord and satisfaction or as to the claim of fraud and recission, we cannot disturb the verdict, even if we were satisfied that there was no substantial conflict as to one of the two questions. In other words we cannot disturb the verdict unless the record shows that there was not sufficient evidence to warrant a finding for plaintiff on either point. We will add, however, that we have examined the evidence printed in the abstract on both questions, and, if we assume that the abstract contains all of the evidence on the subject, we have no hesitation in saying that the evidence is such as to warrant a finding in plaintiff's favor on either ground.

It was not error to sustain the objection to the question put to witness McKinnon: "You heard Mrs. Kinney's statement as to there being nothing said about the funeral expenses until you started away, until after she had signed the voucher. Is that right?" Although the subject-matter of the question was relevant and material, the question was improper in form; and it is apparent that the court considered it objectionable for that reason. This witness, in other parts of his testimony, had given his version of what was said and done on the occasion and as to the subject in question. If it was necessary or desirable to again go into the subject in rebuttal of Mrs. Kinney's version of the same matter, the question ought to have been framed so as to require the witness to refute, either by direct denial or by a statement of facts, some particular statement made by Mrs. Kinney. It does not appear that the proper exercise of this right was denied.

With respect to the funeral expenses, amounting to $38.15, it appears the defendant paid them, and the amount was not repaid to the defendant by Mrs. Kinney. Defendant claims that the failure to repay this sum rendered the attempted rescission nugatory. If the jury believed Mrs. Kinney's version of the transaction,

which defendant claims constituted the accord and satisfaction, this payment was not authorized by or known to her to have been made for and in her behalf, and had no connection with the alleged settlement. We must assume that the jury so found, and hence the payment was wholly voluntary, and consequently was not chargeable to the plaintiff, either as a benefit which must be restored in case of rescission, or which must be credited as a partial payment if there was no executed accord. The record shows no error with respect to the issues arising on the plea of accord and satisfaction.

Error is assigned on the refusal of the court to direct a verdict for defendant because there was no evidence that the insured was a member of the local lodge in good standing at the time of his death and had paid all dues. It is a misapplication of terms to say that these facts were conditions precedent which the plaintiff was bound to prove as parts of her cause of action. The issuance of the policy was itself an admission by defendant of the plaintiff's good standing at that time. If the insured ceased to be a member in good standing of the defendant order, or failed to pay dues and assessments, the defendant's liability on the policy ceased; and if the defendant had been released from liability for those reasons, those facts were defensive matter, which it was incumbent on the defendant to plead affirmatively and prove in bar of the cause of action. Niblack Ben. Soc. & Acc. Ins. section 135; Cornfield v. Order (Minn.) 66 N. W. 970; Kumle v. Grand Lodge (Cal.) 42 Pac. 634. The allegations of the complaint negativing the existence of such a defense were, like the allegation of nonpayment, often inserted in a complaint on a promissory note, mere immaterial surplusage, and did not relieve the defendant of the necessity of pleading, and the burden of proving, the defense. A denial puts in issue only material allegations. The only reference to this defense in the answer is the following: "It specifically denies that said Marland D. Kinney was a member of the defendant order in good standing at the time of his death, or that he had paid assessments due under the terms of his membership." Other allegations in the answer set forth some of the terms of the contract of insurance, from which it appears that the insurance ceased if the insured lost his good standing as a member or failed to pay dues and assessments. It will be observed that the answer, even if read in connection with the allegations of the complaint,

which it denies, does not allege as a fact that any assessment had been levied. It was clearly insufficient as a pleading of an affirmative defense, if timely objections were made. Am. Mut. Aid Soc. v. Helburn (Ky.) 2 S. W. 495, 7 Am. St. Rep. 571; Garretson v. Ass'n (Iowa) 61 N. W. 952.

We need not determine whether this part of the answer was so insufficient as to warrant the exclusion of evidence offered in support of it, no objection having been made before the trial, because the only evidence offered in support of that defense was clearly objectionable for other reasons. The defendant offered to show by the treasuer of the local lodge that Mr. Kinney had failed to pay "assessment No. 4 of the series of 1903." This offer was objected to on the ground, among others, that it had not yet been shown that any assessment had in fact been levied. The court sustained the objection, without stating for which of the several reasons assigned it did so. If any of the reasons assigned in the objection were well taken, the ruling must be sustained. It was clearly discretionary with the court to decline to permit proof out of order. The evidence offered was immaterial, unless it was also shown that an assessment had been levied which it was the duty of the insured to pay. The offer of proof assumed that unproved fact, and the objection called attention to the defect. The defendant made no offer to remedy the defect by evidence of the assumed fact.

The assignments relating to the evidence and rulings touching an arbitration clause in the policy present nothing for review, because, although we infer that there was a stipulation on that subject in the contract of insurance, the record does not disclose what its terms were.

Error is assigned on the rulings of the court in permitting a series of questions to be answered by defendant's witness Nelson on cross-examination. The direct examination is not included in the abstract. The questions were objected to, not because they were improper cross-examination, but solely as calling for hearsay testimony. The questions called for statements by third persons, and the answers were apparently hearsay; but, in the absence of any information as to what the circumstances were with relation to which the witness testified on direct examination, we are unable to say that any error was committed in admitting the evidence. The answers were of such a nature, however, that we cannot conceive how they could possibly have prejudiced the de-

fendant, even if the questions were improper cross-examination, and the answers elicited were not within any exceptions to the hearsay rule.

The refusal to admit Exhibit D was clearly proper. The document purported to be the record of the coroner's inquest on the dead body of the insured. The document showed on its face as, indeed, the coroner, who was called as a witness, testified, that no formal inquest was held. In the blank space left for the insertion of the finding of the coroner's jury, the coroner had inserted what appeared to him to be the cause of the death of the insured, and the coroner signed his name in the space left for the signature of the jurors. No coroner's jury had been called, because the coroner apparently deemed it unnecessary. The coroner, who was a physician and surgeon, was a witness for defendant at the trial, and testified as to the facts he observed relating to the cause of death. Clearly the document had no probative force whatsoever. Puls v. Grand Lodge, 13 N. D. 559, 102 N. W. 165.

Dr. Kaufman, the coroner, was asked: "What, in your opinion, was the cause of his death?" He had not yet been asked, so far as the record shows, to state what facts he based his opinion on. Moreover, his subsequent testimony shows that he had not made a sufficient examination of the corpse to be able to form an intelligent opinion, and he was not asked to state his opinion based on facts and circumstances testified to by himself or other witnesses. The court very properly sustained the objection made to the question.

The remaining assignments of error are so manifestly devoid of merit as to require no mention.

The judgment and order appealed from are affirmed. All concur. (106 N. W. 44.)

KNUD ORVIK AND OLE G. OLSON v. JOHN CASSELMAN.

Opinion filed December 20, 1905.

Evidence — Judicial Notice — Standard Time.

1. It is a fact of which the court takes judicial notice that "standard" or "railroad" time is the system for designating time which has been in general use in this jurisdiction since territorial days.

Time — Notice of Foreclosure.

2. "Two o'clock p. m.," in a notice of foreclosure sale in 1896, must be taken to mean 2 o'clock in the afternoon, standard time.

Foreclosure of Mortgage by Advertisement — Law in Force at Time of Foreclosure Prevails.

3. Section 5848, Rev. Codes 1895, reducing the period of time previously required for publication of the notice of sale in foreclosures by advertisement, applies to all foreclosures by advertisement made after the revision took effect, even though the mortgage being foreclosed was executed before that time.

Constitutional Law — Obligation of Contract.

4. Section 5848, Rev. Codes 1895, did not, as to previously existing powers of sale, impair the obligation of any contract.

Mortgage — Power of Sale — Enforcement.

5. The stipulation in a mortgage conferring a power of sale in case of default gives a remedy which must be exercised agreeably to the statutes relating thereto in force when the remedy is invoked.

Appeal from District Court, Nelson county; *Fisk*, J.

Action by Knud Orvik and Ole G. Olson against John Casselman. Judgment for plaintiffs, and defendant appeals.

Affirmed.

W. H. Standish, for appellant.

The law in force at the time the mortgage was executed must be followed in foreclosing it, although there has been a change in the law regarding procedure. Jones on Mortgages, section 1321: Smith v. Green et al., 41 Fed. 455; Heyward v. Judd, 4 Minn. 483, 4 Gil. 375; Goenen v. Shroeder, 8 Minn. 385, 8 Gil. 344; Carroll v. Rossiter, 10 Minn. 174, 10 Gil. 141; First M. E. Church v. Fadden, 8 N. D. 162, 77 N. W. 615; Garr v. Clements, 4 N. D. 559, 62 N. W. 640; Yealman v. King, 2 N. D. 421, 51 N. W. 721; Nichols v. Tingstad et al., 10 N. D. 172, 86 N. W. 694.

A sale made twenty-eight minutes prior to the time set for it is void. Richards v Tinnegan et al., 45 Minn. 208, 47 N. W. 788.

Scott Rex, for respondent.

Notice of sale published six times, once in each week for six successive weeks, although only forty days between first and last publication, is sufficient. McDonald v. Nordyke Marmon Co., 9 N. D. 290, 83 N. W. 6; Grandin v. Emmons, 10 N. D. 223, 86 N. W. 723.

The increase of the effectiveness of a remedy impairs the obligation of neither party to the contract. 15 Am. & Eng. Enc. Law,

1053; Schoenheit v. Nelson, 20 N. W. 205; Potts v. Arms Co., 17 N. J. Eq. 395; Hill v. Merchants' Mut. Ins. Co., 134 U. S. 515, 10 Sup. Ct. Rep. 589.

There is no vested right in a remedy. 6 Am. & Eng. Enc. Law, 947, 8 Cyc. 917; State Sav. Bank v. Mathews et al., 81 N. W. 918; Hill v. Merchants' Mut. Ins. Co., supra; Tennessee v. Sneed, 96 U. S. 69, 24 L. Ed. 610; New Orleans C. & L. B. Co. v. State, 157 U. S. 219, 15 Sup. Ct. Rep. 581; Rairden v. Holden, 15 Ohio St. 207; Rich v. Flanders, 39 N. H. 304; Henschall v. Schmiedtz, 50 Mo. 454; Bird v. Keller, 77 Me. 270; Conn. Mut. Life Ins. Co. v. Cushman, 108 U. S. 51, 27 L. Ed. 648; Seibert v. United States, 122 U. S. 284, 30 L. Ed. 1161; Von Hoffman v. Quincy, 71 U. S. 4, 18 L. Ed. 403.

Change of remedy in mortgage foreclosure is not within the rule. Webb v. Moore, 25 Ind. 4; Van Baumbach v. Bade, 9 Wis. 559; Halloway v. Sherman, 12 Iowa, 282; Bird v. Keller, 77 Me. 270.

ENGERUD, J. This is an appeal by defendant from a judgment for plaintiffs in an action to quiet title. Plaintiffs derived their title from a sale of the land in proceedings to foreclose a mortgage thereon by advertisement. The mortgage was executed and recorded in 1894. The foreclosure proceedings culminating in the sale were instituted in 1896. It is conceded that, unless that sale was invalid for one or both of the two reasons hereinafter stated, the judgment confirming plaintiff's title is right. Defendant attacks the sale, first, because there was an insufficient publication of the notice of foreclosure; and, second, because the sale was made twenty-eight minutes before the time stated in the notice.

The notice stated that the sale would be made at "2 o'clock p. m." of the day named. The sale was actually made at 2 o'clock in the afternoon, according to standard or railroad time, which at Lakota, the county seat of Nelson county, where the sale took place, is about 28 minutes faster than "sun time." Appellant asserts that the time stated in the notice must be taken to mean two hours after the sun had passed the meridian at that place, and hence the sale was made nearly half an hour too soon. The use of "standard" time in designating the hour of the day has been the universal usage in this state since territorial times. The court takes judicial notice of that usage. Rev. Codes 1899, section 5713e, subd. 30. After the general use of solar time became obsolete, the abbreviations "a. m." and "p. m." in designating time remained in use

to distinguish between forenoon and afternoon. In 1896 the accepted meaning of the expression "2 p. m." was, as it is now, 2 o'clock in the afternoon, standard time. That was its meaning in this notice, as it would be understood in this state at that time by every one of sufficient intelligence to read it. We have not overlooked the decisions on this subject in Georgia, Nebraska and Iowa. Henderson v. Reynolds, 84 Ga. 159, 10 S. E. 734, 7 L. R. A. 327; Searles v. Averhoff, 28 Neb. 668, 44 N. W. 872; Jones v. Insurance Co., 110 Iowa, 75, 81 N. W. 188, 46 L. R. A. 860. Those decisions have no bearing on this case, because, although the standard time may not have been adopted by usage in those several states at the time those decisions were rendered, there is no doubt in this state as to the universal adoption of that system of computing and designating time.

The objection to the sufficiency of the notice is equally as devoid of merit as the objection with respect to the time of sale. It is admitted that the notice was sufficient in form, and was published six times, once in each of six successive weeks before the sale: but the sale took place on the fortieth day after the first publication. This was a full compliance with section 5848, Rev. Codes 1895, as construed in McDonald v. Nordyke, 9 N. D. 290, 83 N. W. 6. In that case it was assumed, both by the court and counsel, that the regularity of the foreclosure was to be tested by the law in force when the proceedings were in progress. Appellant asserts, however, that the assumption was erroneous. He contends that the law in force when the mortgage was given must govern, because the right to foreclosure by advertisement rests upon the contract of the parties, and hence the right to this remedy was a contract obligation which could not be impaired by subsequent legislation. Under the law in force when the mortgage was given, it was necessary that at least forty-two days elapse between the first publication and the day of sale. Finlayson v. Peterson, 5 N. D. 587, 67 N. W. 953, 33 L. R. A. 532, 57 Am. St. Rep. 584. If the present foreclosure is to be tested by that law, then it is void, because only forty days elapsed between the first publication and the sale. The conclusion reached by appellant is unsound, even if it is conceded that the stipulation for the remedy by foreclosure by advertisement renders that remedy in any sense a contract obligation, so as to deprive the legislature of its usual control over remedies. Section 5848, Rev. Codes 1895, instead of impairing

the remedy or the right to resort to it, facilitates the exercise thereof. A law which renders the mortgagee's remedies more speedy and easily exercised clearly does not impair the mortgagor's obligations. The stipulation for the cumulative remedy was not for the mortgagor's protection, but for the benefit of the mortgagee.

Another fallacy in appellant's argument lies in the assumption that the stipulation granting a power of sale in case of default is an agreement that the remedy shall be exercised agreeably to the statute in force when the mortgage was given. The manner of exercising such a power has always been the subject of legislative regulation in this jurisdiction, and, when parties stipulate for that remedy, it must be presumed that they contemplate that the remedy shall, like any other remedy, be exercised agreeably to the statute in force when the remedy in invoked. Section 4709, Rev. Codes 1899, recognizes the right of the parties to contract for this remedy; but section 4710 expressly declares that the remedy can be exercised "only in the manner prescribed by the Code of Civil Procedure." These provisions have been in force since the Civil Code was adopted in the early days of Dakota Territory. It was clearly the intent to reserve to the legislature the right to regulate the manner of exercising the remedy, and it is equally clear that the statute in force when the remedy is used must be the one which governs the procedure.

The judgment is affirmed. All concur.

(105 N. W. 1105.)

THEODORE HOLTON AND B. T. HOLTON v. CHARLES SCHMARBACK.

Opinion filed December 21, 1905.

Justice of the Peace — Limitation of Period to Issue Execution.

1. Section 6723, Rev. Codes 1899, which authorizes a justice of the peace to issue execution within five years after the entry of the judgment, and not afterwards, is a limitation upon the remedy by justice court execution, and not upon the life of the judgment. The limitation upon the latter is fixed by section 5200, and is ten years.

Same — Filing Transcript of Judgment — Effect on Power to Issue Execution.

2. Under sections 6717, 5498, Rev. Codes 1899, the filing of a transcript of a justice court judgment in district court terminates the power of the justice to issue execution, and authorizes the district court there-

after to issue its execution as upon judgments originally rendered and entered therein.

Same — Filing Transcript in District Court — Effect.

3. When a justice court judgment has been regularly transferred to the district court by the filing of a transcript, it has, for the purposes of lien and execution, the same effect as a judgment originally entered therein.

Same — Limitation of Time for Issuance of Execution.

4. The period for issuing district court execution is limited by section 5500, Rev. Codes 1899, to ten years from the entry of judgment. As applied to a justice court judgment, this means ten years form its entry by the justice, and not ten years from the filing of the transcript in district court.

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

Action by Theodore Holton and B. T. Holton against Charles Schmarback. Judgment for defendant, and plaintiffs appeal. Reversed.

Thomas H. Pugh, for appellant.
Frich & Kelly, for respondents.

YOUNG, J. On August 6, 1895, the plaintiff recovered a judgment for $91.45 in justice court against the defendant. On June 12, 1899, a transcript of the judgment was filed and docketed in the office of the clerk of the district court. On December 17, 1904, an execution was issued thereon by the clerk of the district court, and a levy was made thereunder upon certain real estate belonging to the defendant, which was followed by a sale of the same on June 25, 1905, by the sheriff, at which sale the plaintiff was the purchaser. Thereafter, upon defendant's application, the district court recalled and cancelled the execution, and set aside and annulled the sale and all evidence thereof, upon the alleged ground that the judgment was dormant when the execution was issued; and that it was therefore issued without warrant of law. The only question presented upon this appeal is the correctness of the above conclusion.

The position of defendant's counsel, and it was sustained by the trial judge, is (1) that the life and validity of a justice court judgment is limited to five years from its rendition; and (2) that its life is not prolonged by the filing of a transcript in the district court, so as to authorize the issuance of an execution in that court

after the five-year period has elapsed. In our opinion, the first proposition is erroneous. The contention that the life of the judgment had expired, and that it would not, therefore, support the execution, is based upon section 6723, Rev. Codes 1899, which reads as follows: "The judgment of a justice court is enforced by process of execution. * * * Execution may issue at any time within five years after the entry of judgment, but not afterwards, on application of the party in whose favor it was rendered, or his legal representative, to the justice who entered the same, or his successor in office. * * *" In our opinion, this section which is a part of the Justice Code, cannot be given the meaning ascribed to it. It will be seen by reference to its language that it does not relate to the life of the judgment, but to the remedy for enforcement by justice court execution; and it prescribes the time in which a justice of the peace may issue execution. This section gives to the judgment creditor, whose judgment has not been transferred to the district court, a right to a justice court execution for five years after its entry, and it makes it the duty of the justice in whose court the judgment was entered, for that period, upon proper request, to issue execution, and prohibits him from issuing it afterwards. It relates solely to the power of the justice court to enforce the judgment by execution, and limits the exercise of that power to five years; and it does not limit the life of the judgment. The power of the justice to issue execution is also terminated by the issuance of a transcript to the district court. Section 6717, Rev. Codes 1899. But the life of the judgment continues ten years from its rendition; and an action may be maintained upon it for that period. Section 5200, Rev. Codes 1899. A limitation upon the power to issue execution and a limitation upon the life of the judgment are different matters. Weisbocker v. Cahn (N. D.; opinion filed June 22, 1905) 104 N. W. 513. The limitation applied in Kerns v. Graves, 26 Cal. 156, a case cited by counsel for respondent, was general, and prohibited the issuance of executions generally after five years. This limitation was held to apply to executions issued from all courts including those in which a transcript had been filed. The case is not in point under our statute. Section 6723, supra, is not a general limitation. It applies only to the power of the justice court.

The power of the district court to issue execution upon a justice court judgment which has been transferred to that court,

and the limitations upon its power, are contained in sections 5498, 5500, Rev. Codes, 1899, which are a part of the Code of Civil Procedure. Section 5498 reads as follows: "A justice of the peace, on demand of the party in whose favor he shall have rendered a judgment, must give a certified transcript thereof, which may be filed in the office of the clerk of the district court * * * and such clerk must thereupon enter such judgment in the judgment book and upon the judgment docket; and from the time of the docketing thereof it becomes a judgment of such district court (for purposes of execution) and a lien upon real property, and a certified transcript of the docket of such judgment may be filed and the judgment docketed accordingly in any other county or subdivision with the like effect in every respect as if the judgment had been rendered in the district court where such judgment is filed." The words, "for purposes of execution," which were added by chapter 115, page 154, Laws 1903, do not change the meaning or effect of the original section. Section 5500 (which is a part of chapter 11 relating to the execution of judgments in the district court) reads as follows: "The party in whose favor judgment has been given * * * may at any time within ten years after the entry of judgment, proceed to enforce the same by execution as provided in this chapter." The justice, after delivering the transcript for filing, cannot issue execution. That power thereafter is in the district court. The purpose and effect of filing a transcript under section 5498, supra, is to enlarge the effect and means of enforcing the justice court judgment. The judgment becomes a lien upon the judgment debtor's property from the docketing of the transcript and from that time forward it is like a judgment rendered in the district court, and this includes the remedy for enforcement by district court execution. The time within which a district court execution may issue is governed by section 5500. It is limited to "ten years after the entry of judgment." As applied to a judgment originally rendered and entered in the district court there can be no doubt as to when the period of limitation would begin and end. But, as applied to a justice court judgment transcripted to the district court, there is a question.

Does the ten-year period begin to run from the entry of the judgment by the justice, or from the filing of the transcript in the district court? The Supreme Court of South Dakota reached the conclusion, construing a section of the Compiled Laws correspond-

ing with our section 5498, in Williams v. Rice, 6 S. D. 9, 60 N. W. 153, that the period begins with the docketing of the transcript and extends the full statutory time thereafter. We cannot agree to this view. The conclusion is based upon a ground to which we cannot assent; and that is, that the act of filing the transcript in the district court is the "entry of judgment," and that the judgment is in fact a district court judgment entered on that date. True, the filing of the transcript gives to the justice court judgment a new effect. From the date of the filing it has, for the purposes of the lien and execution, the effect of a district court judgment, and the statute says "it becomes a judgment of such district court." But it is not a district court judgment save in effect. It is still in fact a justice court judgment. It was rendered and entered by a justice of the peace, and was not rendered and entered by the district court. The statute broadens its effect when the transcript is filed, but this is not the rendition or entry of a new judgment. It continues to be a justice court judgment, but broadened as to the effect which is added to it by the fact of transcription. Phelps v. McCollam, 10 N. D. 536, 88 N. W. 292. See, also, Dieffenbach v. Roach, 112 N. Y. 621, 20 N. E. 560, 2 L. R. A. 829; Brown v. Wuskoff, 118 Ind. 569, 19 N. E. 463, 21 N. E. 243; Mahoney v. Neff, 124 Ind. 380, 24 N. E. 152. The effect of the South Dakota case (and we do not think it was modified by the later case of Phillips v. Norton [S. D.] 101 N. W. 727) is to make a justice court judgment superior to a district court judgment. A district court judgment is limited to ten years, as to actions, liens and execution. Under the South Dakota view, the time for issuing a district court execution begins to run from filing the transcript (and South Dakota is not alone in this view). This gives to the owner of a justice court judgment all the advantages obtainable in the justice court, and also authorizes him, by filing a transcript thereafter, to have the full period for all district court remedies. A proper construction of the statute does not, in our opinion, sustain this conclusion. In addition to the lien, the principal right acquired by the transcription is the right to a district court execution. That right is limited to ten years from the entry of the judgment upon which it is issued. The judgment in this case was entered by the justice of the peace on August 6, 1895. The execution was issued on December 17, 1904, and the sale was made within ten years from the entry of judgment. The execution was issued within the statutory period.

The order appealed from must therefore be in all things reversed. All concur.

(106 N. W. 36.)

JAMES E. WISNER, CLARENCE B. WISNER, GENEVIEVE A. WISNER AND ANDREW SANDAGER, AS ADMINISTRATOR OF THE ESTATE OF LAURA N. WISNER, DECEASED, v. MARY C. FIELD, WILLIAM H. FIELD, RICHARD CARPENTER AND BENJAMIN F. ELLIOTT.

Opinion filed December 21, 1905.

Contract — Construction — Intent of Parties Thereto.

1. Courts of equity will not be controlled by the name given to a transaction or document by the parties, but will scrutinize the transaction or document and the contract of the parties in reference thereto, to ascertain what the parties intended it to be.

Same — Mortgages — Collateral Security.

2. The fact that a deed is referred to as collateral security will not conclusively stamp the transaction as a security transaction.

Contract for Sale of Land — Abandonment.

3. A written contract for the sale of land may be waived or abandoned by the vendee by parol.

Vendor and Purchaser — Abandonment of Contract.

4. Evidence considered and *held* to show an abandonment of a contract by express terms, followed by more than ten years of silence concerning the same.

Appeal — Costs — Unnecessary Record.

5. Where a party causes unnecessary parts of the record to be printed, the Supreme Court will, on motion, make a special order in regard to the payment of the costs of such printing.

Appeal from District Court, LaMoure county; *Glaspell*, J.

Action by James E. Wisner and others against Mary C. Field and others. Judgment for defendants, and plaintiffs appeal. Modified.

Pierce & Tenneson, for appellant.

The form of transfer makes no difference in its legal effect if security is intended. Carr v. Carr, 52 N. Y. 251, 258; Stoddard v.

Whiting, 46 N. Y. 627; section 4701, Rev. Codes 1899; Hodgkins v. Wright, 60 Pac. 431; Genet v. Davenport, 56 N. Y. 676; Fisk v. Stewart, 24 Minn. 97.

Once a mortgage always a mortgage. Carr v. Carr, supra; Marshall v. Thompson et al., 39 N. W. 309; Murray v. Walker, 31 N. Y. 399; Horn v. Keteltas, 46 N. Y. 605.

The court scrutinizes with great jealousy the acquisition of the equity of redemption by the mortgagee. Marshall v. Thompson, supra; Niggeler v. Maurin, 34 Minn. 118, 24 N. W. 369.

Without such foreclosure, a conveyance from the mortgagor to the mortgagee is necessary to wipe out such interest. Shattuck v. Bascom, 105 N. Y. 43, 12 N. E. 283; Jackson v. Lodge, 36 Cal. 28; Raynor v. Drew, 13 Pac. 866; Niggeler v. Maurin, supra.

Rourke & Kvello and *C. W. Davis*, for respondents.

It is the character, not the name of a transaction that determines what it is. Heady v. Bexar Building & Loan Ass'n., 26 S. W. 468.

Vendee is not entitled to possession of land contracted to be sold without express stipulation to that effect. Williams v. Forbes, 47 Ill. 148; Burnett v. Caldwell, 76 U. S. 290, 19 L. Ed. 712; Irwin v. Olmstead, 9 N. Y. Common Law, 106; Suffern v. Townsend, 4 N. Y. Common Law, 658; Holmes v. Schofield, 29 Am. Dec. 364; Twyman v. Hawley, 24 Gratt. 514, 18 Am. Rep. 661; Kratemayer v. Brink, 17 Ind. 509; Northwestern Iron Co. v. Meade, 21 Wis. 480; Sedgwick & Waite, Trial of Title to Land, section 304.

A delay of from one to three years in tendering the purchase money and demanding a conveyance by the vendee from the vendor will be regarded as an abandonment of the contract, and courts will refuse to decree a specific performance, especially where the land has risen in value. Requa et al. v. Snow, 18 Pac. 862; Simpson v. Atkinson et al., 39 N. W. 323; Smith et al. v. Glover, 52 N. W. 210, affirmed 52 N. W. 912; Miner v. Boynton et al., 89 N. W. 336; Mahon v. Leech, 11 N. D. 181, 90 N. W. 807; Pomeroy Specific Performance (2d Ed., 1897), section 412.

A clause in a note reciting that lands are held as collateral security is not a mortgage nor in the nature of a mortgage. Rogers v. James, 35 Ark. 77. Nor an agreement to purchase. Green v. Cook, 29 Ill. 186.

Neither a surety nor an assignee of a mortgage have any redeemable interest in the mortgaged premises. Anderson v. Olin, 34 N. E. 55; Miller v. Ayers et al., 13 N. W. 436; section 5854, Rev. Codes 1899.

MORGAN, C. J. This action involves the right of the title and possession of section 25, township 134, range 59, LaMoure county, N. D. The facts which control the decision of the case are the following: In the year 1882 James E. Wisner, one of the plaintiffs, was the owner of said section of land, and on August 26th of that year conveyed the same to J. O. Perkins, who gave him a purchase money mortgage for the balance due, amounting to $3,200. In October, 1883, this mortgage was assigned by Wisner to Mary C. Field, at the request of the defendant W. H. Field, her husband and agent, for the sum of $3,200 and accrued interest. The notes were indorsed by Wisner, and their payment guaranteed by him. On July 14, 1885, Perkins having failed to meet his payments, the mortgaged premises were sold under the foreclosure of the mortgage, and bid in by Wisner in Mrs. Field's name, at Field's request, for the full amount due on the notes. In December, 1886, a sheriff's deed of said section 25 was issued and delivered to Mary C. Field, and she thereby became the absolute owner thereof by virtue of such foreclosure sale, unless Wisner became entitled to an equitable ownership or interest therein by virtue of transactions between him and W. H. Field, between the time of the foreclosure sale and the delivery of the sheriff's deed to Mary C. Field. For many years, since 1882, James E. Wisner and W. H. Field were jointly interested in real estate transactions in North Dakota, and from that time until about 1900 Wisner was Field's agent, caring for such real estate, and in making collections on sales thereof. They were friends, and their relations were intimate; each one having confidence in and trusting the other in their business dealings. The Fields resided in Port Chester, N. Y., and the Wisners in Lisbon, N. D. On July 27, 1885, Wisner wrote Field: "I inclose papers in J. O. Perkins mortgage. I attended the sale and made the bid in the interest of M. C. Field and paid all bills. * * * Please send me a statement of the interest on the Perkins matter and I will send same. I would send the whole principal, but I have used perhaps $20,000 or more in R. R. matters which has provided a way for loose money. * * * I will make a clean deed to one or two sections of land, and you may give me a writ-

ing * * * that, when you have been paid, you will deed the same back to me. * * * You will see that this mortgage was foreclosed more than two weeks since." Field answered this letter, and stated that the accrued interest on the Perkins mortgage was $596. The interest was computed up to August 15, 1885, five days later than the date of the letter. He further said: "For the principal, if you choose, you can draw a note payable to the order of M. C. Field for the amount of $3,200, at 8 per cent, and mark on the margin of the note that 'a deed for section 25, in township 134, range 59, is held as collateral security.' This will on the face of it show that the collateral (a deed for the section) must be returned to you or your heirs when the note is paid. This is the same as if a note is given with a railroad or government bond to a bank for security. In such cases the bond must always be returned when the note is paid. It is a simple and perfectly safe way of doing." On September 7, 1885, Wisner sent Field the interest on the Perkins mortgage, and said: "You make out a note in proper shape for the Perkins mortgage." On September 21st Field acknowledged receipt of the interest money, and said: "Inclosed you will find note drawn up ready for your signature. I have made the interest 7 per cent instead of 8, and, whenever you are paying off any of your notes, I will be ready to receive the money, as I have so many enterprises under way that require money that it is not the inducement to me to loan money that it is to some." The inclosed note was in the following form: "$3,200. Lisbon, Dakota Territory, Sept. 1, 1885. One year after date I promise to pay to the order of M. C. Field, three thousand two hundred dollars, with interest at seven per cent, payable at the Bank of Lisbon." The note was signed by Wisner and below his signature was the following: "A deed for Sec. 25 in township 134, range 59 is held by M. C. Field as collateral security for the payment of this note. A deed of this section will be delivered on payment of the note." The note was immediately returned by Wisner to Field. Wisner paid the interest on this note each year for four years, including the year 1889. On behalf of the plaintiff it is contended that the relation of mortgagor and mortgagee was created between Wisner and Field by this note and the correspondence in reference thereto. He brings an action for an accounting, and seeks to compel a conveyance to him of said section 25. The trial court refused to grant him any relief, and dismissed

his action. He has appealed, and asks a review of the entire case in this court.

In the first place it is perfectly apparent that Wisner retained no interest in the land when he sold to Perkins. His conveyance to Perkins was a warranty deed absolute in form. It is also true that Wisner retained no interest in the Perkins mortgage when he assigned it to Mrs. Field. The assignment was absolute in form, unaccompanied by oral or written conditions. It is true that Wisner guaranteed the payment of the note, and indorsed it, but the contention that the Perkins mortgage was assigned as security for the money advanced, being the face thereof with accrued interest, cannot be sustained. Field denies that there was such an agreement. The assignment papers are absolute in form. In the first proposition concerning the transfer, made in a letter to Field by Wisner on October 27, 1883, Wisner says: "I have a mortgage of $3,200 payable in five years from September, 1882, at 10 per cent. * * * This is perfect security, and I will guaranty the same, and let you have it for its face, $3,200 and accrued interest. * * * If any of your friends want a good investment, this is solid." Field answered this letter, and unconditionally accepted the offer, and said that he would take the mortgage. Wisner then sent the note and mortgage to Field, who acknowledged receipt thereof and said: "Your letter inclosing the Perkins mortgage for $3,200 is at hand and in payment for which I inclose you draft on New York. * * * When you have any more such paper, I will try and find a place for it, if you wish to dispose of it." We have no hesitation in concluding that Wisner assigned the mortgage absolutely, and not as security. The trial court so found, and the finding is amply sustained. In fact an opposite finding could not be sustained under the evidence. At the time the land was bid in by Wisner for Mrs. Field, Wisner had no equity or any interest whatsoever in the foreclosed premises. Starting with that proposition as undisputable, it remains to be determined whether he acquired any interest in that land subsequently. In other words, what is the effect of the note of September 1, 1885, known in the record as "Exhibit O," upon Wisner's relation or right to this land when considered in connection with the prior and subsequent correspondence of the parties relating thereto? On the appellant's part it is insisted that the sheriff's deed is a mortgage. On respondents' part it is claimed that Wisner was never entitled to

a conveyance of the land to him, except upon payment of Exhibit O and interest thereon in full. He claims that Exhibit O is merely a conditional sale of the land, or a contract for the sale of the land upon payment of Exhibit O, and that Wisner had no lien under Exhibit O which he could not waive, and which contract he asserts was waived and abandoned by him by express writing and by his conduct, continued for eleven years.

To determine what rights were granted to Wisner by the indorsement on Exhibit O, the prior, contemporaneous, and subsequent conduct and declarations of the parties become material as supplementing the indefinite and incomplete provisions of the memorandum. In Exhibit O are used the words "as collateral security." Appellant contends that these words stamp the transaction as conclusively a mortgage or security transaction. The intention of the parties is not to be gathered alone from what the parties denominate a transaction or document. All communications between them will be scrutinized to determine the character of the transaction or conveyance and the intention of the parties. Heady v. Baxar B. & L. Ass'n (Tex. Civ. App.) 26 S. W. 468; Rogers v. James, 33 Ark. 77. Preliminary to the execution of Exhibit O Wisner had written the letter of July 27, 1885, to Field. This letter called for a statement of interest due on the Perkins mortgage. This mortgage had just been foreclosed and the land bid in by Wisner for Mrs. Field at Field's request. Upon ascertaining what the interest was Wisner paid it, and explained why he did not pay the whole amount of the mortgage. It is claimed that the payment of this interest gave Wisner an equitable interest in this land amounting to an equitable mortgage or lien. The evidence does not show that it was paid on the mortgage debt on the theory that he considered the $3,200 to have been advanced by Field as a loan. The letter of July 25th is not sufficient to stamp Exhibit O as a security transaction. The parties had not made any agreement that the sheriff's certificate should be held by Mrs. Field as security or in trust for Wisner. It is true that at that time Field would have deeded this land to Wisner upon full payment of the $3,200 note and interest. This was not on the theory, however, of any obligation on his part to do so, but because he had use for the money in his business enterprises. He stated this in his letter acknowledging receipt of the interest on the Perkins mortgage and sending Exhibit O to Wisner. At

that time the land was not valuable, and could not have been sold for enough to pay the mortgage in cash. This willingness to accept the money at that time accounts for some expressions in the letters from which appellants argue that the transaction was a loan and that the sheriff's certificate was a mortgage. We cannot sustain that contention. From all the evidence we conclude that Exhibit O is not a mortgage. It was an indefinite agreement to sell to Wisner when the note was fully paid. The fact that the deed is stated in Exhibit O to be held as collateral security is in law a misstatement. The deed was not Wisner's deed at all. It was Field's land unqualifiedly after the sheriff's deed was issued, and before that it was Perkin's land. Wisner never had the title after selling it to Perkins, nor any equitable interest therein. He therefore had no interest to put up or pledge as collateral security. In pledging property as collateral security the property remains in the debtor. The creditor has a right to hold it until payment of the debt. In cases of default the creditor can dispose of the security. Butler v. Rockwell, 14 Colo. 125, 23 Pac. 462. In this case what interest had Wisner in the land at this time? Payment of interest on the note could give him no equity in the land, unless there was an agreement to that effect at least. The payment must have been made either as a fulfillment of the guaranty or in contemplation of a final purchase of the land. In neither case would that give him an equity in the land which could not be waived or abandoned.

Construing Exhibit O as granting Wisner the right to purchase the land for a price fixed by the sum total of the indebtedness represented by the $3,200 note, we find that the note has never been paid, and that Wisner subsequently relinquished all right to the land and wholly abandoned the contract. He paid the interest on the note to 1889, and thereafter made no further payments. On March 11, 1891, he wrote Field, among other things, as follows: Your title is perfect to * * * section 25-134-59. If you can afford to deed to me the Jo Anderson land, 240 acres, all right. If not, it is all right. I will release all my rights in all these lands. It is the best I can do." This letter is an express waiver of any claim under Exhibit O. He makes an appeal for reimbursement out of the 240-acre tract, but relinquishes all right to purchase section 25 in any event. Thereafter Wisner made no claim to the land, nor to rights under Exhibit O, until January 23, 1902, when

Mrs. Wisner wrote to Mrs. Field that Wisner had assigned to her his equity in section 25 on June 20, 1889, and asking for a statement of "your $3,200 note secured on said section 25." Long before the receipt of this letter from Mrs. Wisner, and soon after the receipt of the letter of March 11, 1891, Wisner, acting as agent for Field, had disposed of seperate tracts of section 25 to various parties, who had taken possession thereof and become obligated to pay for the same. In none of these sales by Wisner, as agent, did he inform any of the purchasers that he claimed an equity in this land. Between March 11, 1891, and January 23, 1902, the land had largely increased in value. Wisner had done nothing during all this time showing that he contemplated claiming the land. He had been financially iresponsible and heavily in debt since 1889. During all this time Field has paid the taxes, except when paid by purchasers. Wisner has done nothing to claim the land nor an interest therein, nor to pay the taxes nor to pay Exhibit O, since 1889.

In view of these undisputed facts we are convinced that the following conclusions are sustained by the evidence: (1) That the assignment of the Perkins mortgage was absolute and without any reservation. (2) That Exhibit O was a permission to Wisner to demand a deed upon payment of the indebtedness or purchase price represented by Exhibit O. (3) That the right to purchase section 25 upon payment of Exhibit O was expressly abandoned and waived by Wisner on March 11, 1891, and the contract thereafter wholly abandoned; and relying on such abandonment Field has disposed of some of the land to innocent purchasers. To compel a specific performance of the contract at this late day, or, if performance cannot be compelled, to assess damages, would be inequitable and unjust, and would be granting relief in a court of equity when the plaintiff has expressly waived all rights thereto. That a contract for the sale of real estate may be abandoned by the vendee by parol has been recently held by this court. Mahon v. Leech, 11 N. D. 181, 90 N. W. 807; Wadge v. Kittleson, 12 N. D. 452, 97 N. W. 856. In the first of these cases the authorities are collected, and they show that this principle of law is well sustained. These cases are therefore decisive of this case.

The rules of the Supreme Court provide that the court will make an order in regard to costs of printing the abstract when either party has caused unnecessary parts of the record to be printed.

Rule 15. 75 N. W. x. Appellant filed a motion under that rule, and specified what parts of the record the respondents caused him unnecessarily to print. The printed abstract contains 481 pages. We are satisfied from an examination of the same that a vast amount of unnecessary printing was required to be done on the demand of the respondents. Matters not in issue, and not referred to in argument or brief, were included and were unnecessary. The appellant should not be compelled to bear this burden unnecessarily. For this reason no costs or disbursements will be allowed to the respondents in either court. The expense of this unnecessary printing is approximately equal to defendants' taxable costs in both courts.

The judgment of the district court is modified to that extent, and, as modified, is affirmed. All concur.

(106 N. W. 38.)

HATTIE M. VIETS v. LEWIS SILVER AND MAX BRODKY.

Opinion filed December 22, 1905.

Pleading — Evidence — Note as Evidence.

1. It is error to receive a note in evidence at variance in material matters with the note described in the complaint, when the execution of the note described in the complaint is admitted in the answer.

Judgment on Pleadings.

2. A motion for judgment on the pleadings should not be granted when an issue of fact is made by them.

Appeal — Review — New Trial Ordered by Supreme Court.

3. Where the trial court dismisses the action prematurely on motion of the defendant before the defendant has formally rested, and upon a ground not in issue under the pleadings, and no formal findings of fact are made, this court will not try the case anew, but will order a new trial.

Note Invalid Unless Delivered.

4. A promissory note has no validity between the parties unless delivered.

Appeal from District Court, Logan county; *Burke*, J.

Action by Hattie M. Viets against Lewis Silver and Max Brodky. Judgment for defendants, and plaintiff appeals.

Reversed.

W. F. Cochrane and *Purcell, Bradley & Divet,* for appellant.

George M. McKenna and *Benton & Lovell,* for respondents.

MORGAN, C. J. This is an action for the foreclosure of a mortgage on real estate. The complaint alleges that the mortgage was given to secure a promissory note executed by the defendant on August 29, 1903, wherein they promised to pay to the order of the plaintiff the sum of "one thousand dollars and no cents, on the 29th day of August, 1907, at Napoleon, N. Dak., with interest thereon from the date of said note at the rate of six per centum per annum, for the first two years, payable annually on the 29th day of August in each year thereafter until the maturity thereof, and eight per cent per annum for the remaining two years, which said interest was due on said note on August 29th, 1904. The defendants answered and set forth separate defenses, besides a qualified general denial. In the first alleged defense the answer sets forth that the mortgage described in plaintiff's complaint "was given to secure a promissory note such as is described in plaintiff's complaint, but said note was never delivered to this plaintiff. * * * That even if there has been an actual or constructive delivery of said note to the plaintiff, said note was made without any consideration whatever." The answer further recites that "in accordance with said oral agreement defendants executed * * * their promissory note for $1,000 due in four years from the 29th day of August, 1903, in favor of plaintiff, same drawing interest at the rate of 6 per cent for the first two years and at 8 per cent for the remaining two years." The answer further alleges: "That in accordance with the oral agreement set forth in paragraph eleven of this, defendants' first defense, the defendants permitted the $1,000 note in favor of plaintiff, dated on the 29th day of August, A. D. 1903, due in four years from date with interest at 6 per cent for the first two years and at 8 per cent for the remaining two years (which note is set forth in plaintiff's complaint herein, and upon which plaintff bases her cause of action) to remain. * * *" In the second defense set forth in the answer the note is referred to in the following language: They executed "their joint promissory note for $1,000 in favor of the plaintiff due in four years, with interest payable annually at the rate of six per cent per annum for the first two years and at the rate of eight per cent per annum for the remaining two years." Upon the

trial a note was offered in evidence by the plaintiff and received in evidence without objection. This note is not in terms the same note as is described in the complaint. As received in evidence, there is no provision in it that interest shall become payable annually. Under its terms, as received in evidence, no default existed as to payment of the interest or principal. Before resting the plaintiff asked leave to withdraw the offer of the note in evidence, and, no objection being interposed, leave to withdraw was granted. After plaintiff had rested the defendants offered the note in evidence. Plaintiff objected to the offer on the ground that the execution of the note described in the complaint was admitted in the answer. The note was received in evidence, and plaintiff excepted. Plaintiff then asked to have the case reopened and offered evidence as to the terms and delivery of the note described in the complaint and rested. Defendant thereupon moved to dismiss the action, on the ground of a variance between the terms of the note and the allegations of the complaint in reference to the note. This motion was granted, and judgment of dismissal duly entered. No findings of fact or conclusions of law were made. The plaintiff appeals from the judgment and asks for a review of the entire case under section 5630, Rev. Codes 1899.

The first question presented is, does the answer admit the execution of the note described in the complaint? If so, the dismissal of the action on the ground of a variance was erroneous. It was also an error to receive the note in evidence on application of the defendants after the plaintiff had objected thereto, if the answer admitted the execution of the note.

The answer contains several allegations that admit the execution of the note described in the complaint. They all point to the note described in the complaint, and taken together, as clearly admit the execution of the note as though express terms had been used in making the admission. The amount, date, interest, parties and maturity of the note admitted to have been executed, are the same as the note set forth in the complaint, and the allegations of the answer describe the note therein set forth as the one described in the complaint. It is too clear for argument that there was no issue raised by the pleadings as to the execution of the note described in the complaint. This being true, it was error to dismiss the action. The objection of the plaintiff to the introduction of the note in evidence by the defendant was well founded. The pleadings

had established by positive allegations what the terms of the note were, and, until amended, the pleadings must control as to the terms of the note. The respondent claims that the complaint must be deemed to have been amended, for the reason that appellant offered a note in evidence contrary in terms to the note described in the complaint, and offered proof as to the execution of the note offered in evidence. The note was withdrawn as evidence before plaintiff rested. We do not think that this should bind the plaintiff to accept a note not described in his complaint, which was in the defendants' possession, and was turned over to the plaintiff after a demand in court that it be turned over to him for use during the trial. If the parties had voluntarily litigated the validity of the note as offered in evidence without objection, a different question would be before us, which we need not now pass upon. The note was not, therefore, receivable in evidence. The dismissal of the action was not warranted. Plaintiff contends that this court should try the case anew under the evidence in accordance with the demand made by them for a retrial in the statement of the case. Although the defendants had not formally rested their defense, the action was dismissed on their motion after they had offered the note in evidence. It cannot be said from the record that the issues were tried. The action was dismissed on a motion to dismiss prematurely made.

The answer alleged four separate defenses claimed to be meritorious. No one of them was litigated, nor passed upon. We think a new trial should be awarded under the circumstances. The statute permits such disposition of an appeal under section 5630, by this court "if it deem such a course necessary in the accomplishment of justice." In view of the fact that the action was dismissed on a ground not in issue, and in view of the further fact that no findings of fact were made, we think it would not be in furtherance of justice to try the case anew where the defendants asked for and were granted a dismissal of the action before they had offered any testimony upon any of the issues except merely to offer the note in evidence. The note was not offered in evidence by them to support any issue made by the pleadings, but to show that the plaintiff was relying for judgment on the pleadings before the commencement of the trial and the same was denied. He asks for a review of the decision of that motion on this appeal. Conceding for the purposes of this case only that such motion

is reviewable on appeal under section 5630, Rev. Codes, we are satisfied that the same was properly denied. The answer raised at least one issue. Whether it raised others we need not say. The answer denied the delivery of the note. Appellant contends that the denial of delivery is immaterial, if it appears from the answer that the actual debt that the note would represent was secured by the mortgage sought to be foreclosed. Whether that would be true in a proper case we need not say as no such case is presented. In this case the answer, fairly construed, cannot be said to secure an indebtedness not evidenced by the note. If the note was never delivered the cause of action alleged in the complaint fails. The allegation of the complaint in that particular is "and the said defendants * * * to secure the payment of said principal sum, and the interest thereon according to the terms of said note, made * * * and delivered a certain mortgage," etc. It is elementary in law that the delivery of a promissory note is essential before it becomes of any validity between the parties. Daniel on Negotiable Instruments, section 63. Respondents contend that the answer should be treated by the court as though the motion to amend it had been granted, as it should have been granted. There was no motion made to amend it. The defendants simply indicated to the court that if it construed the allegations thereof to be admission of the execution of the note, they would ask for an amendment. No ruling was made as to an amendment after such statement. The note was introduced in evidence evidently on the theory that the answer did not admit the making of the note described in the complaint.

The judgment is reversed, and a new trial ordered. All concur. (106 N. W. 35.)

STATE OF NORTH DAKOTA TO AND FOR THE USE OF HART-PARR COMPANY, A CORPORATION, v. ROBB-LAWRENCE COMPANY, A CORPORATION, AND NORTHERN TRUST COMPANY, A CORPORATION.

Opinion filed January 2, 1906.

Foreign Corporations — A Single Transaction Not "Doing Business" Within the Meaning of Statute.

1. A single business transaction in this state by a corporation (not an insurance corporation) which is not engaged in doing business generally here does not constitute "doing business," or "transacting business," within the meaning of sections 3261-3265, Rev. Codes 1899.

Same — Complaint Need Not Allege Compliance With Statute.

2. In an action by a foreign corporation founded on a contract or transaction made or had in this state, it is not necessary to allege in the complaint that the corporation had complied with the statutory requirements imposed on such corporations as conditions precedent to their right to do business here.

Same — Answer — Noncompliance With Statute by Foreign Corporation Must Be Alleged.

3. Illegality of a contract with a foreign corporation by reason of noncompliance with the statutes relating to such corporations doing business within this state must, unless shown on the face of the complaint, be pleaded as a defense and proved by the defendant.

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

Action by the state, for the use of the Hart-Parr Co., against the Robb-Lawrence Company and the Northern Trust Company. Judgment for defendants and plaintiff appeals.

Reversed.

Benton & Lovell, for appellant.

A complaint failing to allege compliance with the statutes of this state as to foreign corporations, is not demurrable. Acme Merc. Agency v. Rochford, 72 N. W. 466; American, etc., v. Smith, 73 Mo. 368; Knapp v. Nat., etc., 30 Fed. 607; Cassady v. American, etc,. 72 Ind. 95; Sprague v. Cutler & Savidge Lbr. Co., 106 Ind. 242, 6 N. E. 335; Nelson v. Edinburgh, etc., 92 Ala. 157.

"Doing business" within a state means the general prosecution of their business therein, not an isolated transaction with its citizens. 6 Thompson Corporations, par. 7936; Cooper Mfg. Co. v. Ferguson et al., 113 U. S. 727, 28 L. Ed. 1137; Milan, etc., v. Gorton, 93 Tenn. 590, 27 S. W. 971; Keating v. Implement Co., 35 S. W. 417; Florsheim v. Lester, 29 S. W. 34; Delaware v. Mahlenbrock, 63 N. J. L. 281; Commercial Bank of Vancouver v. Sherman, 28 Ore. 573, 43 Pac. 658; Colorado Iron Works v. Sierra Grande Min. Co., 15 Col. 499, 25 Pac. 325; Davis v. Caigle, 53 S. W. 240; Empire v. Tombstone, 100 Fed. 910; Ware Cattle Co. v. Anderson et al., 107 Iowa, 231, 77 N. W. 1026; Wolf v. Bigler, 192 Pa. 466, 43 Atl. 1092; Mortgage Co. v. Worsham, 76 Tex. 556.

Pierce & Tenneson and *Arthur B. Lee,* for respondents.

All transactions of foreign corporations without compliance with the conditions required to do business in a state are void, and no action can be maintained thereon. Clark & Marshall, Private Corp. 2716; Bank v. Young, 37 Mo. 398; Cincinnati Health Association v. Rosenthal, 55 Ill. 85, 8 Am. Rep. 626; McCanna v. Citizens Co., 74 Fed. 597; Seamens v. Temple Co., 105 Mich. 400, 55 Am. St. Rep. 457, 63 N. W. 408; Seamens v. Christian Bros. Mill. Co., 66 Minn. 205, 68 N. W. 1065; Aetna Ins. Co. v. Harvey, 11 Wis. 294; Iowa Falls Mfg Co. v. Farrar, 104 N. W. 449.

After noncompliance has been alleged by the defendant, burden is upon plaintiff to prove compliance, or facts that excuse it. Clark & Marshall Prov. Corporations, 2726-27; Washington Ins. Co. v. Chamberlain, 16 Gray, 165.

Where the statute forbids doing any business, one transaction is as illegal as many. 6 Thompson on Corporations, section 7937, page 6317; Farrior v. Mortgage Company, 88 Ala. 275; Mullins v. American Freehold Company, 88 Ala. 280; Iowa Falls Mfg. Co. v. Farrar, supra.

ENGERUD, J. The defendant Robb-Lawrence Company is a public warehouseman, duly licensed as such under chapter 141, page 180, Laws 1901. The defendant Northern Trust Company is the surety on the former's bond as such warehouseman. The Hart-Parr Company, which we shall hereafter refer to as plaintiff, is a foreign corporation, and has brought this action by leave of the attorney general, in the name of the state, to recover for an alleged breach of the warehouseman's bond executed pursuant to the law mentioned by the two defendant corporations. The complaint, in substance, alleges that the plaintiff is entitled to the possession of certain personal property valued at $2,900, which it had previously delivered to the Robb-Lawrence Company as a public warehouseman; that said company had refused to deliver the property on demand, and had converted the same to its own use. The only defense involved on this appeal is the one whereby the defendants claim immunity from liability because the plaintiff is a foreign corporation. That plea is set forth in the amended answer as follows: "Denies that said Hart-Parr Company, if it be a foreign corporation, as alleged in paragraph 1 of said complaint, is entitled to maintain this action, for the reason that it has not complied with the conditions of chapter 22 of the Civil Code of this state, and par-

Same — Complaint Need Not Allege Compliance With Statute.

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ticularly the provisions of section 3261 and 3263 of the Revised Codes of 1899, and defendant alleges that any contracts entered into by said Hart-Parr Company are therefore void. And in this behalf defendant alleges that said plaintiff had not, at the time of the issuing of the warehouse receipt described in the complaint, or at the time of the commencement of this action, filed in the office of the secretary of state of this state a copy of its articles of incorporation, duly authenticated, or otherwise; that plaintiff is not a corporation created for religious or charitable purposes solely; that plaintiff has not, by an instrument in writing, duly authenticated, or otherwise, filed in the office of the secretary of state and his successors in office, its attorney, true and lawful, or otherwise, upon whom process in any action or proceeding against it may be served." When the plaintiff attempted to prove the facts alleged in the complaint, the defendants objected to any evidence of such facts, unless the plaintiff first proved that it had complied with the provisons of sections 3261 and 3263, Rev. Codes 1899. The plaintiff asserted that it had never come within the terms of the statute by "doing business" in this state. The court, however, held that the transaction alleged in the complaint was of itself sufficient to constitute "doing business" in the state within the meaning of the statute, and that, although it was not necessary for the plaintiff to allege in the complaint that it had complied with the statute, yet it was incumbent on plaintiff to prove such compliance, because the plaintiff's right to sue was put in issue by the answers. The objection was accordingly sustained, and as the plaintiff offered no evidence of its authority to do business in this state, a verdict was directed for defendant. This appeal is from the judgment entered on that verdict.

Section 3261, Rev. Codes 1899, provides: "No foreign corporation, association or joint stock company, except on insurance company, shall transact any business within this state, or acquire, hold or dispose of any property, real or personal, within this state, until such corporation shall have filed in the office of the secretary of state a duly authenticated copy of its charter or articles of incorporation, and shall have complied with the provisions of this chapter; provided, that the provisions of this chapter shall not apply to corporations created for religious or charitable purposes solely." In addition to the conditions imposed by the foregoing provisions, section 3263 requires such foreign corporations doing business in

this state to file a power of attorney in the office of the secretary of state, constituting that officer and his successors its attorney upon whom process may be served with the same force and effect as if served personally upon the corporation in this state. Section 3265 declares that "every contract made by or on behalf of any corporation, association or joint stock company doing business in this state, without first having complied with the provisions * * * of sections 3261 and 3263, * * * shall be wholly void on behalf of such corporation, association or joint stock company and its assigns, but any contract so made in violation of the provisions of this section may be enforced against such corporation," etc. Section 136 of our constitution prohibits any foreign corporation from doing business in this state "without having one or more places of business and an authorized agent or agents in the same upon whom process may be served." In view of this constitutional provision, it is clear that compliance only with the statutory provisions above referred to would be of no avail in this state, unless it also had one or more places of business within the state, as required by the constitution. The legislature could not waive a condition which the constitution imposed. The statute and the constitution must, therefore, be read together, and the former must be construed as supplementary to the latter. Both the statutory and constitutional prohibitions relate to the same class of foreign corporations, viz., those "doing business" in this state. The statute imposes additional conditions to those imposed by the constitution, and specifically declares what shall be the consequences of a violation of the statutory and constitutional prohibitions. These prohibitions apply only to those foreign corporations which do business in the state. What is meant by "doing business," or "transacting business?" Respondents contend that these terms must be taken literally and construed to include every act done by a corporation of a business nature. In that broad sense the making of a single contract, a single act of buying or selling, and even the prosecution or defense of an action would be a business transaction which could not be done in this state by a foreign corporation unless it had previously established a place of business here and complied with the statutory conditions. If that were the meaning of the language used in the statute and constitution, it is apparent that in a large number of cases the enforcement of the law would interfere with interstate

commerce. Mearshon v. Lumber Co., 187 Pa. 12, 40 Atl. 1019, 67 Am. St. Rep. 560; Milan Milling Co. v. Gorten, 93 Tenn. 590, 27 S. W. 971, 26 L. R. A. 135; Keating Impl. Co. v. Carriage Co. (Tex. Civ. App.) 35 S. W. 417; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137.

The fact that foreign corporations proposing to do business here are required to establish a place of business within the state makes it clear that the term "doing business" does not mean a single isolated transaction. It is not reasonable to suppose that the constitution or the statute intended that a foreign corporation, without intending a continuance of its business in the state, could not collect a debt or make any contract or demand that its property rights should be respected unless it had previously acquired a situs or domicile within our borders. The object of laws of this character is to require foreign corporations which undertake to carry on their business generally in this state, to establish a domicile or situs here so that they shall, like domestic corporations, be within reach of the process of our courts. The term "transacting or doing business," as used in laws of this character, implies continuity, and does not mean a single isolated transaction done within the borders of the state without any purpose of engaging generally in the carrying on of its business here. Cooper Mfg. Co v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 29 L. Ed. 1137; Florsheim v. Lester (Ark.) 29 S. W. 34, 27 L. R. A. 505, 46 Am. St. Rep. 162; Col. Iron Works v. Mining Co., 15 Col. 499, 25 Pac. 325, 22 Am. St. Rep. 433; Mearshon v. Lumber Co., 187 Pa. 12, 40 Atl. 1019, 67 Am. St. Rep. 560; Bank v. Sherman, 28 Or. 573, 43 Pac. 658, 52 Am. St. Rep. 811; D. & H. Canal Co. v. Mahlenbrock, 63 N. J. Law, 281, 43 Atl. 978, 45 L. R. A. 538.

Respondents cite and rely on that line of decisions wherein foreign banking or insurance corporations have been held not entitled to recover on contracts made with citizens of the state where the action was brought, because the corporations had not complied with the conditions imposed on such corporations in that state. Seamans v. Mill Co., 66 Minn. 205, 68 N. W. 1065; Ins. Co. v. Harvey, 11 Wis. 394; Seamans v. Temple Co., 105 Mich. 400, 63 N. W. 408, 28 L. R. A. 430, 55 Am. St. Rep. 457; Seamans v. Zimmerman, 91 Iowa, 363, 59 N. W. 290; Bank v. Young, 37 Mo. 398; Assur. Co. v. Rosenthal, 55 Ill. 85, 8 Am. Rep. 626. Those cases have no application to this case. By reason of the peculiar

nature of some lines of business, such as banking and insurance, the legislatures of many states have imposed special restrictions upon the manner in which the business of such corporations shall be conducted. The object of such laws is usually to protect the citizens of the state from irresponsible companies or improvident contracts, and often to subject the business to taxation, or to protect its own citizens or domestic corporations from the disadvantages which would result to them if foreign corporations could do business in the state on less onerous terms than are imposed on domestic corporations of like character. We had occasion, in Walker v. Rein (recently decided) 106 N. W. 405, to apply the principles enunciated by this line of cases. The courts will not recognize the validity of any contract made by a foreign corporation with a resident of this state, or affecting property here, whether made in or out of the state, if the contract is one which domestic corporations generally are forbidden to make in this state, or if the contract is one which it is contrary to public policy to enforce. A contract of insurance upon property in this state, or upon the life of a resident thereof, without complying with the conditions imposed by our laws, is an evasion of the laws which the courts will not tolerate even if the contract were technically entered into beyond our borders. This is so, not because the corporation is a foreign one, but because it is the policy of the law to prohibit such contracts from being made with our citizens, or with respect to property in the state, without compliance with the conditions imposed by the statute. These objections do not apply to the transaction involved in this case, which, so far as the allegations of the complaint or the offers of evidence disclosed, was an ordinary bailment and a conversion by the bailee. The fact that a foreign corporation may have acquired some personal property in this state, or had occasion to bring it into this state for sale or safekeeping, does not of itself prove that the corporation was doing business here, within the meaning of the laws in question. Even were it so, it is open to question if the bailee could claim immunity against liability for its tortious act on the ground that the corporation had no right to do business here. That question is not before us, and we express no opinion thereon.

The case of Manufacturing Co. v. Farrar (S. D.) 104 N. W. 449, is not in point, because the South Dakota statute there construed and applied required compliance with its terms, not only

as a condition precedent to the right to do business, but also as a condition precedent to the right to maintain an action. In this connection it may be proper to say, by way of explanation, that section 3265 is a provision not appearing in our statute law until the revision of 1895, but sections 3261 and 3263 came down to us from the territorial laws. The latter section, however, changed the provision of the corresponding section of the territorial law with respect to the appointment of a resident agent. The transactions involved in Washburn Mill Co. v. Bartlett, 3 N. D. 138, 54 N. W. 544; Lumber Co. v. Children of Israel, 7 N. D. 46, 73 N. W. 203, and Loan Co. v. Shain, 8 N. D. 136, 77 N .W. 1006, all took place before section 3265 was enacted. In the case of National Cash Register Co. v. Wilson, 9 N. D. 112, 81 N. W. 285, section 3265, if applicable to the transaction involved, was apparently not noticed.

We also think that the court was in error in holding that the burden was on plaintiff to prove either a compliance with the statutory conditions, or that it was not doing business here in such a way as to be subject to those conditions. The case of Washington County Mutual Ins. Co. v. Chamberlain, 16 Gray (Mass.) 165, supports the views of the trial court. We have found no other case holding that view. That decision assigns no reason for the conclusion announced, and we cannot conceive of any satisfactory reason for such a rule. Foreign corporations are, by comity, entitled to recognition in this state, and to have their rights enforced and protected to the same extent as domestic corporations, subject to the rule set forth in section 5756, Rev. Codes 1899, as construed in Walker v. Rein (recently decided) 106 N. W. 405, unless, by reason of a violation of the constitutional or statutory provisions hereinbefore referred to, such recognition must be denied to them. The presumption is in favor of their right to do business, because it is always presumed that persons will obey the law. He who asserts that there is illegality in a transaction, fair on its face, must plead and prove it. 1 Chitty, Pl. 220, 221. By reason of this general presumption in favor of legality it has been very generally held that a complaint, in an action by a foreign corporation, is not subject to demurrer for failing to allege compliance with conditions precedent to its right to do business or maintain suits. Acme, etc., v. Rochford (S. D.) 72 N. W. 466, 66 Am. St. Rep 714; American Ins. Co. v. Smith, 73 Mo. 368; Cassaday v. Ameri-

can, etc., 72 Ind. 95; Nelms v. Edinburg, 92 Atl. 157, 9 South. 141. We know of no good reason why that presumption does not continue as in other cases until overcome by proof. If the illegality of the contract sued on or the absence of the right to sue does not appear on the face of the complaint, the facts showing the illegality or absence of right to sue must be pleaded as a defense. If it is necessary for the defendant to plead those facts as a defense, it ought certainly to be incumbent on him to prove his allegations, unless the defensive facts are disclosed by plaintiff's proof. A defense of this nature cannot be likened to a plea of nul tiel corporation. That plea is a mere denial of the allegations of the complaint with respect to the corporate capacity of the plaintiff. The defense relied on in this case admits the corporate capacity of the plaintiff, and is available only because the plaintiff is a corporation. It does not go to the capacity of the plaintiff to sue, but to the validity of the alleged cause of action.

For these reasons the judgment must be reversed, and a new trial granted. All concur.

(106 N. W. 406.)

GEORGE WALKER v. CARL MARONDA.

Opinion filed January 10, 1906.

Justice Court — Change of Venue — "May" Means "Must."

1. The word "may" in section 6652, Rev. Codes 1899, relating to change of venue in justice court, should be construed to mean "must."

Same — Determination of an Issue of Law Is a "Trial."

2. The hearing and determination of the issue of law raised by a demurrer to the complaint in justice court is a "trial," within the meaning of section 6652, Rev. Codes 1899.

Same — Change of Venue — Time of Motion.

3. It is too late to demand a change of venue in justice court after a demurrer to the complaint has been argued and overruled.

Appeal from District Court, Barnes county; *Burke*, J.

Action by George Walker against Carl Maronda. Judgment for plaintiff, and defendant appeals.

Affirmed.

Young, Wright & Jones, for appellant.

"May," as used in the statute relating to change of place of trial means "must." State v. Kent, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686.

A trial does not begin until issues are joined and witnesses sworn or other testimony taken. State v. Pancoast, 5 N. D. 516, 67 N. W. 1052; Curtis v. Moore, 3 Minn. 29, 3 Gil. 7.

No argument or decision of question merely preliminary, or question of pleading except such as end the case is meant by the word "trial." Lewis v. Smythe, 2 Wood (U. S.) 119; Miller v. Tolin, 18 Fed. 609; Coughran v. Wilson, 63 N. W. 774; Lindskog v. Schouweiler et al., 80 N. W. 190.

Pierce & Tenneson, for respondents.

A "trial" is the judicial examination of an issue between the parties, whether it is an issue of law or fact. Rev. Codes 1899, section 5419; 2 Enc. Pl. & Pr. 956; Tregambo v. Comanche Mill & Mining Co. et al., 57 Cal. 501; Finn v. Spangnoli, 7 Pac. 746; Goldtree v. Spreckels, 67 Pac. 1091.

In federal courts, construing U. S. statutes relating to removal of actions "at any time before trial," interposition of a demurrer and a decision is a trial. Boyd v. Gill, 19 Fed. 145; Wilson v. Rock Island Paper Co., 20 Fed. 705; Lookout Mountain R. R. Co. v. Hobart R. R. Co., 81 Fed. 5; Maher v. Tower Hotel Co., 94 Fed. 225; Alley v. Nott, 111 U. S. 472, 28 L. Ed. 491; Scharff et al. v. Levy et al., 112 U. S. 711, 28 L. Ed. 825; Gregory et al. v. Hartley, 113 U. S. 742, 28 L. Ed. 1150; Laidly v. Huntington et al., 121 U. S. 179, 30 L. Ed. 883; St. Louis & S. F. Ry. Co. v. Weaver, 35 Kan. 412, 11 Pac. 408.

Filing of an affidavit and motion for a change of venue does not oust justice of jurisdiction; it is his order granting the change that terminates his authority. Ritzman v. Burnham, 114 Cal. 522, 46 Pac. 379; Barnhart et al. v. Davis et al., 2 Pac. 633, 30 Kan. 520; City of Ottumwa v. Schaub, 52 Iowa, 515, 3 N. W. 529.

ENGERUD, J. This action was commenced in justice court. On the return day of the summons the defendant appeared and filed a demurrer to the complaint on the ground that it did not set forth a cause of action. After the justice had overruled the demurrer, the defendant demanded a change of venue to some other justice, pursuant to the provisions of section 6652, Rev. Codes 1899. The motion was supported by a sufficient affidavit, alleging

as grounds for such change that the justice before whom the action was pending was biased and prejudiced against defendant. The defendant was refused on the ground that it came too late. The defendant declined to answer the complaint, insisting that the demand for change of venue was in time and that the justice was thereby deprived of all further power in the case, except to transfer it to another justice. The justice entered judgment for plaintiff, and the defendant appealed to the district court on questions of law only.

The specifications of error on that appeal challenge the propriety of the justice court judgment solely on the ground that the justice erred in denying the motion for change of venue. The district court affirmed the judgment, and we think that decision was right. Section 6652, Rev. Codes 1899, is part of the Justice Code, and, so far as material to this case, provides: "The court may at any time before trial, on motion, change the place of trial in the following cases: * * * 2. When either party makes and files an affidavit that he believes that he cannot have an impartial trial before such justice by reason of the interest, prejudice or bias of the justice." It is clear that the word "may," as used in this statute, should be construed to mean "must." State v. Kent, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 637. State v. Barry 14, N. D. 316, 103 N. W. 637. An affidavit and demand for change of venue, properly presented to the justice before the trial has commenced, must be granted as a matter of right. Whether or not a change can be demanded before any issue of law or fact has been joined we do not decide. We are agreed that the submission to the justice for determination of the issue of law raised by the demurrer was a trial within the meaning of section 6652; hence the demand for change of venue came too late. The demand, to be availing, must be presented "before trial." The Code of Civil Procedure (section 5419, Rev. Codes 1899) declares that "a trial is the judicial examination of the issues between the parties, whether they are issues of law or of fact."

Appellant concedes that the examination of the issue of law arising on a demurrer in an action pending in district court is a trial, but he contends that the foregoing statutory definition of a trial does not apply to the examination and determination of an issue of law in justice court. Counsel argues that there is an essential difference between the effect of a demurrer in justice court and

the effect thereof in district court. We do not think there is any substantial difference. It is true that the district court may in its discretion render final judgment in the action on the trial of an issue of law, and that leave to amend after demurrer sustained, or leave to join issue on the facts alleged after a demurrer overruled, may be granted or withheld by that court in its discretion. In practice, however, leave to amend, or leave to take issue on the facts after the determination of an issue of law, is always granted as a matter of course, unless some special reason appears to justify the withholding of such leave. In justice court the right to amend after demurrer sustained, or to take issue on the facts after a demurrer is overruled, is an unconditional statutory right. Sections 6662, 6665, Rev. Codes 1899. In either court, however, the function of the demurrer is to obtain the opinion of the court on a question of law based on an assumed state of facts; and in either court the decision on the argument of the demurrer is necessarily a final determination by that court of the rights of the parties with respect to the matters involved in that decision, unless the assumed facts can be successfully disputed or avoided by proof, or unless the party whose pleading has been held insufficient can prove at the trial the facts necessary to cure the deficiency. Whatever difference there may be in theory between the authority of the two courts with respect to rendering a formal and final judgment on an issue of law, in actual practice the effect and result of a decision of such a question is the same in one court as in the other. We think the definition of the word "trial," given in the Code of Civil Procedure, is applicable to the procedure in justice court, and that definition must be applied in this case; there being no provision in the Justice Code attaching a different meaning to the word. The provisions of the Code of Civil Procedure govern the proceedings in justice court so far as applicable, where there is no express provision on the subject in the Justice Code. Section 6625, Rev. Codes 1899.

To hold that the word "trial," in section 6652, means merely the trial of an issue of fact, would lead to results which we are satisfied the legislature never intended. If the justice, in deciding the question raised by the demurrer, disclosed that his opinion as to the law applicable to the case differed from that of the litigant, the latter might well conclude that the justice was biased and prejudiced and thereupon demand a change of venue and present

the same questions of law to some other justice upon whom he might hope to exert a greater influence by his display of learning and eloquence. The statute in question plainly contemplated but one trial before a single justice, and was clearly designed to enable the party to secure a fair and impartial hearing and decision on the issues of law and fact affecting the cause of action or defense. If the party is convinced that he cannot have a fair and impartial hearing from the justice before whom the action is pending, he can remove the cause to some other justice in the manner provided by the law. It was not intended to permit a party, who had no reason to suspect before trial that the justice was unfair, to experiment with the magistrate, and to demand a trial before some other magistrate after discovering that the justice to whom the issues of law were first submitted entertained views of the law contrary to those advocated by the party. The following cases, based on similar statutes, support our views: Alley v. Nott, 111 U. S. 472, 4 Sup. Ct. 495, 28 L. Ed. 491; Goldtree v. Spreckles, 135 Cal. 666, 67 Pac. 1091.

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

(106 N. W. 296.)

NOTE.—Justice must act within his township and county. In re Dance, 2 N. D. 184, 49 N. W. 733. Judgment must be entered upon return of verdict when a jury trial is had, otherwise it will be avoided upon proper proceeding. In re Dance, Id. Justice has no jurisdiction of unlawful detainer case, where title to land is involved. Heger et al v. De Groat, 3 N. D. 354, 56 N. W. 150. Appearance to object to justice's jurisdiction on account of insufficiency of summons is not a voluntary appearance. Miner v. Francis et al., 3 N. D. 549, 58 N. W. 343. Justice can recover his fees in a criminal action from county. Barret v. Stutsman Co., 4 N. D. 175, 59 N. W. 964. Upon a change of venue, where both parties submitted to trial, objection cannot be made that it does not appear affirmatively that they agreed upon a justice. Henry v. Maher, 6 N. D. 413, 71 N. W. 127. Justice called case; summons and proof of service were subsequently filed, and were in plaintiff's possession. Justice did not lose jurisdiction by allowing plaintiff's counsel to send for them. Cowan v. Farrel et al., 7 N. D. 397, 75 N. W. 771. Where nonresident plaintiff deposits, by consent of parties, an agreed sum as security for costs, upon change of venue to another justice, defendant cannot demand other security. Benoit v. Revoir, 8 N. D. 226, 77 N. W. 605. Under section 6683, Rev Codes 1899, justice can hold a case open twenty-four hours to consider questions submitted. Benoit v. Revoir, Id. Invoking aid of court confers or restores its jurisdiction. Id. Failure of plaintiff to appear at return hour or at the hour of postponement or within one hour

thereafter warrants a dismissal of the case on motion, and justice denying the motion loses jurisdiction of the case. Plano Mfg. Co. v. Stokke, 9 N. D. 40, 81 N. W. 70, section 6258 Rev. Codes 1899. Exempting executors, administrators and guardians from giving a bond on appeal applies to county court only; not to district and justice courts. Richardson v. Campbell, 9 N. D. 100, 81 N. W. 31. Where a justice at the close of a trial adjourns the case indefinitely, he loses jurisdiction, and a judgment entered therein is void, unless jurisdiction is in some manner restored. Sluga v. Walker, 9 N. D. 108, 81 N. W. 282. Failure to serve statutory undertaking renders an appeal from justice court void, and district court cannot allow new undertaking to be served and filed. Richardson v. Campbell, supra. Garnishment law does not modify the law providing for service of summons in the principal action. Searl v. Shanks, 9 N. D. 204, 82 N. W. 734. Justice cannot issue a second garnishment summons when the first one fails of service. Searl v. Shanks, supra. In garnishment case failure to serve summons in the principal action authorizes dismissal of the action. Searl v. Shanks, supra. When the district court, upon appeal from a justice court, reopens the case for trial of an issue of fact, the case will be retained and placed on district court calendar for trial. Grovernor v. Signor, 10 N. D. 503, 88 N. W. 278. Upon an appeal from a justice court, the district court acquires no jurisdiction to try the case anew, when the justice had no jurisdiction to try it or allow a counterclaim. Vidger v. Nolin, 10 N. D. 353, 87 N. W. 593. Transcripting a justice's judgment to the district court does not give it the same presumption afforded those of the latter court. Phelps v. McCallam, 10 N. D. 536, 88 N. W 292. Approval of undertaking upon appeal from justice court by the clerk of the district court, before it is served and filed, not necessary. Eldridge v. Knight, 11 N. D. 552, 93 N. W. 860. Insufficiency of an affidavit for postponement in justice court must be pointed out on objection to postponement, or loss of jurisdiction cannot be availed of. Lyman-Eliel Drug Co. v. Cooke, 12 N. D. 88, 94 N. W. 1041. Postponement may be had after commencement of a trial for causes arising before. Lyman-Eliel Drug Co. v. Cooke, Id. Authority to grant continuance in justice court exists only by statute. Lyman-Eliel Drug Co. v. Cooke, Id. Appeals upon law alone are not dismissed for irregularities in justice court not affecting the appeal. Olson v. Shirley, 12 N. D. 106, 96 N. W. 297. On appeals upon law alone, where the district court reopens the case for trial, the case is retained in district court for such trial. Olson v. Shirley, supra; Wilson v. Atlantic Elev. Co., 12 N. D. 402, 97 N. W. 535.

Where there is evidence before a justice of the peace sitting as a committing magistrate tending to show the commission of an offense by defendant, review and release will not be had upon habeas corpus in Supreme Court. State ex rel. Styles v. Beaverstad, 12 N. D. 527, 97 N. W. 548. A justice of the peace acting as committing magistrate must act upon evidence, and when this jurisdictional requisite is observed, his acts will not be reviewed upon habeas corpus. State ex rel. Styles v. Beaverstad, supra. His finding, when so acting, is conclusive against collateral attack. State ex rel. Styles v. Beaverstad, Id. Complaint in justice court upon information and belief will not justify an arrest. State ex rel. Paul v. McLain, 13

N. D. 368, 102 N. W. 407. Filing of a transcript of proceedings in bastardy, and jurisdictional papers, had before a justice of the peace with the clerk of the district court, gives the latter court jurisdiction. State v. Carrol, 13 N. D. 383, 101 N. W. 317. In such proceeding when approved bail is furnished in justice court formal order of committal to district court is unnecessary. Id. Upon complaint in justice court charging a nuisance a description of a certain one-story frame building, without giving lot or block is sufficient. State v. Wisnewske, 13 N. D. 649, 102 N. W. 883. Limitation of time for issue of execution in justice court is upon the remedy, not the life of the execution. Holton v. Schmarberk, 15 N. D. 38, 106 N. W. 36. Transcripting a judgment from a justice to district court, transfers the power to issue execution from the former to the latter. Id. Such transcript, for the purposes of a lien and execution, gives the judgment the same effect as one originally entered in district court. Id. The period limiting the time to issue an execution upon a judgment transcripted to district court means ten years from its entry by the justice. Id.

GEORGE JACOBSON v. RANSOM COUNTY.

Opinion filed January 23, 1906.

County Treasurer Can Employ a Clerk Only for Compensation Provided by Law.

1. No liability exists against a county for money expended by a county treasurer for clerk hire in excess of the compensation therefor fixed by the county commissioners as provided by section 2081, Rev. Codes 1899.

Same — Discretion of County Commissioners.

2. The necessity for such clerk and the compensation to be paid him are matters within the discretion of the commissioners; and such discretion will not be reviewed by the courts in an action for the recovery of the excess so paid.

Appeal from District Court, Ransom county; *Allen*, J.

Action by George Jacobson against Ransom county. Judgment for plaintiff, and defendant appeals.

Affirmed.

Geo. S. Ego, for appellant.

Alfred M. Kvello, for respondent.

MORGAN, C. J. The plaintiff brings an action against the defendant county to recover moneys paid out by him for clerk hire,

On January 7, 1901, the commissioners of the county authorized the plaintiff, the county treasurer since January 1, 1901, to employ a clerk at a salary of $30 per month for that year. The plaintiff failed to procure one at that price and employed one at $40 per month, after he had conversed with two of the five county commissioners. These two individually indicated to him that they would vote for payment of such salary at $40 per month. In the year 1902 the county commissioners authorized the plaintiff, as treasurer, to employ a clerk at $40 per month as salary. During that year and subsequent years the plaintiff employed a clerk, and at times paid him more than $40 per month. This action is brought to recover the excess paid my him over the salary allowed by the commissioners. The district court found in favor of the defendant and dismissed the action.

In so doing there was no error. Section 2081, Rev. Codes 1899, governs the rights and duties of the commissioners in such matters, and is as follows: "If in the judgment of the board of county commissioners of any county it shall be deemed necessary for the prompt and accurate dispatch of business in the office of the county treasurer that a deputy or clerk be employed therein it shall by resolution fix the number of deputies or clerks to be employed and the length of time they shall be employed, together with the compensation which they shall receive, which compensation shall be paid monthly in the same manner as the salary of the county treasurer." This section delegates to the commissioners the power to determine the necessity for the appointment of deputies and clerks and to fix the duration of the appointment, as well as the compensation to be paid. No power is conferred upon the treasurer, except to appoint and employ the clerk or deputy. He has no power to determine the necessity for such appointment nor the amount of compensation. He cannot bind the county as to these matters any more than any other citizen can. The commissioners have charge of all the fiscal affairs of the county and to secure their management in the best manner. Section 1907, Rev. Codes 1899. The statute cannot be construed to permit the treasurer to substitute his judgment for that of the commissioners as to the necessity for a clerk, nor the compensation, and bind the county by such action. All such expenditures are exclusively within the control of the commissioners. Discretion is vested in the commissioners as to these matters, and the same will not be reviewed

by the courts in such actions as this. No absolute duty devolves on the commissioners to authorize the hiring of clerks. The following cases are in point under similar statutes: Cleary v. Eddy County, 2 N. D. 397, 51 N. W. 586; Hendricks v. Commissioners, 35 Kan. 483, 11 Pac. 450; Peck v. Supervisors, 47 Mich. 477, 11 N. W. 279; Commissioners v. Stoddart, 13 Kan. 207; Roberts v. Commissioners, 10 Kan. 29; Tillotson v. Potter County (S. D.) 71 N. W. 754; Tillotson v .Potter County (S. D.) 83 N. W. 623. The action is not maintainable, and was properly dismissed by the district court.

Judgment affirmed. All concur.

(105 N. W. 1107.)

THE MARSHALL-McCARTNEY COMPANY, A CORPORATION, v. THOMAS HALLORAN.

Opinion filed January 23, 1906.

Deceit — Pleading — Specific Allegations.

1. In an action to recover damages for deceit, the misrepresentations relied upon must be specifically alleged.

Same — Fraud — Misrepresentations Must Justify Belief Upon Which Plaintiff Acted.

2. An averment that the plaintiff was deceived, to his damage, by certain alleged misrepresentations of the defendant, is of no avail if the misrepresentations were not of such a nature, or made under such circumstances, as to justify the belief upon which the plaintiff claims to have acted.

Same — Damage —Proximate Cause.

3. In order to disclose a cause of action for deceit, the complaint must show that the loss or damage was the proximate effect caused by the alleged misrepresentations.

Appeal from District Court, Dickey county; *Allen*, J.

Action by the Marshall-McCartney Company against Thomas Halloran. Judgment for plaintiff, and defendant appeals.

Reversed.

E. E. Cassels and *C. W. Davis,* for appellant.

Deceit consists of telling an untruth knowingly with intent to deceive another to his damage. Watson v. Poulson, 15 Jurist, 1111, 7 Eng. L. & Eq. 588; Pasley v. Freeman, 3 T. R. 51; Polhil v. Walter, 3 Barn. & Ald. 114; Levi v. Langridge, 4 Mees. & Wels 337; Brown v. Castels, 11 Cush. 348; Tryon v. Whitmarsh, 1 Met. 1; Ming v. Woolfolk, 116 U. S. 599, 29 L. Ed. 740; Arthur v. Griswold et al., 55 N. Y. 400; Brackett v. Griswold, 112 N. Y. 467, 20 N. E. 376; Cooper et al. v. Schlesinger et al., 111 U. S. 148, 28 L. Ed. 382.

To warrant relief, fraud must be distinctly alleged in the pleading. Bayard v. Holmes, 34 N. J. L. 296; 9 Enc. Pl. & Pr. 684, 687, 688; 8 Enc. Pl. & Pr. 897, 899; 14 Cyc. 34, 35, 36 and 37.

Purchase of an assignment of a mortgage, of a conveyance of land from one holding title as mortgagee, without a purchase of the debt secured thereby, is a nullity. 20 Cyc. 1033; Carpenter v. Longan, 16 Wall. 271, 21 L. Ed. 313; Perkins v. Sterne, 76 Am. Dec. 72; Peters v. Jamestown Bridge Co., 63 Id. 134; Wilson v. Troup, 2 Cow. 195, 14 Id. 458; Yankton Building & Loan Ass'n. v. Dowling et al., 74 N. W. 438; Miller v. Berry et al., 104 N. W. 311; Jackson v. Bronson, 19 Johns. 325; Aymer v. Bill, 5 Johns. Ch. 570; Merritt v. Bartholick, 36 N. Y. 44; Polhemus v. Trainer, 30 Cal. 685; Ladue v. D. & M. R. Co., 13 Mich. 380, 87 Am. Dec. 759; Johnson v. Clark, 28 Atl. 558; 2 Jones on Mort. 1376; 20 Am. & Eng. Enc. Law, 1029.

A misrepresentation must be as to a material fact. 14 Cyc. 59, 62.

Geo. H. Fay and *W. C. Wickersham, Grigsby & Grigsby,* of counsel.

Wilful deceit inducing another to alter his position to his injury or risk is actionable. Rev. Codes 1899, section 3941; Whitbeck v. Sees, 10 S. D. 417, 73 N. W. 915; Parker v. Ausland, 13 S. D. 169, 82 N. W. 402; Kaeppler v. Red River Val. Nat. Bank of Fargo, 79 N. W. 869; Pomeroy's Eq. Jur., sections 885, 889; 3 Joyce on Damages, 2214; Ergott v. New York, 96 N. Y. 264; Guylle v. Swan, 19 Johnson, 381; McNamara v. Village of Clintonville, 22 N .W. 472; Nash et al. v. Minnesota Title Ins. & Trust Co., 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753; Haven et al. v. Neal et al., 45 N. W. 612; Robbins v. Barton et al., 31 Pac. 686.

ENGERUD, J. Defendant appeals from an order overruling his demurrer to the following complaint:

"(2) That on the 30th day of May, 1899, the defendant was the owner of [certain described land] in Dickey county, N. D., and that on said day defendant executed a deed to one E. K. White, absolute in form, of all of said premises, and that said deed of conveyance so executed by the defendant was duly acknowledged so as to entitle the same to record on said 30th day of May, 1899, and on or about that day was delivered by the defendant to the said E. K. White. That thereafter, and on February 28, 1902, said deed was filed for record in the office of the register of deeds in and for Dickey county, N. D., and recorded at page 339 of Book 27 of the Deed Records of said office.

"(3) That thereafter, and in the month of March, 1902, this plaintiff purchased said premises from the said E. K. White for a valuable and adequate consideration, to wit, the sum of $3,400, and the said E. K. White made, executed and delivered to one C. Duane Holmes, for and in behalf of this plaintiff, a good and sufficient warranty deed of the said premises, with full covenants, conveying the same to this plaintiff in fee simple, which deed of conveyance was duly acknowledged so as to entitle the same to record, and was on the 17th day of March, 1902, filed for record in the office of the register of deeds in and for said Dickey county, and recorded at page 475 of Book 28 of Deeds thereof.

"(4) That said deed was so made by the said E. K. White to the said C. Duane Holmes at the request of this plaintiff, and that the said C. Duane Holmes held the title to said property in trust for this plaintiff.

"(5) That in consummating the purchase and sale of said land between this plaintiff and the said E. K. White it was agreed and arranged that the plaintiff should deposit in the Bank of Oakes to the credit of the said E. K. White the sum of $1,700 and should deliver to said White a mortgage upon said land securing the further sum of $1,700. That in pursuance of such agreement and arrangement this plaintiff deposited in the said bank the sum of $1,700 to the credit of said White, and had a mortgage duly executed upon the said land and delivered to said White, and the said deed was duly delivered to plaintiff and recorded as hereinafter stated. That it was a part of said agreement between this plaintiff and the said E. K. White that the said sum of $1,700 should be held by said Bank of Oakes until the said E. K. White should cause

and procure to be released from the record thereof a certain lis pendens then of record against the said land.

"(6) That some time during the month of March, 1902, and before the $1,700 so deposited in the Bank of Oakes had been paid over to the said E. K. White, the defendant, Thomas Halloran, commenced an action in the district court of Dickey county, N. D., against the said C. Duane Holmes, who then held title to the said land in trust for this plaintiff, and in his complaint in said action the said Thomas Halloran, defendant herein, as plaintiff in said action, alleged: 'That on the 30th day of May, 1899, the plaintiff was the owner of [giving same description of land], all in the county of Dickey, and state of North Dakota, and of the value of $6,400. That on said day the plaintiff, being greatly embarrassed in his affairs, and desiring to borrow of E. K. White, and to secure plaintiff's indebtedness to him, and to secure said White for such money as he would advance to plaintiff's family, plaintiff executed a deed to said defendant E. K. White, for all the above described land; said deed being absolute in form, but intended by both plaintiff and defendant to stand as security for the payment of said indebtedness, loan and advancement as aforesaid, and it was made for that purpose only, and the purported consideration thereof was $1,000. That on or about the 13th day of March, 1902, the plaintiff offered to pay said defendant E. K. White the amount of said loan, and requested him to deliver up possession of said premises upon being paid whatever sum should be found to be justly due him on said account, but that said defendant refused and still refuses to account with plaintiff, but insists upon retaining possession of and selling said estate. That plaintiff is ready to pay whatever may be justly due on said account, and offers to bring the money into court for that purpose. That the defendant C. Duane Holmes claims certain estate or interest in or lien or incumbrance upon the same adverse to this plaintiff. Wherefore plaintiff prays that an accounting may be taken of the amount due said defendant E. K. White, and, upon the payment by the plaintiff of the amount so found to be due, said defendant may be required to reconvey said premises to the plaintiff. That the defendant C. Duane Holmes be required to set forth all his adverse claims to the property and priority thereof be determined. That they be adjudged null and void, and that he be decreed to have no estate or interest in or lien or incumbrance upon said

property. That this title be quieted as to such claims, and that the defendant C. Duane Holmes be forever debarred and enjoined from further asserting the same.'

"(7) That the said complaint was duly verified by the plaintiff, who is the defendant herein, and was filed on the 22d day of March, 1902, in the office of the clerk of said court.

"(8) That the defendant knew that the said C. Duane Holmes purchased the said land as agent or trustee for the Marshall-McCartney Company, the plaintiff herein, and that he was a innocent purchaser, without either actual or constructive knowledge that the defendant herein claimed any equity or interest in said land.

"(9) That the defendant herein knew the allegations of his complaint in said action to be false at the time he made them, and also knew at that time that the plaintiffs in this action were holding back the $1,700 which they had agreed to pay to the said E. K. White, and that, for the purpose of deceiving and inducing the plaintiff herein to believe that they would be amply secured and protected by the conditions set out in his said complaint, he made and served the same on the said C. Duane Holmes in said action.

"(10) That the defendant herein knew that the said E. K. White was a bankrupt, and that after he, the said defendant, had knowledge of the fact that the plaintiff herein, relying on and believing the statements and allegations contained in his said complaint to be true, and had remitted to the said E. K. White, he, the said defendant herein, paid off to the said E. K. White the very indebtedness which he claimed and represented in his complaint in said action was secured by the deed to the land there in question.

"(11) That on or about the 4th day of April, 1902, this plaintiff, relying upon the statements so made by the defendant in his complaint in said action, wherein this defendant was plaintiff and the said C. Duane Holmes and the said E. K. White were defendants, and believing said statements to be true, and that the deed made by said White to Holmes for the use and benefit of this plaintiff would in effect be an assignment of the said mortgage held by said White to said Holmes, and so relying upon the aforesaid verified statements of this defendant in his said complaint, this plaintiff waived the right to stop the payment by the said Bank of Oakes to the said White of the said sum of $1,700.

and did consent that the said sum of $1,700 be paid to the said White.

"(12) That at the time this plaintiff consented to the payment of the sum of $1,700 to the said White, and waived the right and the opportunity to stop said payment, this plaintiff had no notice, knowledge or information of any kind that the defendant herein had or claimed to have any other or different interest in the said land other than the claim set up in said complaint wherein this defendant was plaintiff as aforesaid.

"(13) That this plaintiff was informed by the said sworn complaint of the said defendant in his former action and other statements made by him to this plaintiff, and believed at the time the said sum of $1,700 was so paid by the Bank of Oakes to the said E. K. White, that the amount of the indebtedness of the said Halloran to the said White, at the time the said deed was executed and delivered by the said Halloran to said White, and which according to the said verified complaint of said Halloran was so executed and delivered as security, was in excess of the sum of $1,700.

"(14) That this plaintiff is informed and believes that at the time the said sum of $1,700 was so paid by the Bank of Oakes to the said White the said White was financially irresponsible, and was in fact a bankrupt, and that it would not have been possible then or at any time subsequent thereto, and would be impossible now, for this plaintiff to recover from the said White the sum of $1,700.

"(15) That subsequent to the payment of the said sum of $1,700 to the said White by the Bank of Oakes for and in behalf of this plaintiff, the defendant Halloran, in the said action of Halloran, as plaintiff, against the said Holmes and White, as defendants, established by his own testimony and otherwise that the said deed so given by the said Halloran to the said White was without any consideration whatever, and procured judgment to be entered in said action decreeing said deed to be null and void, which judgment is now of full force and effect.

"(16) That by reason of the false statements of the said Halloran in his aforesaid complaint, and of all the other matters and things hereinbefore set forth, this plaintiff has been damaged in the sum of $1,700.

"Wherefore this plaintiff prays for judgment against this defendant for the sum of $1,700, with interest from April 4, 1902, and for such other and further relief as may be equitable and just, and for the costs and disbursements of this action."

This complaint is attacked by the demurrer on the ground that it does not state facts sufficient to constitute a cause of action; and we are agreed that the demurrer should be sustained. It is evident, and both parties concede, that the plaintiff is seeking to hold the defendant liable in damages for deceit, and the only question is whether the complaint shows such liability. The allegations (paragraph 10 of the complaint) to the effect that Halloran, after having induced this plaintiff to pay White $1,700 in the belief that White had a lien, subsequently paid to White the amount which he had claimed to be due on that lien, are either inconsistent with or immaterial to the remainder of the complaint, which attempts to allege deceit. If White did in fact have a lien for $1,700 or more at the time Halloran is charged with having so represented, then manifestly there could be no cause of action for false representations in that respect. On the other hand, if Halloran, knowing this plaintiff's rights, as the complaint explicitly says he did, nevertheless paid the money to White, such payment would clearly be of no avail as a satisfaction of the lien which this plaintiff claims to have acquired; and hence this voluntary and nugatory payment to White could not have been either an injury or a damage to this plaintiff. If we assume that the allegations impliedly admit that the debt Halloran paid to White was not in fact secured by the lien which Halloran had falsely represented to exist, then said paragraph 10 would not be fatal to the complaint, but would be obviously immaterial, and should be disregarded for that reason. Without deciding which construction this paragraph of the complaint should properly be given as against a demurrer, we shall assume the construction most favorable to plaintiff and disregard these allegations; and we may also assume, without deciding the point, that plaintiff might have been subrogated to White's lien had there been one. No actionable false representations are shown, unless the averments copied from the complaint in Halloran v. Holmes are of such a character as to constitute deceit, if false and made with intent to mislead this plaintiff to its detriment.

The only reference to other representations than the allegations in Halloran's complaint in the former action is the clause appearing in paragraph 13 of the complaint in the case at bar: "And other statements made by him to this plaintiff." What these "other statements" were the plaintiff has failed to disclose. Such an allegation is wholly insufficient. It is a mere conclusion of the

pleader. It is a well settled rule, the reasons for which are obvious, that in an action to recover damages for deceit the misrepresentation relied upon must be specifically alleged. Bigelow on Fraud, pp. 114-116; Am. & Eng. Enc. of Pl. & Pr. pp. 686, 689, and cases cited in notes. Disregarding, as we must, the clause above quoted, this paragraph 13 is merely an assertion by the pleader that from the allegations of Halloran's complaint it reached the conclusion that White had a lien on the land in question for more than $1,700. Such an averment is of no avail if the misrepresentations which it is alleged induced the belief were not of such a nature or made under such circumstances as to justify the belief upon which the party claimed to have acted. Bigelow on Fraud, pp. 115, 139; Neidefer v. Chastain, 71 Ind. 363, 36 Am. Rep. 198; Penn. Ins. Co. v. Crane, 134 Mass. 56, 45 Am. Rep. 282.

In an action to recover damages for deceit, as in every action sounding in tort, it is essential that the complaint show a legal injury resulting proximately in a certain loss or damage. If either of these two essential elements of actionable wrong is lacking, no cause of action is stated. Carroll v. Township of Rye, 13 N. D. 458, 101 N. W. 894. The deceitful misrepresentations are the injury or cause, and the damage is the effect of that cause. In order to disclose a cause of action, the complaint must show that the damage or effect resulted proximately from the cause or injury alleged. Bigelow on Frauds, p. 139; Byard v. Holmes, 34 N. J. Law, 296; Beare v. Wright (N. D.) 103 N. W. 632, 69 L. R. A. 409. Now, it is apparent at a glance that there is nothing in the allegations of Halloran's complaint (and they are the only misrepresentations sufficiently alleged) that could possibly warrant the inference, belief or conclusion that White had a lien for $1,700, or any other specific sum. On the contrary, in that complaint Halloran virtually disclaimed any knowledge as to the amount due and as to whether or not anything was due. It was by reason of this professed ignorance on that subject that Halloran based his demand for an accounting in that action.

Plaintiff's complaint not only fails to allege any misrepresentation to the effect that there was $1,700 due to White on the supposed lien, but it fails to show that Halloran represented or admitted that any sum was due. It follows, therefore, that the plaintiff's assertion that he was deceived by Halloran's complaint as to the sum

due on the supposed lien, and induced thereby to pay $1,700 to White, is untrue. The effect alleged could not result, proximately or otherwise, from the cause set forth.

The order appealed from is reversed, and the cause will be remanded, with directions to enter an order sustaining the demurrer. All concur.

(106 N. W. 293.)

MARY ZIMMERMAN v. CAROLINE McCURDY.

Opinion filed January 23, 1906.

Public Lands — Claims of Homesteader — Contest in Land Department.

1. Where a party claims the right to possession of public land by virtue of a homestead entry against a party in possession under claim of superior right, and the claims of the parties are in contest before the federal land department, the courts will protect the rights of the parties so far as the same can be done without deciding a controversy of which the land department has exclusive jurisdiction.

Same.

2. An occupying claimant of public land cannot be ousted by a claimant under a homestead entry, where the merits of their opposing claims to the right of possession are involved in a contest pending before the federal land department, and have not been finally determined.

Injunction — Claims to Public Lands — Pending Contest.

3. Injunction is the proper remedy in such cases to protect the occupying claimant's possession against the other claimant's attempts to take forcible possession until the rights of the parties shall have been determined in the pending contest.

Appeal from District Court, McHenry county; *Palda, Jr.*, J.

Action by Mary Zimmerman against Caroline McCurdy. Judgment for defendant, and plaintiff appeals.

Reversed.

McClory & Barnett, for appellant.

If the court has no jurisdiction to try the title to land, it can by injunction preserve the statu quo. Cosmos Exploration Co. v. Gray Eagle Oil. Co., 112 Fed. 4, 61 L. R. A. 230.

A defendant is not entitled to an injunction. Forman v. Healy et al., 11 N. D. 563, 93 N. W. 866.

Injunction will not be granted to take property from the possession of one and give it to another. Dickson v. Dows, 11 N. D. 404, 92 N. W. 797.

Until title to land passes from the United States, exclusive jurisdiction to determine adverse claims is in the department of government charged with the disposal of such lands. Grandin et al. v. LaBar, 3 N. D. 446, 57 N. W. 241; Adams v. Couch et al., 26 Pac. 1009; Sommager v| Dicks, 28 Pac. 864; Marquez v. Frisbie. 101 U. S. 473, 25 L. Ed. 800; Johnson v. Towsley, 13 Wal. 72, 20 L. Ed. 485; Shepley et al. v. Cowan et al., 91 U. S. 330. 23 L. Ed. 424; Litchfield v. Register, 9 Wal. 575, 19 L. Ed. 681; Gaines et al.. v. Thompson et al., 7 Wal. 347, 19 L. Ed. 62; Empey v. Klugert, 64 Wis. 603, 23 N. W. 560.

Courts will not pass upon the merits of contesting parties and decide which has established his ultimate right to receive the legal title to the land, but only to protect the actual possession and prevent wrongful and forcible interference until the government parts with the title. 26 Am. & Eng. Enc. Law, 385; Marquez v. Frisbie, supra; Atherton et al. v. Fowler et al., 96 U. S. 519, 24 L. Ed. 732; Fulmele v. Camp, 20 Col. 495, 39 Pac. 407; Hastay v. Banness et al., 84 Minn. 120, 86 N. W. 896; Mathews v. O'Brien, 84 Minn. 505, 88 N. W. 12; McQuistion v. Walton, 69 Pac. 1048; Woodside v. Rickey, 1 Ore. 108; Lee v. Simonds, 1 Ore. 158; Collwell v. Smith, 1 Wash. Ty. 92; Caldwell v. Robinson, 59 Fed. 663; Wood v. Murray, 85 Iowa, 505, 52 N. W. 356.

Where one by a filing and another by prior settlement are entitled to the occupancy of government land, the courts will make an equitable disposition of the possession pending the contest in the land office, and will permit neither the exclusive possession. 26 Am. & Eng. Enc. Law, 386; Adams v. Couch, 1 Okl. 17; Commager v. Dicks, 1 Okl. 82; Sproat v. Durland, 2 Okl. 24, 35 Pac. 682; Peckham v. Faught, 2 Okla. 173, 37 Pac. 1085; Glover v. Swartz, 58 Pac. 943.

Hanchett & Wartner, for respondents.

The holder of a receiver's receipt to a homestead entry is entitled to the exclusive use, possession and occupancy of the land embraced in such entry, and his rights will be protected by injunction. Sproat

v. Durland, supra; Reaves v. Oliver, 41 Pac. 353; Woodroff v. Wallace, 41 Pac. 357; Barnes v. Newton, 48 Pac. 190; Calhoun v. McCornack, 54 Pac. 493; Bank v. Holst, 95 N. W. 931; Moore v. Parker, 80 N. W. 43.

Where a party in good faith has made a settlement and sought to initiate a homestead right, and made application to file, and to contest an entry by one who has received a receiver's receipt, both may remain in possession, but such possession extends only to the portion occupied by each. Commager v. Dicks, 28 Pac. 864; Sproat v. Durland, supra; Peckham v. Faught, supra; Clark v. Diehl, 48 Pac. 178; Glover v. Swartz, supra.

Settlement upon land covered by an existing entry confers no right where such entry is cancelled as the result of a contest for a preference right. Haskins v. Nichols, 1 Dec. Dept. Int. 172; Nichols v. Littler, 3 Dec. Dept. Int. 224; Ebbott v. Schaetzel, 4 Dec. Dept. Int. 687; Hensworth v. Holland, 8 Dec. Dept. Int. 400; Paulson v. Richards, Id. 597.

ENGERUD, J. There is no dispute as to the material facts of this case. The plaintiff, Mary Zimmerman, is the widow of Frank Zimmerman, deceased. Frank Zimmerman in his lifetime, on April 22, 1898, filed a homestead entry on the quarter section of land in question at the Devils Lake land office. He took up his residence upon the land and occupied it, with his family, as his home until his death in June, 1900. After his death his widow and minor children continued in possession of the homestead. Shortly before Mr. Zimmerman's death a contest was initiated by this defendant, Caroline McCurdy, against Zimmerman's entry, on the ground that said entryman had exhausted his homestead right before making the entry in contest. After his death his widow and children were substituted as defendants in the contest. That contest resulted in a final decision canceling the contested entry. The contestant, Caroline McCurdy, thereupon exercised the preference right of entry secured to her by the contest, and on November 24, 1902, her application to enter the land as a homestead was accepted, and the usual receipt evidencing such entry was made and delivered to her by the receiver of the Devils Lake land office. On December 3, 1902, the plaintiff, Mrs. Zimmerman, filed in the Devils Lake land office her application, in proper form, to be allowed to enter the land as her homestead; and at the same time she filed an affidavit of contest against the homestead entry of

Caroline McCurdy. Mrs. Zimmerman claims the right to hold the land as her homestead, and contests the validity of defendant's entry on the ground that she (plaintiff) after the death of her husband became qualified to enter a homestead; and, her deceased husband's entry being void, her possession and her continued cultivation and improvement of the land with intent to hold the land as a homestead gave her a right to file a homestead entry for the land superior to the right of Mrs. McCurdy, notwithstanding the result of the contest against Frank Zimmerman's entry. She also asserted that defendant's entry should be canceled and her own application to enter should be allowed by reason of certain equitable considerations. The officers of the local land office held that the affidavit disclosed sufficient ground for contest, and ordered a hearing. The necessary notice was served on Mrs. McCurdy, a hearing was had, and the contest was still pending and undetermined when this action was tried. It was admitted at the trial by the defendant that the plaintiff and her family had been continuously occupying the land as their home and farming thereon since 1898, and had improved the same in a substantial manner with farm buildings of the value of at least $3,000 and had no other home; and that defendant had never been in possession of any part of said premises until after this action had been commenced. At that time the defendant took possession of ten acres, as she was permitted to do by the injunctional order hereafter referred to. In March, 1903, after the last contest had been commenced, but before the hearing had been had, the defendant attempted to oust plaintiff and take possession of the land and improvements. Plaintiff thereupon commenced this action, setting forth in the complaint her possession, and alleged right to the possession of said premises by reason of the facts above stated, the pendency of the contest against Mrs. McCurdy's entry, and the latter's repeated threats and attempts to oust plaintiff by force, etc., and prayed that the plaintiff's alleged lawful possession be protected by enjoining Mrs. McCurdy from interfering with plaintiff's occupation and cultivation of the premises. In her answer Mrs. McCurdy pleads a counterclaim, alleging her right to possession by virtue of her as yet uncanceled homestead entry, the refusal of the plaintiff to vacate, and her forcible resistance of defendant's attempts to obtain possession. She prays that the plaintiff be dispossessed by a mandatory injunction and be restrained from resisting or interfering

with defendant's right to possession. On the hearing of plaintiff's application for a temporary injunction, the court made an order permitting Mrs. McCurdy to hold and occupy a certain portion of the land, about ten acres in area, and ordering her to refrain from interfering with Mrs. Zimmerman's possession of the remainder of the land until the final determination of the action. The action was subsequently tried, and judgment ordered and entered in effect awarding possession of the entire premises to defendant, but giving the plaintiff the right to remove within ninety days the buildings and other improvements erected by her on the land. The plaintiff has appealed from this judgment, and demands a new trial of all the issues.

The judgment is clearly erroneous. From the foregoing recital of the undisputed facts, it will be seen that the decison of the trial court is necessarily predicated upon the assumption that Mrs. McCurdy's entry is valid and Mrs. Zimmerman's claim is invalid. That is the precise question in litigation before the land department in the pending contest. Mrs. Zimmerman is in actual possession under a claim of right. If her claim is well founded, she has the right to retain possession and hold the land as a homestead, notwithstanding Mrs. McCurdy's entry. Manifestly her possession cannot be disturbed unless her alleged right is held to be unfounded. That question is one which, under the circumstances of this case, the courts have no jurisdiction to decide. That is a question which is within the exclusive jurisdiction of the land department to decide so long as the disposition of the land is under control of the federal land department. Grandin v. LeBar, 3 N. D. 446, 57 N. W. 241; Martinson v. Marzolf (N. D.) 103 N. W. 937; Cosmos Exploration Co. v. Oil Co., 190 U. S. 301, 23 Sup. Ct. 692, 24 Sup. Ct. 860, 47 L. Ed. 1064. This presents the question as to whether the plaintiff is entitled to relief on the facts disclosed. We think she is. She is in possession as a claimant under color of right. The defendant also is a claimant under color of right, but is seeking to obtain possession which she never had. She must recover, if at all, by showing a superior right to that of the party in possession. Not so with the plaintiff. She being in possession as a claimant under color of right, and the court having no jurisdiction to declare her claim invalid, the case is the proverbial one wherein possession is nine points. The right to the possession of public lands is a valuable right, and is one which the courts must

enforce and protect, even though the legal title is in the government. It would be unthinkable to leave the claimants without any means to protect and enforce their conflicting claims except by force Hence the courts, although the title is in the government, have jurisdiction to grant appropriate remedies in behalf of an occupant or claimant of public land. The rightful claimant's possession or right to possession will always be protected or enforced against a trespasser by the appropriate action in court when that can be done without deciding a controversy of which the land department has exclusive jurisdiction. Section 5919, Rev. Codes 1899; Fulmele v. Camp, 20 Col. 495, 39 Pac. 407; Matthews v. O'Brien, 84 Minn. 505, 88 N. W. 12; Woodsides v. Rickey, 1 Or. 108; Wood v. Murray, 85 Iowa, 505, 52 N. W. 356.

When, however, as in this case, the opposing claimant's rights are in litigation before the federal land office, and the courts have therefore no jurisdiction to decide which of the two opposing parties is the rightful claimant, the courts are not powerless to extend their aid to preserve the property and prevent destructive violence. The equity powers of the courts are sufficiently broad and elastic to do justice under such circumstances, without interfering with the jurisdiction of the federal land office officials to determine the ultimate rights of the claimants with respect to the land in controversy. Inasmuch as the plaintiff is in possession, and is contesting in the proper tribunal the validity of defendant's entry, upon which the latter's right to take possession depends, it is clearly improper for defendant to violently dispossess plaintiff until the final result of the contest shall have disclosed which of the two have the better right. The allowance of defendant's application to enter and the issuance to her of a receiver's receipt establish defendant's right to possession as against an occupant who could not show a better right; but, if plaintiff's claim is well founded, defendant's homestead entry is void, and defendant has no right to disturb plaintiff's possession. In other words, defendant has no right to disturb plaintiff's possession unless the former's homestead entry was valid; and the plaintiff, being a bona fide adverse claimant, is in a position to question the validity of defendant's entry. It therefore follows that plaintiff cannot be deprived of her possession unless her alleged right to possession is held to be unfounded. As already stated, the courts have no jurisdiction to decide that ques-

tion until after the disposition of the land has passed from the control of the federal land department.

Defendant contends that the decision in the contest against Frank Zimmerman's entry, in which this plaintiff was made a party after her husband's death, is a conclusive adjudication against the validity of Mrs. Zimmerman's present claim. If that decision could be held to be a conclusive adjudication against the plaintiff's claims, based on a prior settlement, and Mrs. Zimmerman were contesting defendant's entry by reason of facts subsequently arising by virtue of which she hoped to cancel the entry and secure an entry for herself, independent of her alleged prior settlement, then defendant would be entitled to possession notwithstanding the second contest. Under such circumstances the latter's prima facie valid entry would prevail as against the former's bare possession, because the former decision would estop Mrs. Zimmerman to assert any prior right to possession, and the court would have no jurisdiction to question the validity of Mrs. McCurdy's existing entry. Such were the conditions existing in the case of Matthews v. O'Brien, 84 Minn. 505, 88 N. W. 12, cited in counsel's brief. Those are not the conditions here. The question as to whether or not the decision in the contest against Frank Zimmerman's entry is a bar against the claims asserted by Mrs. Zimmerman in the present contest is one of the principal questions involved in the latter proceeding. The court has no more jurisdiction to anticipate the decision of the land department on that question than on any other question at issue in the contest. It is, therefore, still an open question, which the court cannot yet decide, whether the plaintiff is the rightful occupant of the land or the defendant has a valid entry and the consequent right of possession. Under such circumstances an injunction is the appropriate remedy to protect the plaintiff's possession against defendant's threatened violence and maintain the statum quo until the rights of the parties shall have been determined.

Inasmuch as the defendant has been permitted to occupy ten acres of the disputed tract, and the plaintiff expressly concedes that such partial occupation is unobjectionable, we shall permit defendant's possession of said ten acres to continue, without deciding whether such possession ought to have been permitted or not.

The judgment appealed from is reversed, and the district court is directed to enter a judgment for plaintiff to the effect that until

the pending contest shall have been finally decided the defendant and all persons acting for or claiming under her be restrained from trespassing upon or interfering with plaintiff's possession of the land in question, except the ten acres described in the temporary injunctional order dated April 4, 1903, and that plaintiff have and recover the taxable costs and disbursements of both courts. All concur.

(106 N. W. 125.)

JAMES C. MARCK v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, A CORPORATION.

Opinion filed January 23, 1906.

Appeal — Brief — Error.

Unless appellant's brief contains an assignment of errors in compliance with rule 14, Supreme Court rules (74 N. W. x.), or the record discloses a cause for relaxation of the rule, the judgment will be affirmed.

Appeal from District Court, Ransom county; *Allen*, J.

Action by James C. Marck against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

T. A. Curtis (*A. H. Bright*, of counsel), for appellant.

Charles S. Ego, for respondent.

MORGAN, C. J. This action was brought to recover damages alleged to have been caused by the negligence of defendant's employes, in consequence of which plaintiff's horse was struck by one of defendant's engines and killed. The jury found a verdict in favor of the plaintiff. A motion for a new trial was made, based on a settled statement of the case, and denied.

There is an entire failure on the part of the appellant to comply with rule 14 of the rules of this court (74 N. W. x). There are no assignments of error in the brief. The rule is further violated by not making proper reference to the pages and folios of the abstract where the evidence is found in support of the statement of facts. This rule, when complied with, is of great assistance to the

court and opposing counsel, and materially facilitates the work of both. An entire absence of compliance with this rule has always been held ground for an affirmance of the judgment, when its violation is not sought to be cured by timely amendment, or the condition of the record is such as to lead the court to relax from a strict enforcement of the same. In this case there was no applicatoin to amend, and the brief contains nothing in the way of assignment of errors. For these reasons we decline to consider the appeal. The cases sustaining such action by the court are many. We cite the following: Henry v. Maher, 6 N. D. 413, 71 N. W. 127; Hostetter v. Brooks Elev. Co., 4 N. D. 357, 61 N. W. 49; O'Brien v. Miller, 4 N. D. 308, 60 N. W. 841; Globe Investment Co. v. Boyum, 3 N. D. 538, 58 N .W. 339; Brynjolfson v. Thingvalla Twp., 8 N. D. 106, 77 N. W. 284; Wilson v. Kartes, 11 N. D. 92, 88 N. W. 1023.

The judgment is affirmed. All concur.

(105 N. W. 1106.)

JOHN SIEBOLT v. THE KONATZ SADDLERY COMPANY.

Opinion filed January 23, 1906.

Claim and Delivery — Liability on Undertaking — Prosecution of the Action.

1. The condition in plaintiff's undertaking on commencing an action in claim and delivery "for the prosecution of the action," etc., as prescribed by section 5334, Rev. Codes 1899, is broken if plaintiff fails to prosecute the action to a final termination on the merits, whether his failure to do so is due to his own fault or to the fault of the justice of the peace before whom the action is pending in entering up a void judgment.

Same — Separate Conditions of Undertaking.

2. The condition of the undertaking for the prosecution of the action may become effective independently of the other conditions of the bond for the return of the property and for the payment of damages.

Same — Evidence — Damages.

3. On a trial of an action for damages on account of the breach of the condition of the undertaking for the prosecution of the action, the value of the property taken on the writ of replevin and not returned is a material issue, and it is error to exclude evidence offered to prove its value.

Same — Breach of Undertaking — Void Judgment in Replevin.

4. The defendant brought an action in justice court to recover the possession of property on which he claimed a chattel mortgage lien, and recovered judgment. Plaintiff appealed to the district court on questions of law only, where judgment was rendered declaring the judgment void on jurisdictional grounds. The defendant did nothing thereafter towards maintaining his right to the property by action. *Held,* that the conditions of the undertaking for the prosecution of the action were broken.

Appeal from District Court, Stutsman county; *Burke,* J.

Action by John Siebolt against the Konatz Saddlery Company and others. Judgment for defendants, and plaintiff appeals.

Reversed.

S. E. Ellsworth, for appellant.

For a failure in one of the conditions of an undertaking in replevin, action will lie thereon, although the others are kept. Wells on Replevin, section 413.

"To prosecute with effect," is to prosecute to a successful issue. Cobbey on Replevin, section 1253; Wells on Replevin, section 415; 24 Am. & Eng. Enc. Law (2d Ed.) 540.

Dismissal of suit for failure of jurisdiction, negligent failure of plaintiff to prosecute with diligence, negligence of the officer holding the writ, resulting in the abandonment, nonsuit of plaintiff, verdict for defendant, are all breaches of the condition of the bond to prosecute with effect. Cobbey on Replevin, 1250-1256; Biddinger et al. v. Pratt, 35 N. E. 795; Little v. Bliss, 39 Pac. 1025; Boom v. St. Paul & Mfg. Co., 22 N. W. 538; McDermott v. Isbell et al., 4 Cal. 113; Cox v. Sargent, 50 Pac. 201; Keenan v. Washington Liquor Co., 69 Pac. 112; Mills et al. v. Gleason et al., 21 Cal. 274; McKey et al. v. Lauflin, 30 Pac. 16; Manning v. Manning, 26 Kan. 101; Hall v. Smith, 10 Iowa, 45; Parrott v. Scott, 12 Pac. 763.

Right to possession can be shown in a suit on the bond in mitigation of damages, 24 Am. & Eng. Enc. Law (2d Ed.) 541; Mills et al. v. Gleason et al., supra.

Oscar J. Seiler and *Spalding & Stambaugh,* for respondents.

Where suit abates by removal of the court, bond not liable. Cobbey on Replevin, section 1259; Kidder v. Merryhew, 32 Mich. 470; Pierce v. Pardee, 1 Thompson & C. 557.

MORGAN, C. J. The plaintiff in this action was the defendant in an action in claim and delivery brought by the Konatz Saddlery Company in justice court. The other defendants were sureties on the undertaking given by the plaintiff in that action. The present defendant, who was plaintiff in the replevin case, recovered a judgment in that court for the possession of the property involved in that suit. The defendant therein appealed to the district court on questions of law alone, and recovered a judgment that the judgment appealed from was void for the reason that the justice adjourned the case at the close of the trial for an indefinite period and finally entered judgment, in the absence of the parties, at a place other than the place where the trial was had, and four and a half miles therefrom. The judgment appealed from was vacated and set aside by the district court, on the ground that the justice lost jurisdiction to enter judgment. The plaintiff brings this action to recover damages in the sum of $250 for a breach of the undertaking; that being alleged to be the value of the property taken which defendant refused to return on demand.

The condition of the undertaking alleged to have been broken by the defendant is: "That said plaintiff shall prosecute said action with effect," etc. The contention is that there was a breach of the condition of the bond which renders the defendants liable for the value of the property taken and not returned. In other words, it is contended that there was no prosecution of the action. The complaint sets forth that the plaintiff was the owner of the property taken, and had the same "in his possession and under his control." It also alleges the fact of the commencement of the action in justice court, and alleges that the defendant claimed the right to the possession of the property involved therein, "claiming and alleging a special property therein." The defendants answered, and deny that the Konatz Saddlery Company did not prosecute the replevin action, and sets forth its right to the possession of that property by virtue of having a chattel mortgage thereon on which payment was past due, and that it has legally foreclosed said mortgage and sold the property at public sale under the power of sale contained in the mortgage.

Two questions arise upon the record: (1) Was the action in justice court prosecuted by the plaintiff so as to exempt it from liability under that condition of the bond? (2) Did the trial court err in excluding evidence of the value of the property taken in jus-

tice court? The statute provides that undertakings in claim and delivery actions shall be given with conditions "for the prosecution of the action, for the return of the property to the defendant, if return thereof is adjudged, and for the payment to him of such sum as may for any cause be recovered against the plaintiff," etc. Section 5334, Rev. Codes 1899. The only breach of the undertaking relied on in this case is that the action was not prosecuted by the defendant within the meaning of the statute. The condition of the undertaking, as given, is not in the language prescribed by the statute. The words "with effect" are not contained in the statute. So far as this case is concerned, that can make no difference. The bond, as given, is within the terms of the statute. Whether the bond be considered according to its terms or according to the statutory requirements, the result will be the same. We conclude that there was a breach of the bond. The defendant failed to prosecute the action. No judgment was rendered determining the issues involved in the action. The mere fact that the justice rendered a judgment was not a prosecution of the action, for the reason that it was finally set aside as void. That left the issues of fact undetermined, and the action was, in law, as though never commenced. The principal issue in that action was whether this defendant held a valid chattel mortgage on the property taken under the replevin writ. That issue is undetermined. The defendant was entitled to a final adjudication of the issues raised by the answer. Until that right was given him, the condition of the bond for the prosecution of the action was not complied with. The commencement of the action and the taking of the property under the writ was not a prosecution of the action.

The prosecution of the action, within the meaning of the statute, is to continue the proceedings to trial and to a determination of the issues by final judgment. The condition of the undertaking is complied with by continuing the proceedings to judgment on the merits, although not in plaintiff's favor. If the action had been prosecuted to judgment on the merits, the condition of the undertaking would be fulfilled, although the defendant had prevailed. If the action be prosecuted to judgment on the merits, and the defendant recover judgment, that judgment should provide for a return of the property to the defendant and for payment of such damages as had been awarded on the trial, and costs. If the action be prosecuted by the plaintiff to a determination of the issues in de-

fendant's favor, the other conditions of the bond become operative, and the condition thereof for the prosecution of the action cannot be resorted to by the defendant. These conditions of the bond are separate and independent, and are not cumulative in any sense. The last two conditions do not become operative until after judgment determining the rights of the parties in respect to the property replevied. The condition as to the prosecution of the action becomes operative before such final judgment, and is broken by any failure or unwarranted delay in carrying the action to final judgment or through any means under which the rights of the parties to the property are not finally adjudicated by judgment. The fact that the judgment was rendered void through the fault of the justice of the peace alone does not exonerate the plaintiff from complying with the condition of the bond. The bond is given to protect the defendant in case the property is wrongfully taken from him and not returned, and to protect him if he be damaged by a failure to prosecute the action. It was not the defendant's fault that brought about the void judgment.

The case cited by respondent, Kidder v. Merryhew, 32 Mich. 470, is not in point. In that case the defendant was absolved from liability for the reason that the property was not shown to have been delivered or detained by him. What is there said concerning the liability of the defendant when occurring through the fault of the justice of the peace was not involved in the case, and therefore unnecessary. There are many authorities that define what is meant by "prosecuting an action," under statutes like our own. In Alderman v. Roesel, 52 S. C. 165, 29 S. E. 386, the court said: "But whatever the explanation of the sheriff's conduct, it was Roesel's duty under his bond to prosecute for the unlawful detention of said property up to the time of said release—to have carried the cause to final effect; and failing in this, he has rendered himself and surety liable for breach of that condition." In Marryott v. Young, 33 N. J. Law, 336, the court said: "But this position overlooks the first stipulation in the condition, which is that the plaintff in certiorari will prosecute the writ in the court above. This is a substantive term, quite independent of those that follow. Nor is this a stipulation which can be satisfied, as was suggested on the argument, by proof that the writ was returned to the court above, for that is but one of the series of acts which go to make up the prosecution of the writ. The meaning of this

branch of the agreement is that the suit or proceeding shall be prosecuted or followed up to a conclusion." See, also, Cobbey on Replevin, 1255, and cases cited. We therefore conclude that the defendant failed to prosecute the action to such a determination as is contemplated by the statute. Merely taking the property and holding it without a determination of the issues of fact is not a compliance with the statute nor with the bond.

The remaining question is easily determined. A competent witness was asked as to the value of the property taken and detained, and, on objection, was not permitted to answer. The value of the property was a material issue under the pleadings. The action was brought for damages arising out of the breach of a condition of the bond, and the damages were alleged to be the value of the property taken. The value of the property was therefore a necessary element of plaintiff's damages. The defendant admitted plaintiff's former ownership of the property, but pleaded that plaintiff's rights had been extinguished by a foreclosure under the power of sale of a valid chattel mortgage on the property held by the defendant. The burden of proving a valid lien and a foreclosure of it rested on the defendant. The plaintiff was entitled to recover, as damages, the value of the property, unless defendant established the defense pleaded. If there was no valid foreclosure but a valid mortgage, the plaintiff would recover the difference between the value of the property and the amount due on plaintiff's lien. Lovejoy v. Bank, 5 N. D. 623, 67 N. W. 956. If there was no valid lien the plaintiff would recover the value of the property as damages. Cobbey on Replevin, section 1352; Shinn on Replevin, section 829; Pearl v. Garlock, 1 Mich. 419, 28 N. W. 155, 1 Am. St. Rep. 603.

The judgment is reversed, and the cause remanded for further proceedings according to law. All concur.

(106 N. W. 564.)

WALTER A. SATTERLEE v. MODERN BROTHERHOOD OF AMERICA, A CORPORATION.

Opinion filed January 25, 1906.

Trial — Directed Verdict — Exception to Ruling.

1. It is not necessary to except to the denial of a motion for a directed verdict in order to preserve the right to move for judgment notwithstanding the verdict.

Appeal — Review.

2. Error in the denial of a motion for judgment notwithstanding the verdict made before judgment and excepted to is reviewable on appeal from the judgment.

Same — Motion for New Trial.

3. A motion for new trial is not a condition precedent to the right to review in such cases.

Insurance — Representations as to Pregnancy — Warranties.

4. An untrue statement by the insured in her application for insurance that she was not then pregnant, which statement was made as a warranty, is a material misrepresentation, which vitiated the policy issued pursuant to the application, even though the misrepresentation was not made with intent to deceive.

Same — False Warranty.

5. Section 4485, Rev. Codes 1899, does not change the effect of a false warranty in a contract of insurance as to a fact material to the risk assumed.

Appeal from District Court, Ransom county; *Allen*, J.

Action by Walter A. Satterlee against the Modern Brotherhood of America. Judgment for plaintiff, and defendant appeals.

Reversed.

Spalding & Stambaugh, for appellant.

The provisions of the certificate and application meet all the requirements of our statute on the subject of warranties. Sections 4505, 4507, 4511, 4512, Rev. Codes 1899.

The burden of proving express warranties, whether affirmative or negative, in a policy of insurance rests upon the assured. Dreier v. Cont. Life Co., 24 Fed. 670; McLoon v. Ins. Co., 100 Mass. 472, 97 Am. Dec. 116; Wood on Ins. 867; Price v. Phoenix Mut. Life Ins. Co., 17 Minn. 497, 10 Am. Rep. 166; Wilson v. Hampden Ins. Co., 4 R. I. 159; Herrorn v. Peoria M. Fire Ins. Co., 28 Ill. 238; Leete v. The Gresham Life Ins. Co., 7 Eng. Law and Eq. 578.

An express warranty is a statement of fact or promise of performance, relating to the subject of insurance or to the risk, inserted in the policy itself or by reference expressly made a part of it, which must be literally true or strictly complied with, or else the

contract is avoided. Rev. Codes 1899, section 5713, par. 28; Richards on Insurance (2d Ed.) p. 62, par. 52; Johnson v. Dakota Fire & Marine Ins. Co., 1 N. D. 167, 45 N. W. 799.

F. S. Thomas and *M. A. Hildreth,* of counsel, for respondent.

Plaintiff was not entitled to a directed verdict, since his motion therefor did not point out specific defects in plaintiff's proof, and overruling it is not error. Kolka v. Jones, 6 N. D. 461, 71 N. W. 558; Hayne on New Trial and Appeal, section 116; Baker v. Joseph, 16 Cal. 173; Tanderup v. Hansen, 66 N. W. 1073.

The direction of a verdict for the plaintiff cannot be made the foundation of error, as it was not excepted to. DeLendrecie v. Peck, 1 N. D. 422, 48 N. W. 342; Dahl v. Stakke et al., 96 N. W, 353.

The appeal being from the judgment only, the only matter before the court is error of law occurring at the trial and excepted to. Weis v. Schoerner et al., 9 N. W. 794; Morris v. Niles, 30 N. W. 353; Barnard & Leas Mfg Co. v. Galloway et al., 58 N. W. 565; Latimer v. Morrain, 43 Wis. 107; Hawkins v. Hubbard, 51 N. W. 774.

Where false and untrue answers in an insurance application are alleged, the burden to prove such answers false is upon the defendant. Piedmont & A. Life Ins. Co. v. Ewing, 92 U. S. 377, 23 L. Ed. 610; Penn. Mut. Life Ins. Co. v. Mechanics Sav. Bank and Trust Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33; Jones v. Brooklyn Life Ins. Co., 61 N. Y. 79; O'Connell v. Knights of Damon, 102 Ga. 143, 66 Am. St. Rep. 159; Chambers v. N. W. Mut. Life Ins. Co., 64 Minn. 495, 67 N. W. 367; Price v. Phoenix Mut. Life Ins. Co., supra.

The effect of statements, representations and warranties in an application for insurance is controlled by statute, to the extent that they are not material or do not defeat or avoid the policy unless made with intent to deceive, or unless the matter misrepresented increased the risk of loss. Rev. Codes 1899, section 4485; White v. Prov. Sav. Life Assn. Society of N. Y., 27 L. R. A. 398; Levie v. Metropolitan Life Ins. Co., 39 N. E. 792; Price v. Standard Life & Acc. Ins. Co., 95 N. W. 1118.

These are matters of defense to be shown by the defendant. Chambers v. N. W. Mut. Life Ins. Co., supra; Hale v. Life Indemnity & Inv. Co., 65 Minn. 548, 68 N. W. 182.

Appellate court will not adopt a theory different from that of the trial court. Noyes v. Bunt, 9 S. D. 603; Barrett v. Fisch, 76 Iowa, 553, 41 N. W. 310; Louisville, N. A. & C. Ry Co. v. Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197.

Where a contract of insurance is open to construction, assured is entitled to the construction most in her favor. 17 Minn. 497; Supreme Lodge Knights v. Edwards, 41 N. E. 850; N. W. Mut. Life Ins. Co. v. Woods, 39 Pac. 189.

Courts do not favor a construction imposing a warranty. Phoenix Mut. Life Ins. Co. v. Raddin, 120 U. S. 183, 30 L .Ed. 644; Mouler v. Amer. Life Ins. Co., 111 U. S. 341, 28 L. Ed. 477; First Nat. Bank v. Hartford Fire Ins. Co., 95 U. S. 673, 24 L. Ed. 563; Grace v. American Cont'l Ins. Co., 109 U. S. 278, 27 L. Ed. 932; Fitch v. Amer. Popular Life Ins. Co., 59 N. Y. 557, 12 Cush. 416.

Applicant's statement of her not being pregnant, if there was nothing to indicate it to her mind, was but an expression of an opinion. Conover v. Phoenix Mut. Life Ins. Co., Fed. Cas. No. 3113; Goucher v. N. W. Traveling Men's Assn., 20 Fed. 598; Conn. Mut. Life Ins. Co. v .Union Trust, 112 U. S. 251, 28 L. Ed. 708; Aetna Ins. Co. v. Simpson, 69 N. W. 125.

Her answers were only "to the best of her knowledge and belief." Clapp v. Mass. Benefit Assn., 146 Mass. 519, 16 N. E. 433; Hann v. Nat. Union, 97 Mich. 413, 56 N. W. 834; Campbell v. N. Eng. Mut. Life Assn., 98 Mass. 381; Fidelity Mut. Life Assn. v. Jeffords, 53 L. R. A. 193.

ENGERUD, J. This is an action on a benefit certificate or policy of insurance issued by the defendant, a fraternal beneficiary association, to Myrtle Satterlee, who, in her lifetime, was the wife of the plaintiff. The insurance was in the sum of $2,000, payable to this plaintiff upon the death of the insured. The contract of insurance consists of the beneficiary certificate or policy, together with the application of the insured for membership in the defendant order, and the articles of incorporation, fundamental laws, by-laws and regulations of the society. The application for insurance contains, among other things, the statements by the insured as to her physical condition made to the medical examiner of the defendant. This medical examination was had on March 12, 1904. The application was accepted, and the beneficiary certificate issued on March 19, 1904. Said Myrtle Satterlee died September, 12, 1904, after giving birth to a child on that day, which child was living at the

time of the trial in May, 1905. The cause of her death was puerperal eclampsia, a disease caused by childbirth. The insured had been married about five years to the plaintiff, and they had always lived together as husband and wife ever since their marriage.

The contract of insurance, among other things, provides that if the application for membership should be found to be untrue in any respect, the certificate or policy should be thereby voided. The application, which is expressly made a part of the policy of insurance, and referred to in the certificate, is signed by the insured, and among other things recites: "I declare that I am, to the best of my knowledge and belief, in sound physical condition, and I further declare and warrant that the above statements, together with the answers made or to be made in the other parts of the application by me to the physician, are true, and shall form the basis of the contract for membership and certificate between me and my beneficiary and all parties who may at any time have an interest therein and said brotherhood, and any untrue or fraudulent answers or suppression of facts in regard to my health, personal habits or physical condition in this application * * * shall immediately make said benefit certificate null and void." Among other questions appearing in the medical examination, which was in a separate document attached to the application, the applicant was asked if she was then pregnant, to which she answered: "No." In connection with that question there was a clause stating that if the applicant was pregnant, a special waiver in that respect must be signed. At the end of the paper containing the questions and answers of the medical examination was the following: "I hereby further declare that I have read and understood all of the above questions put to me by the medical examiner, and answers thereto, and that the same are warranted by me to be true;" and the paper bears the signature of the insured.

The principal defense pleaded is that the defendant was not liable on the policy because the statement by the insured in her application, to the effect that she was not then pregnant, was untrue, and was a breach of a warranty contained in the contract. On a trial before a jury the facts already stated were shown, and the plaintiff testified that at the time the application was made, and until about two months afterwards, none of the usual indications of pregnancy had appeared; and that the child, which was born about twelve hours before the mother's death, was small and weak

when born, but was still living at the time of the trial. No testimony, unless that just stated can be termed such, was introduced to the effect that the child was in any way undeveloped or that it bore any indication of premature birth. The defendant called as a witness a practicing physician, who testified that a child born at the end of six months from conception could not live more than a few hours. This testimony was not disputed, although the physician who attended the mother at the time of her confinement was present at the trial and testified on other points in the case. At the close of all the testimony, both parties moved for directed verdicts. The defendant urged that it was entitled to a directed verdict, for the reason that the undisputed evidence showed that at the time the application for membership was made the applicant was pregnant, and the statements and representations made in the application and certificate were warranties that that condition did not then exist. The plaintiff moved for a directed verdict on the ground that the evidence showed without dispute that the plaintiff's wife did not know that she was pregnant at the time the application for insurance was made. Defendant's motion was not formally denied, but the plaintiff's motion was granted, and a verdict returned accordingly. The fact that no formal denial of defendant's motion was entered was immaterial. Under the circumstances of this case the granting of plaintiff's motion was of itself a denial of defendant's motion, and it was wholly unnecessary to so expressly declare on the record. The defendant did not expressly take any exception to the ruling of the court in directing a verdict. After the directed verdict had been rendered, the defendant applied to the court for judgment in its favor notwithstanding the verdict. This motion was denied, and a formal exception taken. Thereafter a statement of the case was duly settled, specifying as error the denial of defendant's motion for a directed verdict, the granting of plaintiff's motion, and the denial of the motion for judgment notwithstanding the verdict; and the specifications further specifically point out wherein the evidence is claimed to be insufficient to justify the verdict. Judgment was entered pursuant to the verdict on the 18th of May, 1905. Afterwards, on the 19th day of July, 1905, the defendant moved for a new trial on the ground that the evidence was insufficient to justify the verdict, and errors of law. The motion was denied, and thereupon the defendant appealed from the judgment alone. The errors assigned

include the specifications of error embraced in the statement of the case and also the denial of the motion for a new trial. A motion for a new trial in this case was unnecessary because, if the direction of the verdict was erroneous, it was an error of law which can be reviewed upon appeal from the judgment without a motion for a new trial. Sanford v. Elevator Co., 2 N. D. 6, 48 N. W. 434.

One of the errors assigned, and it is the only one we need consider, is that "the court erred in denying the motion of defendant for judgment in its favor notwithstanding the verdict." The respondent's contention that the court's action in overruling appellant's motion for judgment cannot be considered because no formal exception was taken to its request for a directed verdict, cannot be sustained. The right to move for judgment nowithstanding the verdict is given by chapter 63, p. 74, Laws 1901. The making of a motion for a directed verdict is a condition precedent to the right to make a motion for judgment. Johns v. Ruff, 12 N. D. 74, 95 N. W. 440. But this act does not require that an exception be taken. In this case the defendant's motion for a directed verdict was denied. It had the right, therefore, to move for judgment. This was motion made before the judgment from which this appeal is taken was entered, and is therefore properly before us for review. Whether the additional error assigned upon the court's refusal to direct a verdict can or cannot be reviewed because of the absence of a formal exception we need not determine. The case of De Lendrecie v. Peck, 1 N. D. 422, 48 N. W. 342, is not applicable to this case, and this opinion should not be taken to be an implied approval of the holding in that case to the effect that the direction of a verdict is not a "final decision" deemed excepted to within the meaning of section 5463, Rev. Codes 1899. That question is not discussed because not necessary to the disposition of this case. The error assigned upon the court's refusal to order judgment notwithstanding the verdict presents the same question as that presented upon the motion for a directed verdict, and they are decisive of this case. The statement by the applicant that she was not pregnant was contained in an instrument signed by her, and which was referred to in the policy as constituting part of it. It was also a statement of a material fact relating to the person insured and affecting the risk to be assumed by the insurer. It was also expressly declared to be a warranty by the contract of the parties, and must be given effect as

such by the court. Sections 4503-4512, Rev. Codes 1899; Johnson v. Insurance Co., 1 N. D. 167, 45 N. W. 799.

It is unnecessary to decide in this case whether section 4485, Rev. Codes 1899, which was incorporated in our law by the revision of 1895, after Johnson v. Insurance Co. was decided, has modified the rule announced in that case with respect to the effect of the falsity of an apparently immaterial representation which the parties have agreed shall be regarded as a warranty. That section is part of the article dealing with concealments and representations in insurance contracts. It declares: "No oral or written misrepresentations made in the negotiation of a contract or policy of insurance by the insured, or in his behalf, shall be deemed material or defeat or avoid the policy or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increased the risk of loss." If we assume that the language of this provision includes representations which have been made as warranties, the act, nevertheless, leaves untouched the law as it previously existed with respect to the effect of an untrue warranty as to a fact, the existence or nonexistence of which increased the risk of loss. If the matter misrepresented increased the risk of loss, it is still wholly immaterial whether the matter was intentionally or innocently misrepresented. The applicant in this case warranted that she was not pregnant. That this warranty was untrue cannot be seriously questioned. That a state of pregnancy materially increased the risk of loss is obvious. It was a material fact which increased the risk of loss; and the warranty with respect to it was untrue, however innocent the applicant may have been of any intentional misrepresentation. The warranty being false, the contract was vitiated; and it follows that the defendant's motion for a directed verdict ought to have been granted. As there is no ground for supposing that a new trial would disclose any different state of facts, a judgment dismissing the action should be entered notwithstanding the verdict.

The judgment appealed from is reversed, and the district court will enter judgment notwithstanding the verdict, that the plaintiff take nothing and that defendant recover its taxable costs and disbursements. All concur.

(106 N. W. 561.)

CELINA PATNODE v. JOSEPH DESCHENES AND WM. C. LEISTIKOW.

Opinion filed January 27, 1906.

Cancellation of Instrument for Fraud—Evidence Sufficient.

1. Upon a trial de novo of an action to cancel a conveyance, which is in form a warranty deed, upon the ground that the plaintiff's signature thereto was obtained by fraud, it is *held* that the finding of the trial court against the allegations of fraud is sustained by the evidence.

Married Women—Separate Acknowledgement—Knowledge of Contents and Purport of Instrument.

2. It is not essential to a valid acknowledgment by a married woman, under the statutes of this state, that she shall be examined apart from her husband, or that the contents of the instrument which she executes shall be explained to her. Her position is not different from that of a feme sole. She is presumed to know the contents and purport of an instrument which she executes, and cannot contest its validity upon the ground that she executed it without knowing its contents, unless fraud is shown.

Deed as Mortgage—Execution.

3. The finding of the trial court (1) that the deed in question was duly executed and acknowledged by the plaintiff and her husband, and (2) that it was given for security only and is in legal effect a mortgage, is sustained by the evidence; and the judgment of foreclosure awarded to the defendant, the transferee of the note secured thereby, upon his first counterclaim, is approved.

Surety—Release by Extension of Time—Consent.

4. A surety who would absolve himself from liability as such because of an extension granted to his principal, must allege and prove that such extension was given without his consent.

Mortgage—Reward—Actual and Constructive Notice.

5. On April 15, 1895, the plaintiff and her husband executed and delivered a warranty deed to one Deschenes, which was duly recorded. The deed was, in fact, given for security. No instrument of defeasance was executed, acknowledged and recorded. On December 19, 1898, the defendant Leistikow made a real estate loan of $2,000 upon the property to Deschenes. In doing so he relied upon the record title and Deschenes' apparent ownership, and had no actual notice or knowledge that the deed to Deschenes was other than what it purported to be. It is *held*, construing and applying section 4730, Rev. Codes 1899, that the plaintiff's deed, which purports to be an absolute conveyance, cannot, as to this defendant, be defeated or affected by the parol agreement with Deschenes, of which the defendant had

no actual notice, and that the defendant is entitled to a judgment of foreclosure.

Appeal from District Court, Walsh county; *W. J. Kneeshaw*, J.

Action by Celina Patnode against Joseph Deschenes and W. C. Leistikow. Judgment for defendants, and plaintiff appeals.

Modified.

E. R. Sinkler (*C. F. Templeton,* of counsel), for appellant.

Both spouses must sign and acknowledge instrument affecting homestead. Rev. Codes 1899, section 3608.

Statute must be literally complied with. Section 4, chapter 67, laws of 1891; Cumps v .Kuyo, 80 N. W. 937; Dunn v. Tozer, 10 Cal. 167; Lies v. DeDiablar, 12 Cal. 328; Merced Bank v. Rosenthal et al., 31 Pac. 849; Horboch v. Tyrrell, 67 N. W. 485; Havemeyer v. Dahn et al., 67 N. W. 489; Sav. & Loan Ass'n. v. Strine, 78 N. W. 377; Sewell et al. v. Haymaker, 127 U. S. 719, 32 L. Ed. 299, 8 Sup. Ct. Rep. 1348; Warvelle on Vendors, section 518.

Extension invalidates security. Fellows v. Prentiss, 45 Am. Dec. 484; Smith v. Sheldon, 24 Am. Rep. 529; Hunt v. Smith, 31 Am. Dec. 286; The American Button-Hole, Overseaming and Sewing Machine Co. v. Gurnee, 44 Wis. 49; Andrews v. Marrett, 58 Me. 539, 27 Am. & Eng. Enc. Law, 505; Appleton v. Parker, 15 Gray, 173; Elyton v. Hood, 25 So. 745.

Open and visible possession and occupancy of land is notice of occupant's right. O'Toole et al. v. Omlie et al., 8 N. D. 444, 79 N. W. 849; Dickson v. Dows, 92 N. W. 798, 11 N. D. 407; Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 Sup. Ct. Rep. 239; Hodges' Executor v. Amerman, 2 Atl. 257; Springfield Homestead Ass'n. v. Roll, 137 Ill. 205, 27 N. E. 184; Murphy v. Plankinton Bank et al., 83 N. W. 575; Security Loan & Trust Co. v. Willamette Steam Mills, Lumber & Mfg. Co. et al., 34 Pac. 321, 323; New v. Wheaton, 24 Minn. 406; Goff v. State Bank, 52 N. W. 651; Maupin v. Emmons, 47 Mo. 304; Brinkman v. Jones, 44 Wis. 498.

Mortgage of homestead is void, if wife of the mortgagor's grantor failed to acknowledge the deed to him. Wheelock v. Caritt, 91 Texas, 97, 45 S. W. 796, 66 Am. St. Rep. 920; LeMesnager et al. v. Hamilton et ux., 101 Cal. 532, 35 Pac. 1054, 40 Am. St. Rep. 81; Allen v. Lenoir, 53 Miss. 321; Camp v. Carpenter, 52 Mich. 375; Central Bank v. Copeland, 18 Md. 305, 81 Am. Dec. 597.

Leistikow was a mere volunteer, neither surety nor lien-holder, and not entitled to subrogation. Aetna Life Ins. Co. v. Middleport, 124 U. S. 534, 31 L. Ed. 537; Opp v. Ward et al., 125 Ind 241, 24 N. E. 974; Sudduth v. Gullaher, 248 S. W. 880; Desot v. Ross. 95 Mich. 81, 54 N. W. 694; Skinner v. Terrel, 159 Mass. 475, 34 N. E. 692; White et al. v. Cannon et ux., 125 Ill. 412, 17 N. E. 753; Cumberland Building & Loan Ass'n. v. Sparks, 106 Fed. 101; Kline v. Rugland, 14 S. W. 474; Kocher v. Kocher, 39 Atl. 536; Ft. Dodge Building & Loan Ass'n. v. Scott, 53 N. W. 283; Bible v. Wiscarer, 50 S. W. 670; Wormer & Son v. Waterloo Agricultural Works et al., 14 N. W. 331; Bank of Ackley v. Porter et al., 89 N. W. 1094; Fetter on Equity, section 170; Jefferies et al. v. Allen et al., 7 S. E. 828, 831; Rice v. Winters et al., 63 N. W. 830; Meeker v. Larson et al., 90 N. W. 958; Pollock et al. v. Wright et al., 87 N. W. 584; Campbell v. Ass'n., 30 Atl. 222; Gerber v. Upton, 82 N. W. 363; Wadsworth v. Blake, 45 N. W. 1131; Koehler v. Hughes, 148 N. Y. 507, 42 N. E. 1051; Price v. Courtney, 87 Mo. 387; Berry v. Bullock, 33 So. 410; Downer v. Miller, et al., 15 Wis. 612.

He was guilty of negligence in advancing his money without inquiring as to plaintiff's rights. Subrogation is not allowed to such. Peters v. Huff et al., 88 N. W. 179; Ft. Dodge Building & Loan Ass'n. v. Scott, supra; Mather v. Jenswold, 32 N. W. 512; Gray v. Zelmer, 72 Pac. 228.

To entitle one to subrogation he must plead facts showing him entitled to it. Richardson v. Traver, 112 U. S. 423, 28 L. Ed. 804; Satterlund v. Beal, 95 N. W. 518, 12 N. D. 122; Anderson v. Chilson et al., 65 N. W. 435; Moorman v. Wood, 117 Ind. 144; Pollock v. Wright, supra.

Myers & Myers, for respondent.

Constructive or legal notice is an inference of law, or legal conclusion. Bonzalus v. Hoover, 6 Serg. & Y. R. 118; Birdsall et al. v. Russell, 29 N. Y. 220; Bradburg, v. Inhabitants of Falmouth, 18 Me. 65; 12 Enc. Pl. & Pr. 1025, par. 2; Id. volume 18, page 803, par. 3.

A surety claiming discharge by reason of extension without his consent, his is the burden to prove lack of consent. Washington Slate Co. v. Burdick, 62 N. W. 285; Guderian v. Leland, 63 N.

W. 175; Shepherd v. May, 6 Sup. Ct. 119, 2 Brandt Sur., section 377; 27 Enc. Law (2d Ed.) 507; 16 Enc. Pl. & Pr. 934; University of Ill. v. Hayes, 87 N. W. 664; Riley v. Riley et al., 84 N. W. 347.

When a defeasance has not been recorded, possession is not actual notice, and does not protect the possessor against an otherwise innocent purchaser or incumbrancer. Crassen v. Swoveland, 22 Ind. 434; Exon v. Dancke et al., 32 Pac. 1045; Lamb v. Pierce, 113 Mass. 72; Brinkman v. Jones, supra; Tuttle v. Churchman, 74 Ind. 315; Brophy v. B. D. Co., 15 Nev. 113.

Possession is constructive, as distinguished from actual notice. Crassen v. Swoveland, supra; Tuttle v. Churchman, supra; Lamb v. Pierce, supra; Koon v. Kramel et al., 32 N. W. 243; Pomeroy v. Stevenson, 11 Metc. 244; Parker v. Osgood, 3 Allen, 487; Brinkman v. Jones, supra; Dooley v. Walcott, 4 Allen, 406; Sibley v. Leffingwell, 8 Allen, 584; Red River V. Land & Inv. Co. v. Smith, 74 N .W. 194, 7 N. D. 236.

Subrogation is confined to the relation of principal and surety and lienholders forced to take up a paramount claim for his protection. Bank v. Bierstadt, 48 N. E. 161.

This principal has been expounded by later decisions. Heuser v. Sharman, 56 N. W. 526; Emmert v. Thompson et al., 52 N. W. 31.

Under a later authority, one, paying off an incumbrance on realty at the instance of the owner of the property or holder of the incumbrance, either on the express understanding or under circumstances from which such understanding will be implied, that the advance made is to be secured by a first lien on the property, is not a volunteer. 27 Am. & Eng. Enc. Law (2d Ed.) 247, section 5; Wilton v. Mayberry et al., 43 N. W. 901, 6 L. R. A. 61; Carey v. Boyle et al., 11 N. W. 47; Gans v. Thieme, 93 N. Y. 225; Wall v. Mason, 102 Mass. 314; Union Mortgage, Banking & Trust Co. et al. v. Peters & Trezevant et al., 30 L. R. A. 833, 18 So. 497; Emmert v. Thompson, supra; Whiteselle v. Texas Loan Agency, 27 S. W. 309; Park v. Kirbs, 60 S. W. 905; Wyman v. Johnson, 59 S. W. 250; Rachel v. Smith, 101 Fed. 159; Bruschke et al. v. Wright et al., 46 N. E. 818; Amick v. Woodworth et al., 50 N. E. 437; Levy v. Martin, 4 N. W. 35; Arlington State Bank v. Paulson et al., 78 N. W. 303; Crippen et al. v. Chappel et al., 11 Pac. 453; Heuser v. Sharman, supra; Boewink v. Christiaanse et al., 95 N. W. 652; Veeder v. McKinley Lanning Loan & Trust

Co. et al., 86 N. W. 982; Lashua et ux. v. Myhre, 93 N. W. 811; Sproal v. Larson et al., 101 N. W. 213; Baker v. Baker et al., 49 N .W. 1064; Bank of Ipwish v. Brock et al., 83 N. W. 436; Home Inv. Co. v. Clarson et al., 90 N. W. 153.

Under statutes similar to ours, South Dakota has applied the rule. Bank v. Brock, supra; Home Inv. Co. v. Clarson, supra; Baker v. Baker et al., 49 N. W. 1064.

YOUNG, J. The plaintiff brought this action to set aside a conveyance, in form a warranty deed, purporting to have been executed by the plaintiff and her husband on April 15, 1895, and conveying 160 acres of land situated in Walsh county to one Joseph Deschenes; also to set aside a certain mortgage thereon subsequently executed by Deschenes in favor of William C. Leistikow, and securing an indebtedness of $2,000. Paintiff, who, prior to the execution of the deed above mentioned, concededly was the owner of the premises, alleges as grounds for avoiding it that "no consideration was paid for said conveyance," that her signature was obtained by fraud, and that, in consequence, it is void, and that Leistikow took the $2,000 mortgage with notice of plaintiff's rights and that it is also void. Deschenes and Leistikow were both made defendants. Leistikow alone answered. His answer places in issue all facts alleged as grounds for cancellation, and alleges that the conveyance, while in form a deed, was, in fact, given to Deschenes to secure an indebtedness of $1,992.25, which the plaintiff's husband then owned him, the same being evidenced by their joint promissory note; that, on or about April 1, 1901, and since the commencement of this action, said note was duly transferred to him by one R. B. Griffith, Deschenes' trustee in bankruptcy, and is still unpaid; that prior thereto and on December 19, 1898, and without notice or knowledge that the deed from plaintiff to Deschenes was given for security, and in reliance upon the notice imparted by the recording of said deed, i. e., that Deschenes was the fee-simple owner, he loaned to the latter the sum of $2,000, which said sum the said Deschenes secured by a mortgage upon the land in question; that no part of this sum has been paid; that $1,400 of the said sum of $2,000 so loaned to Deschenes was paid by said Leistikow in extinguishment of mortgages which had theretofore been placed upon the premises by the plaintiff and her husband. The answer prays that the deed may be declared to be a mortgage and for a foreclosure of the same; and for the foreclosure of

the $2,000 mortgage. The trial court found that there was no fraud in procuring the deed; that it was given as security and is in legal effect a mortgage; that defendant is entitled to have the property sold to satisfy the debt which it was given to secure. The judgment declares the deed of April 15, 1895, to be a mortgage and awards a foreclosure of the same, but makes no disposition of the issues in reference to the $2,000 mortgage. Plaintiff appeals from the judgment, and demands a review of the entire case.

The plaintiff contends that her signature to the deed to Deschenes, which she seeks to have canceled, was obtained by fraud. She alleges that she cannot read, write, or speak the English language; that Thomas Tharalson, the notary public who presented the instrument to her for execution stated that "he had a paper which he had obtained from Joseph Deschenes (referring to deed), and that said paper had been agreed to between Joseph Deschenes and said Cyril Patnode, plaintiff's husband, and that it was all right for plaintiff to sign same, and that said Cyril Patnode had instructed him to get her signature to said paper;" that the statement that the instrument had been agreed to by Deschenes and her husband and that the latter wished her to sign it, was false; that the instrument was not read to her; that she was not indebted to Deschenes; that she relied upon Tharalson's statement as to the agreement between Deschenes and her husband, and as to the latter's wishes, and would not have signed the instrument but for such statement. The trial court found against the plaintiff upon the allegation of fraud, and an examination of the evidence has satisfied us with the correctness of the finding. The instrument in question, which is in form a warranty deed, bears the signature of the plaintiff, written by herself, and of two witnesses, namely, T. H. Tharalson and Lea Baillargeon. It also bears the signature of her husband, which the evidence shows was affixed in Tharalson's office in Grafton, by making his mark in the presence of several witnesses. The notary's certificate, which is in all respects regular in form, names the 29th day of April, 1895, as the date of the acknowledgment. It is shown that as of the date of the deed, the plaintiff and her husband executed their promissory note for $1,992.35, payable to Deschenes, and the plaintiff's signature on the note was written by herself.

As explanatory of the transaction it may be said that Deschenes was then, and for several years prior thereto had been, a

dealer in general merchandise in the city of Grafton. The plaintiff's family consisted of herself, her husband, and fourteen children. Their home was upon the land in question, which is situated near Grafton. For a number of years prior to this transaction they had purchased almost all of their family and farm supplies from Deschenes, and during that time had been indebted to him in various amounts. In 1891 Patnode's indebtedness was $635. The plaintiff joined her husband in executing a note for that sum, and also executed a mortgage upon the property now in question to secure it. The indebtedness, instead of decreasing, kept increasing, and in April, 1895, it amounted to $1,992.35, and the note above mentioned was given to cover it. Deschenes testified: That Patnode wanted further credit. That he refused to give it unless he was given a deed of the farm, executed by his (Patnode's) wife and himself. "I said, 'you give me a deed of the farm and I will extend you more credit,' I said, 'I don't want your farm.' I said, 'When you pay me I will deed your farm back to you or anybody else when you want me to do it.'" That Patnode assented to this, and that the note for $1,992.35, and the deed in question were executed in pursuance of that arrangement. That he and Patnode went together to Tharalson's office and had the deed drawn. That Patnode signed it there. That Patnode stated that his wife could not come in to sign the deed. That he (Deschenes) then said to Patnode: "I will send Tom tomorrow to get it signed. I said, 'you can tell her that Tom will be there tomorrow.'" Tharalson testified on this point as follows: "Mr. Patnode and Mr. Deschenes came up in the office and told me that they wanted a deed written, and gave me the description, and I drew the deed and Mr. Patnode signed it, and there was some conversation as to whether Mrs. Patnode could come in and sign it; but it was finally decided that I would have to go out there, and I went down to Mr. Patnode's place to get it signed. I think it was the next day." The trial court gave credence to this testimony, and we think rightly so. True, Patnode broadly denies everything, but his denials are not consistent, and are contradicted by the circumstances surrounding the transaction; and his wife's readiness to sign the instrument when informed that it had been arranged between Deschenes and her husband confirms the truth of Deschenes' statement as to what the arrangement was, and that her husband had fully explained it to her. The burden was upon the plaintiff

to establish the fraud alleged as grounds for cancellation; i. e., the falsity of Tharalson's statement that the paper had been agreed upon between Deschenes and her husband, and that the latter wished her to sign it. This she has not done, and must, therefore, fail in her action.

The contention that the conveyance was without consideration is without merit. As above shown, Deschenes agreed to extend further credit to plaintiff's husband. He also extended the time of payment of the then existing indebtedness of $1,992.35 upon a large part of which the plaintiff was personally liable, until October 15th, following, and the plaintiff and her husband executed and delivered to Deschenes their promissory note for that sum in pursuance of that agreement. This constituted a sufficient consideration.

We now turn to the defendant's nrst counterclaim for foreclosure. The trial court held that the deed was in legal effect a mortgage to secure the note for $1,992.35, and entered judgment for its foreclosure. The plaintiff replied to this counterclam by a general denial of all allegations inconsistent with the allegations of the complaint. The question presented is whether the evidence sustains the allegations of the counterclaim. We agree with the trial court that it does. The existence of the debt and its nonpayment is not disputed, and this is true as to the actual signing of the instrument in question by plaintiff and her husband. That it was not obtained by fraud and was given for security only has already been shown. Two objections are urged: (1) That the property in question was a homestead and that the instrument was not acknowledged by the plaintiff; and (2) that in any event plaintiff was merely a surety and that she was released by an extension granted to her husband.

Neither of these contentions can be sustained. It is true that an acknowledgement by both husband and wife of a conveyance of the homestead is essential to its validity. This is required by section 3608, Rev. Codes 1899, which reads as follows: "The homestead of a married person cannot be conveyed or incumbered, unless the instrument by which it is conveyed is executed and acknowledged by both husband and wife." The certificate of acknowledgment attached to this instrument is regular in form. It recites that Celina Patnode and Cyril Patnode, her husband, executed the instrument, were known to the notary, and "that they

severally acknowledged that they executed the same freely and voluntarily." It is a well-settled rule that "where a certificate of acknowledgment is regular on its face, a strong presumption exists in favor of its truth, and the burden of proof rests upon the party assailing it. The proof to overthrow a certificate regular on its face must be so clear, strong and convincing as to exclude every reasonable doubt as to the falsity of the certificate." 1 Cyc. 623, and cases cited; 2 Jones on Conveyancing, section 1196; McCardia v. Billings, 10 N. D. 373, 379, 87 N. W. 1008, 88 Am. St. Rep. 729. The claim that the plaintiff did not, in fact, acknowledge the execution of this instrument, as recited by the notary's certificate, has no support in the evidence. The notary went to her residence for the sole purpose of having her sign it, and because of her inability to understand the English language, obtained an interpreter, one Lea Baillargeon, to explain his mission. It is not clear how fully the instrument was explained to her, but that is not material. She signed it in the presence of the notary and the interpreter, and signed it willingly, and, as we have already seen, her signature was not obtained by fraud. In some states it is made the duty of a notary public in taking the acknowledgment of a married woman to examine her apart from her husband and to explain to her the nature of the instrument. Dewey v. Campan, 4 Mich. 565, and Fisher v. Meister, 24 Mich. 447, relied upon by counsel, were decided under such a statute. Our statute imposes no such duty upon a notary in taking the acknowledgment of a married woman. He is not required to examine her apart from her husband or to explain to her the nature of the instrument. She stands in the same position as a feme sole. She is assumed to know the contents and nature of the instrument signed by her. The rule which applies to the husband applies to the wife. "The grantor is presumed to know the contents and purport of the deed he executes. He cannot contest its validity on the ground that he executed it without knowing its contents, unless fraud is shown." See 2 Jones on Conveyancing, sections 1009 and 1138, and cases cited. In this case, as already stated, fraud has not been shown.

The contention that the plaintiff was released from her obligation by an extension of the time of payment is based upon the fact that on January 2, 1897, her husband executed three notes covering in the aggregate the amount of the indebtedness, and

due in 1897, 1898 and 1899, respectively. It is not necessary to determine whether the giving of these notes did in fact extend the time of payment of the note signed by the plaintiff or whether her relation to the debt was that of surety. There is an entire absence of allegation and proof of facts which in law would operate as a release, even though she were a surety. It is well settled that in order to establish a release "the burden is on the surety to plead and prove that such extension was given without his consent." Washington Slate Co. v. Burdick, 60 Minn. 270, 62 N. W. 285; Gunderlain v. Leland, 61 Minn. 67, 63 N. W. 175; Shepherd v. May, 115 U. S. 505, 6 Sup. Ct. 119, 29 L. Ed. 456; 27 Am. & Eng. Enc. Law (2d Ed.) 507; Brandt on Suretyship, section 337, and cases cited. There is in this case no allegation as to an extension, and if time was extended it does not appear that it was without plaintiff's consent. The judgment of foreclosure was proper.

We now come to the defendant's second counterclaim, in which he sets up the $2,000 mortgage which was executed by Deschenes and wife on December 19, 1898, and prays that it be decreed to be a valid lien upon the premises for the full amount secured thereby or if that be found inequitable, that it be held to be a valid lien to the extent that it represents payment of the prior mortgages placed upon the property by the plaintiff and her husband. The findings of fact fully cover the facts involved upon this issue. The trial court found in substance that when the $2,000 mortgage was executed by Deschenes there were two outstanding mortgages upon the premises executed by the plaintiff and her husband; that said mortgages had been assigned to one J. L. Cashel, and that the mortgages and assignments were of record; that the debts secured thereby were past due and unpaid, and that the said Cashel was pressing for payment; that he applied to the defendant Leistikow for a loan upon the premises "for the avowed and express purpose of taking up and paying said two outstanding mortgages;" that for the purpose of securing such loan Deschenes represented to Leistikow that he was the owner of the land, and that the sum proposed to be borrowed was for the express purpose of paying off the prior incumbrances, and that the $2,000 mortgage would then be a first lien; that said Leistikow examined the record title, and ascertained that Deschenes held the legal title by a complete chain of conveyances, and that it was unencumbered except by the mort-

gages above referred to; that he had "no notice or knowledge, except as the possession thereof by the plaintiff charged him with constructive notice that that plaintiff had or claimed to have any right or interest therein;" that he fully believed Deschenes was in fact the fee-simple owner of said land, and in reliance thereon loaned to him the sum of $2,000, and took the mortgage in question; that from the sum so loaned he paid to the said Cashel the sum of $1,462.35, the amount due on said prior mortgages, and received and placed of record the satisfaction of the same, and paid the remainder of the $2,000 to Deschenes. The trial court also found that when Leistikow received this mortgage, the plaintiff and her husband, with their family, were residing upon the premises; that "Leistikow had no express or actual notice of any kind of such possession, * * * nor did he at that time or for a long time thereafter have any knowledge of the parol agreement for the reconveyance by Deschenes to the plaintiff." As already stated, the record contains no conclusions of law upon this counterclaim, and it is not referred to in the judgment.

Counsel for defendant contend (1) that the Deschenes mortgage is a valid lien for the full amount which it purports to secure, or (2) if that be held inequitable, that the defendant is entitled to be subrogated to the rights of the original mortgagees whose mortgages he paid and discharged of record under the circumstances above set out. The solution of the first proposition, i. e., that the mortgage is valid and enforceable for the full amount, and this is the only question we need consider—turns entirely upon the question as to whether the defendant Leistikow had "actual notice" of the true nature of plaintiff's conveyance to Deschenes. Her conveyance to Deschenes was in form a warranty deed and purported to be an absolute conveyance. It was in fact given for security, and as between the parties and those having "actual notice" was in legal effect a mortgage. No defeasance was executed, acknowledged and recorded. As to purchasers and incumbrancers in good faith and without "actual notice" the deed must be given effect for what it purports to be; that is, an absolute conveyance. This is settled by section 4730, Rev. Codes 1899, which reads as follows: "When a grant of real property purports to be an absolute conveyance, but is intended to be defeasible on the performance of certain conditions, such grant is not defeated or affected as against any person other than the grantee or his heirs

or devisees or persons having actual notice, unless an instrument of defeasance duly executed and acknowledged shall have been recorded in the office of the register of deeds of the county where the property is situated." It is apparent that the plaintiff's deed to Deschenes cannot be defeated or affected as to the defendan , unless he had "actual notice" within the meaning of the above section. That he did not have "actual notice" will be made apparent by an examination of the legislative definition of "actual notice." Section 4730, supra, is a part of the Civil Code. Other sections of the same Code define the meaning of the phrase "actual notice." The legislature has not left it open for judicial definition. It has itself declared the meaning which is to be ascribed to it. Section 5106: "* * * The words hereinafter explained are to be understood as thus explained." Section 5115: "Notice is either actual or constructive." Section 5116: "Actual notice consists of express information of a fact." Section 5117: "Constructive notice is notice imputed by the law to a person not having actual notice." Section 5118: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself."

The most that can be said is that the defendant had constructive notice because of plaintiff's possession. It is not claimed, and cannot be claimed under the evidence in this case, that he had "actual notice;" i. e., "express information of the fact" that the plaintiff's deed to Deschenes was for security. He not only had no knowledge of that fact, but he was also ignorant of the fact that plaintiff was in possession. It does not avail the plaintiff to say that he had constructive notice, for the legislature has taken from her the right to contradict the terms of her deed and say that it is in fact a mortgage, except as to her grantee, his heirs or devisees, and persons having "actual notice." She cannot, therefore, assert as to the defendant who took his mortgage from Deschenes without "actual notice," that her deed to Deschenes was merely a mortgage. What effect as notice a grantor's possession after conveyance would have under the general rule and independent of statute we need not discuss. The views expressed by this court are not in harmony. See Red River Valley Land Co. v. Smith, 7 N. D. 236, 74 N. W. 194, and O'Toole v. Omlie, 8 N. D. 444, 79 N.

W. 849. In both of these cases the governing statute, section 4730, supra, was apparently overlooked both by court and counsel. The statute is unambiguous. Under it one standing in the position of the defendant as an incumbrancer without "actual notice" is given the right to demand that as to him the plaintiff's deed shall not be defeated or affected. It follows that the defendant is entitled to judgment confirming the validity of this mortgage and for the relief prayed for in his answer.

The district court will modify its judgment to conform to the conclusion herein announced, and, as thus modified, the judgment will be affirmed. All concur.

(106 N. W. 573.)

GEORGE W. BUCKINGHAM v. WILLIAM FLUMMERFELT ET AL. AND W. J. EDWARDS.

Opinion filed January 30, 1906.

Appeal — Review — Evidence — Specification of Fact for Review.

1. Where a review on appeal is sought under section 5630, Rev. Codes 1899, it is the duty of the appellate court to dispose of the case finally on the merits, unless it deems a new trial necessary to the accomplishment of justice; and this, whether the case comes up for review on all the evidence, or whether a single question of fact is specified for review.

Same — Review of Facts.

2. Where a single question of fact is specified for review on the evidence under section 5630, Rev. Codes 1899, this court will not review that question unless all other facts material to the determination of the issues appear on the record.

Mechanic's Lien — Architect's Plans — When Plans are Abandoned and Different Ones Adopted.

3. An architect is not entitled to a mechanic's lien for services in preparing plans and specifications for a contemplated building upon the building actually constructed on a different plan after the first plans for which the lien is claimed had been abandoned.

Same — Service.

4. Services rendered in surveying and marking the site for a building, and drawing a contract for construction of the building are not labor for which a mechanic's lien may be claimed.

Appeal from District Court, Cavalier county; *Kneeshaw,* J.

Action by George W. Buckingham against William Flummerfelt and others. Judgment for plaintiff, and defendant W. J. Edwards appeals.

Affirmed.

G. F. Wyvell, for appellant.

Bosard & Bosard, Joseph Cleary and *Gordon & Wheeler,* for respondents.

ENGERUD, J. This is an action to foreclose a mechanic's lien. There were apparently several other liens besides that of the plaintiff, and these respective lienholders were made parties defendant. The appellant is one of these defendant lienholders, and in his answer sets up a mechanic's lien in his favor, and demands that his lien be taken into account and paid out of the proceeds of the sale of the land. A trial was had to the court which resulted in a judgment of foreclosure and directing the proceeds to be distributed amongst the parties interested, as set forth in the decree. The judgment conforms to the findings and conclusions. Defendant was held to have a lien in the sum of $432 and interest, and entitled to share in the proceeds of the sale to that extent. Defendant appealed from the judgment. He does not demand a retrial of all the issues but in the statement specifies the following question as the only one for review: "What is the reasonable value of the services rendered by defendant Edwards in controversy herein?" Only so much of the evidence as is pertinent to that question is embodied in the statement and abstract.

Defendant's lien is claimed for the value of his services as an architect. The claim consists of several items: $220 for preparation of plans and specifications for a proposed building on the land in question, which were abandoned after the excavation for the building had been commenced; $495 for a second set of plans and specifications which were used; $150 for superintending the construction of the building; $5 for drawing a contract between the owners and builders; $10 for making a change in the plans; $20 for making bills of materials and checking same; $25 for surveying and marking the building site and making certain measurements. The claims aggregate $925 and $162.50 had been paid thereon, leaving a balance of $762.50 for which the lien was

claimed. The court found the work of preparing the first set of plans and specifications to be $75. The work of preparing the second set of plans and superintending the construction was held to be worth $495. All the remaining services were valued at the aggregate sum of $25. After crediting the payment there was a balance of $432.50, for which sum the trial court held appellant had a lien. The appellant claims this reduction of his demand was unwarranted by the evidence, and as indicated by the specification of the question for review, insists that all other questions of law and fact should be left undisturbed, but the amount of the lien awarded to him should be corrected. It is apparent at once that the appellant was not rightfully entitled to any lien except for the superintendence of construction, and possibly for the second set of plans and specifications. None of the other items, even by the most liberal construction, could be held to be "labor upon any building or structure." As to whether the second set of plans and specifications would come within that category is open to question, and the authorities thereon are conflicting. While the statute relating to this kind of appeal permits the appellant to specify a single question of fact for review, and declares that "all questions of fact not so specified shall be deemed on appeal to have been properly decided by the trial court" (section 5630, Rev. Codes 1899), the statute does not require this court to ignore errors of law apparent on the record, or to accept the decision of the trial court on questions of law as conclusive. This feature of section 5630, permitting the party, who is dissatisfied with the judgment to obtain a retrial of the case on the merits partly on the evidence and partly on the findings, is capable of being used to the great disadvantage of the party not appealing. Assuming that it is constitutional, and as to that point we express no opinion, it is apparent that one who seeks to avail himself of this anomalous provision must see to it that he is fully within its terms.

When a case has been brought to this court for review under section 5630, it requires this court to retry on the evidence either all the issues of fact or the one or more questions of fact specified for review, and "finally dispose of the same [the case] whenever justice can be done without a new trial, and either affirm or modify the judgment or direct a new judgment to be entered in the district court." A new trial is to be ordered only in those

cases where that relief is deemed "necessary to the accomplishment of justice;" but "failure of the [trial] court to make findings upon all the issues in the case shall not constitute a ground for granting a new trial or reversing the judgment." The object of this statute is clearly to require, whenever possible, a final determination by the Supreme Court of the merits of this class of cases on the facts. We must apply what we deem to be the law to the facts as disclosed by the record; and this, whether we retry all the questions of fact on the evidence or whether we are required to accept the trial court's findings on part of the facts and ascertain the other facts from the evidence. It is manifest that a case cannot be finally disposed of on the merits unless all the facts material to the determination of all the issues therein are in some way brought before the court. When the pleadings and all the evidence are before us we can get the necessary facts from those sources and apply the law. But when, as in this case, only some of the material facts appear in the pleadings and findings; and the fact or facts which we are asked to decide on the evidence do not, when added to the other facts shown by the record embrace all the material facts in the case, it is clear that we cannot perform the duty required of us by the law. In order to properly exercise our appellate jurisdiction in this class of cases we must have a record before us presenting all the material facts. It is only when such a record is presented that we are able to decide what the judgment should be on the facts, or to declare that in our opinion a new trial is necessary to accomplish justice. It is the duty of the appellant who invokes our jurisdiction to see to it that the record is one which affirmatively shows the necessary facts to enable us to exercise our powers.

In this case, the appellant has failed to do so. For reasons hereinafter stated, the findings in this case do not cover all the material issues. A decision in appellant's favor on the single question specified for review would not cure the defect in the findings. The result is that we have not a record sufficient to enable us to perform the duty required of us on a review of this character. The findings do not show, and it is not admitted in the pleadings, that the work of making the plans and specifications and of superintending the construction was performed under a single indivisible contract, as was the case in Friedlander v. Taintor (N. D.) 104 N. W. 527, where we sustained a lien claimed for such

services under those circumstances. It is a debatable question, not yet decided by this court, whether services of an architect in preparing plans and specifications alone, not connected with his services in superintending construction, constitute labor for which a mechanic's lien may be claimed. But assuming that the item is one for which a lien may be had, and that this item and the superintending were worth $645, as appellant claims, the question would arise as to how the payment of $162.50 should be applied. Should it be applied on this lien or on the other items not secured by the lien? Or should it be applied partly on each? The record does not purport to contain all the evidence relating to the circumstances of this payment and the findings do not disclose them. Without those facts we could not decide the question as to the application of this payment. In order to determine the amount of the lien to be awarded it is essential to know how to apply the payment. The appellant, therefore, is not entitled to a review under section 5630.

The appellant assigns no error reviewable without a statement of the case. The lien awarded was for a larger amount than the findings warranted. The error was in appellant's favor and the respondents are not objecting, so there is no ground for a new trial.

The judgment is accordingly affirmed. All concur.

(106 N. W. 403.)

ACME HARVESTER COMPANY v. ROLAND MAGILL.

Opinion filed January 30, 1906.

Satisfaction of Judgment by Mistake Will Be Set Aside on Motion.

1. A satisfaction of a judgment entered through a mistake of fact may ordinarily be set aside on a motion based on affidavits made in the action.

Same — Where Facts are Complicated Court May Order an Action.

2. In cases where the facts are complicated and disputed the court may refuse to decide them on motion and compel the party to resort to an action.

Same — Time for Motion.

3. A motion to set aside a satisfaction in such cases can be made after the lapse of one year from the date of satisfaction, and section 5298, Rev. Codes 1899, is not applicable to such motions.

Justice Court — Execution May Issue Within Ten Years from Entry.

4. Under a judgment of the justice of the peace, a transcript of which is filed in district court, an execution may issue at any time within ten years after the date of the judgment in justice court.

Appeal from District Court, Ransom county; *Frank P. Allen,* J.

Action by the Acme Harvester Company against Roland Magill. Judgment for plaintiff, and defendant appeals.

Affirmed.

Charles S. Ego and *M. A. Hildreth,* of counsel, for appellant.

There is no life in this judgment, and it could not be executed if reinstated. Sections 6723, 5489, Rev. Codes 1899; Phelps v. McCollam, 10 N. D. 536, 88 N. W. 292.

Application to vacate a satisfaction must be made within one year after the judgment is satisfied. Section 5298, Rev. Codes 1899.

The remedy is by action, not motion. 18 Enc. Pl. & Pr. 1057-60-61; 19 Enc. Pl. & Pr. 266; Section 5741, Rev. Codes 1899; State v. Shiveley, 10 Ore. 267; People v. Hall, 80 N. Y. 119; Roman v. Garth, 3 Hun. 214.

Rourke, Kvello & Adams, for respondents.

A court of law can vacate a satisfaction, reverse an erroneous entry and make a correct one, and resort to equity is unnecessary. 19 Enc. Pl. & Pr. 139; Martin v. State Bank, 20 Ark. 636; Turnan v. Tenke, 84 Ill. 286; Farmer et al v. Sasseen et al., 63 Ia. 110, 18 N. W. 714; Waters v. Eagle, 53 Md. 179; Harrison v. Maxwell, 44 N. J. L. 316; Wilson v. Stillwell, 14 Ohio Stat. 464; Kinney v. Fritz, 2 Pa. 173; McNeil v. Hunt, 6 Kan. 760.

Such power exists by virtue of its control over its records and is inherent in all courts of general jurisdiction. 19 Enc. Pl. & Pr. 139; Ackerman v. Ackerman, 44 N. J. L. 173; Tudor v. Taylor, 46 Vt. 444.

The usual remedy is by motion in the original action to cancel this entry or return of satisfaction and direct an execution for the portion of the judgment unpaid. 19 Enc. Pl. & Pr. 142; Aicardi v. Robbins, 41 Ala. 541; Mutin v. State Bank, 20 Ark. 636; Cramer v. Tittel et al., 79 Cal. 332, 21 Pac. 750; Farmer v. Sasseen, supra; Seymour v. Haines, 104 Ill. 557; Bogle v. Bloom, 36 Kan. 512, 13 Pac. 793; Potter v. Hunt et al., 68 Mich. 242, 36 N. W. 58; Cohen v. Camp, 46 Mo. 179; Phillips v. Kuhn et al., 35 Neb. 187, 52

N. W. 881; Faughnan v. Elizabeth, 58 N. J. L. 309; Wallace et al. v. Berdell et al., 105 N. Y. 7, 11 N. E. 274; Snead v. Rhodes, 2 Dev. & B. L. 386; Wilson v. Stilwell, 14 Ohio St. 464; Miller v. Preston, 154 Pa. St. 63; Townsend v. Smith, 20 Tex. 465; Voell v. Kelly, 64 Wis. 504, 25 N. W. 536.

Only where damage, or equitable relief, which cannot be had on motion, is sought, is an action necessary. Cramer v. Tittel et al., supra; McNeil v. Hunt, 6 Kan. App. 670; Jenkins v. Morriweather, 109 Ill. 647; Chapman et al v. Blakeman, 31 Kan. 684, 3 Pac. 277.

The judgment was not barred by lapse of time. Section 5498 Rev. Codes 1899; Phelps v. McCullam, supra; Williams v. Rice, 60 N. W. 153; Mahony v. Neff, 24 N. E. 152; Rand et al v. Garner et al., 39 N. W. 515; Carpenter v. King, 42 Mo. 19.

MORGAN, C. J. This is an appeal from an order setting aside a satisfaction of a judgment and granting leave to issue an execution thereon. The facts are as follows: On the 20th day of June, 1898, the plaintiff obtained a judgment against the defendant in justice court for the sum of $201.41, damages and costs. On October 8, 1898, a transcript of said judgment was filed in the office of the clerk of the district court and the judgment duly docketed therein. Thereafter an execution was duly issued on said judgment and levied upon property which was thereafter sold for the sum of $361, and the execution was returned fully satisfied by entries on the docket on January 18, 1900. Thereafter, on or about the latter date, the minor children of the defendant, through him as their guardian, brought an action against the sheriff for damages to them for having sold their property under the execution in this action, and they recovered judgment against the sheriff for the sum of $242. This plaintiff paid that judgment in full. On December 9, 1904, the plaintiff made a motion to set aside the satisfaction on the ground stated and the motion was granted. Through a misunderstanding there was no appearance at the hearing of this motion. Later the defendant moved to set aside the order setting aside said satisfaction, and the motion was heard before the present judge of the district court of Ransom county; and on stipulation of the attorneys the motion was heard on the merits and an order was again entered setting aside the satisfaction and permitting the judgment to stand so far as the same was un-

satisfied, and granting leave to issue execution thereon. Defendant appeals from this order.

These are the grounds urged against the validity of said order: (1) That a motion to set aside the execution is not the proper remedy, as plaintiff should have proceeded by action. (2) That more than five years have elapsed since the rendition of said judgment in justice court, and no rights exist to issue an execution thereon. (3) That more than one year having elapsed since the judgment was satisfied, no authority exists to have the same set aside.

The first objection is not tenable. Courts have inherent power in such cases over their own judgments and records. In this case the facts were undisputed; hence, the objection that disputed questions of fact should not be determined on affidavits does not arise in the case. The rule is general that, unless exceptional circumstances exist, the court will grant such relief on motion. If damages are claimed, or equitable relief is asked, which cannot be had on motion, or disputed questions of fact on material issues arise, the court may compel the parties to resort to an action, or hear the motion upon oral evidence as in trial of actions. 19 Enc. Pl. & Pr. p. 142, and cases cited; 2 Black on Judgments, section 1016; Chapman v. Blakeman, 31 Kan. 684, 3 Pac. 277.

The next contention is that the right to issue execution on the judgment has become barred by the lapse of more than five years since the judgment was entered in the justice court. The contention is that the filing of the transcript in district court does not extend the time during which an execution may issue on the judgment. After mature consideration, this court has recently held that this contention cannot be sustained. In that case it was held that an execution may issue on the judgment during the life of the judgment; that is, ten years from the time of its entry in justice court. Holton v. Schmarback (N. D.) 106 N. W. 36.

It is next contended that the order should be reversed for the reason that more than one year has elapsed since the satisfaction of the judgment was entered of record. Respondent relies upon section 5298, Rev. Codes 1899, to sustain this contention. That section governs the right to be relieved from a "judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect." It is clear that entering a satisfaction does not constitute a proceeding within the meaning of that section. This section relates to opening up defaults

taken by the opposite party through the judicial acts of the court or judge. We find no case where a limitation of one year or other fixed time has been placed upon the right to vacate a satisfaction of a judgment; and from the reading of the section we conclude that it does not apply to satisfactions. The right to vacate satisfactions is based upon the inherent rights of courts to correct its records to conform to the facts. In this case the judgment was satisfied on the erroneous conclusion that the judgment was paid in full. Subsequently it was adjudged in another action that the property sold, from the proceeds of which the judgment was satisfied, did not belong to the defendant. From that fact it followed that plaintiff's judgment was only partially satisfied. The plaintiff was therefore entitled to have its judgment reinstated to the extent that it was unpaid. To permit it to stand wholly satisfied would be an injustice and to correct such injustice it was equitable and just to reinstate the judgment by setting aside the satisfaction. Magwire v. Marks, 28 Mo. 193, 75 Am. Dec. 121. This was done under the general powers of the court and was granting no relief under said section 5298, Rev. Codes 1899.

The order is affirmed. All concur.

(106 N. W. 563.)

CORA L. CALMER v. HENRY L. CALMER, ET AL.

Opinion filed January 30, 1906.

Homestead — Exemption — Definition of Same.

1. Section 3605, Rev. Codes 1899, is not to be construed as a definition of the term "homestead," but as a definition and limitation of the homestead exemption.

Same — Rights of Widow and Children.

2. The surviving widow or minor children are entitled to a homestead estate to the extent prescribed by the statute in the property owned and occupied by the decedent at the time of his death as a family home, although the homestead exceeds in value the statutory limits of the homestead exemption.

Same — Surviving Husband or Wife and Children May Hold Title, Although Value Exceeds Statutory Limit.

3. Where the homestead is indivisible without material injury the surviving husband or wife or minor children, as the case may be, are entitled as against the heirs or devisees, to hold the entire premises as a homestead estate, even though the property exceeds $5,000 in value.

Same — Excess Applied to Debts After Other Assets Are Exhausted.

4. To the extent that such indivisible homestead exceeds $5,000 in value it may be subjected to the payment of the debts of the deceased, but not until all other available assets of the estate are exhausted.

Same — Value — Deduction of Liens.

5. In determining the value of the homestead for the purpose of ascertaining and selecting therefrom the homestead exemption or estate, the amount of existing mortgages or liens thereon cannot be deducted from the value of the property.

Same — Decree Assigning Homestead Must Show the Excess Value.

6. When a homestead estate is decreed by the county court in a homestead which exceeds $5,000 in value, and is indivisible, the decree should show the amount of the excess in value and the fact that the property is indivisible.

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

Action by Cora L. Calmer against Henry E. Calmer, and others. Judgment for plaintiff and defendants appeal.

Modified.

Lewis T. Hamilton and Newman, Holt & Frame, for appellant.

Homestead must possess all the requirements prescribed by the Code. Cosebolt v. Donaldson, 67 Mo. 308; Helfenstein v. Cave, 3 Iowa, 290; Zoellner v. Zoellner, 19 N. W. 556; Beecher v. Baldy, 7 Mich. 500.

Value is one of the requirements. Beecher v. Baldy, supra.

The value is of the fee, not the owner's equity therein. Yates v. McKibbin et al., 23 N. W. 752; In re Noah, 15 Pac. 290; Brown v. Starr et al., 21 Pac. 973; Franks v. Lucas, 77 Ky. 395; Arnolds v. Jones, 77 Tenn. 545; Kinkaid v. Burem, 77 Tenn. 553; Herdman v. Cooper, 29 Ill. App. 589; Miles v. Hall, 75 Ky. 105; Morris v. Moulton, 34 N. H. 392; McCanna v. Anderson, 6 N. D. 487.

If the value exceeds the limit fixed by statute there is no homestead. Zoellner v. Zoellner, supra; Beecher v. Baldy, supra; Estate of Delaney, 37 Cal. 176; Farley v. Whitehead, 63 Ala. 295; Pazello v. Campbell, 46 Ala. 40; Miller v. Andrews, 45 Ala. 454; Miller v. Marx, 55 Ala. 322; Garner v. Bond, 61 Ala. 84; Wardell v. Wardell, 99 N. W. 674.

Homestead cannot be sold and the value of the exemption paid to the widow, and balance applied to debts. Noah's estate, 15 Pac 290; Helfenstein v. Cave, 3 Iowa, 287; Zoellner v. Zoellner, supra; Casebolt v Donaldson, 67 Mo. 308; Wright v. Westheimer, 28

Pac. 430; In re Isaacs, 30 Cal. 106; Schuyler v. Broughton, 76 Cal. 524.

T. H. McEnroe, for respondent.

The exemption is not determined from the value of the fee simple title, but of the claimant's interest in the premises. Sanford v. Anderson et al., 92 N. W. 152; Rawles v. Reichenbach et al., 90 N. W. 943; Joslin et al. v. Williams, 93 N. W. 701.

Homestead may be claimed in land held under equitable as well as legal title. 15 Am. & Eng. Enc. Law (2d Ed.) 607, 608.

Value and extent are not considered in determining what is the homestead. 15 Am. & Eng. Enc. Law (2d Ed.) 602, 603; Gregg v. Bostwick, 91 Am. Dec. 637, 644.

County court may set aside a homestead, whether its value exceeds $5,000 or not. McElroy v. Bixby, 84 Am. Dec. 684; Wardell v. Wardell, supra; Burns et al. v. Keas et al., 21 Iowa, 257.

ENGERUD, J. This is an appeal from a judgment of the district court affirming a decree of the county court setting apart to the respondent her homestead and personal property exemptions out of the estate of Charles J. Calmer, deceased. The appellants are the two sons of said deceased. The respondent is the widow.

The facts are undisputel. Charles J. Calmer died intestate April 9, 1904, leaving surviving him a widow and three children; two sons and a daughter. The two sons are now over 21 years of age, the younger having attained his majority in December, 1905, after this appeal was heard. The daughter is about three years old. The deceased died seised in fee of the real property in question. He had owned it, and occupied it as a family residence for several years, and he and his family were residing thereon at the time of his death. The property consisted of a lot in the city of Fargo less than two acres in area, upon which there was a two-story brick building; the upper of story of which was used as the family dwelling, and the lower as a store. The building was mainly used as a family residence; its use in part as a place of business was only incidental. The property is worth $7,000, is mortgaged for about $2,800, and cannot be divided without material injury. The appellants assert that under these circumstances the widow has no homestead estate in the premises. The respondent contends that the entire premises are unconditionally exempt to her as a homestead, because, for the purpose of determining the value of the

property claimed as a homestead the amount of existing incumbrances thereon should be deducted from the value of the land and buildings thereon.

We shall take up appellant's proposition first, as that presents the question whether the respondent has a homestead right in the premises in question. The state Constitution directs that (section 208): "The right of the debtor to enjoy the comforts and necessaries of life shall be recognized by wholesome laws, exempting from forced sale to all heads of families a homestead, the value of which shall be limited and defined by law, and a reasonable amount of personal property; the kind and value shall be fixed by law. This section shall not be construed to prevent liens against the homestead for labor done and materials furished in the improvement thereof, in such manner as may be prescribed by law." Previous to 1891, the homestead was limited as to area but not as to value. Comp. Laws 1887, section 2449, et seq. The present law with relation to the exemption and descent of the homestead is found in chapter 39 of the Civil Code. Sections 3605-3638, Revised Codes, 1899. Section 3605, Rev. Codes 1899, provides: "The homestead of every head of a family residing in this state, not exceeding in value five thousand dollars, and if within a town plat, not exceeding two acres in extent, and if not within a town plat, not exceeding in the aggregate more than one hundred and sixty acres, and consisting of a dwelling house in which the homestead claimant resides, and all its appurtenances and the land on which the same is situated shall be exempt from judgment lien and from execution or forced sale except as provided in this chapter." Subsequent sections (3610-3618) prescribe the method of determining the value of the homestead and the procedure by an execution creditor who has levied thereon and desires to reach the nonexempt part of the property, in case "the value of the homestead exceeds the amount of the homestead exemption." Section 3611, Rev. Codes 1899. These sections, among other things, in substance provide that if the value of the property claimed as a homestead exceeds $5,000, and cannot be divided without material injury, the whole shall be offered for sale, and if it can be sold for more than $5,000, then that said sum shall be paid to the homestead claimant, and the remainder of the proceeds of the sale may be applied on the execution. Sections 3626-3631 relate to the disposition of the homestead after the owner's death. Upon the

death of a person holding the title to real property constituting a homestead "a homestead estate in such property" shall survive, descend, and be distributed to the surviving husband or wife for life; and if he or she dies before the youngest minor child attains its majority the same estate continues for the benefit of the children during its or their minority. If there is no surviving husband or wife, the homestead estate vests at once in the minor child or children until the youngest child attains its majority. Section 3627 defines the term "homestead estate" to mean "the right to the possession, use, control, income and rents of the real property held or occupied by the decedent as a homestead at death." The county court is required to ascertain and award the homestead estate to the persons entitled thereto after the owner's death. Section 3628 provides: "If a homestead in such real property had been ascertained and set off to such decedent before death as provided in this chapter the homestead estate provided for in section 3626 shall be commensurate therewith and must not be again ascertained; but if such homestead had not been so ascertained and set off, the county court must ascertain in the manner provided in the Probate Code and set off and decree the homestead estate to the surviving husband or wife, or minor child or children, as the case may be; provided, however, that the real property which is subjected to the homestead estate by the county court and in which such estate is ascertained and set off by such court must not exceed in value or area the value or area prescribed in section 3605." Section 3629 prescribes the form and contents of the decree of the county court setting off the homestead estate. Section 3630 provides, in substance, that the "real property subjected to the homestead estate" shall, "subject to the satisfaction of such estate," descend to the heirs or devisees exempt from the decedent's debts, except those enumerated in section 3607. If there are no heirs in the direct descending line then the property is subject to the claims of general creditors after the satisfaction of the homestead estate. The procedure for ascertaining and setting off the homestead estate in county court is further described in article 3, c. 6, of the Probate Code. Rev. Codes 1899, section 6389, et seq.

In cases where the homestead property can be divided without material injury, and exceeds the amount exempted in area or value, the exempt part is set off by metes and bounds in substantially the same manner as that prescribed in case of an execution

levy in the lifetime of the decedent. Section 6390. If, however, the property cannot be divided without material injury, the appraisers are required to report that fact to the court, and thereupon the court proceeds as provided in section 6392, which will be hereinafter referred to. It is apparent from the foregoing statutory provisions that a "homestead estate" can attach only to such property as constituted the decedent's homestead at the time of his death. If the deceased had no homestead, there is nothing in which to decree a homestead estate for his widow. Appellant asserts that Charles J. Calmer, in his lifetime, had no homestead, because the real property occupied as a home by him and his family did not possess all the requirements perscribed by the statute to constitute a homestead. Counsel insists that section 3605 is a definition of the word "homestead," and that the limitation as to value and area fixed in that section are descriptive features of the thing which is termed a homestead. Hence, he argues that the property in question was not a homestead, because, with respect to value, it does not come within the statutory definition. This argument is unsound for two very plain reasons: First, such a construction of section 3605 would cause it to be in conflict with section 208 of the Constitution; second, that interpretation would render the section inconsistent with subsequent sections of the chapter of which it forms a part, and would defeat the legislative intent. Section 208 of the Constitution was designed to "guaranty to every resident head of a family in this state an exemption of a homestead." Roesler v. Taylor, 3 N. D. 546, 548, 58 N. W. 342. The legislature is required to limit the value of this homestead exemption.

It is plain that the homestead referred to in the Constitution means the real property in or upon which the home is located, and which is devoted to a use appropriate and usual to a home place. It may be a small lot and building in town or a section or more of farm land with its buildings and it includes a palace as well as a hovel. Gregg v. Bostwick, 33 Cal. 220, 91 Am. Dec. 637; Ferguson v. Kumler, 27 Minn. 156, 6 N. W. 618. The Constitution guarantees to every head of a family a homestead exemption, but requires the legislature to limit the amount of this exemption as to value. It is self-evident that the legislature cannot change the meaning of the constitutional guaranty, neither can it deprive the head of a family of the right to a homestead

exemption, yet this is what we would convict the legislature of attempting to do if we were to adopt appellant's construction of section 3605. According to this construction there is no homestead out of which the head of a family could demand the exemption guaranteed to him by the Constitution, unless the property constituting the home place did not exceed in area or value the limitations fixed by the statute. Such was not the intention of the legislature. Chapter 39 of the Civil Code, which deals with the homestead right, is merely a revision of chapter 67, page 185. Laws 1891. The law of 1891 was a revision or amendment of the law relating to homesteads found in chapter 23 of the Territorial Political Code. Comp. Laws 1887, section 2449 et seq. The territorial law limited the area of the homestead exemption, but not its value. The revision and amendment of 1891 was therefore necessary, and evidently the main reason for that enactment was to comply with the constitutional mandate to fix a limit of value on the homestead exemption. Section 3605 must therefore be construed, not as an attempt to define the meaning of the word homestead, but as an act recognizing the right to a homestead exemption and fixing the amount in area and value of the homestead property which could be held exempt. That such is the meaning of the section is very clear from those subsequent sections of the same act which prescribe the procedure to be followed in order to ascertain and set off to the debtor's family the homestead exemption, or its equivalent in case the homestead property exceeds the statutory limits in value or area. Even when the property, as in this case, is incapable of division, and the exemption cannot be carved out of the property itself, the statute provides in case of an execution that the cash value of the exemption shall be paid to the debtor. We hold, therefore, that this property constituted the homestead of the deceased.

Appellant, however, further contends that even though the property was subject to the exemption right in the lifetime of the deceased, yet no homestead estate can be awarded therein to the surviving family under the circumstances of this case. This argument proceeds on the theory that the homestead estate is a creature of the statute, and unless the statute has provided the means and procedure for ascertaining and awarding it, the rights thereto does not exist. In other words, reversing the maxim, counsel insists that where there is no remedy there is no right.

The fallacy of the argument lies in the assumption that a statutory right can only be enforced by a statutory remedy. There are many instances where either the nature of the right or the language of the statute giving the right or the remedy are such that the right does not exist where the statutory remedy is not available. This, however, is not such a case. The homestead exemption is primarily for the benefit of the householder's family. The intent of the law to continue the exemption for the benefit of the surviving family after the death of the owner of the homestead is too clear for question. Fore v. Fore, 2 N. D. 261, 50 N. W. 712. The exemption right is not only continued after the death of the family head, but is enlarged so as to possess all the attributes of an estate in the property for the benefit of the widow or minor children superior, not only to the rights of the creditors, but also to the rights of the legal heirs or devisees. The legislature, it is true, has not provided any specific method of procedure by which to adjust the respective rights of the widow, and the creditors of the decedent's estate in case such adjustment becomes necessary. Where the right is clear, however, it will not fail for want of a remedy. If the legislature has failed to provide a remedy the courts will invent one. Wardell v. Wardell (Neb.) 99 N. W. 674. Even if there were no way in which to preserve the homestead estate to the family in case creditors should become entitled to resort thereto, that fact would be of no avail to these appellants in the present proceeding for reasons hereinafter stated. The respondent clearly has a homestead estate in the property, and the court must determine the extent of the right. The respondent has a homestead estate to the extent of $5,000 in value in this property, and the excess is subject to the demands of creditors if the general assets of the estate are insufficient to satisfy their claims. Section 6392, Rev. Codes of 1899. This brings us to the consideration of the respondent's proposition.

As to area, the property is within the prescribed limit and the question is, whether it exceeds the limit as to value. The respondent contends, and the county and district courts held, that in determining the value for the purpose of ascertaining the extent of the exemption right the amount of the incumbrances should be deducted from the value of the land with the buildings and improvements thereon. Acting on this theory the entire premises were unconditionally set off to the respondent as her

homestead, because, after deducting the amount of existing incumbrances, the value of the homestead was less than $5,000. That view has the support of the Supreme Court of Nebraska. Hoy v. Anderson, 39 Neb. 386, 58 N. W. 125, 42 Am. St. Rep. 591, and subsequent cases in that state. We think that view is erroneous. A mortgage or other lien upon the property does not diminish the value either of the property itself or of the homestead claimant's estate therein. The occupant's estate in the property is not diminished by a lien or mortgage. His estate remains as before, and the mortgage or lien merely gives the creditor so secured a right to collect the debt out of the debtor's estate in the land if the debt is not otherwise discharged. If the deceased was personally liable for the debt secured on the homestead, the creditor has the right to demand payment out of the general assets. The heirs, having an interest in the mortgaged property subject to the homestead estate have the right, and might find it necessary, to pay the mortgage in order to prevent the extinguishment of their rights by a foreclosure. If either event should happen in a case where the property could be divided without material injury, the result would be that, notwithstanding the divisibility of the property, the whole of it would be exempt regardless of value. The language of the statute does not permit such a construction. The statute exempts the land not exceeding a specified area and value, if it constitutes a homestead. In a controversy as to the value between the homestead claimant and an execution creditor, the appraisers are directed (section 3613) "to view the premises and appraise the value thereof."

Again, in section 3628, in prescribing how the homestead estate shall be ascertained in the county court after the owner's death, this proviso appears: "Provided, however, that the real property, which is subjected to the homestead estate by the county court, and in which such estate is ascertained and set off by such court, must not exceed in value and area the value and area prescribed in section 3605." Here is a specific direction that the value of the property itself is the measure of the extent of the exemption. Even if the term "property" could be construed to mean the claimant's estate in the property, and as to that we express no opinion, there is no warrant for deducting the amount of incumbrances from such value. As before stated, the incumbrances do not diminish the owner's estate. We think the weight

of authority is against the views expressed by the Nebraska courts. Brown v. Starr (Cal.) 21 Pac. 973, 12 Am. St. Rep. 180; Estate of Herbert, 122 Cal. 329, 54 Pac. 1109; Yates v. McKibbin (Iowa) 23 N. W. 752; Arnold v. Jones, 77 Tenn. 545; Norris v. Moulton, 34 N. H. 392. As the property exceeds $5,000 in value and is incapable of division without material injury, its disposition must be governed by that part of section 6392, Rev. Codes 1899, which provides as follows: "If the court finds that the homestead exceeds in value the sum of five thousand dollars and further finds that the property cannot be divided without material injury, the order setting it apart must determine the amount of such excess and the property may thereafter be subjected to the payment of debts in the same manner as other property to the extent of the excess so determined after all the other available property has been exhausted." If the creditors of the estate can be satisfied out of the other assets the homestead is not to be disturbed even though it exceeds the limited value. In other words, the rights of the widow and the minor children to the family homestead are very properly recognized as superior to those of the heirs. If the homestead cannot be divided without material injury the family home must be preserved intact as against the heirs, whose right to inheritance is inferior in degree, and should be postponed to the right of the decedent's family to their home, even though the homestead exceeds five thousand dollars in value. Creditors alone can demand that the homestead in such a case be subjected to their claims to the extent that it exceeds the statutory limit of value. Even creditors cannot resort to the homestead until all other available assets are exhausted.

In this case the creditors, if there are any besides the mortgagee, are making no claim, and in view of the amount of the mortgage on the homestead it is not likely that there will be any occasion for such a demand. It is clear that these appellants have no cause for complaint even though the judgment appealed from is technically erroneous. The judgment and decree should be modified so as to show, as required by section 6392, that the homestead assigned to the respondent exceeds the statutory limit to the extent of $2,000, and that the homestead cannot be divided without material injury.

As thus modified the judgment is affirmed. All concur.

(106 N. W. 684.)

N. B.—See note on homestead to Helgebye v. Dammen, 13 N D. 176.

AULTMAN, MILLER CO. v. ANDY JONES.

Opinion filed February 1, 1906.

Appeal — Court Will Not Review the Excusing of a Juror Unless the Examination Is Preserved.

1. Under the rule that a party urging error must present a record of the facts upon which the error is predicated, this court will not review the trial court's action in excusing a juror when the record contains merely the exception, and wholly omits the examination and challenge.

Same — Error Without Prejudice.

2. Error without prejudice in the order of eliciting evidence is not ground for reversal.

Same — Incompetent Evidence to Prove Admitted Facts.

3. The admission of incompetent evidence which tends merely to prove facts that are expressly admitted in the pleadings, is not prejudicial, and is not, therefore, reversible error.

Appeal from District Court, Pierce county; *Cowan*, J

Action by Aultman, Miller & Co. against Andy Jones. Judgment for plaintiff, and defendant appeals.

Affirmed.

Burke & Middaugh and *A. E. Coger*, for appellant.

Guy L. Whittemore, H. Steenerson and Charles Loring, for respondent.

YOUNG, J. The plaintiff brought this action to recover the sum of $806.60, which sum the plaintiff alleges the defendant collected from certain notes left with him by it for collection and failed to account for. The answer admits the receipt of the notes, but alleges that all moneys collected were paid to the plaintiff and that all notes remaining unpaid were returned. The jury returned a verdict for plaintiff for the amount claimed. This appeal is from the judgment.

All of the three alleged errors which are urged as grounds for reversal are without substantial merit. The first assignment is that "the court erred in excusing Juror Haugen." The abstract does not present a record upon which this assignment can be reviewed. It merely presents the defendant's exception, and does not contain the examination of the juror or the challenge which was interposed. Under the rule that an appellant, to secure a

review of an alleged error, must present a record of the facts upon which the error is predicated, the assignment is not reviewable. The defendant was called by the plaintiff as an adverse witness. In the course of his examination, after denying that a certain letter to the plaintiff (Exhibit 3), which purported to bear his signature, was not in fact signed by him, he was asked this question: "Q. Look at Exhibit 3. If that is not your signature, who wrote that signature? It's your name?" Defendant's counsel objected to the question "as calling for a conclusion of the witness, no foundation laid for it." The objection was overruled and exception taken. The witness answered: "That is a man named McIlvain." This ruling is assigned as error. The assignment has no merit. The objection goes to the formal order in which the testimony was elicited. The question assumed that the defendant knew who wrote the signature. Properly he should have first been asked if he knew who wrote it. His answer, however, stating positively who wrote it, cured this impropriety in the question and the error was without prejudice.

It is urged, finally, that certain incompetent evidence was admitted to show that the defendant did not turn over to the plaintiff the moneys collected by him and return the uncollected notes. This contention is not sustained by the record. R. H. Wright, a witness for plaintiff, after testifying that he was the treasurer of the plaintiff company during all of the time here in question, and had charge of all of the financial part of its business and the keeping of all book accounts with its agents and the collection of all bills receivable, testified that "nothing had been received by the plaintiff either in the shape of the return of the notes, renewal notes, or the cash, and the full amount of the notes is still there." J. D. Palmer, who was employed in the collection department and charged with the duty of superintending collections and overseeing this work, testified to the same effect.

The chief argument of counsel under this assignment is directed against the admission in evidence of a copy of plaintiff's ledger account with Jones in connection with the testimony of the witness Wright, which was taken by deposition. This witness, among other things, testified as follows: "The collection account of Andy Jones in the original books of entry of Aultman, Miller & Co. is in Ledger G3, folio 372, which is before me, and I herewith produce an exact copy of that account as nearly as it can be made, which

copy I have carefully prepared and which I hand to the stenographer to attach to my deposition, marking it 'Exhibit A.'" Proper objection was made to the introduction of the copy. Whether, under the circumstances, the admission of this sworn copy was error as against the objection that it was not the best evidence, we need not determine. It furnishes no ground for reversal in any event. The abstract describes this exhibit as "a copy of the record of notes purporting to have been sent to Andy Jones for collection." As already stated, the receipt of the notes is admitted by the defendant's answer. It is clear that prejudice could not result from the admission of incompetent evidence of a fact that is expressly admitted. The sufficiency of the evidence to justify the verdict is not challenged by any specification.

The record presents no ground for reversal, and the judgment must be affirmed, and it is so ordered. All concur.

(106 N. W. 188.)

McCORMICK HARVESTER MACHINE COMPANY v. M. W. CALDWELL, DEFENDANT, CITIZENS' BANK OF DRAYTON, N. D., RESPONDENT, AND JOHN H. HOGG, GARNISHEES.

Opinion filed February 2, 1906.

Bill of Sale as Security — Fraudulent Conveyance — Future Advances.

1 A bill of sale of property absolute in terms, but given as security for a present indebtedness and for future advances, is not fraudulent as against creditors as a matter of law.

Garnishment — Evidence.

2. Evidence considered, and found to show that there was no money or property belonging to defendant in the garnishee's possession when the garnishee summons was served.

Appeal from District Court, Pembina county; *Kneeshaw*, J.

Action by the McCormick Harvester Machine Company against the Citizens' Bank of Drayton. Judgment for defendant, and plaintiff appeals.

Affirmed.

W. B. Kellogg and *Charles F. Templeton*, for appellant.

A debtor cannot, as against other creditors, transfer his property to one creditor, by an instrument purporting to convey an absolute title, but in fact as security; such conveyance, irrespective of intent, is a fraud on creditors. First Nat. Bank v. Comfort, 4

Dak. 167, 28 N. W. 855; Lukins et al. v. Aird et al., 6 Wall. 78, 18 L. Ed. 750; Switz v. Bruce, 20 N. W. 639; Chenery v. Palmer, 6 Cal. 119; section 3849, Rev. Codes 1899; Coburn v. Pickering, 3 N. H. 415; Mitchell et al. v. Sawyer et al., 5 N. E. 109; Smith v. Conkwright, 28 Minn. 23, 8 N. W. 876; Kissam v. Edmonston, 1 Ired. Eq. 180.

Where a secret trust is established, an intent to defraud need not be proved—it is a legal inference. Coburn v. Pickering, supra; Phelps v. Curts, 80 Ill. 112; Powers v. Alston, 93 Ill. 587; Emerson v. Bemis, 69 Ill. 537; Moore v. Wood, 100 Ill. 454; Chenery v. Palmer, supra.

A trust is attached to the proceeds of property when converted in money. Wait on Fraud Con., section 177; Ferguson v. Hillman, 12 N. W. 389.

Where property of defendant is shown to be in garnishee's hands, it is presumed to continue there until the contrary is shown. 22 Am. & Eng. Enc. Law, 1243; Farr v. Payne, 40 Vt. 615; Cardee v. Prim, 52 Mo. App. 102; Northrop v. Knott, 114 Cal. 612, 46 Pac. 599; Diel v. Stegner, 56 Mo. App. 535; Love v. Edmonston, 5 Ired. L. 354; Kidder v. Stevens, 60 Cal. 414; Smith v. Railroad Co., 43 Barb. 225; Laughlin v. C. & N. W. Railway Co., 28 Wis. 204; 1 Rice on Evid., section 42; Rev. Codes 1899, section 5413, subdivision 32.

Non-leviable assets can be reached by garnishment. 9 Enc. Pl. & Pr. 847; First Nat. Bank v. McDonald Mfg. Co. et al., 67 Wis. 373, 28 N. W. 225; LaCrosse Nat. Bank v. Wilson, 74 Wis. 391, 43 N. W. 153.

Change of possession does not purge the transaction of its fraudulent character. Blakeslee v. Rossman, 43 Wis. 116; Stein et al. v. Munch, 24 Minn. 390.

Robert Ferguson, for respondent. *M. Brynjolfson* and *Jeff M. Myers,* of counsel.

No intent to hinder, delay or defeat creditors being shown, the same must not be presumed. Allan et al. v. Smith et al., 129 U. S. 465, 9 Sup. Ct. Rep. 338, 32 L. Ed. 732; Smith v. Collins, 94 Ala. 394, 10 South. 334; Rochester v. Sullivan, 11 Pac. 58; Hempstead v. Johnston, 18 Ark. 123, 65 Am. Dec. 458; Schroeder v. Walsh, 120 Ill. 403, 11 N. E. 70; Prichard v. Hopkins, 52 Iowa, 120, 2 N. W. 1028; Graig v. Fowler, 59 Iowa, 200, 13 N. W. 116; Adams v. Ryan, 61 Iowa, 733, 17 N. W. 159; Gleason et al.

v. Wilson et al., 48 Kan. 500, 29 Pac. 698; McMillan v. Edfast, 50 Minn. 414, 52 N. W. 907; Landauer et al. v. Mack et al., 38 Neb. 8, 57 N. W. 555; Fisher v. Dickenson et al., 84 Va. 318, 4 S. E. 737; Rice v. Jerenson, 54 Wis. 248, 11 N. W. 549.

Fraudulent intent must be shown by direct evidence or circumstances which the law says are conclusive evidence of it. Rochester v. Sullivan, 11 Pac. 58; Riethmann et al. v. Dodsman, 23 Colo. 202, 46 Pac. 684; Mathews v. Reinhardt, 149 Ill. 635, 37 N. E. 85; Allen v. Wegstein, 69 Iowa, 598, 29 N. W. 625; Pidock v. Voorhies, 84 Iowa, 705, 42 N. W. 646, 49 N. W. 1038; Long v. West, 31 Kan. 298, 1 Pac. 545; Gleason v. Wilson, supra; Hasie v. Connor, 53 Kan. 713, 37 Pac. 128; Foster v. Hall, 12 Pick. 89, 22 Am. Dec. 400; Kipp v. Lamoreaux, 81 Mich. 299, 45 N. W. 1002; McMillan v. Edfast, 50 Minn. 414, 52 N. W. 907; Landauer v. Mack, supra; Columbus Watch Co. v. Hodenpyl et al., 135 N. Y. 430, 32 N. E. 239; Evans v. Rugee, 57 Wis. 623, 16 N. W. 49; Shores v. Doherty, 65 Wis. 153, 26 N. W. 577.

If circumstances point equally to honesty of purpose and fraudulent design, the former construction must be given. Gregg v. Sayre, 8 Pet. 244, 8 L. Ed. 932; Alabama L. Ins. Co. v. Pettway, 24 Ala. 544; Stiles v. Lightfoot, 26 Ala. 443; Thames v. Rembert, 63 Ala. 561; Dardenne v. Rardwick, 9 Ark. 482; Erb v. Cole, 31 Ark. 554; Bowden v. Bowden, 75 Ill. 143; May v. Gulliman, 105 Ill. 272; Lyman v. Cessford, 15 Iowa, 229; Burleigh v. White, 64 Me. 23; Whitfield et al. v. Stiles et al., 57 Mich. 410, 24 N. W. 119; Bear's Estate, 60 Pa. St. 430; Norton v. Kearney et al., 10 Wis. 443.

Bills of sale given as security are not per se void as to creditors. Chickering v. Hatch, 3 Sumn. 474; McClure et al. v. Smith et al., 14 Colo. 297, 23 Pac. 786; Ross v. Duggan, 5 Colo. 100; Cathcart v. Grieve et al., 104 Iowa, 330, 73 N. W. 835; Fuller v. Griffith et al., 91 Iowa, 632, 60 N. W. 247; First National Bank of Peoria v. Jaffray et al.,41 Kan. 694, 21 Pac. 242; Emmons v. Bradley, 56 Me. 333; Stevens v. Hinckley, 43 Me. 440; Rawson v. Plaisted, 151 Mass. 71, 23 N. E. 722; Muchmore v. Budd, 53 N. J. Law, 369, 22 A. 518; Moore v. Roe, 35 N. J. Eq. 90; Rigney v. Talmadge, 17 How. Pr. 556; Haseltine et al. v. Espey et al., 10 Pac. 423; Gibson v. Seymour, 4 Vt. 518; Parker v. French, 18 Vt. 460; Bigelow v. Topliff, 25 Vt. 273; Samuel v. Kittenger et al., 6 Wash. 261, 33 Pac. 509; McFarlane v. Louden, 99 Wis. 620, 75 N. W.

394; Rock v. Collins, 99 Wis. 630, 75 N. W. 426; Bump Fraud Con. (3d Ed.) 41; Waite Fraud. Cov. 238.

The indebtedness to the bank, made up of its original claim, with others assumed by it, though constituting an antecedent indebtedness, affiorded a sufficient consideration for the sale. Nat. Bank v. Dickinson, 107 Ala. 265, 18 So. 144; Boston Marine Ins. Co. v. Proctor et al., 168 Mass. 489, 47 N. E. 414; Dick v. Jackman, 37 S. W. 344; Davenek v. Kutzer, 43 S. W. 541; Rickman v. Miller, 18 Pac. 304.

That the transaction operated to prefer certain creditors to the exclusion of others does not invalidate the sale. Rev. Codes 1899, section 5050; Cutter v. Pollock et al., 4 N. D. 205, 59 N. W. 1062.

MORGAN, C. J. The plaintiff brought an action against defendant Caldwell to recover upon a promissory note given by him to the plaintiff. At the time of issuing the summons in the action, the plaintiff also commenced a garnishee action or proceeding against the Citizens' Bank of Drayton and John R. Hogg, claiming that they had money or property in their hands belonging to the defendant. The plaintiff instituted the garnishee action or proceeding by filing and serving the affidavit prescribed by section 5383, Rev. Codes 1899, and the garnishee answered by serving their affidavits prescribed by section 5389, Rev. Codes 1899, in which they denied having any money in their hands belonging to the defendant. The plaintiff took issue upon the allegations of this affidavit, pursuant to section 5393, Rev. Codes 1899. The sole issue for trial was whether the garnishees had any money or property in their hands on November 30, 1901; that being the day on which the garnishee summons was served. Before the trial the plaintiff secured a judgment against Caldwell upon the promissory note described in the complaint, and the judgment roll was received in evidence at the trial. The district court made findings of fact and conclusions of law in favor of the garnishees, and judgment was entered dismissing the garnishee action. The plaintiff has appealed from the judgment, and asks a review of the entire case, under section 5630, Rev. Codes 1899.

There is no practical dispute as to the facts on which the judgment is based. The appeal is founded more particularly upon the conclusions of law which the court made from the facts. The principal facts upon which the garnishee action is based are the following: On and prior to July 6, 1901, the defendant was indebted

to the garnishee bank in the sum of about $3,550. On that day the defendant executed and delivered to the bank a bill of sale absolute in terms, but in reality as security only, upon about 560 acres of growing flax belonging to the defendant. Under parol agreement made when the bill of sale was executed, the bill of sale was to be security for said sum of $3,550, and for such future advances as might thereafter be made by the bank to the defendant. The bill of sale was filed in the office of the register of deeds. Thereafter advances were made by the bank from time to time and notes taken for such advances at times, and sometimes such advances were evidenced by cash slips kept by the bank. Some of these advances were temporary loans made for a short time and paid promptly, and the slips returned or canceled. The defendant retained complete possession of the crop of flax and harvested it and delivered it for shipment in the bank's name to Duluth, and turned over all the shipping bills to the bank, and the proceeds of the flax were remitted to the bank. After the bill of sale was executed and delivered, the defendant made orders upon the bank for the payment of certain claims owed by him to other parties, and these orders were accepted by the bank and the sums paid by it to such persons out of the proceeds of the flax. The first shipment of flax was made on the 19th day of October, 1901. The next shipment was made on or about November 19, 1901. The proceeds of each shipment were remitted to the bank and aggregated about $5,148. The bank paid out upon the Caldwell claims, orders and liens due to other persons the sum of $1,933, and applied the balance of the money in its hands upon its own debt against Caldwell. This left Caldwell still owing the bank the sum of $1,829. The garnishee summons was served on the bank on November 30, 1901.

The plaintiff's contentions in reference to this transaction are: (1) That the bill of sale was void as to creditors as a matter of law, for the reason that it constituted a secret trust in favor of the defendant and in favor of other creditors; (2) that the bank had in its possession money belonging to the defendant on the day that the garnishee summons was served. Upon the first contention appellant claims that the bill of sale was absolutely void as a matter of law without regard to the real intent of the parties in the execution thereof. The basis of such contention is the claim that such contracts create a secret trust in favor of the

debtor, which constitutes a fraud upon the other creditors. In the case at bar there was no such trust existing. It was an agreed transaction of security for a present debt and for debts to accrue. The disposition, control and possession of the property was in the debtor. Before any proceedings were taken by any creditor, the security property was changed into money by act of the debtor, and the proceeds came into the bank's hands under direction of the debtor. When the bill of sale was executed, no other creditors were secured thereby. It is sufficient to say that a bill of sale absolute in form, but in equity a mortgage, does not render it void as security for present indebtedness or indebtedness to accrue. The fact that a bill of sale or deed absolute in form is given does not of itself make it void as a matter of law. It may be a fact to be considered in connection with other facts to determine whether the transaction was fraudulent in fact. But standing alone it is not given that effect when the debtor has no rights under it save that of paying his debts, and thereby releasing the property from the lien of the mortgage, and the creditor has no rights thereunder except to hold the property as security. In this case the bank made no claim to the property except for security purposes. There is nothing in such a transaction that creditors can justly complain of. We have recently considered and decided a similar case involving the giving of a deed on land absolute in terms, but in fact a mortgage. In that case the same contentions were made as in this, and the case of Newell v. Wagness, 1 N. D. 62, 44 N. W. 1014, was relied on. That case is distinguishable from these cases, as was pointed out in the case referred to. Merchants' State Bank v. Tufts (N. D.) 103 N. W. 760. What was said in that case is applicable here and decisive of the case. In addition to the authorities cited in that case, the following also bear upon the question: McFarlane v. Louden, 99 Wis. 620, 75 N. W. 394, 67 Am. St. Rep. 883; Rock v. Collins, 99 Wis. 630, 75 N. W. 426, 67 Am. St. Rep. 885; Ross v. Duggan, 5 Col. 85; Cathcart v. Grieve, 104 Iowa, 330, 73 N. W. 835; Bank v. Jaffrey, 42 Kan. 694, 19 Pac. 626; Rawson v. Plaisted, 151 Mass. 71, 23 N. E. 722; Samuel v. Kittenger, 6 Wash. 261, 33 Pac. 509.

It is not seriously contended that the transaction was fraudulent in fact. If it were, the contention would be futile. On a careful review of all the evidence it is amply shown that the trans-

action was made in good faith, and the trial court so found. It is claimed that the bank had money in its hands which was unappropriated and belonged to the defendant, when the garnishee summons was served upon it. Whatever money it may have had in its possession at that time was paid to it in satisfaction of the notes and indebtedness for which the bill of sale was security. The mere fact that the notes had not been marked paid is of no moment whatever. The notes were paid by the payment of the money to the bank for that purpose, and stamping the notes as paid added nothing to the effect of paying the money into the bank for the particular purpose of liquidating, to the amount of the payments the defendant's debts. Plaintiff complains that the disclosure made by the garnishee is evasive, indefinite and unsatisfactory, and should not be held sufficient to warrant a dismissal of the proceedings. The objection made as to the insufficiency of the garnishee's evidence is that the sums paid to various persons out of the proceeds of the flax crop is not specifically given; the names of the persons to whom paid nor the amounts paid to each is not given. The sum total paid out upon orders or directions from Caldwell is given. The items making up the sum total paid out are very numerous. The garnishee's books showed precisely what amounts were paid out and to whom paid. The books were in the courtroom at the trial on plaintiff's subpoena, and were subject to examination. The cashier at the bank at the time these various payments were made was a witness. He was examined at length by plaintiff, and again cross-examined at great length by plaintiff. We do not think that his evidence shows any desire to evade a full answer to all questions, nor does it show a desire to conceal anything. He was not asked to give the names of the persons to whom the money was paid. We deem the showing made by the bank free from the objection urged against it. The evidence shows that the bank paid out all money that came into its hands before the garnishee summons was served, and that it was paid on the defendant's orders. It also shows that the proceeds of the flax crop did not come up to the expectations of Caldwell or of the bank. Hence, when these proceeds had all been disbursed by the bank, there was still due the bank from Caldwell the sum of $1,829. The action of the bank in endeavoring to collect this sum gives rise to the dispute as to the legality of what is called the "Bottineau Transaction." Caldwell owned some

property in Bottineau county on which the bank had a mortgage. The bank sent an attorney there on November 27, 1901, to collect that sum. The attorney also represented two other creditors of Caldwell. He was accompanied by one Vestre, another creditor. Before the attorney arrived at Bottineau, Caldwell had made a bill of sale of some horses and other property to the bank, but Caldwell was to retain the use and possession of the property sold. The attorney refused to accept a bill of sale, unless it was to be an absolute sale, accompanied by immediate delivery. After lengthy negotiations, Caldwell agreed to sell the property absolutely in full payment of the bank's indebtedness, as well as that of Vestre and the other creditors represented by the attorney. All of these creditors receipted in full to Caldwell for their claims, and Caldwell delivered the property to the bank. The creditors agreed among themselves to divide the proceeds of the property after sale in the proportion of their several claims.

There is no room for doubt as to the character of this transaction up to this time. It was a completed sale of the property to the bank in consideration of the release of the claims of these creditors against Caldwell. It is claimed that subsequent events show that Caldwell still retained an interest in the property. On December 9th Caldwell asked leave of the bank to take the horses to Duluth and use them there during the winter. This request was refused. The bank was desirous of disposing of the horses to get its money and stop the expense of keeping them. Caldwell insisted that they could be sold to better advantage in Duluth, and guaranteed that they would bring more than $2,100 net in Duluth. This was more than had been offered for them at Drayton. The bank and Caldwell reached this agreement: The bank was to employ an agent to take the horses to Duluth for sale, and Caldwell was to go there also, but not as agent, or on request of the bank, or at the bank's expense. If the horses were sold at Duluth for $2,000, over and above the expense of taking them there, Caldwell was to have all over that sum. They were sold at Duluth for $2,000, and Caldwell got nothing out of them. This was a new contract and had nothing to do with the original sale of November 27th. In effect the bank agreed to sell the horses to Caldwell for $2,000 net. Caldwell made no claim that he had any interest in the horses at that time. This transaction has no weight as evidence that the sale was originally as security. It corroborates the evi-

dence that the transaction was an absolute sale. On December 21st Caldwell telegraphed the cashier of the garnishee bank from Duluth as follows: "Can you send me one hundred dollars to go west with, haven't a dollar. Answer Meirs Hotel." On consultation with the other creditors who had become interested in the property sold to the bank, they agreed to send him $100, each to pay a portion thereof; and the money was sent. There is no evidence that it had any connection with the sale of the horses at all. The cashier and others of the contributors testify that it was sent to him in charity. Whatever the motive was, the evidence does not show that it was sent because Caldwell had any interest in the horses, and the mere fact of sending the money does not show that he had any interest in the horses. When it was sent there was nothing due to Caldwell from the bank. Our conclusion is that there was no money or property belonging to Caldwell in the garnishee's hands when the summons was served upon it, and that the transaction was not tainted with actual or constructive fraud. Whether a garnishee action or proceeding is properly triable under section 5630, Rev. Codes 1899, and whether either party may demand a jury trial in such an action, was not raised in this court, nor considered.

The judgment is affirmed. All concur.

(106 N. W. 122.)

Fred Spencer v. T. L. Beiseker.

Opinion filed February 3, 1906. Rehearing denied March 12, 1906.

Quieting Title — Failure of Court to Determine All Claims Asserted Is Error.

1. It is the duty of the trial court in actions brought to determine adverse claims to real property, under chapter 5, p. 9, Laws 1901, to adjudicate and determine all claims set forth in the defendant's answer, and the failure to do so is error.

Equity — Action Tried Without a Jury — Mode of Appeal.

2. An equity action in which a jury is called to find part or all of the facts is not "an action tried * * * without a jury," within the meaning of section 5630, Rev. Codes 1899, and is therefore not governed by that section, either as to the manner of trial in the district court or the review in this court upon appeal. Following Peckham v. Van Bergen, 80 N. W. 759, 8 N. D. 595.

Appeal from District Court, McLean county; *Winchester*, J.

Action by Fred Spencer against T. L. Beiseker. Judgment for plaintiff, and defendant appeals.

Reversed.

R. A. Palmeter, Hanchett & Wartner, and *Guy C. H. Corliss,* for appellant.

H. R. Turner, for respondent.

YOUNG, J. The plaintiff brought this action to determine adverse claims to 160 acres of land situated in McLean county. The complaint is substantially in the form prescribed by chapter 5, page 9, Laws 1901, and demands, among other things (1) that the defendant set forth all adverse claims that he may have to said land, and "that the validity, superiority and priority thereof be determined;" and (2) "that the same be adjudged null and void. * * *"

The defendant answered, setting forth two distinct claims. The first is a mortgage for $849.15, alleged to have been executed and delivered by the plaintiff and his wife to the defendant on October 21, 1902, to secure their joint promissory note for the above sum of even date with said mortgage. The second claim is under a sheriff's certificate to the defendant issued on August 21, 1904, at a foreclosure sale of the premises under a mortgage alleged to have been given by the plaintiff and his wife on August 1, 1903, to Hatch and Heinsius to secure the sum of $334.50, and duly assigned to the plaintiff prior to the foreclosure. It is alleged that the premises were struck off to the plaintiff at the sale for $423.13. and that there has been no redemption. The answer also alleges the due execution and recording of all the instruments referred to, and prays for judgment confirming the validity of the mortgage and the validity of the sheriff's certificate. The plaintiff did not reply, and a reply was unnecessary. The statute above referred to, and under which this action is brought, expressly declares that "no reply shall be required on the part of the plaintiff," except "* * * when he has made permanent improvements under color of title." In other words, the statute dispenses with the necessity of framing issues by a proper pleading as in other actions, and requires the court to determine "the validity, superiority and priority" of the claims set up without a pleading assailing their validity. The presiding judge called a jury and the evidence was submitted to them pursuant to a stipulation of the parties,

made when the case was called, that "the questions of fact involved in this action" should be submitted to a jury. During the course of the trial the plaintiff and his wife testified that they did not sign the mortgage constituting plaintiff's first claim, or the note purporting to be secured by it. The notary public who took the purported acknowledgment of the mortgagor and one of the subscribing witnesses testified that both the note and mortgage were signed in their presence. No evidence was offered assailing the sheriff's certificate, and there is sufficient evidence in the record to sustain its validity. The trial judge submitted a single question to the jury, and that was whether the plaintiff and his wife executed and delivered the note and mortgage set forth in defendant's first claim, to which they answered "No." The trial judge approved this finding of the jury, and thereafter made and filed his findings of fact and conclusions of law in accordance therewith, and directed the entry of judgment for plaintiff canceling said mortgage and the record thereof and for costs. No questions of fact affecting the validity or invalidity of the sheriff's certificate were submitted, and the findings and judgment do not refer to it, directly or indirectly. The defendant moved for a new trial for alleged errors of law occurring at the trial and upon the ground of surprise arising from the unexpected denial by plaintiff and his wife of the genuineness of their signature. The motion was denied. Plaintiff has appealed from the judgment and from the order denying a new trial.

Error is assigned (1) upon the denial of the motion for new trial, and (2) upon the court's failure to determine the validity of the sheriff's certificate. The last assignment, which is based upon the judgment roll proper, is the only one we shall consider. That this was error is apparent from the statement already made. The purpose of the action is to determine the validity, superiority and priority of the defendant's adverse claims. The defendant set up the certificate and asked that it be held valid. Its validity was in issue, and it was the duty of the court to determine that question, and the error in failing to do so requires a reversal of the judgment and a new trial.

The reason advanced by respondent's counsel to support his contention that the failure of the trial court to find upon this issue is not ground for reversal, or granting a new trial is not tenable. He contends that the case was tried under and is reviewable in

this court under section 5630, Rev. Codes 1899, and relies upon the provision in that section which declares that "in actions tried under this section failure of the court to make findings upon all the issues in the case shall not constitute a ground for granting a new trial or reversing the judgment." Counsel is in error in assuming that the action was tried under section 5630. That section particularly describes the actions which are within its provisions as "all actions tried * * * without a jury;" but not including action properly triable with a jury. Amendment of 1903, page 201, chapter 201. It includes only actions tried without a jury, and does not include actions tried with a jury. The fact that the action is equitable and one in which the findings of the jury are merely advisory is not material. It is true in an equitable action that the case is in fact tried by the court, for the court ultimately finds the facts, approving or rejecting the jury's findings; but even so it is not a case tried "without a jury" when a jury is called. This was the construction placed upon this section in Peckham v. Van Bergen, 8 N. D. 595, 80 N. W. 759. This case was decided in 1899. The section was amended in 1903 in other respects, but in no way affecting the basis of the decision referred to and the construction there announced must be accepted as settled.

It must be held, therefore, that an equity action, in which a jury finds part or all of the facts, "is not an action tried * * * without a jury" within the meaning of section 5630, and is therefore not governed by that section, either as to the manner of trial in the district court or as to the review in this court upon appeal. This section has no application to this action. It was the duty of the trial court to determine the validity of both claims set up by the defendant's answer. The validity of the sheriff's certificate was in issue and was not determined. This was error.

The judgment will be reversed, and a new trial ordered. All concur.

(191 N. W. 189.)

CONTINENTAL HOSE COMPANY NO. 1 v. CHARLES H. MITCHELL, CITY TREASURER OF THE CITY OF FARGO.

Opinion filed February 11, 1906.

Injunction — Remedy at Law.

1. Courts of equity will not grant relief by injunction in cases where there is a plain, speedy and adequate remedy at law.

Same — When Maintainable.

2. An action for a permanent injunction against a city treasurer is not maintainable to determine the rights of fire companies to money claimed by them under the provisions of chapter 208, p. 265, Laws 1901.

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

Action by the Continental Hose Company No. 1 against Charles H. Mitchell, city treasurer. Judgment for plaintiff, and defendant appeals.

Reversed.

Newman, Holt & Frame, for appellant.
Barnett & Richardson, for respondent.

MORGAN, C. J. This is an action for a permanent injunction against the defendant as treasurer of the city of Fargo. The plaintiff is a fire company duly incorporated under the laws of the state. The pleadings raise an issue as to the rights of the plaintiff to a portion of the 2 per cent of the money payable by the state out of the premiums received upon policies issued on property in the city of Fargo, and the duties of the city treasurer in reference to such money. The right to such money is governed by the provisions of chapter 208, page 265, of the Laws of 1901, amending section 2464 and 2465 of the Revised Codes of 1899. Said chapter 208 prescribes the duties of said treasurer in reference to said money in the following manner: "And when so received by said treasurer the same shall be paid over to the treasurer of each separate organized fire company, or companies, in equal proportion, who are members in good standing in the North Dakota Firemen's Association, and having a membership of at least fifteen members for a period of eight months prior to the date of the certificate of the clerk, as provided in section 2462, and having the management of at least one steam, hand or fire engine, hook and ladder truck or hose cart, upon the written order of such company

or companies, approved by the city council, trustees or other governing body of such city, town or village; provided, that in cities, towns and villages having a paid fire department, the amount so received by the city, town or village treasurer shall be placed in a fund to be disbursed by the city council, trustees, or other governing body of such city, town or village in maintaining such fire department."

The complaint alleges the facts which the plaintiff claims entitle it to a portion of the money payable under the provisions of said section. Upon its right to a permanent injunction the allegations of the complaint are as follows: "That the defendant herein threatens to, and the plaintiff alleges that he will, if not restrained by this court, pass said money belonging to this plaintiff to a certain fund of the city of Fargo, and that the same will thereupon be expended by the city of Fargo without authority of law and against the rights of this plaintiff, and to plaintiff's great injury." The prayer of the complaint is as follows: "Wherefore plaintiff prays judgment that the defendant be forever restrained from placing the money above described in any fund of the city of Fargo, or in any manner disposing of or using the same, save and except to pay the same to the plaintiff herein, and for such other and further relief as may be just and equitable." After a trial on the merits, the district court entered a decree permanently restraining the defendant from disposing of said money, unless by payment to the plaintiff. The defendant has appealed from the judgment, and requests a review of the entire case under section 5630, Rev. Codes 1899.

The complaint does not state facts sufficient to authorize the extraordinary remedy of relief by injunction. It is an axiomatic principle of jurisprudence that courts of equity will not interfere, in the adjustment of disputed issues, where there is a plain, speedy, and adequate remedy at law. It is apparent that the defendant could not prejudice the plaintiff's rights, if any it has, by applying this money to some other fund. Whatever fund it be applied to it would still be subject to control by the city council. If the treasurer does apply it to some other fund, the plaintiff would not be thereby deprived of its right to a share of the money. The statute gives the plaintiff a right to such money if the facts exist that bring it within the terms thereof. By refusing to pay the money to the plaintiff, or by placing the same in some other

of the city's funds, the plaintiff's right thereto is not defeated. Under that statute the city council first passes upon the right of the plaintiff to such money, and the treasurer would have no right to pay it to plaintiff, unless the city council has approved the order of the plaintiff company on the city treasurer for such money. Whenever such money comes into the hands of the treasurer, if the plaintiff shows itself entitled to it, an action at law can be maintained for it, irrespective of what fund the treasurer may pass it to. The facts are not, therefore, such as entitle the plaintiff to relief in a court of equity.

The judgment is reversed, and the district court directed to dismiss the action. All concur.

(105 N. W. 1108.)

AMUND OLSON v. THE COUNTY OF SARGENT, NORTH DAKOTA, A. LAND, E. B. JOHNSON, ALBERT STEVENS AND J. W. STRAUB, AS COUNTY COMMISSIONERS OF SARGENT COUNTY; RICHARD MCCARTEN, AS AUDITOR OF SARGENT COUNTY; MANLEY T. JACOBSON, AS TREASURER OF SARGENT COUNTY, AND D. J. JONES, AS SHERIFF OF SARGENT COUNTY, DEFENDANTS AND RESPONDENTS.

Opinion filed February 14, 1906.

Setting Aside a Default Judgment — Discretion of Court.

1. Upon setting aside a default judgment and granting leave to serve an answer, upon grounds within the provisions of section 5298, Rev. Codes 1899, the trial court is vested with wide discretion, which will not be disturbed except in a clear case of abuse thereof.

Same — Imposition of Costs — Terms Discretionary.

2. In granting relief under section 5298, Rev. Codes 1899, the court is vested with an extremely wide discretion as to the imposition of costs or terms; and, if no terms are allowed, such action is not necessarily an abuse of discretion.

Client May Settle Action Without His Attorney's Consent.

3. A plaintiff in an action may settle the same and make a binding agreement to dismiss the action, without notice to and against the will of his attorney.

Same — Settlement May Be Oral — Notice to Plaintiff's Attorney.

4. If a plaintiff makes a settlement of the cause of action, it is not necessary that the same be in writing or filed, or that defendant notify the plaintiff's attorney of such settlement.

Appeal from District Court, Sargent county; *Lauder,* J.

Action by Amund Olson against the county of Sargent and others. From an order setting aside a default judgment and granting leave to answer, plaintiff appeals.

Affirmed.

O. S. Sem, for appellant.
E. W. Bowen and *J. E. Bishop,* for respondents.

MORGAN, C. J. This is an appeal from an order setting aside a default judgment and granting the defendant leave to answer the complaint. The facts are these: The action was commenced on the 26th day of November, 1901, by the personal service of the summons and complaint. Judgment by default was entered on January 14, 1903. On December 1, 1903, the judgment was set aside on motion of the defendant after notice to the plaintiff, and leave was granted the defendant to interpose an answer. The application to open up the judgment was regular in all respects. The district court did not allow any terms or costs to the plaintiff as a condition upon the opening up of the judgment. This is the principal ground of objection to the order. Upon the application to set aside the judgment the following facts were shown: Within a few days after the service of the summons and complaint upon the defendants in the action, it being an action to set aside certain void taxes amounting to about $70 pretended to have been assessed against the plaintiff, the defendants settled the action with the plaintiff personally without the knowledge of the plaintiff's attorney, and in such settlement the plaintiff agreed to dismiss the action. The action was not dismissed, however, and plaintiff's attorney thereafter procured the entry of judgment without knowledge that the action had been settled by his client. The defendants, relying upon such settlement, did not serve an answer nor take any further steps in the action until the motion was made to set aside the judgment. It does not expressly appear when the defendant received actual notice that a judgment had been entered in the action. Hence the question of laches in applying to be relieved from the judgment is not definitely presented. The main contention of the plaintiff is that no terms were imposed as a condition to granting the motion. Plaintiff's attorney had expended $12 in money as disbursements, and it is his contention that it was an abuse of discretion to allow the defendant to answer in the case

without compelling a payment to him of the money actually expended at least. The statute prescribes that judgments rendered against parties through their "mistake, inadvertence, surprise or excusable neglect" may be set aside "upon such terms as may be just."

Plaintiff contends that the statute should be construed as mandatory, and that some terms must in all cases be imposed. We are unable to concur in that view. The imposition of terms is a matter in which trial courts have an extremely wide discretion. Section 298, Rev. Codes 1899, vests such discretion in the trial court. It is not to be construed as prohibiting the opening of a judgment unless on terms. There are cases frequently arising in which it would be unjust to open the judgment on terms or conditions. Like statutes have been construed not to make it incumbent on the court to impose terms in every instance. Robinson v. Merrill, 80 Cal. 415, 22 Pac. 260; Warder v. Patterson, 6 Dak. 83, 50 N. W. 484; Cottrell v. Cottrell, 83 Cal. 457, 23 Pac. 531. There was no abuse of discretion in not allowing any terms or costs to the plaintiff as a condition upon setting aside the judgment.

It is next contended that the proposed answer failed to allege a meritorious defense. The defense set forth was that the action had been settled by the parties before the time to answer had expired, and that on such settlement the plaintiff had personally agreed to procure a dismissal of the action. Two objections are urged against the merits of the answer: (1) That the plaintiff had no right to settle the action in such a case. (2) That the settlement was unconscionable and secured through undue influence. The facts in this case are not distinguishable in principle from Paulson v. Lyson, 12 N. D. 354, 97 N. W. 533. In that case this court held that a party to an action controls the cause of action or defense and may settle the same contrary to the wishes and without the consent of his attorney. Whether the settlement entered into was valid and binding is not reviewable on this appeal, nor was it a proper matter for consideration before the court below. The answer stated a valid defense and that was sufficient. The merits of the same as a defense cannot be litigated on affidavits. Griswold Linseed Oil Co. v. Lee (S. D.) 47 N. W. 955, 36 Am. St. Rep. 761. If the facts set forth in the answer were not true or the settlement was procured through fraud or undue influence, the answer can be disproved on the trial. In this case we think

that the state's attorney was not derelict in his duty in not securing a dismissal of the action after the settlement was made. He had a right to rely upon the agreement of the plaintiff that the action would be dismissed. It was through the plaintiff's fault that his attorney was put to the unnecessary trouble and costs.

Plaintiff's attorney filed a notice of an attorney's lien in the clerk's office against the judgment for his costs and disbursements. It is claimed that this fact should entitled him to reimbursement for the money expended by him in procuring the judgment. This is not necessarily so. The lien did not change the position of the parties in any respect, except to give the defendant notice of the lien and thus secure to plaintiff the payment of his costs. A notice of attorney's lien has no force whatever in any case independent of the judgment. If the judgment falls for any reason, the lien falls also. The defendant did not notify plaintiff's attorney of the settlement. For that reason he claims he was misled and continued the proceedings to judgment, which would not have been done had he been notified of the settlement. This fact is urged as a forceful reason why the default should not have been set aside without at least giving him his costs as a condition precedent thereto. There is no provision requiring such notice, and there is no requirement that such settlement should be in writing or filed. There was no binding legal or moral obligation upon the defendant to notify plaintiff's attorney. Defendant had no reason to suppose that the attorney would not be informed of the fact by his client, and it cannot reasonably be said that any such obligation to give notice rested upon any one except the plaintiff. Whatever hardships have fallen upon the attorney are due to the plaintiff, and not to the defendant. There is nothing in Paulson v. Lyson to conflict with what is here said as to necessity of notice. What is said in that case on that subject refers to court proceedings—in that case a motion to dismiss the action.

The order is affirmed. All concur.

(107 N. W. 43.)

C. A. EDWARDS v. CHARLES EAGLES.

Opinion filed February 14, 1906.

Appeal — Motion to Dismiss Record.

On an appeal to this court from a judgment dismissing an appeal from a judgment of a justice of the peace, this court cannot review the judgment dismissing the appeal unless the motion to dismiss, or the grounds on which it is based, appear on the face of the record.

Appeal from District Court, Stutsman county; *Burke*, J.

Action by C. A. Edwards against Charles Eagles. Judgment for plaintiff, and defendant appeals.

Affirmed.

J. A. Coffee, for appellant.
Parks & Olsberg, for respondents.

MORGAN, C. J. The respondent recovered a judgment in justice court against the defendant and appellant for the sum of $4.50 damages and $17.05 costs. Defendant appealed from such judgment to the district court on questions of law only. In the district court the respondent made an oral motion to dismiss the appeal on the ground as counsel claims that the undertaking was defective.

The grounds of the motion do not appear in the record. There is a recital in the abstract that the motion was made "on the ground of defective appeal bond." The motion was granted by a written order and judgment of dismissal was subsequently entered. Neither the order nor the judgment state the grounds of the motion to dismiss the appeal nor the grounds on which the appeal was dismissed. They each recite simply that there was a motion to dismiss the appeal, and that the appeal was dismissed. No statement of the case was settled. The assignments of error in the brief are that it was error to dismiss the appeal, and further, that it was error not to grant the motion asking that permission be given to substitute a new bond. The motion is not made a part of the record by a statement of the case, and does not appear on the face of the judgment roll in any way, nor does the order contain any statement of the grounds on which the motion was made or granted. The appeal being from the judgment, and it not appearing what the ground of the motion was, we have nothing before us authorizing a review of the motion that was the basis of

the order dismissing the appeal. The bond is certified to this court as constituting a part of the judgment roll, but neither the motion nor the grounds thereof. It is perfectly consistent with the record before us that the motion was based on some defect not appearing on the face of the bond. Error does not appear on the face of the record, and the judgment could be reversed only by presuming error. The contrary presumption must prevail.

The judgment is affirmed. All concur.

(107 N. W. 43.)

J. L. RAPP v. FRED HANSEN.

Opinion filed February 15, 1906.

Appeal — Informalities — Remedy Below.

A judgment will not be reversed on appeal for an informality which ought to be remedied by motion in the court below.

Appeal from District Court, Stutsman county; *Burke*, J.

Action by J. L. Rapp against Fred Hansen. From a judgment on appeal from a justice plaintiff appeals.

Affirmed.

J. A. Coffey, for appellant.
Parks & Olsberg, for respondent.

ENGERUD, J. This action was commenced in justice court, where plaintiff recovered judgment. Defendant thereupon appealed to the district court, and demanded a new trial of the action in that court. The action was accordingly tried anew in that court without a jury. After hearing the testimony, the court made findings of fact and conclusions of law adverse to plaintiff. The conclusions state that, on the facts found, the court held that plaintiff was not entitled to recover on the cause of action alleged, and ordered judgment to be entered to the effect that the judgment rendered in justice court be reversed, and that defendant recover the taxable costs and disbursements. Judgment was entered accordingly. Plaintiff appeals from that judgment.

Appellant urges, and it is the only error relied upon for reversal, that the conclusions and judgment do not dispose of all the issues. The order for judgment, which was included in and made part of the conclusions, fails to state in express terms that the ac-

tion should be dismissed on the merits. The judgment is subject to the same criticism. The order for judgment and judgment were improperly worded, but it does not follow that there should be a new trial of the action or a reversal of the judgment. It is conceded that the issues were properly tried, and that the findings of fact are sufficient, and in accordance with the evidence. Appellant does not question the correctness of the court's conclusion that the facts as found showed that the plaintiff had no right to recover. It is perfectly clear from the whole judgment roll that the court intended to dismiss the action on the merits. The only irregularity is that the judgment standing alone, apart from the judgment roll, does not clearly show that the action was tried and decided on the merits. If the irregularity was prejudicial to plaintiff, he had ample remedy by motion for the formal correction of the judgment in the district court. The informality of the judgment is clearly no ground for reversal, or a new trial.

The judgment is affirmed, with leave to either party to apply to the district court for the correction of the informality thereof. All concur.

(107 N. W. 48.)

J. D. GILBREATH v. MARGARET TEUFEL, G. CHRISTIAN KLINK, ET AL.

Opinion filed February 15, 1906.

The Propriety of an Order to Show Cause, to Secure a Speedy Hearing, Is Determined Ex Parte.

1. An order to show cause may be granted for the purpose of bringing a motion before the court more speedily than it could be done by the ordinary notice; and the propriety of dispensing with the usual notice must be determined on the applicant's ex parte showing.

Same — Where Opposite Party Opposes Such Order Upon the Merits at the Hearing, He Cannot Complain of Insufficiency of Time for Preparation.

2. When a motion is brought before the court by an order to show cause, and the opposing party appears, and opposes the motion on the merits without making any claim that he has not had sufficient time to prepare for the hearing, it is improper to deny the motion on the ground that the order to show cause was improvidently issued.

Vacating Judgment for Fraud.

3. The district court has inherent power to vacate a judgment procured by means of proceedings which are in effect fraudulent.

Same — Fraud on Court.

4. In an action to determine adverse claims to real property, although the proceedings may in all things comply in form with the provisions of the statute relative to the manner of obtaining jurisdiction, it is nevertheless an abuse of the statutory provisions, and is in effect a fraud upon the court and the adverse claimants to not disclose, and name as defendant, all adverse claimants whose names and places of residence could be readily ascertained.

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

Action by L. D. Gilbreath against Margaret Teufel and others. Judgment for plaintiff, and defendants appeal.

Reversed.

W. H. Stutsman, for appellant.
Nuchols & Murphy, for respondents.

ENGERUD, J. This is an action to determine adverse claims to real property commenced and prosecuted to judgment under the provisions of chapter 30 of the Code of Civil Procedure (Rev. Codes 1899, section 5904 et seq.), as amended by chapter 5, page 9, Laws of 1901. Judgment by default was entered in plaintiff's favor December 7, 1903. The appeal is from an order denying appellant's application after judgment for leave to answer and defend the action.

On December 2, 1904, appellants served notice on plaintiff's attorneys that an application would be made to vacate the judgment, and for leave to answer, and also that application would be made for an order to show cause why the motion should not be heard and the relief granted on less than eight days' notice. On the same day an order was obtained returnable December 5, 1904, requiring the plaintiff to show cause why the relief asked for should not be granted, and the motion therefor heard on less than eight days' notice. The order, together with the affidavit and the proposed answer, was served on plaintiff's attorneys December 2d, and service admitted. On the return day the plaintiff appeared by counsel in opposition to the motion and presented a counter affidavit. After hearing both parties, the court made the order appealed from, which, after sundry former recitals, reads as follows: "The court further finds, as conclusions of law, that applicants have not shown such diligence in making their application in time so that the required eight days' notice might be given of

the hearing of said motion before the expiration of one year from the entry of the judgment in said action, as would move the court to exercise its discretion in favor of the prayer of applicants. Therefore it is ordered that the application to shorten the time as prayed be not granted, and the order to show cause is hereby discharged, with $10 motion costs to plaintiff's attorneys."

It is apparent from the record that it was considered in the court below that the propriety of permitting the motion to be heard on less than eight days' notice was one of the questions involved on the hearing pursuant to the order to show cause, as well as the merits of the motion. This was plainly a misconception of the question before the court, as well as of the office of an order to show cause. The latter was merely a means of bringing the motion before the court on less than eight days' notice. Whether such an order shall be granted or not is a discretionary matter which is decided on the applicant's ex parte showing. After the court has thus permitted a motion to be heard on less than the usual notice, the motion is as fully before the court on its merits as if the full eight days' notice had been given. If it shall appear on the hearing that the adverse party has not had sufficient time to prepare for the hearing, his rights can be amply protected by a continuance, if necessary. Although the order appealed from is ambiguous, and might be construed as one merely quashing the order to show cause on the ground that it was improvidently issued and hence was not a denial of the appellant's motion on the merits, it is quite evident from the whole record that it was intended to be and was in fact a final order on the merits of the motion, which would bar another application for the same relief. That this was the effect of the order is evident from the fact that the record shows that the opinion prevailed in the court below that the appellants were entitled to no relief unless the motion to vacate the judgment was heard within one year after the entry of the judgment. It was for this reason the order to show cause was applied for and granted, and made returnable before the expiration of the year; and the motion to vacate was denied, as disclosed by the order appealed from, because the moving party had "not shown such diligence in making the application in time so that the required eight days' notice might be given of the hearing of said motion before the expiration of one year from the entry of the judgment." No objection was made to the hearing of the motion at the time

fixed by the order to show cause on the ground that the plaintiff had not had sufficient time to prepare therefor. The plaintiff presented a counter affidavit and the merits of the motion were fully presented. For these reasons we must construe the order as a final one denying appellant's motion on the merits.

The facts which we deem material to the application are undisputed. The appellants are the heirs of Christian Teufel and G. Christian Klink, respectively, both deceased. Christian Teufel died in 1896 at Cleveland, Ohio; and G. Christian Klink died in 1889 at Chicago, Ill. Teufel and Klink, in 1885, acquired the fee-simple title to the land as tenants in common, and each of them died seised in fee of an undivided one-half of it. The title of each passed to their respective heirs, the present appellants, all of whom are nonresidents of this state. The plaintiff claims to have acquired title to the land by virtue of one or more tax sales. It seems that there has never been any administration of the estates of the two decedents in this state; and said Teufel and Klink still appear on the record as the owners of the land subject to plaintiff's alleged tax title.

The only designation of the defendants in this action was "Christian Teufel and G. Christian Klink and all other persons unknown claiming any estate or interest in or lien or incumbrance upon the property described in the complaint, and their unknown heirs." The complaint was in the form prescribed by section 5907, Rev. Codes 1899, as amended by chapter 5, page 9, Laws of 1901. It was duly verified and filed. The summons was issued and returned by the sheriff showing the defendants could not be found. An affidavit for publication of the summons was filed stating that the places of residence of the defendants named were not known; that the last known residence of defendants G. Christian Klink and Christian Teufel was Chicago, Ill.; and that personal services upon said defendants could not be had in this state. Thereupon the summons was published in a newspaper the number of times prescribed by statute. Two copies of the summons and complaint were mailed, one addressed to Christian Teufel, Chicago, Ill., and one to G. Christian Klink at the same place. After the expiration of 30 days from the last publication, proof of the substituted service was made and judgment entered by default. All the proceedings seemed to comply in form with the statutory requirements.

It appears from the counter affidavits presented by plaintiff in opposition to the motion that her authorized agent who had the entire management of her business affairs, including this litigation, had actual knowledge, long before the commencement of this action, that Teufel and Klink were dead, and that their respective widows and children were living. He had a conversation with one Franks, who represented himself to be the agent for the heirs, and attempted to negotiate a settlement with him of the conflicting claims to the land. He also had some correspondence in 1902 with one J. H. Reese, the executor of the estate of Christian Teufel, deceased, relative to the same matter. It is plainly evident that if the said agent did not in fact know the names and addresses of the heirs, it was because he did not take the trouble to inquire. He knew where the information could be had, and it was easily accessible. Under such circumstances, a person cannot be permitted to assert ignorance of facts which reasonable inquiry would disclose. It is needless to say that her agent's knowledge is chargeable to plaintiff. It is too plain for argument that the proceedings resulting in this judgment were a gross abuse of judicial process even if it be conceded that they were in form "due process of law." The real persons whose rights were sought to be barred by the judgment were not named but were included in a general designation of "unknown," although they were in fact known to the plaintiff, or at least ought to have been. The two ostenisble defendants named were known to be out of existence; but that fact was not disclosed. Copies of the summons and complaint were mailed, addressed to the last known residence of the dead men. The real defendants being ostensibly "unknown," the necessity of mailing copies of the papers to them was avoided. In this way the probability of notice of the pending action ever reaching the real defendants before the expiration of a year was reduced to a minimum. To permit a judgment based on such procedure to stand would be a reproach to the administration of justice.

It is contended that the proceedings are in all things in strict compliance with the statutory provisions regulating the procedure in this form of action. We deem it entirely immaterial under the circumstances of this case whether the proceedings did or did not comply in form with the statute; and it is therefore unnecessary to discuss that question. Assuming that the proceedings did formally comply with the statutory requirements, and assuming that such procedure could be held to be "due process," and would

be valid as against collateral attack, the fact remains that the statutory forms were abused. Whether any actual deceit was intended or not, the effect of the procedure followed was a fraud on the court as well as upon the defendants. There was apparently no unnecessary delay in seeking relief, and the motion was made within the year. Independently of the statute the court had power to grant relief and ought to have done so. Yorke v. Yorke, 3 N. D. 343, 55 N. W. 1095; Martinson v. Marzolf (N. D.) 103 N. W. 937; Freeman on Judgments, section 100.

The order appealed from is reversed. The district court will be directed to vacate the judgment, and the action will then stand for trial on the answer served by the defendants. The appellants will recover the costs of this appeal. All concur.

(107 N. W. 49.)

ELLEN PYKE v. THE CITY OF JAMESTOWN.

Opinion filed February 15, 1906. Rehearing April 24, 1906.

Pleading — Assent to Error Waives Future Objection.

1. The rule that "acquiescence in error takes away the right of objecting to it" is applicable to errors in procedure. One who consents to an irregular method of amending a pleading cannot afterwards urge the irregularity as error.

Municipal Corporation — Presenting Claims for Damages — City Auditor.

2. The city auditor is the official representative of the city council for the purpose of receiving claims against the city, including claims for personal injuries.

Same — Claim for Personal Injuries.

3. The plaintiff delivered her verified claim for damages for personal injury to the mayor and auditor of the defendant city. The delivery of the copy to the auditor was outside of his office, and was accompanied by a statement of what the paper was and a request that it be presented at the next meeting of the council. *Held,* upon facts stated in the opinion, that the clam was "presented," within the meaning of section 2172, 2173, Rev. Codes 1899, which require such claims to be "presented to the mayor and common council."

Negligence and Contributory Negligence — Questions for Jury.

4. The question of the negligence of a defendant or the alleged contributory negligence of a plaintiff is primary and generally a question of fact for the jury.

Same — When Questions for Court and Jury.

5. The question of negligence becomes a question of law only when upon the undisputed facts reasonable men can draw but one conclusion. When reasonable minds may differ, the question is for the jury.

Municipal Corporation — Proper Submission of Question.

6. Upon the facts stated in the opinion, the question of the plaintiff's contributory negligence was properly submitted to the jury.

Opinion Evidence — Expert Testimony.

7. Questions calling for the opinion of an expert witness must be based upon facts previously stated by the witness, or upon facts testified to by others, or upon facts agreed to or assumed as true hypothetically.

Same.

8. A question which calls for the opinion of a physician, which is based in part upon facts not contained in the record, is improper, even though the facts are personally known to him.

Damages — Personal Injuries — Aggravation.

9. The aggravation of the consequences of a personal injury by the use of opiates, taken under the direction of a reputable physician to alleviate the pain resulting from the injury, is not a defensive fact in an action to recover damages for the injury. The necessity for the use of the opiates arises in such case from the negligent act causing the injury, and not from any negligence of the person injured.

Appeal from District Court, Stutsman county; *Burke,* J.

Action by Ellen Pyke against the City of Jamestown. From a judgment for plaintiff defendant appeals.

Affirmed.

F. G. Kneeland and *S. L. Glaspell,* for appellant.

The amendment of a pleading is by rewriting it, leaving out such allegations and inserting such others as the pleader may desire. Satterlund v. Beal, 1 N. D. 122, 95 N. W. 518.

Where one knows of a defect in a sidewalk, it is contributory negligence not to remember and avoid the danger, unless satisfactory excuse is given for forgetting it. Beach on Contributory Negligence, 257; Lyon v. City of Grand Rapids, 99 N. W. 311; Collins v. City of Janesville, 87 N. W. 241; Bender v. Town of Minden, 100 N. W. 352; Tuttle v. Town of Clear Lake, 102 N. W. 136; Beach on Cont. Neg. 39; Gilman v. Deerfield, 15 Gray, 577; Baltimore Ry. Co. v. Whitacre, 35 Ohio St. 627; Bruker v. Town of Covington, 69 Ind. 33, 35 Am. Rep. 202; Kewanee v.

Depew, 80 Ill. 119; City of Erie v. Magill, 101 Penn St. 601, 47 Am. Rep. 739; Walker v. Town of Reidsville, 2 S. E. Rep. 74; C. R. I. & P. R. R. Co. v. Houston, 95 U. S. 697, 24 L. Ed. 542; Schefler v. Sandusky, 33 Ohio St. 246; Hudon v. Little Falls, 71 N. W. 678; Dillon on Mun. Corp. (4th Ed.) 1007, 1026; Wilson v. Charlestown, 8 Allen, 137; Parkhill v. Town of Brighton, 15 N. W. 853; Elliott on Roads and Streets, 472.

Presentation of a claim for damages to the mayor and common council is a condition precedent to an action for damages. Elliott on Roads and Streets, 475; 20 Enc. Pl. & Pr. 1231; 4 Enc. Pl. & Pr. 659; Gay v. Cambridge, 128 Mass. 387; Schmidt v. City of Fremont, 97 N. W. 830.

Claim must be presented to the council in session. Coleman v. City of Fargo, 8 N. D. 69, 76 N. W. 1051; Whalen v. Bates, 33 A. 224; Hiner v. City of Fondulac, 36 N. W. 632; Selden v. Village of St. Johns, 72 N. W. 991; Doyle v. City of Duluth, 76 N. W. 1029; City of Denver v. Saulcey, 38 Pac. 1098; Wilton v. City of Detroit, 100 N. W. 1020; Rhoda v. Alameda Co., 52 Cal. 350; Reining et al. v. City of Buffalo, 102 N. Y. 308, 6 N. E. 792; Curry v. City of Buffalo, 135 N. Y. 366, 32 N. E. 80.

Delivery of papers to an officer out of his office is not filing the same. Peterson v. Village of Cokato, 87 N. W. 615; 8 Enc. Pl. & Pr. 924; Schulte v. Bank, 34 Minn. 48; Gates v. State, 128 N. Y. 221, 28 N. E. 373.

Whether an affidavit was sworn to was a question of fact to be proved as any other question of fact, by competent testimony. Bantley v. Finney et al., 62 N. W. 213.

The certificate of a notary is presumptive evidence of its contents. Smith et al. v. Johnson et al., 62 N. W. 217.

A physician who has treated a person, administered drugs, etc., to her, is competent to express an opinion as to the condition of such person. Rogers on Expert Testimony (2d Ed.) 121, 161.

If a statement of facts is according to testimony and contains those essential to the proponent's theory, it is a proper basis for opinion evidence. Rogers on Expert Testimony, 65; Herpolsheimer et al. v. Funke, 95 N. W. 688; Wharton on Evidence (3d Ed.) 441.

S. G. Cady and *John Knauf,* for respondent.

If the error exists in not rewriting, serving and filing an amended complaint, it is an "invited error," and cannot be availed of. Davis v. Dunlevy, 53 Pac. 250; Olsin v. Teeford, 34 S. E. 168;

American Grocery Co. v. Kennedy, 28 S. E. 251; North Texas Bridge Co. v. Coleman, 58 S. W. 101; Walton v. Chicago Elec. Ry. Co., 56 Fed. 1006.

Where a party agrees to the manner in which his rights shall be submitted to the trial court, he cannot complain on appeal. Judge v. French, 3 S. & P. 263; Green v. Taney, 3 Pac. 423; Crab v. Mickels, 5 Ind. 145; Haggard v. Atlie, 1 Greene, 44; Wiscomb v. Cubberly, 33 Pac. 320; Harris v. Loyd et al., 28 Pac. 736; Perego v. Dodge et al., 163 U. S. 160, 41 L. Ed. 113; 16 Sup. Ct. Rep. 971; Mai v. Herdenhemer, 63 Texas, 304; Mertend v. Roche, 57 N. Y. Supp. 349; Graham v. Rooney, 42 Iowa, 557.

Where an error results in no prejudice there will be no reversal. Belt v. Farrow, 83 Ga. 695; Kissel v. Lewis, 156 Ind. 233; Gregg v. Berkshire, 62 Pac. 550; Hewan v. Morris, 96 Fed. 703; Cooney v. Lowenthal, 61 Pac. 940; Van Patters v. Burr, 7 N. W. 522; Pittsburg v. Broderson, 62 Pac. 5; Bannan v. Warfield, 42 Md. 22; Gray v. Smith, 83 Fed. 824; Walker v. Beever, 50 Iowa, 504; Lyons v. Red Wing, 78 N. W. 868; Smith v. Smith, 57 N. Y. Supp. 1122; Whitehall v. Crawford, 37 Ind. 147.

Previous knowledge of a defect in sidewalk or highway does not always constitute contributory negligence barring a recovery, as each case must be controlled by its own circumstances, and if the question is not free from doubt, it is for the jury to determine. Linnver v. Gillilan, 24 N. W. 44; N. & N. R. Co. v. Bailey, 9 N. W. 50; Alexander v. City of Big Rapids, 42 N. W. 1071; Shaw v. Soline Twp., 71 N. W. 642; S. C. & P. R. R. Co. v. Stout, 17 Wall. 657, 21 L. Ed. 745; Lowell v. Township of Waterton, 25 N. W. 517; City of Altoona v. Lutz, 60 Am. Rep. 346; Finn v. City of Adrian, 53 N. W. 614; Morrill on City Negligence, 139; Smith v. Ryan, 29 N. Y. S. R. 672; Fort Wayne v. Breese, 123 Ind. 581.

Whether respondent exercised due care is one of the facts for the jury. 15 Am. & Eng. Enc. Law, 466; Kingsley v. Morse, 40 Ark. 577; Robinson v. Commonwealth, 22 Vt. 213; McQuillean v. Seattle, 45 Am. St. Rep. 800; Talbot v. Taunton, 140 Mass. 552; George v. Halvorson, 110 Mass. 506; Barton v. Springfield, Id. 131; Reed v. Northfield, 13 Pick. 94; Dwire v. Bailey, 131 Mass. 170; Stoker v. Minneapolis, 32 Minn. 478; Collins v. City of Janesville, 87 N. W. 241; Barry v. Ferdildsen, 72 Cal. 254.

It is enough that respondent used the same walk in the same manner as persons of ordinary prudence would. Hill v, Seekonk, 119 Mass. 85; Hawks v. Inhabitants of Northampton, 121 Mass. 10; Woods v. City of Boston, 121 Mass. 337; Weare v. Fitchburg, 110 Mass. 334; Kelley v. Blackstone, 147 Mass. 448; Mahoney v. Met. R. R. Co., 104 Mass. 73; Thomas v. W. W. Tel. Co., 100 Mass. 156.

The fact that plaintiff knew of the condition of the walk two or three weeks before the accident and yet passed that way is not conclusive evidence of negligence. Dotton v. Albion, 57 Mich 477; Clinton v. Harris, 64 Mich. 477; Reed v. Northfield, 13 Pick. 94; Frost v. Waltham, 12 Allen, 85; Whittaker v. West Boylston, 97 Mass. 273; Looney v. McLean, 129 Mass. 33; Walker v. Decatur Co., 67 Iowa, 307; Kendall v. Albia, 73 Iowa, 341; Village of Orleans v. Perry, 40 N. W. 417; Larsh v. City of Des Moines, 74 Iowa, 512, 38 N. W. 384; Mill Creek Twp. v. Perry, 10 Cent. Rep. 299; Shook v. City of Cohoes, 108 N. Y. 648, 15 N. E. 531; Strong v. Sacramento & P. R. R. Co., 61 Cal. 326; Klanowski v. Grant T. R. R. Co., 57 Mich. 528.

Momentary forgetfulness is not necessarily conclusive proof of contributory negligence. Kelly v. Blackstone, 9 Am. St. Rep. 730; Malloney v. City of St. Paul, 54 Minn. 398, 56 N. W. 94.

Filing notice of claim with city auditor is a sufficient presentation to the "common council." Roberts v. Village of St. James, 79 N. W. 519; Doyle v. City of Duluth, 76 N. W. 1029; Bacon v. City of Antigo, 79 N. W. 31.

A paper is filed when delivered to the proper official, and by him received to be kept on file. Bouvier's Law Dict. 782; Stone v. Crow, 51 N. W. 335; Beebe v. Morrill, 76 Mich. 114; Bishop v. Cook, 13 Barn. 326; Lamson v. Falls, 6 Ind. 309; Pinders v. Yager, 29 Iowa, 468; Tregombo v. Comanche Mill & Milling Co., 57 Cal. 501.

A magistrate's certificate is conclusive as to the matter therein, except for fraud or mistake of officer. Davis v. Jenkins, 40 Am. St. Rep. 197; Heeter v. Glasgow, 21 Am. Rep. 46; Kerr v. Russell, 69 Ill. 666.

Opinion testimony must be based upon a clear statement of assumed facts, and these based upon all of the testimony when undisputed, or if disputed, upon that which counsel claims to be true according to his theory of the case. Commonwealth v. Rogers,

7 Metc. 500, 41 Am. Dec. 458; Jefferson Ins. Co. v. Cotheal, 7 Wend. 72, 22 Am. Dec. 567; Re Barber's Estate, 22 L. R. A. 90; Turner v. Twp. of Ridgeway, 105 Mich. 409, 63 N. W. 406; Dickenson v. Fitchburg, 13 Gray, 546.

The truth of facts appearing in the evidence according to the theory of the examiner is assumed. Rivard et al. v. Rivard et al., 66 N. W. 681; Moore v. C. M. & St. P. Ry. Co., 47 N. W. 273; Kerr v. Lundsford et al., 31 W. Va. 659, 2 L. R. A. 668; Louisville N. A. & C. R. Co. v. Shires, 108 Ill. 617; Central Branch Union Pac. R. Co. v. Nichols, 24 Kan. 242; Murphy v. Marston Coal Co., 183 Mass. 385, 67 N. E. 342.

Facts should be stated hypothetically and call for the opinion based thereon. Dexter v. Hall et al., 15 Wall. 9, 21 L. Ed. 73, 79; People v. Harris, 136 N. Y. 423, 33 N. E. 65; C. & A. R. Co. v. Glenny et al., 175 Ill. 238, 51 N. E. 896; Fuller v. City of Jackson et al., 92 Mich. 197, 52 N. W. 1075.

YOUNG, J. The plaintiff recovered a verdict for $5,000 for personal injuries sustained through a fall which was caused by a defective sidewalk upon one of the defendant's streets. A motion for judgment notwithstanding the verdict or for a new trial was made and denied. The defendant has appealed from the order overruling its motion, and also from the judgment.

The first assignment of error is based upon the refusal of the trial court to grant defendant's motion for a directed verdict. The motion was upon three distinct grounds: "(1) That there is no complaint served or filed in this action; (2) that there is no allegation in the pleading and no evidence to prove any presentation of a claim for damages, as provided by sections 2172 and 2173 of the Revised Codes of 1899, to the mayor and common council of the city of Jamestown; (3) that it is shown by plaintiff's evidence that she was guilty of contributory negligence." The questions presented by the above assignment (and they are the ones chiefly relied upon for reversal) will be considered in the order stated in the motion.

The question presented under the first ground of the motion, i. e., the claim that no complaint was served or filed in the action, is not fairly disclosed in the motion.

It refers to an amendment of the complaint and relates wholly to an irregularity in procedure. The record shows that the action was regularly commenced by the service of a summons and com-

plaint, which were filed, and in due time the defendant served and filed its answer. When the case was called for trial counsel for defendant objected to the introduction of any evidence under the complaint, upon the ground that two of its allegations were insufficient in certain particulars, which were pointed out in the objection. The objection was sustained, and leave was given to the plaintiff to amend to cure the alleged defects, and a recess of 15 minutes was taken for that purpose. When court reconvened the presiding judge inquired of plaintiff's counsel whether he had amended the complaint, to which the latter replied, "Not as yet," and began reading a proposed amendment from a paper in his hands, when he was interrupted by counsel for defendant with a demand "that the proposed amendment be dictated to the stenographer," and, in pursuance of this demand and under the direction of the court, this was done. Counsel for defendant then "orally demurred to the amended complaint, which demurrer was dictated to the stenographer." Counsel for appellant caused the amendment and the demurrer to be transcribed, and they are contained in the statement of the case. After the demurrer was overruled "defendant's counsel asked the court to permit the former answer filed in the case to stand as the answer to the amended complaint, which request was granted." The trial then proceeded, and continued until verdict, without specific objection on the part of the defendant's counsel to the irregular manner pursued as to the amendment. Two days after the verdict was rendered, and before the entry of judgment, the trial court made an order which recited the allowance of the amendment at the trial, and directed that it be written out and filed, and that when so filed it should have the same force and effect as if written out and filed when the objection was made. In pursuance of this order the amendment was written out and verified and served upon defendant's counsel and filed. Upon this state of facts it is apparent that the defendant cannot urge the irregularity as error. One of the cardinal maxims of jurisprudence, and it is declared by section 5078 of our Code of 1899, is that "acquiescence in error takes away the right of objecting to it." This rule is well stated in Rogers v. Cruger, 7 Johns. (N. Y.) 611, as follows: "If a party after an irregularity has taken place, consents to a proceeding which, by insisting on the irregularity, he might have prevented, he waives all exception to the irregular-

ity. This is a doctrine long established and well known. 'Consensus tollit errorem' is a maxim of the common law and the dictates of common sense." Rogers v. Cruger, 7 Johns. (N. Y.) 557, 611. The following cases illustrate the application of the rule to errors and irregularities in procedure: Yates v. Russell, 17 Johns. (N. Y.) 461; Watkins v. Weaver, 10 Johns. (N. Y.) 107; Farrington v. Hamblin, 12 Wend. (N. Y.) 212; George L. Co. v. Strong, 3 How. Prac. (N. Y.) 246; Webb v. Mott, 6 How. Prac. (N. Y.) 439. It is true counsel coupled with other objections to certain evidence the objection that it was "inadmissible under the pleadings;" but this did not disclose the real objection, and it was not an objection that the complaint had not been regularly amended and that defendant objected to proceeding further with the trial until it had been so amended, and this is also true as to the motion for a directed verdict. The defendant's counsel made no demand that the complaint be written out, served and filed, and did not fairly apprise either the court or opposing counsel that they withdrew their consent to the method of amendment in which they had acquiesced. Had they done so, no doubt the ground of objection would have been removed by a regular amendment. If it be conceded, therefore, that the error was one which, in any case, is available as ground for a directed verdict, still it follows from the reasons above stated that in this case defendant had forfeited its right to urge it.

The second ground of the motion, the alleged failure of plaintiff to present her claim for damages in accordance with the requirements of section 2172 and 2173, Rev. Codes 1899, presents a more serious question. These sections, so far as material, read as follows:

"2172. All claims against cities for damages or injury alleged to have arisen from the defective, unsafe, dangerous or obstructed condition of any * * * sidewalk, * * * shall within sixty days after the happening of such injury or damage, be presented to the mayor and common council of such city by a writing signed by the claimant, and properly verified, describing the time, place, cause and extent of the damage or injury.

"2173. No action shall be maintained against any city as aforesaid for injuries to person or property unless it appears that the claim for which the action was brought was presented to the mayor and common council as aforesaid * * * and that the

mayor and common council did not within sixty days thereafter audit and allow the same."

The succeeding section (2174) declares that the failure to make presentation of a claim in the manner prescribed, "for audit and allowance within said sixty days," shall be a sufficient bar and answer to any action against the city. The question is whether the evidence shows that the claim was "presented," within the intent and meaning of the above provisions. The facts are as follows: On March 27th, after the accident, the plaintiff, who was then at Oakes, for the purpose of complying with the above section caused her attorney, S. G. Cady, to prepare a written statement of her claim against the defendant, and she signed and verified three copies of the same, and the following day Cady went to Jamestown for the purpose of presenting the same. He presented one copy to the mayor and one copy to the city auditor. The copy presented to the mayor was delivered at his office. The copy delivered to the auditor was delivered upon the street. Accosting that officer, he inquired whether he was the city auditor, and, receiving an affirmative answer, he gave him the copy, informed him what it was, and stated that he desired to have it presented at the next meeting of the city council. The claim was addressed: "To the City Council of the City of Jamestown, N. D." The mayor testified that he submitted the copy he received to Mr. Thorp, the city attorney. He also testified that "the notice was not discussed or presented to the council at any time." Two aldermen testified to the same effect. The present city auditor testified that he could find no copy of the claim among the records and no entry in reference thereto. The auditor to whom the claim was presented died in the following December. His wife testified that at the time this claim was presented and previous thereto she did the clerical work in his office, and that it was the custom of the office to mark claims against the city as filed, and to place them in a box called "the live box," and take them to the meetings of the city council; that she was absent from Jamestown at the time this claim was presented and for a month thereafter.

Counsel for appellant contend that these facts do not show compliance with the statute above referred to. We are of opinion that the presentation was sufficient. The manifest purpose of the statute is to protect cities from the unnecessary expense and the annoyance of legal proceedings until claims against them can

be investigated. The person injured must present his claim within 60 days from the date of the injury, during which period the facts are fresh and ascertainable. The city is given 60 days thereafter in which to inform itself as to the merits of the claim and determine whether it will audit and allow it. If not allowed at the end of that period, the party injured may pursue his remedy by action. Statutes having the same end in view are found in a number of states. Some require notice of the claim to be served upon the city attorney, some upon the mayor, while others require the claim to be filed. Our statute, as will be seen, does not, in terms, require either service or filing. It merely requires that the claim shall be "presented to the mayor and common council," and it does not state how it shall be presented. As this court said in Coleman v. City of Fargo, 8 N. D. 69, 76 N. W. 1051: "The statute governing the presentation of this class of claims has not attempted to prescribe the manner of the presentation, nor to indicate the person who shall present them, or the particular channel through which the claims are to be presented. In the absence of statutory regulation, the claimant is wholly unrestricted with respect to the manner of presenting his claim, and may choose any manner which suits his convenience, provided, always, that his claim is presented in proper form and within the statutory time, to the proper body." In this case there was a proper and sufficient presentation of the claim to the mayor. The only question is whether the delivery of the copy to the mayor and the city auditor satisfies the requirement of the statute that the claim shall be presented "to the mayor and common council." We are of opinion that it does. The city auditor has charge of all papers and records of the city and attends upon and keeps a record of the proceedings of the city council (section 2168, Rev. Codes 1899), and is the first officer who has a duty to perform in reference to claims against the city. The auditor is the proper official channel through which all claims and demands reach the city council, and is the official representative of the city council for receiving all claims and demands against the city, including claims for personal injuries. Where a copy of the claim is delivered to the mayor and to the auditor, as in this case, the purpose of the statute is accomplished. If the auditor neglects his duty to call the council's attention to the claim, it is a neglect of a duty which he owes to the city, and not a negiect of a duty which he

owed to the claimant. The claimant has performed his duty when he has delivered the copy of his claim to the mayor and to the auditor, who is authorized to receive it on behalf of the council.

As to the contention that the claim must be directly presented to the council in session, it is perhaps sufficient to say that the statute does not so specify. No particular mode of presenting having been designated, it is our duty to give the statute a practical construction, so as to carry out its purpose. A delivery of the claim to the mayor and to the auditor accomplishes this result. To require a presentation to the city council in session would often deprive the claimant of the benefit of the full 60-day period for making presentation, and, by failure to meet, the council could make it entirely impossible for the claimant to make presentation. For reasons similar to those which control our conclusion, the Supreme Court of Minnesota held, in Doyle v. City, 74 Minn. 157, 76 N. W. 1029, that a statute which required the giving of notice to a city council and the presentation of the claim to the council is sufficiently complied with by giving the notice to the clerk of that body. The court said: "There is no practical difficulty in giving notice to the council. It may be directed to the council and left with the clerk or officer who has charge of the records and files of the council, with a request annexed that it be laid before the council at the next meeting. This would be the orderly and practical way of giving notice to the council or other governing body." This case was approved in Lyons v. Red Wing, 76 Minn. 20, 78 N. W. 868, and Peterson v. Village (Minn.) 87 N. W. 615. See, also, Parish Adm'r v. Town, 62 Wis. 272, 22 N. W. 399, and Mason v. City (Wis.) 74 N. W. 357. In the case last cited the court said "that the only orderly way by which a claim can be presented to a common council for its action is by filing the same with its clerk. When so filed it is, in legal effect, presented to the common council." The fact that the notice of claim was presented to the auditor outside of his office, and does not now appear among the files of his office, does not, on the facts of this case, warrant us in holding that it was not delivered and received by him officially. The notice of claim was directed "to the mayor and city council." He was informed what the paper was, and it was delivered to him with the statement that the claimant desired to have it presented at the next meeting of the council. He could properly have refused to accept it outside of his office. He chose

to accept it elsewhere, and his acceptance was none the less official because of that fact. The act was not one which had to occur in his office in order to make it official and valid. On this point see the opinion of Judge Caldwell in Bank v. Batchelder Co., 51 Fed. 130, 2 C. C. A. 126, 4 U. S. App. 603. Statutes which designate the particular manner of presentation, i. e., by service upon a particular officer, or by filing in a certain office, must, of course, be complied with. Our statute merely requires the claim to be presented. For the reasons above stated, we are constrained to hold that the presentation in this case was sufficient.

No error was committed in overruling the third ground of the motion. The plaintiff is a professional nurse. At the time of the accident she was engaged in the practice of her profession in the city hospital of Jamestown. The accident occurred while she was going from the hospital to the business part of the city upon an errand. The defendant's contention that plaintiff was guilty of contributory negligence is based upon the following testimony elicited upon her direct and cross-examination: "In coming up town from the city hospital on the evening of March 1, 1903, my right foot went into a hole in the sidewalk and threw me forward on my right side [describing her injury]. This was on Main street, between first and Second avenues, between 70 and 80 feet from Second avenue. It was somewhere between half past 7 and 8 o'clock in the evening. I remember that it was very cold and stormy the night I received the injury. I was walking the ordinary rate; the usual pace we would take on a cold evening; was not running. A portion of the plank on the right side of the center beam was out, and it was in that hole my foot went. I never measured the width of the hole, and cannot estimate its width. It was as wide as the plank that was out. It was large enough for my foot to get into. I usually walk back and forth from the hospital to town. I recall two occasions. The last one was two or three weeks before the accident. I had noticed the sidewalk was greatly out of repair. I cannot say that I noticed this particular place. I know that these planks were gone for some time before I fell. I remember there were defective places in the sidewalk. I drove to the place of injury on April 14 or 15, 1903, with my husband. I remembered the place after going back and examining it. I had not noticed the place any more particularly than I did the other places. I had noticed it along

with the other places. I knew the particular defect existed in the sidewalk. I knew there was more than one place in the sidewalk. After examining it I remembered there was a place there. I remember that I noticed it two or three weeks before the accident. * * * Do you remember noticing any other places where the plank was gone on the right hand of the center beam? A. No; well, I did notice places that became very impressive after the accident. Q. Did you think of that while you were walking on the sidewalk before you fell? A. No. Q. Were you walking fast at the time? A. About the usual pace one would take on a cold evening. Q. How cold was it that evening? A. Quite cold. Q. Was there a wind blowing? A. I don't remember. Q. It was a dark night? A. It was starlight."

Appellant's counsel contend that it was the duty of the trial court, upon the foregoing testimony, to hold, as a matter of law, that plaintiff was guilty of contributory negligence. We cannot agree to this contention. The question of negligence, whether it be of a defendant or the alleged contributory negligence of a plaintiff, is primarily and generally a question of fact for the jury. The question becomes one of law ,authorizing its withdrawal from the jury, only when but one conclusion can be drawn from the undisputed facts. "If the undisputed facts are of such a character that reasonable men might draw different conclusions or deductions therefrom, then the question of negligence must be submitted to the jury." Heckman v. Evenson, 7 N. D. 173, and cases cited on page 182, 73 N. W. 427, page 430. Also R. R. Co. v. Stout, 17 Wall. 657, 21 L. Ed. 745. The plaintiff was required to exercise such care as the condition of the street and her knowledge of it made reasonable under the circumstances. A traveler is not required to forego traveling upon a sidewalk because he has knowledge that it is defective. He has, as a general rule, a right to assume that it is safe, and when he is injured as a consequence of a defect of which he had previous knowledge, the mere fact of previous knowledge does not per se establish contributory negligence. And this is also the rule when previous knowledge is coupled with absence of thought concerning the defect at the time of the injury, or momentary forgetfulness of it. Previous knowledge of a defect and forgetfulness of it are important facts to be considered in connection with all other circumstances in determining whether the party injured was exercising reasonable care. But

it is not negligence, as matter of law, for a person who has knowledge of a defect not to remember it at all times and under all circumstances. The foregoing rules, which are founded upon reason and experience, are of general acceptance. Cuthbert v. City, 24 Wis. 383; Wheeler v. Town, 30 Wis. 392; Spearbracker v. Town, 64 Wis. 573, 25 N. W. 555; Simonds v. City, 93 Wis. 40, 67 N. W. 40, 57 Am. St. Rep. 895; Doan v. Town, 101 Wis. 112, 76 N. W. 1104; Driscoll v. Mayor, 11 Hun. (N. Y.) 101; Bassett v. Fisk, 75 N. Y. 303; Weed v. Village, 76 N. Y. 329; Whittaker v. Inhabitants, 97 Mass. 273; Blood v. Inhabitants, 103 Mass. 509; Weare v. Inhabitants, 110 Mass. 334; Kelly v. Inhabitants, 147 Mass. 448, 18 N. E. 217, 9 Am. St. Rep. 730; Dwyer v. City, 19 Utah, 521, 57 Pac. 535; Dempsey v. City, 94 Ga. 420, 20 S. E. 335; Ouverson v. City, 5 N. D. 281, 65 N. W. 676, See, also, 5 Thompson on Negligence, section 6266, and cases cited.

Cases may be readily imagined, and many of them will be found in the books, in which the defect is so conspicuous and its existence and dangerous character so well known to the person injured, and his opportunity for seeing and avoiding it so manifest, that reasonable minds would agree that he was not in the exercise of reasonable care in failing to avoid it. In such cases it has frequently been said that the previous knowledge and the failure to remember constitute contributory negligence. The following may be cited as illustrative cases of this class. Gilman v. Deerfield, 15 Gray (Mass.) 577; Bruker v. Covington (Ind.) 35 Am. Rep. 202; C. R. I. & P. Ry. So. v. Houston, 95 U. S. 697, 24 L. Ed. 542; City v. Magill (Pa.) 47 Am. Rep. 739; Bender v. Minden (Iowa) 100 N. W. 352. It will appear from the statement of facts already made that this case does not belong to the above class. The defect which caused plaintiff's injury was not of such a character that a traveler passing over it infrequently would necessarily and permanently charge his memory with its existence and exact location The plaintiff's previous knowledge of it was at most very indefinite. Nothing unusual had occurred to cause her to charge her memory as to it. It does not appear that the defect was especially noticeable, even in daylight, and it does not appear that on the night of the injury it was readily observable, if it could be seen at all. The accident occured between half past 7 and 8 o'clock in the evening. The night was cold and disagreeable. It was apparently dark, for it was starlight. The plaintiff was going upon an er-

rand, and she was walking at the pace one usually walks on such a night. Under the circumstances, it cannot be said that but one conclusion can be drawn. The jury found that she exercised reasonable care, and we cannot say, upon the facts above stated, that there is no basis for that conclusion.

The plaintiff, after testifying in cross-examination to the time, place and circumstances of the execution of the notice of claim and that it was read to her, that she signed it and swore to it before the notary public who prepared it, was asked this question: "Did you take an oath?" Her counsel interposed an objection upon the ground that the question called for secondary evidence, claiming that the notice itself was the best evidence. The objection was sustained, and the ruling is assigned as error. It is not necessary to determine whether the ruling was erroneous, for it is quite clear, in any view, that it was without prejudice. If, by this question, the defendant's counsel meant to inquire whether the plaintiff in fact swore to the statement, it was a mere repetition of a previous question, which the witness had answered in the affirmative. If counsel sought to ascertain the particular manner in which she verified it, his purpose was not fully disclosed by the question, for in any event it is the fact of verification, and not the manner, that is controlling. The notary's jurat shows that it was regularly verified. The plaintiff testified that she swore to it, and in this she is corroborated by the testimony of the notary. It is undisputed that the plaintiff and the notary understood that everything was done that was necessary to complete the oath. This was sufficient. An inquiry on the particular method pursued to accomplish this result was not material. Dunlap v. Clay, 65 Miss. 454, 4 South. 118.

Error is also assigned upon the court's action in sustaining the objection of plaintiff's counsel to three questions propounded to Dr. Sifton, who was a witness for defendant. A consideration of these assignments requires a preliminary statement. The plaintiff alleged in her complaint, among other things, "that out of and arising from the injuries to her body and nerves, her nervous system was so shocked that thereafter she became insane and was by the board of insanity commissioners of Stutsman county committed to the state hospital for the insane, where she remained as a patient for two months, and that owing to her injury her mind has never been permanently cured, and that her mind will

always remain weak and affected thereby." The record shows that after plaintiff was injured she was treated or examined at different times by at least five physicians, Drs. Boardman, Moore, Rankin, Hill and Sifton, all of whom testified in the case. It appears that from March 1st, the date of the injury, until April 14th or 15th, the plaintiff remained at the hospital at Jamestown. On the above date she went to Oakes, and while there was treated for 10 days or more by Dr. Boardman. While at the hospital and at Oakes her treatment included the taking of opiates, chiefly morphine, often in large doses, which was made necessary by the great severity of the pain which she suffered. This was particularly true while she was being treated by Dr. Boardman. During this time she had violent spasms, and he testified that at such time he gave her three or four doses of morphine to quiet her. After three weeks of treatment at Oakes she became insane, and on July 8th was committed to the state insane asylum. Dr. Moore, the superintendent of that institution, testified that she had no stated form of insanity or hallucination; that her mind was weak and her memory poor and weak. Dr. Rankin, the examining physician for the insanity board, testified that he reported at the time she was committed that her insanity "was due to an overindulgence in opiates, possibly to overwork," and that he was still of that opinion. Dr. Sifton was called to see the plaintiff at the hospital at the time of her injury. He testified as follows: "I gave her one dose of morphine—one-half grain. One-fourth grain is a fair dose. I did not prescribe for her, and never told her to take anything whatever. * * * Where one-half grain of morphine has no more effect upon a patient than it did upon her, there is one of two things: Either she was accustomed to taking morphine, or the pain was very, very severe. * * * And the reason, in my opinion, that the one-half grain dose of morphine had no effect upon her was the severe pain which she was suffering at the time." This witness does not remember that he prescribed for her or gave directions for her treatment at any other time. Towards the close of his testimony he was asked the following questions: "Q. From your knowledge of the plaintiff at that time and your observation of her at different days, when you visited the hospital, and your experience on that night, do you have any opinion as to whether or not she was accustomed to taking morphine in excessive quantities? A. Yes, sir; I have an opinion.

Q. Will you state what that opinion is?" This was "objected to as incompetent, irrelevant and immaterial; no proper foundation laid." The objection was sustained, and this is assigned as error. In our opinion no error was committed. The witness had previously stated that his opinion was that she was not accustomed to taking morphine. But the question itself was clearly improper. It called for the opinion of the witness, and no proper foundation was laid for it. A physician may, in testifying as an expert, give his opinion upon facts resting in his own knowledge, or upon facts testified to by other witnesses, but, in the former as well as the latter case, the facts upon which the opinion is based must appear in the evidence. The rule is that such questions must be based upon facts previously stated by the witness, or upon facts testified to by others, or upon facts agreed to, or assumed as true hypothetically. The rule must be adhered to, for otherwise there is no basis upon which the jury can measure the value of the opinion. The above question calls for the witness' opinion, not only from his knowledge derived at the time he gave her the half grain of morphine, but also from knowledge derived from his observation of her on different days at the hospital. There is no evidence in the record that he visited the hospital or saw her on any other occasion than that above stated. A very material part of the facts upon which his opinion was asked not appearing in evidence, the question was improper. Kinney v. Brotherhood of American Yeomen, 15 N. D. 21, 106 N. W. 44; 2 Jones on Evidence, 377; Burns v. Barenfield, 84 Ind. 43; Hitchcock v. Burgett, 38 Mich. 501; Van Deusen v. Newcomer, 40 Mich. 90; 5 Enc. of Evidence, 610.

The two additional questions which were asked of the witness, and to which objections were sustained, called for his opinion as to the effect the use of morphine in doses similar to those administered by Dr. Boardman would have upon the mental faculties, and whether the continued use of morphine will ever produce insanity. The apparent purpose of these questions was to show that the plaintiff's insanity resulted from the use of morphine taken after her injury. Whether the questions were proper we need not determine, for it is apparent that no prejudice resulted. There is no evidence in the record that prior to her injury the plaintiff was addicted to the use of morphine. Her use of morphine after the injury was under the advice and direction of reputable physicians. If its use under such circumstances in fact aggravated the

effect of her injury and was the cause, in whole or in part, of her temporary mental derangement, still that fact avails the defendant nothing; for the necessity for the use of drugs to alleviate the pain arose from the injury caused by defendant's negligence, and is not attributive to any fault on the part of the plaintiff, and this would be true even if the physicians had erred in their treatment. Collins v. Council Bluffs, 32 Iowa, 324, 329, 7 Am. Rep. 200; Sauter v. N. Y. Cent. & H. R. Ry. Co., 66 N. Y. 50, 23 Am. Rep. 18; Lyons v. Erie Ry. Co., 57 N. Y. 489; Wharton on Negligence, section 134. The record shows, however—and in this the physicians agree—that the plaintiff was treated in accordance with the rules of practice of medicine as prescribed by the physicians of this state.

Finding no prejudicial error in the record, it follows that the judgment and order must be affirmed, and it is so ordered. All concur.

(107 N. W. 359.)

JOHN S. PILLSBURY, JR., AND CHARLES S. PILLSBURY v. THE J. B. STREETER, JR., COMPANY.

Opinion filed February 19, 1906.

Affidavit for Publication — When Findings of Fact Thereon Sustained.

1. The findings of the district court that it is satisfied that the facts stated in an affidavit, on which an order of publication of a summons is requested, are true, will not be disturbed, where it fairly and reasonably appears that the facts stated in the affidavit show due diligence.

Same — Findings Based Upon Conclusions.

2. It is only where such recitals in an order for the publication of the summons are merely conclusions that a finding of due diligence will not be upheld.

Same — Residence.

3. A finding that the residence of a party is in a specified place is a finding of a fact and not a conclusion.

Affidavit of Publication — Jurisdiction.

4. The facts stated in an affidavit for the publication of the summons considered, and *held*, sufficient to sustain an order of publication; and that the publication of the summons, pursuant to such order, conferred jurisdiction on the court to enter judgment of foreclosure of a real estate mortgage against a nonresident defendant.

Same — Failure to File Affidavit and Order Until After Complaint Is Filed.

5. The failure to file the affidavit and order for publication, until one day after the filing of the summons and complaint, does not invalidate a publication of a summons, as the statute does not prescribe that the affidavit or order shall be filed at the time the complaint is filed.

Specific Performance — Tender of Deed and Abstract of Title — Interest.

6. In an action for specific performance, the allowance of interest on the purchase price due on a contract for the sale of real estate in favor of the vendor was proper, where the vendee did not pay the same when a valid deed and abstract was tendered pursuant to the contract, although the contract did not provide for interest, as the vendee had taken possession.

Same — Equity Will Adjust Rights of Parties to Contract.

7. Courts of equity will adjust the rights of parties to such contracts in such actions, so as to give to each what he would have received under the contract, if there had been no default by the vendee.

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

Action by John S. Pillsbury, Jr., and Charles S. Pillsbury, against the J. B. Streeter, Jr., Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Thomas H. Pugh, for appellant.

The statute relating to substituted service is mandatory and failure to comply with its terms confers no jurisdiction. Beach v. Beach, 6 Dak. 371, 43 N. W. 701; Yorke v. Yorke, 3 N. D. 343, 55 N. W. 1095; Bothell v. Hoellwarth et al., 10 S. D. 491, 74 N. W. 231; Carlton v. Carlton, 85 N. Y. 313; McCracken v. Flanagan et al., 27 N. Y. 493, 28 N. E. 385; 24 Am. St. Rep. 481; Kennedy v. N. Y. Life Ins. Co., 32 Hun. 35; Greenbaum v. Dwyer, 66 How. Pr. 266; Simensen v. Simensen, 100 N. W. 708, 13 N. D. 305.

The affidavit for publication does not show any diligence to find defendant within a reasonable time prior to the date of the order. Woods v. Pollard, 84 N. W. 214; McCarthy v. McCarthy, 16 Hun. 647; Collins v. Ryan, 32 Barb. 647; 19 Enc. Pl. & Pr. 622; Carnes et al. v. Mitchell, 48 N. W. 941; Orr v. Currie, 35 N. Y. S. 198; Am. Dig. 1896, Col. 4434; State v. Horine, 63 Mo. App. 1; Plummer v. Blair et al., 80 N. W. 139; Coughran v. German, 87 N. W. 527; Allen v. Richardson, 92 N. W. 1075.

Order must be based on a state of facts existing at or near the time of making it. N. Y. Baptist Union v. Atwell et al., 54 N. W. 760; Adams v. Hosmer, 56 N. W. 1051.

Affidavit must be filed before the order can be made. 17 Enc. Pl. & Pr. 56; Guinn v. Elliott, 98 N. W. 625.

Order must show that the facts necessary for an order were shown to the satisfaction of the court. McCracken v. Flanagan, supra; Davis v. Cook, 69 N. W. 18; Manning v. Keady, 25 N. W. 1.

Failure to state facts required by statute renders order of publication defective. 17 Enc. Pl. & Pr. 81; Lawrence v. State, 30 Ark. 719.

The judgment may be attacked collaterally. Murphy v. Lyons, 28 N. W. 328; McGavock v. Pollock, 4 N. W. 659; Boker v. Chapline, 12 Iowa, 204; Palmer v. McMaster, 19 P. 585; McMinn v. Wheelan et al., 27 Cal. 312; Jordan et al. v. Giblin et al., 12 Cal. 100; Duxbury v. Dahle, 78 Minn. 427, 81 N. W. 198; O'Malley v. Fricke et al., 104 Wis. 280, 80 N. W. 436; Cody et al. v. Cody, 98 Wis. 445, 74 N. W. 217; Pendleton v. Weed, 17 N. Y. 75; Fowler v. Simpson, 79 Texas, 611; Turner v. Malone, 24 S. C. 405; Bigelow v. Stearns, 19 Johns, 41; Davis v. Cook, 9 S. D. 319, 69 N. W. 18; Coughran v. Markley, 87 N. W. 2; Cox v. Boyce, 152 Mo. 576, 75 Am. St. Rep. 483; Wilkinson v. Schoonmaker, 77 Tex. 615, 19 Am. St. Rep. 803; Oelberman v. Ide, 93 Wis. 669, 57 Am. St. Rep. 947; McGee v. Hayes, 127 Cal. 336, 78 Am. St. Dep. 57; Black on Judgment (2 Ed.) 278.

Proof of affidavit and order of publication must exist *dehors* the judgment. Palmer v. McMasters, supra; Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959.

Interest is due when plaintiff is in position to demand the money, and does demand it. Morse v. Rice, 54 N. W. 308.

Guy C. H. Corliss, for respondent.

Equity will enforce a contract against the vendee as well as the vendor. Anderson et al. v. Wallace Lumber & Mfg.. Co., 70 Pac 247; Warvelle on Vendors, 779-780.

The proper judgment to be rendered, is one requiring the vendee to pay within a certain time, and if he does not, direct a sale of the property to pay the amount due, and enter judgment for the deficiency. Edmison v. Zborowski, 68 N. W. 288; Gates v. Parmly, 66 N. W. 253, 257; Loveridge v. Shurtz, 70 N. W. 132; Clark v. Hall. 7 Paige, 382, 385; Corpus v. Teedt, 69 Ill. 205;

Anderson v. Wallace, supra; Peake v. Young, 18 S. E. 237; Abbott v. Moldestad, 77 N. W. 227, 74 N. W. 293; Peck v. Zborowski, 82 N. W. 387; Strauss v. Beudheim, 66 N. Y. Supp. 247; Andrews v. Sullivan, 7 Ill. 327; Robinson et al. v. Appleton et al., 124 Ill. 276, 15 N. E. 761; Goddin v. Vaughn, 14 Gratt. 102; Adams v. Ash, 46 Hun. 105; Peake v. Young, 40 S. C. 41; Brace et al. v. Doble, 3 S. D. 110, 52 N. W. 586.

The affidavit was amply sufficient to give jurisdiction for the order of publication. Bank of Colfax v. Richardson et al., 54 Pac. 359; Salisburk v. Cooper, 69 N. Y. Supp. 258; Kennedy v. N. Y. L. Ins. & Trust Co., 101 N. Y. 488, 5 N. E. 774; Rue v. Quinn, 66 Pac. 216; Allen v. Richardson, 92 N. W. 1075; Woods v. Pollard, 84 N. W. 214; Coughran v. Marcley, 87 N. W. 2; Coughran v. Germain, 87 N. W. 527; Marks v. Ebner, 180 U. S. 314, 21 Sup Ct. Rep. 376; McDonald v. Cooper, 32 Fed. 745; Crouter v. Crouter et al., 30 N. E. 726; Pike v. Kennedy et al., 15 Pac. 637.

There is nothing in that the affidavit was not filed until after the filing of the complaint. Allen v. Richardson, 92 N. W. 1075.

In equity, where the contract is silent on the subject of interest, the vendor will be regarded as trustee of the land for the benefit of the purchaser and liable to account for rents and profits; the vendee is trustee of the purchase money, and, if not paid, will be charged with interest thereon. Pomeroy on Specific Performance, section 428; Worrall v. Munn, 38 N. Y. 137; Bostwick v. Beach et al., 9 N. E. 41; Lynch v. Wright, 94 Fed. 703; 2 Story Eq. Jur., section 789; Fry, Spec. Per., section 889; Drake v. Barton, 18 Minn. 462.

Even when the vendor is in fault, the vendee in possession must pay interest, unless he sets aside the money and appropriates it for the vendor and so notifies him. Calcraft v. Roebuck, 1 Ves 221; Powell v. Martyn, 8 Ves. 146; Roberts v. Massey, 13 Ves. 561; Regents Canal Co. v. Ware, 23 Beav. 575; Winter v. Blades, 2 S. & S. 393; Dyson v. Hornby, 4 DeG. & Sm. 481; Pomeroy on Specific Performance, section 430.

MORGAN, C. J. Action to compel the vendee to specifically perform a contract for the sale of real estate. The district court entered a decree of specific performance in accordance with the relief demanded in the complaint. The defendant appeals from the judgment and requests a review of the entire case in this court, under section 5630, Rev. Codes 1899.

The facts are stipulated, and there is no question raised as to procedure nor as to the form of the decree. The complaint sets forth a contract in writing between the vendor and vendee, wherein the vendor agreed to convey to the vendee the land in question by warranty deed "and abstracts to each quarter section thereof to be furnished, showing perfect title in the grantors in said deed," and that upon furnishing such deed and abstract the vendee was to pay the balance of the purchase price. The complaint alleges a performance by the vendors of all the conditions of the contract and a tender of a warranty deed and abstract in accordance with the provisions of the contract. The only issue as to a compliance with the contract by the plaintiffs is whether a certain foreclosure of a mortgage upon the land in question was regular and valid. That foreclosure was by action, in which one Samuel L. Bean was the mortgagor. The defendant contends that the foreclosure was void for the reason that the affidavit on which the order of publication was based did not show that the plaintiff had exercised due diligence in ascertaining whether said Bean was a resident of the state at the time such affidavit was made, and could have been personally served in this state. The affidavit was made by plaintiff's attorney in that action, and is in the following language, so far as the point in question is concerned: "That the said defendants Samuel L. Bean, * * * cannot, after due diligence, be found within the state of North Dakota; that the diligence used to ascertain the whereabout of the said defendants is as follows, viz.: As to the said Samuel L. Bean, by inquiring of and from E. H. Wilder, of the village of Arvilla, Grand Forks county, state of North Dakota, James H. Bosard, Grand Forks City, North Dakota, Ralph Whalen of 350 Temple Court, Minneapolis, Minnesota, who all unite in stating that the last known place of residence of the said Samuel L. Bean was General Delivery, City of New York; that is the place where he received his mail; that he always neglected and failed to give them his place of residence in said city of New York; that they have all received letters from the said Samuel L. Bean within the last year, in which he stated that his address was general delivery, New York City; that this deponent himself is in receipt of a letter from said Samuel L. Bean within the past year stating his address was general delivery, New York City, New York; * * * that none of the said defendants above named are residents of the said state of North

Dakota; and that the place of residence of the said defendants above named is as follows, viz.: Samuel L. Bean, New York City, N. Y. * * *" The forcelosure was made in the year 1893, and under section 4900, Comp. Laws 1887, governing the procedure to obtain jurisdiction of absent defendants in foreclosures of mortgages on real estate. That section provides that: "Where the person on whom the service of the summons is to be made cannot after due diligence be found within the territory, and that fact appears by affidavit to the satisfaction of the court, or a judge thereof, * * * such court or judge may grant an order that the service be made by the publication of a summons in either of the following cases: * * * (4) Where the subject of the action is real or personal property in this territory and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein." Upon the presentation of the affidavit, the district court made an order with the following recitals: "On reading and filing the foregoing affidavit, and the facts therein stated appearing to the satisfaction of the court to be true." Publication of the summons was ordered and a copy of the summons ordered to be mailed to said Samuel L. Bean, General Delivery, New York City, N. Y. The only defects in the foreclosure claimed are that the affidavit fails to show the exercise of due diligence in the endeavor to find the said defendant in North Dakota, and the fact that the affidavit and order were not filed in the clerk's office until July 11, 1893, while the summons was dated, and the complaint verified, on July 10, 1893, and each of them filed on that day.

It is generally held that a mere statement in affidavits, to be used as a basis for orders of publication, that due diligence was used to find the defendant, is not alone a statement of fact authorizing a publication. Such statements are deemed conclusions. The facts must be stated, and the court draws the inference therefrom whether due diligence has been exercised or not. What constitutes due diligence is therefore generally held to be a question of law. The affidavit in question, homever, states other matters besides the statement that the defendant could not be found within the state after due diligence to find him had been used. It states that inquiry was made of three persons as to the defendant's whereabouts, and these persons each stated that his last known residence

was in the city of New York, and that his post office address was general delivery in that city, and that each had received letters from him within a year. We think the affidavit showed the exercise of reasonable or due diligence to find the defendant within the state. The information imparted by the persons of whom inquiry was made was not definite as to the place of defendant's residence at the time that the affidavit was made, or at any other time, but it stated that he could not be found within the state, after due diligence. In addition to the information received from the persons named, the affidavit states positively that Bean was not a resident of this state ,and positively states that he was then a resident of the city of New York. Affiant's statement that the defendant was then a resident of New York City, and not a resident of North Dakota cannot be properly or fairly said to be based on what was told to him by those of whom inquiry was made, and is not therefore a conclusion drawn from such information.

The district court found the facts stated in the affidavit to be true. It became satisfied judicially of the existence of such facts and made the order of publication. The statement of the persons inquired of, and that of the affiant of his own knowledge, that Bean was a resident of the city of New York, is not a conclusion of law, but a statement of a fact. In such a case they were not stating a deduction from facts, but a fact. We think due diligence was strictly shown, within the rule announced in Simensen v. Simensen, 13 N. D. 305, 100 N. W. 708. That case, however, is distinguished from this one. There was no positive showing of facts in that case. All was upon information and belief, and there was a lapse of several months between the time when the showing was made by the return of the sheriff and the making of the affidavit and order. The affidavit in this case goes much further than the affidavit commented on in Carlton v. Carlton, 85 N. Y. 314, relied on by counsel. In that case there was no statement that due diligence had been used. The court was asked to infer due diligence from a statement of nonresidence. The court refused to do so, and gave as reasons for its refusal the well known fact that persons residing in one state may do business in a border state and may be served there if diligence be used. In this case the positive fact of residence in the distant state of New York is stated, and the fact stated that after due diligence, with a statement of what it consisted of, the defendant cannot be found within

this state, and the court finds in its order, based on the affidavit, that it is satisfied that the facts stated in the affidavit are true.

We conclude that the court had jurisdiction to make the order, and that the service by publication was valid, even against a direct attack, which this is not. The rule is that the recitals in an order of publication that the facts stated in an affidavit are true to the satisfaction of the court are deemed a judicial finding that such facts exist. This is true as to the facts showing due diligence, although there be but slight evidence of diligence. If it fairly appears that reasonable diligence has been used, the order of publication will be upheld. It is only when the affidavit leaves it as a matter of speculation as to what diligence was used that the findings in such an order will not be upheld. Orr v. Currie (Sup.) 35 N. Y. Supp. 198. That the order of publication in this case is valid is supported by the following cases: Marx v. Ebner, 180 U. S. 314, 21 Sup. Ct. 376. 45 L. Ed. 547; Kennedy v. N. Y. Life Ins. Co. 101 N. Y. 487, 5 N. E. 774; McDonald v. Cooper (C. C.) 32 Fed. 745; Rue v. Quinn et al. (Cal.) 66 Pac. 216; Coughran v. Germain (S. D.) 87 N. W. 527; Coughran v. Markley (S. D.) 87 N. W. 2; Pike v. Kennedy (Or.) 15 Pac. 637; Crouter v. Crouter, 133 N. Y. 55, 30 N. E. 726; Allen v. Richardson (S. D.) 92 N. W. 1075; Woods v. Pollard, 14 S. D. 44, 84 N. W. 214. The fact that it is not shown that the summons was placed in the hands of the sheriff for service is not fatal to the judgment. The means by which due diligence is shown is not confined to any particular method of procedure. It is the fact that due diligence of some kind is shown that gives validity to the order of publication.

The objection that the affidavit and order for publication were not filed until one day after the complaint was filed is fully met by the statement that the statute does not require the filing thereof when the complaint is filed. Allen v. Richardson, supra. The trial court allowed the plaintiff to recover interest on the unpaid purchase money from May 1, 1902. This was about 24 days before the plaintiff tendered a deed and abstract to the defendant. The contract contained no provision as to payment of interest, if payment was not made when plaintiffs had complied with all the conditions required before it became incumbent on the defendant to pay the unpaid purchase price. The contract did not provide that defendant should go into possession of the land before the deed was delivered. By a new agreement made after the written con-

tract was executed and delivered, the defendant was given and took possession of the land within a few days after the written contract was delivered. The allowance of interest may be made by a court of equity, although the contract does not so provide. The adjustment of the equities between the parties is within the powers of the court in equitable actions. To offset the benefits of possession by compelling interest to be paid was an equitable adjustment which cannot be disturbed in this case. The object to be aimed at by courts of equity in such cases is to place the party without fault as nearly as possible in the same condition as he would have been in had there been no default by the other party. Pomeroy on Specific Performance, sections 429, 430; Worral v. Munn, 38 N. Y. 137; Bostwick v. Beach (N. Y.) 9 N. E. 41. The defendant, having enjoyed the fruits of possession, cannot justly claim that it was unjustly prejudiced by the judgment compelling the payment of interest on the money withheld without legal cause.

The judgment is affirmed. All concur.

(107 N. W. 40.)

EZRA MILLER v. W. B. SHELBURN AND JOSEPHINE SHELBURN.

Opinion filed February 19, 1906.

Vendor and Purchaser — Vendee Acquires No Title to the Land at Law, and May Rescind Without Reconveyance.

1. Under a written executory contract for the sale of land, the vendee derives in law no interest in the land or in the title and may rescind the contract in a proper case without a reconveyance.

Same — Trust Relationships of the Vendor and Vendee.

2. The principle that the vendor in such contracts holds the title as trustee for the vendee and the vendee holds the purchase price as trustee for the vendor, applies only in equity, under the equitable doctrine that what ought to be done has been done.

Same — Rescission of Contract.

3. A rescission of a contract for the sale of land may be effected by act of a party thereto, when the consideration for the contract has wholly or partially failed through the fault of the other party; and in such case a notice that the vendee rescinds and disaffirms the contract is sufficient, where there is nothing to be returned under the same.

Same — Consideration — Failure to Convey as Ground for Rescission.

4. The consideration for a contract for the sale of land in vendee's favor is the title to be conveyed after performance; and, in case the vendor refuses to convey after full performance or offer to perform, the consideration for the contract wholly fails, and is ground for rescission by the vendee.

Same — Recovery of Purchase Money.

5. Where the vendor refuses to perform his contract to convey the land after full performance or offer to perform by the vendee and the contract has been duly rescinded by the latter, the money paid by him to the vendor under the contract may be recovered back in an action at law for money had and received.

Same — Complaint.

6. Complaint considered, and *held* not subject to demurrer.

Appeal from District Court, Dickey county; *Kneeshaw,* J.

Action by Ezra Miller against W. B. Shelburn and Josephine Shelburn. Judgment for defendant and plaintiff appeals.

Reversed.

George T. Webb and *C. R. Krause,* for appellant.

A contract to convey lands affords an equitable title only upon the purchaser performing all the conditions that entitle him to a deed. Warvelle on Vendors (2d Ed.) 176; Bispham's Equity, 365; Phinizy v. Gurnsey et al., 50 L. R. A. 680; Chappell v. McKnight, 108 Ill. 570.

Where the contract to convey is void—embracing homestead and lacking wife's signature and acknowledgment—vendor's only recovery is to claim his money paid on the purchase. Rev. Codes 3608, 5032; 15 Am. & Eng. Enc. Law (2d Ed.) 681 and 683; Solt v. Anderson, 89 N. W. 306, 93 N. W. 204, 99 N. W. 678; Scott v. Bush, 26 Mich. 418; Larson v. Butts, 35 N. W. 190; Horback v. Tyrrell et al., 67 N. W. 485; Interstate Sav. & Loan Assn. v. Strine, 78 N. W. 377; Gleason v. Spray, 81 Cal. 217; 15 Am. St. Rep. 47; Donner v. Redenbaugh et al., 16 N. W. 127; Cowgell v. Warrington, 24 N. W. 267; Hall v. Loomis, 30 N. W. 374; Weitzner v. Thingstad, 56 N. W. 817; DeKalb v. Kingston, 73 N. W. 350.

Where the vendor defaults in making title, the vendee can recover the purchase money paid. Warvelle on Vendors (2d Ed.) 836 and 919; Kicks v. State Bank, 98 N. W. 408, 12 N. D. 576; Moore v. Williams, 115 N. Y. 586; 12 Am. St. Rep. 844; Judson v. Wass, 11 Johns. 525; 6 Am. Dec. 392; Wright v. Dickinson et al., 35 N. W. 165; Scott v. Bush, supra; Cowgell v. Warrington, supra; Donner v. Redenbaugh, supra; Primm v. Wise & Stern, 102 N. W. 427; Gregory v. Christian, 44 N. W. 202; Proctor v. Stevens Land Co., 102 N. W. 395; Payne v. Hackney, 84 Minn.

195, 87 N. W. 608; Goetz v. Walters, 25 N. W. 404; Baston v. Clifford, 68 Ill. 70; Demesney v. Gravelin, 56 Ill. 96; Smith v. Lamb, 26 Ill. 396.

Newman, Holt & Frame, for respondents.

The allegation of homestead is insufficient. The pleading must set out the facts to establish the right. Meyer v. Pfeifer, 50 Ill. 485; Over v. Shannon, 75 Ind. 352; Helfenstein v. Cave, 6 Iowa, 374; Union National Bank v. Harrison, 21 N. W. 446.

Respondents were in possession when the contract was made and appellant is presumed to know of their homestead rights, and having paid money under a mistake of law, he cannot recover it. Keener Quasi Contracts, 85; 2 Pom. Eq. Jur. 851; Billie v. Lumley, 2 East. 469; Clark v. Dutcher, 9 Cow. 679.

An action for damages will not lie until the contract is rescinded. Brumagim et al. v. Tillinghast, 18 Cal. 265; Harralson v. Barret et al., 34 Pac. 342; Erkens v. Nicolin, 40 N. W. 567; Valley Ry. Co. v. Lake Erie Iron Co., 18 N. E. 486; Mutual Sav. Inst v. Euslin, 46 Mo. 200; Wessel v. D. S. B. Johnston Co., 3 N. D. 160, 54 N W. 922.

The equitable estate in the land conveyed by the contract may be disposed of by the vendee and it may descend to his heirs. Pom. Eq. Jur., section 105; Clapp v. Tower et al., 11 N. D. 556, 93 N. W. 862.

There is no allegation of the restoration or offer to restore the equitable estate passing under the contract, and without its surrender there can be no rescission of the contract. Telford v. Frost, 44 N. W. 835; Kneeland v. Schmidt, 47 N. W. 438; O'Donnel v. Brand, 55 N. W. 154.

MORGAN, C. J. Action for the recovery of $1,400, as money had and received under a written contract for the sale of real estate duly rescinded by the vendee. The complaint alleges the making of the contract between the defendants, husband and wife, as vendors and owners of the land, and the plaintiff as vendee; that said land consisted of 320 acres, and that the defendants were then in the possession of the same and that "they were living thereon and occupying one-half thereof as their homestead;" that defendants agreed to convey the land by warranty deed, clear of all incumbrances, on November 1, 1903, upon payment to them of $3,600, in addition to the $1,400 paid in cash to them when the contract was entered into; that on November 1, 1903, the plaintiff

complied with all the terms of the contract on his part to be performed, by tendering to the defendants the sum of $3,600, in full compliance with the terms of the contract at the place where the contract provided that such payment should be made and there demanded that the defendants should deliver to him their warranty deed for said land, clear of all incumbrances, in pursuance of the provisions of the contract; that defendants failed to comply with said demand but tendered to him a deed of said land which was not clear of incumbrances, but there were tax liens, judgments and mortgages against said land aggregating the sum of $4,000, on account of which the title to said land was not a good title nor such a title as defendants had agreed in the contract to convey; that in December, 1903, the plaintiff notified the defendants that he rejected said deed and abstract, and at the same time notified them of the defects in said title, and "informed and notified them that he rescinded, abrogated and disaffirmed said agreement to purchase the said real property, and at the same time demanded of the defendants the payment of said sum of $1,400 so by him paid them as aforesaid, but that they have not paid the same.' The complaint also contained the following paragraph: "That said agreement of the defendants to so sell and convey said real property was not so executed, and was not acknowledged by the defendants so as to entitle the same to be recorded, and it was not recorded. * * * And the defendant then and ever since retained full and exclusive possession of the said real property and each and every part thereof and have at all times since had the full uses, issues, profits and benefits thereof and of the whole thereof. And that the plaintiff had no right to possession of the said real property under the said agreement, nor has he ever had possession of the same or any part thereof, nor has he ever received anything of value whatsoever of the defendants under or on account of the said agreement." The defendants demurred to the complaint for the alleged reason that it appeared upon the face thereof that it does not state facts sufficient to constitute a cause of action, and the demurrer was sustained. Plaintiff appeals from the order sustaining the same.

The particulars in which it is claimed that the complaint is insufficient are the following: (1) That the allegations that the land was the defendant's homestead are conclusions of law merely, and not statements of the facts that would constitute the land a home-

stead; (2) that the facts pleaded in the complaint do not show that there was a full rescission of the contract; (3) that the complaint shows that the $1,400 was paid under a mistake of fact.

The main reliance of the respondents in support of the demurrer is that there was no rescission of the contract. It is contended that the plaintiff became vested with an equitable interest or ownership in the land upon the execution of the contract, and that there could be no complete rescission until he had conveyed such interest back to the defendants. Equity does so regard the effect of such contracts. Under certain circumstances the vendor becomes the trustee of the title for the benefit of the vendee and the vendee becomes the trustee of the purchase money for the benefit of the vendor. But this doctrine applies only in equity. Speaking of the effect of such contracts in law, it is said in Pomeroy on Equity Jurisprudence, section 367: "It is wholly in every particular executory, and produces no effect upon the respective estates and titles of the parties and creates no interest in nor lien or charge upon the land itself. The vendor remains to all intents, the owner of the land; he can convey it to a third person free from any legal claim or incumbrance; * * * In short, the vendee obtains at law no real property nor interest in real property. The relations between the two contracting parties are wholly personal." See, also, Davis v. Williams, 130 Ala. 530, 30 South. 488, 54 L. R. A. 749, 89 Am. St. Rep. 55; Chappell v. McKnight, 108 Ill. 570; Warvelle on Vendors (2d Ed.) section 176.

It follows from these principles that the plaintiff obtained nothing under the contract and that there was nothing to restore as a condition precedent to the right to rescind. Section 3932, Rev. Codes 1899, permits a party to a contract to rescind by his own act under certain conditions therein enumerated. The facts pleaded bring the case within one of those conditions. The consideration for the contract in plaintiff's favor was the right to the land by warranty deed, clear of incumbrances, upon the fulfillment of the terms of the contract on his part. Dahl v. Stakke, 12 N. D. 325, 96 N. W. 353. This consideration wholly failed by defendant's failure or inability to convey the land by such a deed. The right to rescind followed such refusal after plaintiff had tendered full and complete performance. Thereafter defendant retained the $1,400 as money had and received under the contract, which he should in equity and good conscience restore. Under such a state

of facts, the authorities are unanimous that the money paid on the contract may be recovered back as money had and received when the vendor refuses or fails to convey in accordance with the terms of the contract. Kicks v. State Bank of Lisbon, 12 N. D. 576, 98 N. W. 408; Bank of Columbia v. Hagner, 1 Pet. 455, 7 L. Ed. 219; Payne v. Hackney, 84 Minn. 195, 87 N. W. 608; Primm v. Wise et al. (Iowa) 102 N. W. 427; Martin v. Roberts (Iowa) 102 N. W. 1126; Wright v. Dickinson (Mich.) 35 N. W. 165, 11 Am. St. Rep. 602; Moore v. Williams, 115 N. Y. 586, 22 N. E. 233, 5 L. R. A. 654, 12 Am. St. Rep. 844; School District v. Hayne (Wis.) 1 N. W. 170.

Objection is made that the fact of rescission is not pleaded except as a conclusion. The fact of the breach of the contract is set forth and the refusal to convey by a deed free from incumbrances. The tender of full performance by the plaintiff is set forth as well as the failure of the defendant to return the money paid. Then follows the allegation that plaintiff rescinded and disaffirmed the contract. This notified the defendant in express words that plaintiff had terminated and put an end to the contract; and in a case like the one under consideration, nothing further was necessary, or could be done. The complaint is not framed on the theory that the contract was void. The allegation that part of the land constituted defendants' homestead, which defendants complain of as insufficient, was not inserted to sustain a cause of action for recovery of money paid on a void contract, but to negative the possible claim that the doctrine of equitable conversion was applicable. The gist of the cause of action is the failure to perform the contract and the refusal to pay back the money received under the contract. It is not, therefore, material to determine the sufficiency of the allegation that the premises or a part of them were defendant's homestead. The cause of action was well stated without such allegation. The complaint negatives the claim that the money was paid under a mistake of law. It expressly states that it was paid in reliance on the contract and that plaintiff was at all times ready and willing to perform his obligations thereunder. The tender was made in affirmance of the contract by the plaintiff. The claim that the money was paid under a mistake of law is not, therefore, inferentially in the case and need not further be noticed or the validity of the contention considered or decided.

The order is reversed and the cause remanded for further proceedings. All concur.

(107 N. W. 51.)

JAMES MICKELS v. MARTHA M. FENNELL, KNOWN AS MARTHA M. MICKELS.

Opinion filed February 20, 1906.

Void Marriage — Statutory Action for Annulment.

1. An action to annul a marriage, which is void because the defendant had contracted a prior marriage which was still in force, is not an an action to annul a marriage for fraud within the meaning of the statutes relating to that subject, even though it is alleged and found that the plaintiff was the innocent victim of defendant's fraudulent representation that her former husband had died.

Same — Custody of Children.

2. Section 2734, Rev. Codes 1899, relating to the custody of the children of an anulled marriage, applies only in actions for the annulment of a voidable marriage, in which the fraud or force are essential facts to be proved in order to establish the cause of action.

Same — Rights and Obligation of Parents.

3. By virtue of section 2733, Rev. Codes 1899, the children resulting from a marriage annulled for any cause are legitimate, and both parents have the same rights and are under the same obligations with respect to such children as if the marriage were valid.

Same — Evidence.

4. Evidence examined, and *held*, that the mother has a better right to the custody of the child in question than the father.

B. D. Townsend, for appellant.

R. A. Stuart and *McGlory & Barnett*, for respondents.

ENGERUD, J. Defendant has appealed to this court from a judgment declaring the nullity of a pretended marriage theretofore existing between herself and plaintiff, and awarding to plaintiff the custody of the child which resulted from the union. The case is here for trial de novo.

It is conceded that the marriage was bigamous, and void for that reason. The only controversy is as to the custody of the child. Plaintiff claims that he was induced to enter into the pretended marriage by reason of defendant's fraudulent representation that her former husband was dead. This contention was sustained by

the trial court, and hence the custody of the child was awarded to plaintiff pursuant to the provisions of section 2734, Rev. Codes 1899. That section provides: "The court must award the custody of the children of a marriage annulled on the ground of fraud or force to the innocent parent, and may also provide for their education and maintenance out of the property of the guilty party." Each party charges the other with being an unfit person to have the custody of the child, but no findings were made on that subject. In the view taken of the case by the trial court such findings were immaterial.

The appellant contends, first, that the finding of fraud is not warranted by the evidence; and, second, that if a deceit was practiced upon plaintiff he is barred from relief on that ground because he continued to freely cohabit with defendant after knowledge of the deceit. We are fully convinced from a careful examination of the evidence, that appellant's contention must be sustained for reasons which will appear in subsequent portions of this opinion. Discussion of that subject would, in the view we take of the case, be unnecessary were it not because the facts relative to the alleged fraud have a bearing on the question of the comparative fitness of the two opposing parents to be intrusted with the custody of the child. In our opinion, section 2734 does not govern the disposition of the child in this case, even if the plaintiff had been the innocent victim of defendant's deceit. The allegations of the complaint as well as the findings and the undisputed facts show that this pro forma marriage was not one which could be annulled for fraud within the meaning of the statutes of this state on that subject.

Plaintiff and defendant were married on November 27, 1901, and the child in controversy was born October 24, 1902. At the time of this marriage the defendant was and still is the wife of one George Fennell, to whom she was duly married in 1890, and with whom she lived as his wife until February, 1901. She and Fennell separated at that time, but there has never been any divorce. "A marriage contracted by a person having a former husband or wife living, if the former marriage has not been annulled or dissolved, is illegal and void from the beginning unless such former husband or wife was absent, and believed by such person to be dead for a period of five years immediately preceding." Section 2723, Rev. Codes 1899. In this case only about nine months had elapsed since

the separation from George Fennell, and hence the pro forma marriage was an absolute nullity. Although the marriage ceremony was a nullity it had the appearance of validity, and therefore an action may be maintained by either party to it or by the former husband for the purpose of obtaining a decree declaring the fact of nullity. Section 2731, subdivision 2, and section 2732, subdivision 2, Rev. Codes 1899. It is wholly immaterial in an action for annulment on this ground whether the party capable of making the contract was deceived by the other party or not. The pretended marriage is a nullity for all time and under all circumstances, whether questioned directly or collaterally. The statute recognizes five other grounds for annulling a marriage. Section 2731, subdivisions 1, 3-6, Rev. Codes 1899. These grounds are: That the party in whose behalf relief is sought was under the age of legal consent and marriage without the consent of his or her parent or guardian, unsoundness of mind, fraud, force, incurable physical incapacity. It will be noticed that where relief is sought on any of these five grounds, the right to relief is conditional. Where the marriage is voidable for infancy, mental incapacity, fraud or force, the marriage becomes valid if, after the removal of the disability, or discovery of the fraud or termination of the force, the injured party freely continues the marital relation. For any of these five causes relief can be obtained only by the injured party or in his or her behalf, by a relative or guardian, and, save as to mental incapacity, the relief must be sought within four years after the marriage or discovery of the fraud or withdrawal of the force. Section 2732, subdivisions 1, 3-5. In short the statute plainly recognizes and gives effect to the distinction between a pretended marriage that is an utter nullity and one that is only voidable. Subdivision 2 of section 2731 and subdivision 2 of section 2732, refer to void marriages that can never become valid. All the other subdivisions refer to marriages which, although void in their inception because the aggrieved party was incapable of consenting, or because his or her apparent consent was obtained by fraud or force and hence not free, may, nevertheless, become valid by ratification. As in any other contract in form not binding for want of the element of free consent, a marriage void for that reason may be affirmed and become valid from the beginning, if after the incapacity is removed or the force withdrawn, or the fraud discovered, the aggrieved party freely gives his or her consent. This distinction between an action

to annul a voidable marriage, and an action to establish the nullity of one that is and forever must be absolutely void, must be kept in mind and applied in construing section 2734. With this distinction in mind, it is apparent that section 2734 applies only to actions where a voidable marriage is annulled for fraud or force—that class of actions where the fraud or force is an essential fact to be proved in order to sustain the cause of action. We are not disposed to extend the arbitrary rule established by this section further than the express language of the statute demands. It follows that the allegations and findings with respect to fraud, even if true, are immaterial, and section 2734 has no application to this case.

Although the marriage was a nullity, the child is in law legitimate. Section 2733, Rev. Codes 1899, declares: "When a marriage is annulled children begotten before the judgment are legitimate and succeed to the estate of both parents." The effect of this humane provision is to protect the offspring of an annulled marriage from the stain and disability of bastardy. It places both parents of such child in the same position with respect to the child and the latter in the same relation to each of them as if it had been born in lawful wedlock. Watts v. Owens, 62 Wis. 512, 22 N. W. 720; Harris v. Harris, 85 Ky. 49, 2 S. W. 549; Graham v. Bennett, 2 Cal. 503. The general rules, therefore, which should govern in awarding the custody of this child are those found in section 2817, Rev. Codes 1899: "In awarding the custody of a minor or in appointing a general guardian the court or judge is to be guided by the following considerations: (1) By what appears to be for the best interests of the child in respect to its temporal and its mental and moral welfare; and if the child is of sufficient age to form an intelligent preference, the court or judge may consider that preference in determining the question. (2) As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right, but, other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor or business, then to the father.' The child is a girl, and she was about nine months old at the time of the trial of this action. Respondent asserts that this harsh proceeding, if not required by section 2734, was imperatively necessary for the welfare of the child, by reason of the depravity and poverty of the mother. This charge of depravity is based wholly on the inferences to be drawn

from the facts disclosed with reference to the manner in which the defendant became separated from her husband, George Fennell, and contracted and continued marital relations with plaintiff. There is no testimony directly attacking her reputation or conduct except so far as those circumstances may detract from her good name, and impute dishonest conduct. It is manifest that if the plaintiff is no better than the woman he traduces, then it will avail him nothing to prove her to be of bad character. Other things being equal, the mother has the better right to so young a child.

The defendant's explanation of the circumstances under which she parted with Fennell in the spring of 1900 is in all material particulars undisputed, although Fennell was present at the trial and testified as a witness. She was obliged to do cooking and washing for the coal miners, among whom she and her husband lived, in order to support herself and a boy then less than five years old, the issue of her marriage to Fennell. She finally parted from Fennell because, as she claims, he did not try to support her. He seems to have acquiesced in this decision and went away without disclosing to her his destination. Shortly afterwards she also left and came to this state where she sought employment as a domestic servant and thereby supported herself and son until she met and married this plaintiff. There is not a scintilla of evidence that she was anything but a virtuous, hard working woman up to this time. Whether her parting with Fennell was in law a desertion on her part or his is immaterial. There was clearly much to justify her abandonment of that worthless husband, and there is nothing therein that indicates immorality. The plaintiff met her while she was working for one of his neighbors about five or six weeks before he married her. He was a widower and engaged her as housekeeper. He proposed marriage and she accepted. She testified that when plaintiff proposed marriage she told him fully and fairly all the evidence upon which she based her belief that her former husband had died since the separation. Her testimony on this point is clear, full and specific. The plaintiff admits that she told him of her former marriage to and separation from Fennell, but claims that he accepted, without inquiry as to the circumstances, her statement that her former husband was dead. The following quotation from his direct examination will sufficiently disclose how unsatisfactory and improbable was his testimony on this subject: "A. The first time I met the defendant

I asked her the question whether her husband was dead, and she said he was, afterwards she told me the best evidence she could obtain that he was dead, that she didn't see him dead, nor did she see him buried. Q. Did she tell you she believed he was dead? A. I am not positive as to that, but she always maintained that he was dead. Q. Did she tell you whether she had taken any steps to find out whether he was dead? A. Nothing more than what I have said that the best authority that she could obtain he was dead. Q. Did she tell you what steps she had taken, if any, did she tell you what that authority was? No, sir; she did not to my knowledge. Q. Did you at that time believe her statements that her husband was dead? A. I did. Q. And married her under that belief? A. Yes, sir." On cross- examination, when pressed for a specific admission or denial of some statement, which the defendant claimed she made relative to that subject, he generally answered that he had no recollection of the alleged circumstance or statement. Even if true his version of the representations made by the defendant falls short of showing a fraud. If his version is true, he relied on her mere belief confessedly based on undisclosed hearsay evidence.

His testimony on this subject is well-nigh unbelievable, even if uncontradicted. His improbable version of the transaction is contradicted, and the defendant's version corroborated, by an oral admission made in the presence of a disinterested witness, and by a written admission in a document which he freely executed. That his desire for the defendant's companionship, regardless of consequences, exerted a more powerful influence upon his conduct than any scruples he may have had as to the legitimacy of his relations with the defendant, is demonstrated by the fact that he freely cohabited with the defendant after he knew that her former husband was still alive. He confesses that after he learned that fact he not only continued his cohabitation with defendant but also that after she had been forced by his brutality to leave the shelter of his house, he went in search of her, and by means of fair promises persuaded her to return. If the defendant had been guilty of fraud the plaintiff waived and condoned it in the most unequivocal manner. The evidence proves beyond doubt that the defendant fully informed the plaintiff of the facts and circumstances upon which she founded her belief that her former husband was dead. It is true that she manifested undue credulity; and that her failure

to make sufficiently diligent investigation as to the truth of the information she had received gives ground for doubt as to whether she entertained her professed belief in good faith. It ill becomes this plaintiff, however, to question the good faith of this woman for these reasons. He accepted without hesitation or further inquiry the statement of this defendant as to the infomation she had received as sufficient proof of death. If the insufficiency of the information and lack of diligent inquiry proves bad faith and immorality on her part, it is stronger proof of his guilt of like bad faith and depravity. Indeed we believe the defendant told the truth when she testified that whatever doubt of her husband's death, or scruples as to the propriety of the proposed marriage to plaintiff that had previously existed in her mind were overcome by the assurances of the plaintiff that the information she had received left no room for doubt or scruples and was sufficient in law to justify her in remarrying.

The fact that the defendant cohabited with the plaintiff after her former husband was known to be alive does not prove her character worse than his. He confessedly persuaded and induced her to do so by holding out to her the glittering promise of protection, and a home for herself and children. She was led to hope that the marriage to Fennell would be dissolved by means of a suit for divorce, to be followed by a lawful marriage to plaintiff. In this manner the illegality of her relations with plaintiff would be cured and disgrace to herself and children to a great extent at least, avoided. Is a woman to be condemned for yielding to such a temptation? Her needy, homeless and friendless condition are powerful pleas in her favor, which at least mitigate, if they do not justify her misconduct. What shall be said of the plaintiff's conduct in whose behalf no such plea is possible? The most shameful of all his many disgraceful acts disclosed by this record is that he did not fulfill the promises by which he induced the defendant to return to his home. We shall not pursue the subject further. Suffice it to say that the defendant is no worse than the plaintiff, and if she has lost her good name it is due to her unfortunate association with this plaintiff. No other wrongdoing is proven against her. It appears to us that she is a woman more sinned against than sinning.

The shameful and brutal conduct of this plaintiff disclosed by the testimony in this case, and which he does not attempt to deny

or excuse, if it does not stamp him as a person unfit to have the custody of this child at least makes it doubtful if abode in his home is better for the child's welfare than the care of a mother. If the mother has become unfit to keep her child, there is ample remedy in another proceeding. As between the parties to this litigation the mother has the better right upon the record presented by this appeal. The poverty of the defendant is no reason for denying her claims as a mother in favor of the more prosperous parent. The child is legitimate, and the father can be compelled to provide for the support and education of the child if the mother's means are inadequate.

The judgment appealed from will be modified, so as to award the custody of the child to the defendant. The appellant will recover the taxable costs in both courts. All concur.

(107 N. W. 53.)

CHARLES O. SMITH AND W. W. SMITH, CO-PARTNERS AS THE NORTH DAKOTA HARNESS COMPANY, v. THE GREAT NORTHERN RAILWAY COMPANY.

Opinion filed February 20, 1906.

Common Carriers — Binding Effect of Classification Sheets — Interstate Commerce Commission.

1. Common carriers of freight, having adopted classification sheets fixing transportation charges, and having filed the same with the Interstate Commerce Commission, are, as well as the shippers, bound thereby; and contracts between such carriers and shippers are presumed to be governed by the classification sheet in force at the date of shipment.

Same — Construction — Local Usage and Customs.

2. In construing such classification sheets, the intention of the framers thereof as to the meaning of words used, when such intention can be ascertained, should be given effect regardless of the intention of the shipper, or of local usages and customs relating to the meaning of terms contained therein.

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

Action by Charles O. Smith and Walter W. Smith, doing business as the North Dakota Harness Company, against the Great Northern Railway Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

Morrill & Fowler, for appellant.
Murphy & Duggan, for respondent.

FISK, District Judge. This appeal is from a judgment of the district court of Cass county in favor of the defendant railway company, adjudging that it is entitled to the possession of certain personal property consisting of 76 bales of burlap horse covers, or, in the event the delivery of the possession thereof cannot be had, then that defendant have judgment against plaintiff for the value of its special property therein under its lien as a common carrier, together with its costs and disbursements. The plaintiff is a consignee of said goods which were transported from Philadelphia, Pa., to Fargo, in this state, over the lines of the Great Northern Railway company and connecting lines. The goods were billed by the common carriers as first-class freight, and it being the contention of plaintiff that the same should be transported as third-class freight, they tendered a sum sufficient to cover the latter charges and demanded possession of the property. The tender and demand were refused, and this action was commenced to recover possession of said property. The action was tried to a jury, and at the close of the testimony the district court, on defendant's motion, directed a verdict in defendant's favor, and judgment was entered upon such verdict. This is the only error assigned, and the sole dispute between the parties is as to the proper classification, under the schedule of rates, of the goods in question for the purpose of transportation charges, the plaintiff contending that they should be charged for on the basis of third-class freight, while defendant company contends that they were properly billed as first-class freight.

If plaintiff's contention is sound, then the tender of the charges on the basis of third-class freight operated to discharge the lien of the common carrier and plaintiff would be entitled to recover the possession of the property, or its value; but on the contrary, if defendant is correct in its contention, then it is entitled to hold the property under its lien until the proper freight charges are paid or tendered. The controversy, therefore, turns upon the question as to the proper classification of the shipment in question according to the schedule of freight rates in force at the date of shipment, which was in 1903; and there being no conflict in the evidence as to the nature of the goods shipped or as to any question of fact, the controversy is one of law, and involves a proper construction

of the rate schedule or classification sheet in force at the date of such shipment. What the schedule or sheet may have provided for at any other date, either prior or subsequent, is wholly immaterial, and, therefore, certain testimony which plaintiff was permitted to introduce over defendant's objection relative to the classification of similar shipments under other schedules or at other times should have been excluded. The evidence shows beyond dispute that the shipment consisted of burlap manufactured into covers for horses. Under the rate classification sheet in force when this shipment was made, these goods were not specifically mentioned, but there was a general classification therein under the heading "Blankets," and goods included under this general classification were rated as first-class freight and billed as such by the common carrier.

It appears in evidence that the various transportation companies, from time to time, through their representatives, meet and adopt classification sheets in which the different kinds of merchandise are classified and the rate of transporting same is fixed. These classification sheets, when agreed upon, are filed with the Interstate Commerce Commission pursuant to the provisions of the interstate commerce law, and thereafter and while in force no transportation company has any right to deviate therefrom. See Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 379, 1 Supp. Rev. St. 529 [U. S. Comp St. 1901, p. 3154]; also Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]. All contracts entered into with common carriers are presumed to be governed by the classication sheet in force at the time of the shipment. Whether such classification is just or unjust it is, nevertheless, binding, both upon the common carrier and the shipper, so long as the same remains in force. The tariff thus fixed must govern regardless of any contract for a greater or less rate. Ward v. Railway Co. (Mo. Sup.) 58 S. W. 28; Raleigh, etc. v. Swanson (Ga.) 28 S. E. 601, 39 L. R. A. 275; Gerber v. Company, 63 Mo. App. 145; Railway Co. v. Lumber Co., 1 Tex. Civ. App. 533, 21 S. W. 290. The transportation companies having the sole right to fix such classification sheets, without any voice on the part of the shipper, it follows as a matter of law that in construing the same, the intention of the framers thereof, when such intention can be ascertained, should be given effect; and in arriving at such intention, the court should give no weight to the alleged intent of the shipper or to any local

custom or usages of trade as to the meaning of words or expressions contained in such classification sheets. Guided by this rule we are of the opinion that the shipment in question came clearly under the general classification heading of "Blankets." Such was the evident intent of the framers of the schedule as shown by the testimony, and this construction is supported by standard authority as to the definition of the word "Blanket." See Webster's International Dictionary. If we are correct in this conclusion, then it follows that said shipment was properly billed as first-class freight, and defendant is entitled to the possession of the goods under its lien as a common carrier until the proper freight charges are paid or tendered.

We therefore decide that the district court committed no error in directing a verdict in defendant's favor, and the judgment appealed from is affirmed. All concur.

ENGERUD, J., being disqualified, took no part in the foregoing decision; Judge C. J. Fisk, of the First judicial district, sitting in his place by request.

(107 N. W. 56.)

ED. PETERSON v. FRED HANSEN.

Opinion filed February 20, 1906. Rehearing denied May 11, 1906.

New Trial — Statement of Case — Extending Time Discretionary — Abuse of Discretion.

1. In granting or refusing extensions of time within which to settle statements of the case, under section 5477, Rev. Codes 1899, the trial court is invested with wide discretionary power, and its action will not be disturbed, except where there has been a manifest abuse thereof.

Appeal — Burden of Showing Error.

2. The burden is upon the party objecting to such extension to show that it was unauthorized.

Justice of the Peace — Time of Entering Judgment.

3. The mere fact that a justice of the peace did not enter judgment on the same day on which a verdict was returned into court is too indefinite a showing to sustain an objection to the offer of the judgment in evidence.

Same.

4. Section 6707, Rev. Codes 1899, providing that justices of the peace must enter judgment on receipt of verdict at once, construed to mean within a reasonable time in view of the circumstances of each case.

Appeal from District Court, Stutsman county; *Glaspell,* J.

Action by Ed. Peterson against Fred Hansen. Judgment for defendant, and plaintiff appeals.

Affirmed.

J. A. Coffey and *S. E. Ellsworth,* for appellant.

Notice of intention to move for a new trial is indispensable to such motion; and unless made within the time prescribed, the right to make such motion is waived. 14 Enc. Pl. & Pr. 879; First National Bank v. Comfort, 28 N. W. 855, 4 N. D. 167; Gould v. Duluth & Dakota Elevator Co., 2 N. D. 216, 50 N. W. 969; Gaines v. White, 50 N. W. 901; Clark v. Crane, 57 Cal. 629; Wright v. Snowball, 45 Cal. 654; Ellsasser v. Hunter et al., 26 Cal. 279.

Mistake, inadvertence or misconstruction of the law is no excuse for delay in doing things mentioned in section 5474. Moe v. N. P. R. R. Co., 2 N. D. 282, 50 N. W. 715; McDonald v. Beatty et al., 9 N. D. 293, 83 N. W. 224

Where no cause, or sufficient cause is shown, for extension of time to serve a statement of the case, the court is without power to grant it McDonald v. Beatty, supra; Moe v. N. P. R. R. Co., supra.

What constitutes a good cause, or showing of good cause, is presented to the discretion of the trial court, but its action is reviewable and liable to be set aside for abuse. Crane v. Odegaard, 11 N. D. 342, 91 N. W. 962; Moe v. N. P. R. R. Co., supra; McDonald v. Beatty, supra; McGillycuddy v. Morris, 65 N. W. 14.

Where no particulars, wherein a verdict lacks support in law or the evidence, are pointed out, the grounds for setting it aside cannot be considered. Rev. Codes, section 5474; Billingsley et al. v. Hiles et al., 61 N. W. 687; Henry v. Maher, 6 N. D. 413, 71 N. W. 127.

A justice's judgment upon the verdict of a jury must be entered immediately, or jurisdiction is lost and the entry is a nullity. Section 6707, Rev. Codes 1899; Sluga v. Walker, 9 N. D. 108, 81 N. W. 282; In Re Evingson, 2 N. D. 184, 49 N. W. 733; Hull v. Mallory, 56 Wis. 355, 14 N. W. 374; McNamara v. Speen et al., 25 Wis. 539.

Want of jurisdiction may always be set up, whenever anything is claimed under the judgment, and the principle that forbids impeachment or contradiction of a record does not apply. 17 Am. &

Eng. Enc. Law (2d Ed.) 1046; Latham v. Edgerton, 9 Cow. 227; Mills v. Martin, 19 Johns. 33; Joy v. Elton et al., 9 N. D. 426, 83 N. W. 875; Thornily v. Prentice, 96 N. W. 728; Cooley v. Barker et al., 98 N. W. 289; Phelps v. McCollam, 10 N. D. 537, 88 N. W. 292; People v. Cassels, 5 Hill, 164; Harrington v. People, 6 Barb. 607; Starbuck v. Murray, 5 Wend. 158.

Jerome Parks, for respondent.

A judgment of a justice of the peace, showing on its face jurisdiction prerequisites, is invulnerable. Jewett et al. v. Sundback, 58 N. W. 20; Smith et al. v. Pierce, 18 N. W. 111; Cassidy v. Mellerick et al., 9 N. W. 165; In Re Evingson, supra.

MORGAN, C. J. This is an action for damages for the conversion of 669 bushels and 13 pounds of oats. Plaintiff recovered a verdict on which judgment was entered for the sum of $267.61. Defendant moved for a new trial upon a settled statement of the case, which was granted by the district court. Plaintiff has appealed from the order granting a new trial. The specifications relied on for reversal are: (1) That the trial court abused its discretion in settling the statement of the case after the time during which it should have been done had passed, and no good cause was shown to excuse the failure to settle it within the time prescribed. (2) That no error was shown to have occurred at the trial to warrant the granting of a new trial.

The first assignment renders it necessary to review the several orders made by the court to enlarge or extend the time during which the motion for a new trial was to be made. The trial occurred on the 5th day of July, 1904. The order granting a new trial was made on the 10th day of December, 1904. During this period four orders were made by the court staying all proceedings for the purpose of enabling the defendant to move for a new trial. The first order was made on July 9th by an order entered on the minutes. The order was made on written notice to the plaintiff that defendant would move for an order at 10 o'clock of said day "for a stay of proceedings in said action pending a motion for a new trial." So far as the record is concerned the time during which the stay was granted is not shown. The motion was simply granted without limiting the time during which it was to continue. On August 20th defendant's attorney procured a further stay based on his affidavit. In this affidavit he states that he was

mistaken as to the time during which the stay of July 9th was to continue. That he believed that it was to continue for 60 days, but had just been informed that the stay was for a shorter period, and had already expired. He asked for further time for the reason that he had not yet received a transcript of the proceedings at the trial from the stenographer, although he had promptly ordered the same after the decision adverse to the defendant. The application was made without notice to the plaintiff. The court made an order reciting the consideration of the affidavit by the court, and that it showed good cause for the relief asked and stayed all proceedings in the action for 30 days "pending defendant's motion for a new trial in said action and that defendant have from date hereof the time fixed by statute to serve notice of motion and motion for a new trial of said action." On August 23d the defendant served notice of intention to move for a new trial and therein stated that the motion for a new trial would be made upon a settled statement of the case. On September 21st the attorney asked for another stay of proceedings based upon his own affidavit stating that he had not obtained a transcript of the evidence until September 18th and that he had served a copy of a statement of case upon plaintiff's attorney, who refused to enter into any stipulation for settling a statement. The court granted an additional stay of proceedings for a period of 20 days On October 14th another stay was applied for based on the attorney's affidavit, stating "that defendant has been unable to get such transcript from the court stenographer and that the time to prepare such statement has expired, and the stay granted by this court has expired or will expire October 15, 1904." Thirty days was asked for in order to procure the transcript. The court granted the request by an order in which it recited that the further extension was granted on good cause shown by affiant. On November 12th, appellant's attorney obtained an order to show cause why the order of October 15th staying all proceedings for 30 days should not be set aside. The order to show cause was granted on an affidavit of plaintiff's attorney stating as ground for setting aside the said stay "that some of the stays which have been granted were based upon false affidavits which were misleading and without foundation in fact." The attorneys appeared before the court, and were heard upon the merits of the motion. The court denied the motion by an order reciting: "Now upon considering the affidavit

of J. A. Coffey attached to said order to show cause and the affidavits of Jerome Parks, marked Exhibits A and B, and upon the records and proceedings in said cause; the court finds that the said extension order was properly granted, and is by this order continued, and the plaintiff is assessed for motion costs," etc. Exhibits A and B are the contradictory affidavits made by defendant's attorney to procure the orders of September 21st and October 14th.

It is claimed that the granting of this order as well as the previous ones was an abuse of discretion and that neither of the affidavits showed good cause for enlarging or extending the time for the presentation and settlement of the statement of the case. Section 5477, Rev. Codes 1899, authorizes an extension of the time for doing any of the acts prescribed by sections 5474 and 5467, Rev. Codes 1899. Those sections relate to the procedure for giving notice of intention to move for a new trial, and for the settlement of the statement of the case. The extension of time, under said section 5477, is to be granted "upon good cause shown in furtherance of justice." In McDonald v. Beatty, 9 N. D. 293, 83 N. W. 224, this court held that district courts have no authority under section 5477, supra, to grant extensions over objections without cause, and that the cause for extension must appear of record in order to be subject of discussion before the trial court and that something may appear in the record for review by the Supreme Court. That case further lays down the rule that where cause is attempted to be shown for an extension this court will apply a liberal rule in favor of the discretion exercised on the review thereof by this court. Under this strict construction of section 5477, supra, we agree that the respondent is within the rule laid down by that case. The serious objection made to the showing to procure the last extension is that the affidavits of September 21st and that of October 14th are contradictory. The former states a transcript was procured on September 18th, while the latter states that the attorney had been unable to procure the transcript on the date of the last affidavit. One of them was evidently made under a mistake. What the mistake was or why the discrepancy the record before us does not disclose. Which of them is true we are unable to state from the statement of the case. We can give no reason for holding that one was true and the other false. Appellant's attorney gives no aid to solve the dilemma in his affidavit. He simply recites that the affidavits are

contradictory and misleading and false. Which is false he does not attempt to state. That they were misleading and contradictory is evident from the reading of them. The trial court found that the second affidavit was true, and that the extension was properly granted. Although the record is in a most unsatisfactory state, and shows a careless presentation of the facts to the trial court, we still think that the action of the trial court should be sustained. It is found as a fact after considering all the affidavits, all the records and proceedings and hearing the respective attorneys that good cause was shown for the last extension. If there was good cause shown for the last extension it is immaterial whether the cause for the extension of September 21st was good or not. The last extension is the one attempted to be set aside, and if that was properly granted it excused all prior defaults for not presenting a statement for settlement up to the date of granting the last order. The burden was upon the appellant to show that the discretion exercised by the trial court was abused. The record does not show an abuse of discretion. No reason is given to show that the last extension was based on a false statement. The trial court have a wide latitude in determining such matters on such occasions. This court should be liberal and not technical in reviewing their acts in such matters. As to previous extensions they are based upon the failure to procure a transcript. This was certainly a good ground for extension. It is urged that the notice of intention to move for a new trial was not served in time, and that no extension was expressly granted to serve that notice. The serving of that notice is a part of or the basis of a motion for a new trial. The orders were clearly made to secure more time in which to make the motion for a new trial. We hold that this included within their terms the giving of the notice of intention. It would be too strict a construction to hold that all the acts necessary to be done preliminary to the motion for a new trial must be specifically mentioned in the orders. The main purpose is the motion for a new trial, and an extension for that purpose should be held to include all acts necessary thereto.

It is urged that it was error to grant a new trial. Unless there was error at the trial and an exception to the same was duly saved, it was error to grant a new trial. We agree that there was error at the trial, and that the same was excepted to and incorporated as a specification of error in the statement of the case on

which the motion for a new trial was made. At the trial a judgment of a justice of the peace was offered in evidence to show that the defendant had been adjudged entitled to the possession of the oats which the defendant was charged to have converted to his own use. To the introduction of this judgment in evidence the plaintiff objected, and the objection was sustained. The ground of the objection was that the evidence showed that said judgment was a nullity for the reason that the justice before whom it was rendered had not entered the same at once after the verdict was received. The judgment which was excluded was entered in an action in which there was a trial by jury. Section 6697, Rev. Codes 1899, provides that when the jury "have agreed upon their verdict they must render it publicly to the justice and it must be entered immediately." Section 6707, Rev. Codes 1899, provides that when a trial by jury has been had, judgment must be entered by the justice at once in conformity with the verdict." These sections have been construed in this state, and it was held that the words "immediately" or "at once" will not be construed strictly according to their literal meaning, but will be held to mean within a reasonable time, in view of the circumstances of each case. Sluga v. Walker, 9 N. D. 108, 81 N. W. 282; In re Dance, 2 N. D. 184, 49 N. W. 733, 33 Am. St. Rep. 768; Brown v. Smith, 13 N. D. 580, 102 N. W. 171. See, also, Knox v. Nicoli (Iowa) 66 N. W. 876; Sorrenson v. Swenson (Minn.) 56 N. W. 350, 43 Am. St. Rep. 472; Huff v. Babbott (Neb.) 15 N. W. 230.

The evidence to support the contention that the justice lost jurisdiction to enter judgment by an indefinite adjournment or by not entering it at once after the verdict was rendered is too indefinite, and does not bring the entry of that judgment within the law laid down in the cases cited. It is not shown that there was an unreasonable delay. The evidence on that question is as follows: The justice who entered the judgment testified that "he tried a case in his court in December, 1903, wherein Fred Hansen was plaintiff and Ed. Peterson was defendant, the same parties to this action, and that the action was brought into his court to determine the right of possession of the same grain which is the subject matter of this action. That the case was tried by a jury and that upon verdict of the jury he * * * rendered judgment and entered the same in his justice's docket at page 393 thereof." The verdict was then offered and received in evidence after objection. The justice was

then asked "if he rendered a judgment on that verdict on the day the verdict was rendered?" And he answered "that he did not enter judgment on the day the verdict was returned into court, and that the reason he did not was that Mr. Coffey requested him not to enter judgment then as he wished to look up the matter of costs." The judgment is not made a part of the record, and there is nothing before us to show at what time the judgment was entered. The mere fact that it was not entered on the same day that the verdict was received is far from showing that it was not entered within a reasonable time after the verdict was received. It is not therefore shown that it was not entered at once or within a reasonable time within the meaning of those terms as construed in the cases cited. This disposes of the objection made to receiving the judgment in evidence. That objection was not tenable, and it should have been overruled. It inferentially appears, from one objection in the record, that the judgment was void on its face, but as the judgment is not in the record we cannot pass upon the objection.

There was no error in granting a new trial, and the order is affirmed. All concur.

(107 N. W. 528.)

STATE EX REL. RUSK v. BUDGE ET AL., STATE CAPITOL COMMISSIONERS.

Opinion filed February 23, 1906.

Costs — Discretion.

Under the discretion as to the matter of costs in an original suit in equity, vested in the court by Rev. Codes 1899, section 5580, commissioners appointed under a statute to execute its provisions, and who are in good faith attempting to perform their duties, will not be taxed with costs, on being enjoined because of the invalidity of the statute.

Motion to tax costs.

Denied.

For former opinion, see 105 N. W. 724.

PER CURIAM. The decision and order for judgment in the above entitled matter made no mention of costs, and the clerk therefore declined to tax any costs or insert in the judgment any provision for the recovery thereof. The plaintiff has applied for an order

requiring the clerk to do so. This is an original suit in equity commenced in this court; hence costs may be allowed or withheld in the discretion of the court. Section 5580, Rev. Codes 1899. Under the circumstances of this case we do not think costs should be allowed. The defendants had been appointed to execute the provisions of a statute and were in good faith attempting to perform their duty. It would be unjust to mulct them for the mistakes of the legislature.

The applicaion is denied.

(106 N. W. 293.)

J. I. CASE THRESHING MACHINE COMPANY v. JOHN BALKE AND BERTHA BALKE.

Opinion filed February 23, 1906.

Appeal — Review — Statement of the Case.

1. An omission from the copy of a statement of the case of a demand for a review of the entire case on an appeal to this court under section 5630, Rev. Codes 1899, is not ground for affirming the judgment, when the original statement contained such demand, and the omission of the demand from the copy served is shown to be excusable.

Sale — Warranty — Rescission.

2. Evidence considered, and *held*, to show compliance by the vendee with the conditions of a contract of warranty required to effect a rescission thereof.

Appeal from District Court, Bottineau county; *Kneeshaw*, J.

Action by the J. I. Case Threshing Machine Company against John Balke and Bertha Balke. Judgment for plaintiff and defendants appeal.

Reversed.

B. G. Skulason and *Albert Besancon*, for appellant.

H. R. Turner, for respondent.

MORGAN, C. J. This is an action to foreclose a real estate mortgage. Defendant purchased a threshing machine and engine from plaintiff, and to secure the payment of the same gave the mortgage in suit and a chattel mortgage on the outfit. The contract for the purchase of the machine was in writing, and contained a warranty that the machine would do good work, and that if it failed to do good work the defendant should give written notice of its

failure to work, and wherein it failed to work, to the agent "through whom received" and to the company at its home office at Racine, Wis. The issue for review in this court under section 5630, Rev. Codes 1899, is whether the defendant complied with the conditions imposed by the contract as to giving these notices. There is no question raised, nor could it be fairly raised, as to the failure of the machine to do such work as it was warranted to do. The trial court found that the defendant had failed to give the required notices, and gave judgment for the plaintiff for the amount due on the purchase price, after giving credit for what the personal property was bid in for at the foreclosure, less costs of sale.

We are asked by the appellant to review all the evidence on the appeal. The respondent interposed a preliminary motion to affirm the judgment on the alleged ground that the statement of the case contained no demand for a review of the entire case, nor for a review of any specific fact as required by the rules of practice. The facts on which this motion is based are the following: The copy of the proposed statement of the case as served on the respondent did not contain any demand for a retrial. The appellant explains the omission, and shows that it occurred through an excusable inadvertence. The original statement of case contained such demand or specification at all times. The omission to have the same put in the copy served on respondent was clerical, and under the showing made ought not to be the cause of depriving the defendant of a retrial. The motion is therefore denied.

The appellant claims two grounds for a reversal of the judgment: (1) That the notices were served in accordance with the requirements of the contract. (2) If the notices were not served as specified that they should be in the contract, that the respondent waived the failure to do so by acting under the notices that were served. If the first question be answered in the affirmative, no consideration need be given to the second. There is no dispute in the evidence as to what was done towards a compliance with the provisions of the contract. Defendant's evidence on that question is to some extent unsatisfactory and contradictory, but we see no ground to deduce therefrom that there was an entire failure to show that the contract was complied with in respect to the giving of the notices, as there was no contradiction of defendant's evidence by the plaintiff. The transaction transpired about 2½ years

before the trial; and that fact, in connection with the fact that the defendant cannot read nor write, explains the contradictions. To hold that the notice was not sent to Racine, Wis., would require us to say that the defendant committed perjury, which the record will not justify us in doing. Otherwise, there is enough evidence to justify the conclusion that the notices were served as required.

The respondent lays great stress upon the fact that the trial court made a finding that no notice was mailed to the company at Racine, and insists that the finding must be given the same force and effect as a verdict of a jury on disputed issues. Such is not the effect of a finding of fact in trials under section 5630, Rev. Codes 1899. It is the evidence that this court reviews on a retrial under that section and not the findings. Except in certain conditions, the probative force of such findings is very small. Such exceptions may occur on disputed issues closely balanced by evidence on each side, and in such case the finding might be considered of weight, and has been given weight by this court, for the reason that the trial judge saw the witnesses and was thereby better enabled to judge as to the credibility of the witnesses. In this case that situation does not exist, and the review of the uncontradicted evidence is for the purpose of determining whether it shows that the notices were mailed. It is undisputed that no written notice was given to the local agent at Omemee, where the order for the machine was taken. It is not clear that this local agent was the one through whom the machine was received. He solicited the defendant to purchase the machine, but the bargain was made with an agent from Fargo, and the order was drawn up by another agent. The machine was consigned to the defendant, who took it from the car without assistance from the local agent. It is also undisputed that this local agent was notified orally that the machine failed to work, and that he communicated with the Fargo office in regard to that fact, and that experts were sent from Fargo to make the machine work. The local agent accompanied one of these experts to the place where the machine was, and assisted in the attempt to make the machine work. In place of a written notice to the local agent, the defendant mailed one to the office at Fargo. We do not think that the defendant should be held not to have complied with the contract in this respect, in view of the divers agents that he negotiated with in ordering the

machine. The local agent did everything that he could have done, had notice been served on him. There was no possible prejudice to the company, although it may be a fact that the local agent might be deemed in a technical sense the one through whom the machine was received. The company responded to the notice sent to Fargo, and the local agent responded to and acted upon the oral notice given him. This is sufficient ground on which to hold that the company cannot claim that the contract was not complied with.

The trial court found that no written notice was mailed to the company at Racine, Wis. This finding was not warranted, as we construe the evidence. Defendant testified explicitly that he procured one Fox to write the notices for him, and that he mailed both of them himself. Fox testified to writing one notice and that he mailed that notice himself by registering it. He was not asked as to writing or mailing a notice to the company at Racine. We do not think that the discrepancy as to which one of them mailed the letter to the Fargo office should be held to entirely discredit the defendant's positive testimony that he mailed both notices himself. It is true that he or Fox was mistaken as to which one of them mailed the letter which Fox says that he wrote. Fox was examined in a very cursory way, and was not cross-examined at all. It is not improbable that, had he been asked specifically as to writing two letters, his memory would have been refreshed as to the transactions that occurred more than two years before he gave the evidence, and his testimony changed so as to be the same as defendant's. As to mailing the letters, defendant's testimony was as follows: "Q. Tell just what you did. A. I went out and notified them. Q. Whom? A. The Case Company, and I sent them a registered letter to Fargo, and they sent up an expert. Q. You sent them a registered letter to Fargo? A. Yes. Q. Did you notify anybody else, or send a letter to anybody else? A. I sent a letter down to Wisconsin. Q. To what place? A. Racine, Wis. Q. These letters were both registered? A. No, sir. Q. Who sent the letters? A. I sent them myself. Q. You sent the letter to Fargo? A. Yes, sir. Q. Those letters were both sent the same day? A. Yes, sir. Q. Did you write those letters yourself? A. No, sir. Q. Who wrote them? A. Tom Fox. Q. You mailed them yourself? A. Yes, sir." These statements were repeated without substantial variation several times. Defendant testifies at all times that he mailed two notices. Except that Fox's

testimony is silent, as stated, as to whether he wrote more than one letter, this testimony is uncontradicted, and convinces us that the company was notified by letter to Racine that the machine did not meet the requirements of the warranty.

The defendant has complied with the terms of the contract, and was entitled to and did rescind the same by returning the machine to the place where received within a reasonable time after the failure of the company to make it do the work that it was warranted to do. The trial court found that the machine was not returned until October 28th, but this finding is not sustained by the evidence. A letter was written on that day notifying the company that the machine had been returned, but defendant's evidence shows that the machine was returned about four weeks before that, and we deem this within a reasonable time under the facts of this case.

The defendant paid the sum of $199.50 freight on the machine. He asks judgment for this sum in his answer, and pleads the facts entitling him to such judgment for money paid out under the contract. The contract provided that the defendant should pay all freight charges. Having done so, and having paid out the money in reliance upon the fulfillment of the contract, and a breach having occurred through the fault of the plaintiff, the defendant is entitled to recover judgment for the sum paid out.

The judgment is reversed, and the district court is directed to order judgment for a dismissal of plaintiff's action, and for judgment in defendants' favor for $199.50, with 7 per cent interest thereon from August 19, 1902. All concur.

(107 N. W. 57.)

M. A. COSGRIFF, WILLIAM WHITEMORE, SARAH BUSSEE, JAMES MCSHERRY AND FRANK COUFAL v. THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, A CORPORATION.

Opinion filed February 28, 1906. Rehearing denied May 11, 1906.

Telegraph and Telephone Lines — Their Construction Over Highways Is an Additional Servitude.

1. The construction and operation of a telegraph and telephone line upon a rural highway is not a highway use, within the purpose of the original dedication of the highway, but is a new use, and constitutes an additional servitude upon the fee of the abutting owner for which he is entitled to compensation.

Eminent Domain — Post Roads — Compensation to Abutting Owners.

2. Rev. St. U. S. sections 5263-5268 [U. S. Comp. St. 1901, pp. 3579-3581], which authorize the construction of telegraph lines along "post roads," upon complying with certain conditions, does not affect the right of an abutting landowner to compensation for the burden imposed upon the fee by the erection of a line upon a rural highway, which is a post road.

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

Action by M. A. Cosgriff and others against the Tri-State Telephone and Telegraph Company. Judgment for defendant, and plaintiffs appeal.

Reversed.

Skulason & Skulason, for appellant.

A telephone line in a street is an additional burden on the fee of the abutting owner. Donovan v. Allert, 11 N. D. 289, 91 N. W. 441, 58 L. R. A. 775, 95 Am. St. Rep. 720.

The rights of an urban are more restricted than those of a suburban owner. Penn. R. R. Co. v. Montgomery County Pass. R. Co., 27 L. R. A. 766; Palmer v. Larchmont Electric Co., 158 N. Y. 231, 52 N. E. 1092; 2 Dillon Mun. Corp. 688; Van Brunt et al. v. Town of Flatbush et al., 27 N. E. 974; McDevittt v. Company, 28 Atl. 948.

Telegraph and telephone lines are an additional serviture upon county highways. Elliott, Roads and Streets (2d Ed.) section 706; Board of Trade Telegraph Co. v. Barnett, 107 Ill. 453; Western Union Tel. Co. v. Williams, 8 L. R. A. 429; Eels v. Am. Telephone and Telegraph Co., 143 N. Y. 133, 38 N. E. 202; Postal Telegraph Cable Co. v. Eaton, 170 Ill. 513; Dailey v. State, 24 L. R. A. 724; Cook on Corp. (5th Ed.) section 933.

Sections 5263 and 5268, U. S. Rev. Statutes 1866, conferring on telegraph companies the right to construct and operate their lines over post routes, have no application to telephone lines. City of Richmond v. Company, 19 Sup. Ct. Rep. 778.

The federal statutes give no foreign corporation the right to enter upon private property without the owner's consent, but provides that where the owner's consent has been obtained no legislation shall prevent the occupation of post roads by telegraph companies. Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 1, 24 L. Ed. 708; St. Louis v. Telephone Co., 148 U. S. 92, 13 L. Ed. 485; W. U. Tel. Co. v. Commonwealth of Mass., 125 U. S. 530,

8 Sup. Ct. Rep. 961; Kester v. W. U. Tel. Co., 108 Fed. 926; Phillips v. Postal Tel. Cable Co., 41 S. E. 1022; W. U. Tel. Co. v. Ry. Co., 20 Sup. Ct. Rep. 867; Cook on Corp. (5th Ed.) sections 933, 934, 935; Am. Tel. & Tel. Co. v. Smith, 18 Atl. 910; W. U. Tel. Co. v. Ry., 120 Fed. 362; Postal Tel. Cable Co. v. Southern Ry. Co., 89 Fed. 190.

J. B. Wineman, Geo. A. Bangs and *Tracy R. Bangs,* for respondent.

Congress has the right to dispose of public lands as it deems will best serve public interests. Iowa Homestead Co. v. DesMoines Navigation & R. R. Co. et al., 17 Wal. 153, 21 L. Ed. 622.

The interest of the United States in public lands is that of owner and sovereign. Iowa Homestead Co. v. DesMoines Navigation & R .R. Co., supra; People v. Shearer, 30 Cal. 645; Lux et al. v. Haggin et al., 69 Cal. 255, 10 Pac. 674 at 719; Woodruff v. Mining Co., 9 Saw. 441, 18 Fed. 753.

Section 2477, Rev. Statutes U. S., granting right of way for roads over public lands is a present grant. Walcott Twp. v. Skauge, 6 N. D. 382, 71 N. W. 544; Wells v. Pennington Co., 2 S. D. 1, 48 N. W. 305; Tholl et al. v. Koles, 65 Kan. 802, 70 Pac. 881; St. J. & D. City R. R. Co. v. Baldwin, 103 U. S. 426, 26 L. Ed. 578; M. K. & T. Ry. Co. v. K. P. Ry. Co., 97 U. S. 491, 24 L. Ed. 1095; Leavenworth L. & G. R. R. Co. v. U. S., 92 U. S. 733, 23 L. Ed. 634.

All public land entries are subject to the right of way for highway purposes. Wells v. Pennington Co., supra; Keen v. Board of Supervisors, 8 S. D. 588, 67 N. W. 623; Walcott Twp. v. Skauge, supra; Riverside Twp. v. Newton, 11 S. D. 120, 75 N. W. 899.

The right of way being so reserved, congress had the right to establish and declare post roads over it. Searight v. Stokes, 3 How. 151, 11 L. Ed. 537; Luxton v. North River Bridge Co., 153 U. S. 525, 38 L. Ed. 88; Cal. v. C. Pac. R. R. Co., 127 U. S. 1, 32 L. Ed. 150, 8 Sup. Ct. Rep. 1073; Kohl et al. v. U. S., 91 U. S. 367, 23 L. Ed. 449.

The grant of a right of way for highway by a private owner, carries with it the right to use same for telephone purposes and such purposes impose no additional servitude upon the fee. Keasbey on Electric Wires, 102-3; Pierce v. Drew, 136 Mass. 75, 49 Am. Rep. 7; McCormack v. District of Columbia, 54 Am. Rep. 284; Ass'n v. Bell Co., 57 Am. Rep. 398; Lockhart v. Co., 21 Atl.

26; Hershfield v. Rocky Mountain Bell Tel. Co., 29 Pac. 883; People v. Eaton, 100 Mich. 208, 59 N. W. 145, 24 L. R. A. 721; McGee v. Overshiner, 150 Ind. 127, 49 N. E. 951, 40 L. R. A. 370, 65 A. S. R. 358; Coburn v. New Tel. Co., 156 Ind. 90, 59 N. E. 324; Palmer v. Larchmont Electric Co., 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672; McCann v. Johnson Co. Tel. Co., 69 Kan. 210, 76 Pac. 870.

The telephone is the telegraph. Wis. Tel. Co. v. City of Oshkosh, 21 N. W. 828; Roberts v. Wis. Tel. Co., 46 N. W. 800; Iowa U. Tel. Co. v. Board of Equalization, 25 N. W. 155, Franklin v. N. W. Tel. Co., 28 N. W. 461; Bell Tel. Co., v. Com., 3 Atl. 825; P. T. & T. Co. v. Road, 49 Atl. 284; C. & P. T. Co. v. B. and O. Co., 66 Md. 399, 7 Atl. 809; St. L. v. B. T. Co., 97 Mo. 623, 10 S. W. 197, 9 A. S. R. 370; State v. C. N. J. Tel. Co., 53 N. J. L. 341, 21 Atl. 460, 11 L. R. A. 664; State v. Mayor, 11 N. J. L. 168, 48 Atl. 1022; Hudson River Tel. Co. v. W. T. R. Co., 135 N. Y. 393, 32 N. E. 148, 17 L. R. A. 674, 31 A. S. R. 838; S. A. & A. P. Ry. Co. v. S. W. Tel. and Tel. Co., 93 Tex. 313, 56 S. W. 201, 49 L. R. A. 459, 77 A. S. R. 884; Davis v. P. T. Co., 127 Cal. 312, 59 Pac. 698.

Telephone poles, when erected in a public highway, do not create an additional servitude. Taggert v. Newport Street Ry. Co., 19 Atl. 326; Rafferty v. Central Traction Co., 23 Atl. 884; Williams v. Electric Street Ry. Co., 41 Fed. 556; Palmer v. Larchmont Electric Co., 158 N. Y. 231, 52 N. E. 1092.

There is no real distinction between city streets and rural highways. Abbott v. City of Duluth, 104 Fed. 833; N. W. Tel. Ex. Co. v. Minneapolis, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69; Chamberlain v. Iowa Tel. Co., 93 N. W. 596; Cater v. N. W. Tel. Ex. Co., 60 Minn. 539, 63 N. W. 111; Julia Building Ass'n v. Bell Tel. Co., 88 Mo. 258; McCann v. Johnson Tel. Co., 76 Pac. 870. 66 L. R. A. 171; People v. Eaton, 100 Mich. 208, 59 N. W. 145.

YOUNG, J. The plaintiffs brought this action to enjoin the defendant from constructing and operating a long distance telephone and telegraph line on a certain rural highway in Chester township, Grand Forks county. The plaintiffs own seven quarter sections of land abutting upon the highway, which is located upon a section line. The defendant is a foreign corporation regularly authorized to do business in this state. It obtained the consent of the township supervisors to construct its line over the highway in question,

but did not obtain the consent of the plaintiffs, who are abutting owners, and it has not compensated them for the taking of the property or instituted condemnation proceedings. The plaintiffs allege that the defendant's acts are in violation of section 14 of the state constitution, which provides that "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, * * *" and section 5955, Rev. Codes 1899, which contains the same provision. The plaintiffs applied for a temporary injunction upon notice, and after a hearing it was denied, and plaintiffs have appealed from the order denying the same.

It is agreed that the sole and controlling question is whether the construction of a telephone and telegraph line upon a rural highway constitutes an additional servitude on the fee of the abutting owners. The trial court held that it does not, and, in support of this conclusion, counsel for defendant urges two grounds: (1) That the maintenance of a telephone and telegraph line upon a rural highway is a proper highway use, within the purpose of the grant of the easement, and does not therefore constitute an additional servitude; and (2) that, irrespective of the question as to whether it is a proper highway use, the defendant has the right to the use it is now attempting to assert under the authority of sections 5263, 5264, Rev. St. U. S. [U. S. Comp. St. 1901, pp. 3579, 3580].

Both contentions must be denied. The first ground has already been ruled upon by this court and adversely to the defendant's contention. In Donovan v. Allert, 11 N. D. 289, 91 N. W. 441, 58 L. R. A. 775, 95 Am. St. Rep. 720, this court held, after mature deliberation and an extended review of the authorities, that the construction of a telephone line upon the streets of a city imposed a new servitude upon the fee of the abutting owner, for which he was entitled to compensation. The rights of a landowner whose land abuts upon a rural highway are not inferior to those of one whose land abuts upon the streets of a city. This is conceded. Indeed it has often been held that the rights of the owner of land abutting upon the streets of a city are more restricted. This distinction, which is sometimes made, rests upon an alleged difference

in the purpose of the original dedication. Eels v. A. T. & T. Co., 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640; Croswell on Electricity, sections 117, 126. The underlying principle which must govern is the same, however, in either case. The proposed use must be within the purpose of the original dedication. If it is not, it constitutes an additional servitude, whether it be of a street or rural highway. Cases like this primarily involve a determination of property rights, and, where it is held that a new serviture is imposed, it follows necessarily that the fee owner is entitled to relief. The point of difference, and it is the only one which can logically serve as a basis for different conclusions, is as to the original purpose of the grant of the easement. Rights which have been granted to the public cannot be claimed by the abutting landowner. Such rights as have not been granted to the public remain in him and should be protected to the same extent as any other property right. In Donovan v. Allert, supra, this court held that the construction and operation of a telephone line upon a street was not a proper street use, and, in stating the original purpose of the dedication, used the following language: "The primary use of a street or highway is confined to travel or transportation. Whatever the means used, the object to be attained is passage over the territory embraced within the limits of the street. Whether as a pedestrian, or on a bicycle, or in a vehicle drawn by horses or other animals, or in a vehicle propelled by electricity, or in a car drawn by horses or moved by electricity, the object to be gained is moving from place to place. The same idea is expressed by courts and text-writers by the statement that 'motion is the primary idea of the use of streets.' * * * The streets of the city were given to the public for public use. What is understood by 'public use?' The primary intention and idea of the use of the street was for travel—moving from place to place in any way that does not interfere with the use of the street for travel in any other way. The manner or mode of travel is not restricted to those known or in use at the time of the dedication, but may be those modes of travel that are the result of modern invention." The weight of authority and reason supports the views set forth in the above case. See cases cited in opinion. The leading cases to the contrary are Pierce v. Drew, 136 Mass. 75, 49 Am. Rep. 7; People v. Eaton, 100 Mich. 208, 59 N. W. 145, 24 L. R. A. 721; Building Ass'n v. Bell Tel. Co., 88 Mo. 258, 57 Am. St. Rep. 398; and Cater

v. N. W. T. Ex. Co., 60 Minn. 539, 63 N. W. 111, 28 L. R. A. 310, 51 Am. St. Rep. 543—in each of which the decision was by a divided court. The cases opposed to the majority view differ as to the basis of their conclusion. Some courts have held that the primary and original purpose of the dedication of a street or highway includes the transmission of intelligence as well as public travel. To this class belongs Pierce v. Drew, supra, and other cases which might be cited. These cases have the merit of being logical in their conclusion for, adopting the view, which in our opinion is erroneous, that a street or highway is dedicated for use, both for travel and the transmission of intelligence, it follows necessarily that the maintenance of a telephone is not a new use, and this would also be true of any and all new modes of communication which ingenuity may devise. Other courts, while not expressly denying that the primary purpose of dedication of a highway is for travel, as above stated, apparently rest their decision upon public policy or what they deem to be the requirements of the public good. As illustrative of this class may be cited McCann v. Telephone Co., 69 Kan. 210, 76 Pac. 870, 66 L. R. A. 171, and Kirby v. Citizens' Telephone Co., 17 S. D. 362, 97 N. W. 3, both decided after Donovan v. Allert, supra. The decision in the Kansas case was by a divided court. The majority held that "the more liberal view should be taken, which is in keeping with the progress of the times, holding the easement to include the modern methods of travel and communication." Johnston, C. J., in his dissent, which was concurred in by two of the judges, after a full review of the authorities, said: "I think the function of the telephone is quite apart from the purpose for which the highway was designed when the easement was acquired. All methods whereby a part of the rural highway is exclusively and continuously occupied is a new use, and constitutes an additional burden, which entitles the person over whose land the highway is laid to compensation. The authorities are very nearly uniform, however much they may differ as to reasons, that a telephone is not within the scope and purpose of a rural highway." In the South Dakota case the court announced its views in the following language: "With the advance of civilization and new discoveries in science and new inventions, a more varied use of the streets of a city has become a necessity, and the rights of fee owners must yield to the public good, and new uses and more appropriate methods must be deemed to have been compensated

for in the appropriate dedication or condemnation of the streets." This case, it will be noted, goes to the extent of holding that when a different use of the streets becomes necessary "the rights of the fee owners must yield to the public good," and that the new use must be deemed to have been compensated for in the original appropriation or dedication. The effect of this and cases announcing the same view, and we are urged to overrule Donovan v. Allert and adopt it as the more modern and progressive view, is to deprive abutting owners of their property rights by judicial fiat —rights, which, whether of great or small value, have been made the object of constitutional protection. We cannot assent to this mode of transferring property rights. If telephone companies require the use of private property for the construction of their lines, they have the power of acquiring it by condemnation, but they may not, in our opinion, lawfully take it without first making compensation.

The defendant's second contention is that the highway in question is a "post road," and that authority is granted to it, under section 5263, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3579], to construct its lines upon "post roads" without making compensation to abutting owners. Before referring to the provisions of the above section and of certain kindred sections, it may be stated that the highway in question, which is upon a section line, became such by grant of congress (section 2477, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1567]), to and acceptance by the public long before the land was patented to the plaintiffs. Patents to six of the quarter sections were issued prior to 1884, and the seventh on November 28, 1884. The public having lawfully acquired the right of way for highway purposes, the plaintiffs took their title burdened with the easement in favor of the public. McRose v. Bottyer, 81 Cal. 122, 22 Pac. 393; E. P. T. R. Co. v. Edwards, 3 Col. App. 74, 32 Pac. 549; Tholl v. Koles, 65 Kan. 802, 70 Pac. 881; Walcott v. Skauge, 6 N. D. 382, 71 N. W. 544; Wallowa v. Wade, 43 Or. 253, 72 Pac. 793; Keen v. Fairview Twp., 8 S. D. 558, 67 N. W. 623. Section 3964 Rev. St. U. S. [U. S. Comp. St. 1901, p. 2707], adopted March 1, 1884, declared "all public roads and highways, while kept up and maintained as such," to be "postal routes." Section 5263, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3579], adopted July 24, 1866, granted permission to telegraph companies to construct and operate lines over public lands and over and along military roads and

"post roads," upon filing the written acceptance required by section 5268 of the same act [U. S. Comp. St. 1901, p. 3581]. The defendant has complied with the requirements which entitle it to the privileges of the above statute and contends that, under the authority of the above section, it not only has the right to construct its lines upon the highway in question, but that it may exercise this right without making compensation to the abutting owners. The contention cannot be sustained. The privilege given by section 5263, supra, is to telegraph companies, and it has been authoritatively settled that a telephone company is not entitled to its benefits. Richmond v. Southern Bell Tel. Co., 174 U. S. 761, 19 Sup. Ct. 778, 43 L. Ed. 1162; Wichita v. O. C. T. Co., 132 Fed. 641, 657, 66 C. C. A. 19. We may assume, however, for the purposes of this case, that, because the defendant's charter authorizes it to construct and operate telegraph and telephone lines, it comes within the above provision, and, further, that highways which are declared to be "post routes" are "post roads," within the meaning of section 5263, supra, so that it may claim the benefit of that section, still it avails the defendant nothing. Long before it attempted to exercise its right to go upon the land in question, the highway easement had passed to the public, and the fee had passed to private owners. It has been repeatedly held, and without a dissenting voice, both by state and federal courts, that section 5263-5268, supra, which authorize the construction of telegraph lines along post roads, do not affect the right of a landowner to the damage to which he is entitled for the additional burden upon the fee caused by the erection of telegraph poles upon a public highway, which is a post road. Kester v. W. U. Tel. Co. (C. C.) 108 Fed. 926; A. & P. T. Co. v. C. R. I. & P. R. Co., Fed. Cas. No. 632; P. T. Co. v. Southern Ry. Co. (C. C.) 89 Fed. 190; N. W. T. Ex. Co. v. C., M. & St. P. Ry. Co., 76 Minn. 343, 79 N. W. 315; Daily v. State, 51 Ohio St. 348, 37 N. E. 710, 24 L. R. A. 724, 46 Am. St. Rep. 578; A. T. & T. Co. v. Pearce, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200; W. U. T. Co. v. Ann Arbor, 90 Fed. 379, 33 C. C. A. 113, 120; W. U. T. v. Ann Arbor Ry. Co., 178 U. S. 243, 20 Sup. Ct. 867, 44 L. Ed. 1052; W. U. T. Co. v. Penn. Ry. Co. (C. C.) 120 Fed. 362; Phillips v. Telegraph Co., 130 N. C. 513, 41 S. E. 1022, 89 Am. St. Rep. 868; Pensacola T. Co. v. W. U. T. Co., 96 U. S. 1, 24 L. Ed. 708. Some of the cases above cited involve the rights of the holders of easements, and others the rights of abutting own-

ers. It is held in either case that compensation must be made by the telephone company as a condition to imposing the additional servitude.

The district court is directed to reverse its order and grant the temporary relief prayed for. All concur.

(107 N. W. 525.)

THE STATE OF NORTH DAKOTA EX REL DENNIS DORGAN, v. CHARLES J. FISK, JUDGE OF THE DISTRICT COURT, FIRST JUDICIAL DISTRICT OF GRAND FORKS COUNTY.

Opinion filed March 2, 1906.

Drains — Drainage Commissioners Act Judicially in Assessing Benefits.

1. A board of drainage commissioners, appointed under statutory authority and acting regularly in the discharge of its statutory duties, is exercising functions in their nature judicial when it assesses the benefits to lands in the drainage district established by it.

Same — Action Final Unless Assailed for Fraud, or Other Ground for Equitable Interference.

2. After such board has assessed the benefits to lands under such circumstances, and has proceeded in all things in accordance with the statutory requirements, its action in assessing benefits is final unless assailed for fraud or other ground for equitable interference.

Same — Disqualification of Commissioner.

3. The fact that one of the members of a board of drainage commissioners owns land in the drainage district that will be benefited by the drain will not disqualify such member from acting, nor render the proceedings in which he participated void or subject to attack by a court of equity.

Same — Writ of Prohibition.

4. When a district court enjoins proceedings by a board of drainage commissioners acting regularly and within its exclusive jurisdiction, a writ of prohibition from this court is a proper remedy to be invoked against further proceedings by the district court.

Same — Adequate Remedy at Law.

5. An appeal from the action of the district court, under such circumstances, is not a speedy nor adequate remedy.

Application for writ of prohibition by the state of North Dakota, on the relation of Dennis Dorgan, against Charles J. Fisk, as judge of the District Court of the First judicial district.

Writ issued.

C. N. Frich, Attorney General, and *J. B. Wineman*, State's Attorney, for petitioner.

In the absence of fraud, proceedings of drain commissioners are not open to collateral attack. Turnquist v. Cass County Drain Commissioners et al., 11 N. D. 514, 94 N. W. 852; Glide v. Superior Court of County of Yolo et al., 81 Pac. 225; Stanley v. Supervisors of the County of Albany, 121 U. S. 535, 30 L. Ed. 1000; Bauman et al. v. Ross et al., 167 U. S. 548, 19 Sup. Ct. Rep. 966; Pittsburg C., C. & St. L. Ry. Co. v. Backus, 154 U. S. 421, 14 Sup. Ct. Rep. 1114; Davidson v. Board of Admrs. of the City of New Orleans, 96 U. S. 97, 24 L. Ed. 616; Board of Directors v. Tregea, 88 Cal. 334, 26 Pac. 237; Fallbrook Irrigation District et al. v. Bradley et al., 184 U. S. 167, 17 Sup. Ct. Rep. 56; Lambert v. Mills County et al., 12 N. W. 715; Griffith v. Pence et al., 59 Pac. 677; Dodge County et al. v. Acom et al., 85 N. W. 292; Swan Creek Township et al. v. Brown, 90 N. W. 38; Oliver et al. v. Monona County et al., 90 N. W. 510; Tucker v. People, 156 Ill. 108; People, etc., v. Hagar, etc., 66 Cal. 59, 4 Pac. 951; Terre Haute & L. R. Co. v. Soice, 128 Ind. 105, 27 N. E. 429; Brady v. Haward, 114 Mich. 326, 72 N. W. 233; Stone v. Little Yellow Drainage District et al., 118 Wis. 388, 95 N. W. 405; Skinner v. Nixon, 52 N. C. 342; Bowersox v. Wattson, 20 Ohio St. 496.

Findings of the drainage commissioners are as conclusive upon the courts as the verdict of a jury upon conflicting evidence. Miller v. Logan County, 3 Ohio Cir. Ct. 617; Smith v. City of Worcester, 182 Mass. 232, 65 N. E. 40; Prior v. Buechler, 71 S. W. 205; Klein v. Tuhey, 13 Ind. App. 74; Toledo v. Ford, 20 Ohio Cir. Ct. 290; Fort Wayne v. Cody, 43 Ind. 197.

The question of the comprehensiveness, cost or more natural outlet for the drain, is for the determination of the board, which is not for review by the courts. Heick et al. v. Voight, 110 Ind. 279, 11 N. E. 306; Maranda v. Spurlin, 100 Ind. 380; Anderson v. Baker, 98 Ind. 587; Neff v. Reed, 98 Ind. 341.

The doings of the board are legislative acts by a municipal corporation. Glide v. Superior Court of Yolo County, supra; Rice v. Snider, 134 Fed. 953.

Where fraud is relied upon the bill must be specific and definite as to the acts constituting it. High on Injunctions, section 21.

Prohibition is the proper remedy. 23 Am. & Eng. Enc. Law, 197.

The writ issues where the right of appeal does not afford speedy and adequate remedy. Jenkins v. Barry, 83 S. W. 594; State v. Alne, 54 S. W. 494, 26 Ky. Law Rep. 1141; Wells v. Torrance, 119 Cal. 437, 51 Pac. 626; Havemeyer et al. v. Superior Court, 84 Cal. 327, 24 Pac. 121; State of Missouri et al. v. Wear et al., 33 L. R. A. 341; Norfolk & Western Ry. Co. v. Pinnacle Coal Co., 41 L. R. A. 414; Newport News and M. Valley Co. v. McBrayer, 15 Ky. Law Rep. 399; see note, 51 L. R. A. 33; Swaneburn v. Smith, 15 W. Va. 483; Siding Cull Pepper Co. v. Gerrell, 20 Gratt. 484; Thomas v. Mead, 36 Mo. 246; City of North Yakima v. Superior Court of King County, 30 Pac. 1053; Quimbo Appo v. People, 20 N. Y. 531; Fayerweather v. Monson, 23 A. 878.

Tracy R. Bangs, for respondent.

The attack upon the decision of the drain commissioners is direct, not collateral. Marrill v. Marrill, 23 Am. St. Rep. 97; Bailey v. Bailey, 44 Am. St. Rep. 713; Estate of Claghorin, 59 Am. St. Rep. 681; Burke v. Interstate Sav. & Loan Ass'n, 87 Am. St. Rep. 416.

The exercise of discretionary power is not an arbitrary act of will; it is an act of judgment deciding what equity and justice require upon a given state of facts. No appeal being provided by law, the only remedy is the one invoked. 2 Enc. Pl. & Pr. 417; Patterson v. Ward et al., 6 N. D. 609, 72 N. W. 1013; Anderson v. First National Bank, 5 N. D. 80, 64 N. W. 114; Wheeler v. Castor et al., 92 N. W. 381; Fargo v. Keeney et al., 92 N. W. 836; Minn. Thresher Mfg. Co. v. Holz et al., 10 N. D. 16, 84 N. W. 581; Braithwaite v. Aiken, 2 N. D. 57, 49 N. W. 419; Gull River Lbr. Co. v. Osborn McMillan Elev. Co., 6 N. D. 276, 69 N. W. 691; Dinnie et al. v. Johnson, 8 N. D. 153, 77 N. W. 612.

No person can be a judge in his own case. Stockwell v. The Township Board, 22 Mich. 341.

The plaintiff has a plain, speedy and adequate remedy at law. State ex rel Carrau. v. Superior Court of King County, 71 Pac. 648; Agassiz v. Superior Court, 27 Pac. 49; Walker v. District Court, 35 Pac. 982; White v. Superior Court, 42 Pac. 471; Willman v. District Court, 35 Pac. 692; County Court v. Boreman et al., 12 S. E. 491; State v. Whiteaker, 19 S. E. 376; State ex rel Mayor v. Rightor, 6 So. 102; State v. Judge, 33 La. Ann. 925; State v. Jones, 25 Am. St. 897; People v. District Court, 77 Pac. 239;

State v. Neal, 71 Pac. 647; State ex rel. Carrau v. Superior Court, supra; People v. DeFrance, 68 Pac. 267; County Court v. Boreman, supra; State v. Whitaker, supra; People v. District Court, 19 Pac. 541; Strouse v. Police Court, 24 Pac. 747; Agassiz v. Superior Court, supra; The Eau Claire Dells Impr. Co. v. Court, 26 Minn. 233; People v. Wayne Cir. Ct., 11 Mich. 403; State ex rel. Mayor v. Rightor, 6 So. 102; Turner et al. v. Mayor, 3 S E. 649; State v. Jones, 26 Am. St. Rep. 897; People et al. v. District Court, 77 Pac. 239; Walker v. District Court, supra; White v. Superior Court, supra; Willman v. District Court, supra.

MORGAN, C. J. The board of drain commissioners of Grand Forks county, appointed and acting under chapter 21 of the Revised Codes of 1899, as amended by chapter 80, p. 89, Laws of 1903, instituted proceedings for the establishment of a drain in said county. The board had advertised for bids for the construction of said drain and a day was set for considering bids. Prior to the time for opening such bids 16 land owners whose lands were in the established drainage district commenced an action against the drainage board, praying that it be enjoined from taking any further proceedings in reference to letting contract for constructing the drain. The plaintiffs procured an order to show cause why a preliminary injunction should not be issued enjoining the defendant from further proceedings. On the day fixed for the hearing on the order to show cause the defendants appeared and objected to the issuance of an injunction. The objections were all overruled and the court stated that a preliminary injunction would be issued. Prior to the issuing of such injunctional order one Dennis Dorgan, claiming to be a land owner in said drainage district and beneficially interested therein, applied to this court for an alternative writ of prohibition directed to the district judge and commanding him to desist from further proceeding in the injunctional action. The district judge made his return to the writ in this court, wherein all the proceedings in the action before him and upon which he alleged that his acts were legal and justifiable were set forth. The return also denies that this court has jurisdiction to issue the writ in this case for the reason that there is a plain, speedy and adequate remedy in the ordinary course of law.

The complaint in the action against the drainage board alleged as grounds for an injunction: (1) "That the drain proposed to be constructed, and for which the plaintiff's lands are to be assessed

for benefits, will not be of any benefit whatever, direct or indirect, to the plaintiffs' lands. (2) That said defendants, the said board of drain commissioners, as such board and individually, each and all know and knew on the 26th day of August, 1905, after all the facts had been submitted to it and them with respect to the benefits to accrue to the lands hereinbefore referred to that no benefit whatever would accrue to the land described herein as belonging to these plaintiffs; that notwithstanding such knowledge on the part of said board of drain commissioners and the members thereof, the said board of drain commissioners willfully, fraudulently, and in violation of the rights of these plaintiffs * * * in violation of the duties imposed upon said defendants * * * ordered and directed that said ditch or drain to be dug * * * and that the lands of these plaintiffs be assessed, taxed and charged with benefits, etc. (3) That Owen Lavelle, one of the defendants, and one of said board of drain commissioners, owns considerable lands north of the line between the townships of Walle and Grand Forks, and claims and contends, and these plaintiffs concede the fact to be, that the land so owned by said Lavelle will be benefited by the construction and maintenance of said drain. That said Lavelle has been extremely active in his efforts to force through the proceedings preliminary and incidental to the construction of said drain."

The defendants answered this complaint and alleged: (1) That the lands owned by the plaintiffs would be benefited by the construction and maintenance of the drain. (2) That the defendants, as such drainage board, are vested with sole jurisdiction in the ascertainment of the lands to be assessed and the apportionment of benefits in the construction of drains under and by virtue of chapter 21 of the Political Code of North Dakota. (3) That said drainage board is a municipal corporation and in the performance of the acts complained of in said complaint were performing a legislative act. The affidavit on which the preliminary writ of prohibition was issued recited all the proceedings taken by the board of drainage commissioners from their appointment up to the advertisement for bids for doing the work necessary to the construction of the drain that had been established by it. It further set forth that said drainage board had proceeded regularly in all its doings and that it had sole jurisdiction to determine whether said drain should be established and what benefits should be assessed to each tract of land within the district established and that the

district court had no jurisdiction to proceed with the trial of said action.

The questions presented and argued in this court are: (1) Did the district court have jurisdiction to enjoin further proceedings by the drainage board under the showing made? (2) Is the writ of prohibition a proper remedy under the facts of this case?

The defendant contends, under the first question raised, that the complaint stated grounds for interference by a court of equity. The grounds of such contention are that the drainage board acted fraudulently and arbitrarily in assessing benefits and that one member of the board was disqualified by personal interest in the establishment of the drain from acting on the board, and having acted, that all the proceedings were rendered null and void. It is further contended that the lands of the plaintiff in the injunctional action were so situated that no benefits whatever were conferred upon their lands. The allegations as to fraud, hereinbefore set forth at length, are to the effect that the board had knowledge before assessing benefits to the lands that no benefits whatever would accrue to the lands. It is an elementary principle of pleading that facts must be pleaded before an issue of fraud can be raised. To base an allegation of fraud solely on the pleader's conclusions as to what knowledge the opposite party possessed as a basis for his actions is not such a statement as well sustain a cause of action for fraud. Nor can that cause of action be pleaded by the use of the word "fraudulently." No fact was pleaded showing fraudulent conduct of the board. At most the allegation of fraud is a conclusion drawn from another conclusion. Fraud was not pleaded nor shown by any fact developed at the hearing. The testimony at the hearing was conflicting. The plaintiffs each testified that their lands would not be benefited at all by the drain. The members of the board testified that they made at least two personal examinations of the land in the drainage district, and made inquiries of divers persons interested in the drain, and, from such examinations and the information received, stated that the plaintiff's lands would be benefited. The engineer employed to survey the route of the drain testified that the plaintiffs' lands would be benefited by the drain. The record therefore discloses nothing on which fraud can be predicated. The question for the board to decide was the necessity for the establishment of the drain, and the further one, what lands would be benefited thereby. On the review provid-

ed for by section 1451, Rev. Codes of 1899, the plaintiffs were present and protested and gave evidence that their lands would not be benefited. There was also evidence that the plaintiffs' lands would be benefited. On this conflicting evidence the board decided that plaintiffs' lands would be benefited. Is this finding reviewable by a court of equity in the absence of allegation and proof of fraud? That is the first question of law presented.

Section 1452, Rev. Codes 1899, provides that the board shall assess the amount "which any lot, piece or parcel of land shall be liable to pay by reason of benefits to accrue thereto, either directly or indirectly by reason of the construction of such drain, whether such lands are immediately drained thereby or can be drained only by construction of other and connecting drains, but such assessment shall be subject to review by the commissioners as hereinafter provided." Upon the review of the assessment, the statute provides that the same shall be corrected or confirmed. There is no provision for an appeal from the decision of such boards and no provision for any further review of their action by any court or body. The question of fraud having been eliminated it remains simply to determine whether the action of the board is final and beyond review by a court of equity when the only attack made upon it is that it was erroneous or against the weight of the evidence. This court has recently held that the findings of such boards are final in this state when attacked collaterally and no fraud is alleged. Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841. This case would control the present case if the attack by the injunction suit be a collateral one. The injunction aims to stop further proceedings by the board. It is a proceeding directed against the present acts of the board, and seeks to prevent the consideration of bids and the letting of contracts. The board has not finally acted on the whole matter of the construction of the drain, and while about to take final steps toward the construction of the drain, their proceedings are attacked. We deem this to be a direct attack. It is not analogous to an attempt to resist payment of the tax assessed, as was done in the Erickson case. It is a proceeding instituted to prohibit further proceedings and thereby annul all past proceedings. See Van Fleet on Collateral Attack, section 2; Morrill v. Morrill (Or.) 25 Pac. 362, 11 L. R. A. 155, 23 Am. St. Rep. 97; Bailey v. Bailey (S. C.) 19 S. E. 669, 728, 44 Am. St. Rep. 713; Burke v. Interstate Savings & Loan Ass'n

(Mont.) 64 Pac. 879, 87 Am. St. Rep. 416. There is no claim in this case that the commissioners did not have jurisdiction to establish the drain and do all things necessary for its construction. It is admitted that all their proceedings were regular so far as complying with all the statutory requirements is concerned.

The lack of jurisdiction is urged solely on the ground of an abuse of discretion or fraud in assessing benefits, and not on account of any irregularity in the proceedings. In this case, it is the claim that jurisdiction was exceeded after having been regularly acquired. We do not think the case is brought within the rule applicable to cases where there is an excess of jurisdiction. The statute imposes upon the board the duty to assess benefits. A review is provided for, and a hearing granted, where evidence may be produced. The board acts judicially in assessing benefits. The board is acting under a delegation of power from the legislature in respect to local affairs, but in the exercise of that power is exercising functions in their nature judicial. Stone v. Little Yellow Drainage District, 118 Wis. 388, 95 N. W. 405; Dodge County v. Acom et al. (Neb.) 100 N. W. 136; Erickson v. Cass County, supra. The statute not having provided for an appeal nor for a review by any other body, court or tribunal, its action is final, unless attacked for fraud. Cases may be supposed where the board acted so arbitrarily, and in defiance of the statute, that a court of equity might interfere, but the record discloses nothing of that sort. In this case the drainage district comprised about 12,000 acres, of which the objectors owned about 4,000. To determine whether the land will be benefited by a proposed drain is a very difficult and delicate question under some circumstances. It involves the question of the enhanced value of the land by reason of better drainage thereof, easier access thereto, and the health and comfort of the people residing in the district. The petition for the drain urged these as grounds for the establishment of the drain. The statute allows a wide latitude of discretion in the assessment of benefits and allows the lands to be assessed when the benefits are indirect even.

The objectors in this case claimed that their lands are all drained naturally. It is not necessary to consider whether these contentions are sustained or not. Their determination will not affect the question of the jurisdiction of the drainage board to determine them. These questions were rightfully before that board

for decision and its determination will not be disturbed on the sole ground that it was an erroneous decision. The statute not having given an appeal, and nothing having been shown to warrant interference by a court of equity, and the jurisdiction of the board being complete, the action of the board is final and beyond review in an equitable action or in any other manner. In Erickson v. Cass County, supra, this same drainage law as is involved in this case was construed and its constitutionality upheld as against the contention that it authorized the taking of property without due process of law. It was competent for the legislature to invest the drainage board with power in good faith and after notice and an opportunity to be heard to finally determine the benefits accruing to each tract of land in the drainage district, and, having done so, courts of equity will not interfere except upon some recognized principle of equitable jurisdiction not existing in this case. State v. Blake et al., 36 N. J. Law, 442; High on Injunction, section 1309; Lambert v. Mills, 58 Iowa, 666, 12 N. W. 715; Gauen v. Drainage District No. 1, 131 Ill. 446, 23 N. E. 633; Studabaker v. Studabaker, 152 Ind. 95, 51 N. E. 933; Horn v. Board, etc. (Mich.) 98 N. W. 256; Glide v. Superior Court (Cal. Sup.) 81 Pac. 223; Pittsburg, Cincinnati, Ohio & St. Louis Ry. Co. v. Backus, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031; Reeves v. Grottendick, 131 Ind. 107, 30 N. E. 889; Klein v. Tuhey, 13 Ind. App. 74, 40 N. E. 144.

One of the drainage commissioners owned land within the drainage district that would be benefited by the drain. The owner, it is alleged, took an active interest in bringing about the establishment of the drain. This is claimed as a reason for invalidating the proceedings of the board entirely, under the principle that "no man can be a judge on his own case." No specific facts are shown that the commissioner did or said anything indicating that he prejudiced the case owing to the fact that his own land would be benefited. The existence of his interest and acting are alone claimed to be ground for nullifying all the proceedings. The board was acting under regular appointment pursuant to statutory authority. It had sole and exclusive authority to carry out the provisions of the drainage law. Although a majority might legally act, there is no provision by which a member, claimed to be disqualified, could be prevented from acting. If such a state of facts constitutes such interest in the result as will avoid the proceedings, the enforcement of the drainage law will necessarily be delayed or perhaps

entirely thwarted. Similar questions have been before the courts resulting in different conclusions. Those holding the acts of boards or persons void by reason of interest or bias give no effect to the fact that such boards are by the legislature constituted as such to perform the duties devolving upon them. Such are State ex rel. Barnard v. Board of Education, 19 Wash. 8, 52 Pac. 317, 40 L. R. A. 317, 67 Am. St. Rep. 706, and Stockwell v. White Lake, 22 Mich. 341. We think that these and similar cases are in the minority and do not give effect to the better reasons. As stated in State ex rel. Cook v. Houser, 122 Wis., on page 581, 100 N. W., on page 979: "The matter to be dealt with was a mere legislative privilege granted upon any condition the legislature saw fit to impose. The tribunal was given unqualified authority in respect thereto, so long as it proceeded within its appropriate sphere. None of the rules disqualifying judges or jurors have any application to such a situation."

The principle urged upon us would nullify the proceedings of many governmental agencies or boards. Boards of equalization, city councils, county commissioners, assessors, and other officers have a resulting pecuniary interest in many of their official acts. It is often remote and indeterminate, as in the case at bar, and sometimes may be said to be a direct financial benefit. Still, such boards being constituted by the statute to perform the duties in which they may have a pecuniary interest, it becomes a necessity that they act and that their acts be not nullified on account of their interest in the result. Such boards or commissioners are not courts in the strict sense, hence the rules laid down by statute and existing under the common law are not applicable. In the case at bar the proceedings are purely statutory. The only qualification of a member of a drainage board is that he shall be a freeholder of the county and the acts of the board cannot be avoided because one of the members was interested in a general way in the establishment of the drain. As bearing on the principle involved, see: Case v. Hoffman, 100 Wis. 314, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945, 44 L. R. A. 728; In re Ryers, 72 N. Y. 1, 28 Am. Rep. 88; People v. Sherman (Sup.) 72 N. Y. Supp. 718; State ex rel. Starkweather v. Common Council, 90 Wis. 612, 64 N. W. 304; State ex rel. Cook v. Houser, supra.

It is claimed that the relator has a plain, speedy and adequate remedy in the ordinary course of law, and in consequence thereof

that the writ should not be issued. Section 86 of the state constitution provides that the Supreme Court shall have appellate jurisdiction only, and "shall have a general superintending control over all inferior courts under such regulations and limitations as shall be prescribed by law." Section 6123, Rev. Codes 1899, provides that: "The writ of prohibition is the counterpart of the writ of mandamus. It arrests the proceedings of any tribunal, corporations, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." Section 6124, Rev. Codes 1899, provides that: "It may be issued by the supreme and district courts to an inferior tribunal, or to a corporation, board or person in all cases, when there is not a plain, speedy and adequate remedy in the ordinary course of law. It is issued upon affidavit on the application of the person beneficially interested." It is patent from these sections that this writ is available only in cases where jurisdiction was never acquired, or, if acquired, has been exceeded.

The remedy by appeal would exist if the injunction be granted. The mere fact that an appeal would lie is not enough. It must be speedy and adequate. The granting of the writ to inferior courts is seldom a matter of absolute right as the remedy by appeal generally exists, and whether the appeal is speedy or adequate is a matter within the discretion of the appellate court, depending upon the particular facts of each case. The court cannot accurately determine when a trial in the case at bar would come on nor when the appeal would reach this court if an appeal were necessary. Inasmuch as the district court has exceeded its jurisdiction, a trial is unnecessary, and would be expensive and vexatious to each party; and that the result of a trial and appeal could not under the most favorable circumstances, be as speedy as a decision upon this original proceeding, we deem it a proper case for issuing a writ. The application for the writ is made to hasten a public improvement deemed to be of importance, at least to the petitioner and a large number of interested persons. There being a plain case of want of jurisdiction presented, and the appeal not being as speedy or adequate as this proceeding, we are satisfied that the petitioner is entitled to this summary and extraordinary remedy. We appreciate that this remedy should be cautiously granted. But, in view of the nature of the act that was enjoined, we have no doubt of the propriety and legality of assuming original jurisdiction.

Let the writ issue. All concur.

(107 N. W. 191.)

STATE OF NORTH DAKOTA v. GEORGE E. MOODY.

Opinion filed March 12, 1906.

Appeal from District Court, Richland county; *Glaspell*, J.

Application by the state on the relation of C. N. Frich, Attorney General, to remove George E. Moody from office. Judgment for defendant, and relator appeals.

Dismissed.

C. N. Frich, Attorney General, *Chas. E. Wolfe* and *A. J. Bessie*, for appellant.

Purcell, Bradley & Divet, for respondent.

PER CURIAM. The relator brought this action to remove the defendant from the office of sheriff of Richland county, and at the same time applied to the district court for an order under section 363, Revised Codes of 1899, to suspend him from office pending the determination of the action. The trial judge denied the application, and without hearing the case upon the merits entered judgment dismissing the action. The relator then applied to this court for a writ of mandamus to compel the district court to reinstate the case. State ex rel. v. Moody, 13 N. D. 211, 100 N. W. 248. The application was denied. This appeal is from the judgment of dismissal, and the court's action in refusing to make the order of suspension and in entering the order of dismissal are assigned as error. The defendant's term of office expired on January 1, 1905. The lapse of time has accomplished the purpose of the action. It also appears that, subsequent to the entry of the judgment of dismissal, the relator invoked the summary remedy for defendant's removal which is provided by section 7838, Rev. Codes 1899, and upon substantially the same charges, and that he was tried and acquitted. As to the merits of the action, our opinion upon the questions presented could therefore have no practical value. They would neither benefit nor prejudice either party upon the merits. Under these circumstances we do not deem it proper to review any of the assignments or consider any of the questions involved upon the appeal. Appeal dismissed, without costs to either party.

ENGERUD, J., having been of counsel, did not sit in the above-entitled case; HON. CHARLES A. POLLOCK, judge of the Third judicial district, sitting in his place by request.

(106 N. W. 1135.)

E. C. RAYMOND, DOING BUSINESS UNDER THE NAME AND STYLE OF LACROSSE CREDIT ASSOCIATION, v. E. M. EDELBROCK AND PETER MASSOTH, CO-PARTNERS AS EDELBROCK AND MASSOTH.

Opinion filed March 12, 1906.

Fraud — Evidence.

1. Evidence examined, and *held*, insufficient to establish the defense that the contract sued upon was void for fraud.

Damages — Breach of Contract — Liquidated Damages.

2. Where a contract provides that the party who fails to comply therewith shall pay the other party a stated sum as liquidated damages for the breach, such stipulation will be construed to refer to a total breach of the contract and not to a breach in some minor particular, unless the language of the agreement is explicit to the contrary.

Same — Penalty.

3. If an agreement fixes the same sum as damages for a breach in a minor particular as for a total breach regardless of the lesser amount of detriment apt to ensue from such partial breach as compared to the loss from an entire failure to comply, the stipulation will be construed to be one for a penalty, and therefore void.

Damages — Opinion Evidences Must Be Based on Stated Facts.

4. The opinion of a witness as to the amount of damages resulting from the defendant's wrong, where no facts are stated as the basis for an estimate of damages, is incompetent.

Deposition — Objection to Evidence.

5. Incompetent testimony in a deposition may be objected to and excluded at the trial.

Appeal — Dismissal After Argument.

6. A motion to dismiss an appeal for an alleged irregularity which is not of a jurisdictional nature will not be entertained, when not urged until after the appeal has been argued on the merits and a rehearing ordered.

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

Action by E. C. Raymond, doing business as the LaCrosse Credit Association, against E. M. Edelbrock and Peter Massoth. Judgment for defendants, and plaintiff appeals.

Reversed.

McCumber, Forbes & Jones, for appellant.

Right to move for a dismissal of an appeal is waived by any act recognizing it as before the court, such as motion for continuance, submission of the cause on its merits, etc. 2 Enc. Pl. & Pr. 348-

349; White v. Polleys, 20 Wis. 530; Anderson v. Webster, 11 So. 546; Ricker v. Collins, 17 S. W. 378; Warner v. Whitaker, 5 Mich. 241; Steward v. Dixon, 6 Mich. 391; Matson v. Connelly, 24 Ill. 143; Price v. Pittsburgh, 40 Ill. 44; Dinet v. People, 73 Ill. 183; Dobbins v. Baker, 80 Ind. 52; Field v. Burton, 71 Ind. 380; Trueman v. Scott, 72 Ind. 258; French v. French, 84 Iowa, 655, 15 L. R. A. 300, 51 N. W. 145; 3 Cyc. 199; Edwards v. Logan, 69 S. W. 800; Louchheim v. Deeley et al., 43 N. E. 646; Jacob v. Gale, 1 So. 822; Parker v. DesMoines, 78 N. W. 826; Kemp v. Hein, 48 Wis. 32, 3 N. W. 831; Dorman v. McDonald, 36 So. 52.

Where damages cannot be ascertained, upon a breach of contract, the amount stipulated as liquidated damages should prevail. 19 Am. & Eng. Enc. Law, 402; Jaquith v. Hudson, 5 Mich. 123; Williams v. Green, 19 Am. & Eng. Enc. Law, 404; Hathaway v. Lynn, 75 Wis. 186; Clement v. Cash, 21 N. Y. 253; Mason et al. v. Callander Flint & Co., 2 Minn. 302; Lyman v. Babcock, 40 Wis. 503; Ward v. Hudson, 26 N. E. 256; sections 3923 and 3924, Rev. Codes 1899; Schroeder v. Cal. T. Co., 95 F. R. 296; Kelly v. Fejervary, 78 N. W. 828; Sanford v. First Nat. Bank, 63 N. W. 459; Barnes v. Clement, 66 N. W. 810; Manistee Iron Works Co. v. Shore Lumber Co., 65 N. W. 863; Lorius v. Abbott, 68 N. W. 486; Fisher v. Walsh et al., 78 N. W. 437; Seim v. Krause, 83 N. W. 583.

Purcell, Bradley & Divet, for respondents.

The defense of fraud is always available. When nothing has been received or parted with, rescission has no application. Hazzard v. Irwin, 35 Mass. 95; Thurston v. Blanchard, 39 Mass. 18; Fitz v. Bynum, 55 Cal. 459; Aultman et al. v. Olson, 26 N. W. 451; Ward v. Speltz, 58 N. W. 426; Woodbridge et al. v. DeWitt et al., 70 N. W. 506; Cole Bros. & Hart v. Williams, 11 N. W. 875.

A misrepresentation may be as to the contents of a written instrument. Maxfield et al. v. Schwartz et al., 47 N. W. 448; Aultman v. Olson, 26 N. W. 451; Ward v. Spelts et al., 58 N. W. 426.

One cannot reap the fruits of his fraudulent acts, because if his victim had been more intelligent, less negligent and confiding, he would not have been injured. Ward v. Spelts, supra; Woodbridge v. DeWitt, supra; Cole Bros. & Hart v. Williams, supra; Strand v. Griffith, 97 Fed. 854; Chamberlain v. Fuller, 59 Vt. 256; Warder, Bushnell & Glessner Co. v. Whitish, 46 N. W. 540;

Ganill v. Johnson, 1 S. W. 610; Davis v. Parker, 103 Mass. 501; Holland v. Anderson, 38 Mo. 55; Albany Sav. Institution v. Burdick, 87 N. Y. 40.

If defrauded party has not full knowledge of the facts and law as to the fraud, no act of his is effectual to ratify the deed. 2 Pom. Eq. 964; Hamilton v. Hodges, 30 La. 1290; Cleary v. Morrison, 11 Tenn. 369.

The contract sued upon is void on its face as it provides for a penalty. Lampman v. Cochran, 16 N. Y. 275; Spears v. Smith, 1 Denio, 464; Field on Damages, 136; Ledgvick on Damages, 396; Chadwick's Ex'rs. v. Marsh, 21 N. J. Law, 463.

ENGERUD, J. Defendants executed and delivered to plaintiff, who does business under the name "La Crosse Credit Association," the following contract: "Wahpeton, N. D., 8-15, 1902. I agree to send to the La Crosse Credit Association, within twenty days from the above date, correct post office addresses of and amount due from at least thirty debtors who owe me accounts and notes, not outlawed, amounting in the aggregate to one hundred and fifty dollars. The first money received on said notes and accounts up to thirty-six dollars I agree to send to said association within five days after their receipt. If I comply with this agreement, I am not to pay any money to said association except from money collected. Should I fail to comply with this agreement I promise to pay to said association said sum of thirty-six dollars, as liquidated damages, within ten days after default. Two two-cent stamps to accompany each claim. All claims sent for collection to be listed on blanks furnished by said association and to give the name of debtor, correct post office address, date of last payment or purchase and occupation of debtor if said occupation is known to me. In consideration of this agreement the LaCrosse Credit Association agrees to handle this subscriber's business for a period of four years, to send this subscriber, upon request, blanks on which to send claims for collection, to give each claim diligent attention, and to furnish a special report, when requested, in accordance with the provisions made in the special report book which will be mailed to the subscriber upon request. The La Crosse Credit Association agree that if they do not fulfill their part of this agreement they will, upon default, pay this subscriber the sum of thirty-six dollars. No agent of the La Crosse Credit Association has authority to change the terms of this agreement. Receipt of a copy of the

above agreement is hereby acknowledged [Signed] La Crosse Credit Ass'n, per Harry Taggart. Edelbrock & Massoth." The defendants failed to comply with the contract in this that they sent to the plaintiff within twenty days after the execution of the contract the names of only five debtors who owed defendants the aggregate sum of $150, instead of the names of thirty debtors. For this breach of said contract the plaintiff brought this action to recover $36 stipulated damages for the breach thereof. The defendants denied liability on the ground that their signatures to the contract had been procured by fraud. There was a trial by jury and a verdict for defendants. A statement of the case was duly settled, upon which plaintiff applied for judgment notwithstanding the verdict, or for a new trial. Both motions were denied and the plaintiff appeals from the judgment.

Appellant contends that the plea of fraud is conclusively disproved, and that a verdict should have been directed in his favor, and hence that he is entitled to a judgment notwithstanding the verdict; but, even if he is not entitled to such judgment, there should be a new trial by reason of the insufficiency of the evidence to justify the verdict and numerous alleged errors of law.

It is urged by the appellant that the allegations of the answer are insufficient to show that the contract was void, because it does not allege that the same was rescinded upon the discovery of the alleged fraud. The point is well taken. The obligation imposed by the contract upon the plaintiff was wholly executory. The defendants had received nothing under the contract and consequently had nothing to restore to the plaintiff as a condition precedent to exercising their option to treat the whole transaction as a nullity. The views of the writer on this subject are not in accord with those of my associates and are in conflict with those expressed by the majority of the court in Sonnesyn v. Akin, 14 N. D. 248, 104 N. W. 1026. I fully agree with the views expressed by Judge Fisk in his dissenting opinion in that case. Rescission of a contract is the act of canceling it by restoring the conditions existing immedately before it was made. Rescission is effected by each party returning to the other what has been received pursuant to the contract or its equivalent. It is manifest that if nothing has been received through the voidable contract by the party seeking to avoid it there is nothing for him to do as a condition precedent to exercising his election to treat it as a nullity except

to assert the invalidity of the transaction whenever the guilty party seeks to assert some right under it. The defrauded party has the option to treat the transaction as void or valid and this right continues so long as the party having the election does not do anything which amounts to a ratification. The defrauded party is not required to give notice of disaffirmance, provided he does not after knowledge of the fraud, retain the fruits of the fraudulent transaction, or tacitly or by affirmative action lead the other party to change his position by reason of apparent ratification. These propositions are so plainly elementary that citation of authorities is unnecessary. We call attention, however, to the following: Bigelow on Fraud (Ed. 1888) p. 77 et seq.; Thurston v. Blanchard, 22 Pick. (Mass.) 18, 33 Am. Dec. 700; Starch Co. v. Lendrum (Iowa) 10 N. W. 900, 42 Am. Rep. 53.

It is next claimed that the answer, although alleging fraud in procuring the contract sued on, does not show any damage, present or prospective, resulting from the fraud. It is not necessary to avoid a contract for fraud that any damage has been or may be suffered by the defrauded party. As was said in Beare v. Wright (lately decided by this court) 103 N. W. 634, a contract induced by fraud "is voidable, not because of any supposed pecuniary damage done to the defrauded party, but because the consent of the latter was not free. Rev. Codes 1899, sections 3836 3841-3844. Fraud, actual or constructive, renders a contract voidable for the same reason that mistake, undue influence, duress, etc., have the same effect." We think the answer was sufficient The allegations of the answer are not, however, sustained by the proof. The only evidence in behalf of the defendants as to the alleged fraud is that of one of the defendants. In response to several very leading questions he was induced to make answers which, standing alone, give some apparent support to the allegations of fraud. When the answers to these leading questions, however, are read in connection with his testimony on cross-examination it clearly and conclusively appears that he carelessly signed the contract without reading it himself or having it read to him, and that no miss-statements of its contents were made to him. It further appears by his own admission that after he had learned the exact terms of the contract he ratified it by partial performance. The verdict for defendant being based solely on the defense of fraud is without support in the evidence. A

verdict should have been directed for plaintiff, but for nominal damages only.

It will be observed that the plaintiff is seeking to recover damages for only a partial breach of the contract. The defendants sent to plaintiff within the time prescribed the required amount of claims for collection, but failed to send the specified number. By the terms of the contract the defendants promised to pay $36 "as liquidated damages" if they failed "to comply with this agreement." If this language is to be construed to mean that the stipulated sum was to be the measure of damages for a breach of any of the stated conditions, then the pretended liquidation of damages was a mere agreement for a penalty; and the entire stipulation would be void for familiar reasons. Where a contract stipulates for the performance of several acts and fixes the same amount of damages for the nonperformance of any single minor condition as is fixed for a total breach, regardless of the relative detriment apt to result from such partial breach as compared to the loss for a total breach, the very terms of the contract itself demonstrate that compensation for actual detriment was not the thought of the parties. If the agreement is not for compensaion it is necessarily one for a penalty. Such a stipulation is therefore void. Lyman v. Babcock, 40 Wis. 503; Lampman v. Cochran, 16 N. Y. 275; Sedgwick on Damages (8th Ed.) section 406; Sutherland on Damages (3d Ed.) section 295. It follows that if the stipulation in question is to be upheld it must be construed to be applicable only to a total breach. Sedgwick on Damages (8th Ed.) section 415. The stipulation fixing the amount of damages in case of a total breach having no application to the partial breach shown in this case, it was incumbent upon the plaintiff to prove the extent of his loss if he would recover more than a nominal amount. This he failed to do. The only attempt to do so was in the examination of plaintiff whose testimony was taken by deposition. He was asked this question: "What damages have you sustained by reason of the failure of the defendants to keep and perform their contract?" The question was objected to on the trial on the ground that it called for the conclusion of the witness, and incompetent testimony, and there was no proper foundation laid. The objection was properly sustained. The question did not call for a statement of facts upon which an estimate of damages could be based. The opinion of

the witness as to what his damages should be was clearly incompetent. Objections to testimony by deposition may be made at the trial for incompetency. Rev. Codes 1899, section 5687. Although the plaintiff failed to prove actual damage he was nevertheless entitled to recover nominal damages for the defendant's breach of contract. Revised Codes, section 5016. The court should have given an instruction to that effect as requested by the plaintiff.

This case was commenced in justice court, and hence the recovery of only nominal damages would entitle the plaintiff to recover full costs. The action also involves the validity of the contract in question. The effect of this verdict and judgment is to nullify the contract itself and forever bar the plaintiff from asserting any right under it, as well as to absolve the defendant from all obligations under it. As we have seen, the evidence did not warrant such a verdict and judgment. If the judgment were to be affirmed the plaintiff would be wrongfully deprived of a substantial right. Under such circumstances the verdict must be set aside even though the plaintiff was entitled to only nominal damages. 1 Sutherland on Damages, 11, 13, 815; 8 Am. & Eng. Enc. Law (2d Ed.) 560. We decline to entertain respondents' motion to dismiss the appeal, because the motion comes too late. The regularity of the appeal was not questioned until after a rehearing had been ordered. The ground upon which the dismissal is urged, if tenable, is an irregularity not of a jurisdictional nature.

The judgment is reversed, and a new trial ordered.

YOUNG, J. I concur in the foregoing opinion, but not in all that is said on the question of rescission. The point urged by appellant's counsel is that the third paragraph of the answer, which alleges that the contract is void because of fraud in its procurement, and sets forth the particular fraud relied upon for declaring it void, i. e., that the plaintiff falsely and corruptly misstated its contents and thus secured the defendants' signature, does not state a defense, because it does not alleged a rescission of the contract prior to the commencement of the action. It is said that the first and only notice the plaintiff has received that the defendants claim that the contract is void for fraud was given by their answer, and it is urged that they cannot disaffirm by their answer, but on the contrary, that the answer must, to be sufficient, allege a precedent rescission. The contract in question was executory and defendants have received nothing to return as a condition for dis-

affirmance. It is not contended that the answer is not sufficient in form or substance to constitute a disaffirmance. Their sole contention is that the disaffirmance must have occurred before the action was brought, and must be so alleged. As applied to an executory contract upon which nothing has been received, such as in the case at bar, the contention, in by opinion, is not sound. The answer alleges that the defendants' consent to the contract was procured by fraud. This made the contract voidable and gave them the right to render it void by proceeding in the manner prescribed by the chapter on rescission. There is nothing contained in that chapter which forbids a disaffirmance by answer. The right to disaffirm, existing, the election to do so is manifested and effected (1) by a repudiation of the contract; and (2) by a return of anything of value received, where a return is necessary. In this case nothing of value having been received, the only act required was the declaration of these defendants that they refused to be bound by the contract and this was sufficiently done in their answer. The answer in this case contains an express disaffirmance and is notice to the plaintiff that the defendants refuse to be bound. There is then no absence of notice and the case does not therefore present the question as to whether a rescission can in any case be effected without notice of some kind of the election to rescind. The rule of the cases as stated in 24 Am. & Eng. Enc. Law (2d Ed.) 645, is that "a party who intends to rescind a contract must within a reasonable time give to the other party notice of disaffirmance or must in some way communicate to him his intention to rescind." And this court approved the rule in the recent case of Sonnesyn v. Akin, 14 N. D. 248, 104 N. W. 1026, 1030.

The requirement that property or value received be returned is merely an incident of the rescission, and I do not understand that the fact that there is no return required in a particular case excuses the party having the right to rescind from actually repudiating by notice of some kind or by some act which will communicate his election. Such contracts are not void until disaffirmed. The first requirement of a rescission is that "he must rescind promptly" (Subdivision 1, section 3934, Rev. Codes 1899), and it is apparent that this cannot be done by silence and nonaction.

MORGAN, C. J., concurs in this view.

(107 N. W. 194.)

W. L. BENNETT v. S. L. GLASPELL.

Opinion filed March 14, 1906.

Vendor and Purchaser — Compensation in Lieu of Forfeiture.

1. Under section 4970, Rev. Codes of 1899, one who has subjected himself to a forfeiture by committing a breach of contract may by making compensation be relieved therefrom, when the breach is not grossly negligent, willful, or fraudulent.

Same — Relief from Forfeiture.

2. Upon the facts stated in the opinion, the plaintiff is entitled to be relieved from the forfeiture upon which the defendant relies to defeat his action for specific performance.

Same — Grounds of Forfeiture Must Be Those of the Contract.

3. The grounds upon which a contract may be forfeited must be contained in the contract; and a contract will not be extended by construction to include other grounds than those specified in it. Following Coughan v. Larson.

Same — Fraud, Unless Affirmed, Is a Ground for Rescission.

4. Fraud inducing the execution of a contract, and by reason of which consent is not free, renders it voidable, and, unless the contract has been affirmed, is available as a ground for rescission or as a defense against its enforcement.

Same — Taking Benefits Under Contract With Knowledge of Fraud Affirms It.

5. One who, with full knowledge of the facts which entitle him to rescind a contract or defeat its enforcement, voluntarily takes benefits under it, thereby affirms it; and he cannot thereafter assail its validity.

Specific Performance — Parties.

6. One who is not a party to a contract and disclaims any interest in it is not a necessary party plaintiff in an action to enforce it.

Appeal from District Court, Foster county; *Burke*, J.

Action by W. L. Bennett against S. L. Glaspell. Judgment for plaintiff. Defendant appeals.

Modified.

C. B. Craven and *E. H. Wright*, for appellant.

An agent to purchase cannot buy from himself, and an agent to sell cannot be himself the purchaser without his employer's consent. Clendenning v. Hawk, 10 N. D. 90, 86 N. W. 114; Anderson v. First National Bank, 5 N. D. 80, 64 N. W. 114; Dutten v. Willner, 52 N. Y. 312; Webb et al. v. Marks, 51 Pac. 518.

The rule is not relaxed when the authority to sell is for a fixed price. Ruckman v. Bergholz, 37 N. J. Law, 437; Colbert et al. v. Shepherd, 16 S. E. 246; Webb v. Paxton, 32 N. W. 749; Jensen et al. v. Williams, 55 N. W. 279; Rennick v. Butterfield, 64 Am. Dec. 316; Tisdale v. Tisdale, 2 Sneed. 596.

A partnership is liable for any loss or injury caused to one not a member of the firm by any wrongful act or omission of a party in the ordinary course of the business of the firm or with the authority of the copartnership. Brundage v. Mellon, 5 N. D. 72, 63 N. W. 209; 22 Am. & Eng. Enc. Law, 166; Wiley v. Stewart, 122 Ill. 545, 14 N. E. 835; Wolf v. Mills, 56 Ill. 360; Chester et al. v. Dickerson et al., 54 N. Y. 1; Loomis v. Barker, 69 Ill. 360; Tenney v. Foote, 95 Ill. 99; Castle et al. v. Bullard, 23 How. 172, 16 L. Ed. 424, 64 U. S. 172; Blight's Heirs v. Tobin, 18 Am. Dec. 219; Nicholsen v. Janeway, 16 N. J. Eq. 285; sections 4394, 4395, 4340, Rev. Codes 1899.

T. F. McCue, John Knauf and *S. E. Ellsworth,* for respondent.

Where time is not of the essence of the contract, default in a condition may be cured by a payment, or offer of payment within a reasonable time after the performance was due. Crittenden v. Drury, 4 Wis. 229; Hall v. Rawson, 5 Wis. 206; Butler v. Archer, 41 N. W. 309; Volz v. Grummett, 13 N. W. 814; 4970 Rev. Codes 1899; Pier v. Lee, 86 N. W. 642; Barnes v. Clement, 81 N. W. 301.

Hoopes has no interest in the subject matter of the contract and was not a proper party to the action. His remedy, if any, would be an action for an accounting. Davenport v. Buchanan et al., 61 N. W. 47; Bates v. Babcock, 30 Pac. 605; Richard v. Grinnell, 63 Iowa, 44, 18 N. W. 668; Newell et al. v. Cochran et al., 43 N. W. 84.

No person is a necessary party to a suit in equity although he may have an interest in the subject matter, if such interest cannot be affected by a decree. 16 Enc. Pl. & Pr. 182.

Parties to a contract are the only proper parties to a suit for its performance. Willard v. Tayloe, 8 Wal. 557, 19 L. Ed. 501; Moulton v. Chafee, 22 Fed. 26.

The presence of a party having an interest that is neither recognizable nor enforcible, and against whom no relief is asked by either party, is entirely unnecessary and improper. Hoskins v. Dougherty, 69 S. W. 103; Stanton v. Singleton, 54 Pac. 587;

Burril v. Gaist, 34 A. 436; Denneston v. Hougland, 67 Ill. 265; Brown v. Ritter, 26 N. J. Eq. 456; Robinson v. Robinson, 116 Ill. 250, 5 N. E. 118; Washburn, etc., Mfg. Co. v. Chicago, etc., Fencing Co., 109 Ill. 71.

YOUNG, J. This action was commenced on March 6, 1905, to compel the specific performance of the defendant's written contract wherein he agreed to sell and convey to the plaintiff 640 acres of land situated in Foster county. The purchase price, $8,764, was to be paid on what is commonly termed the "crop payment plan." The entire sum was to be paid not later than November 1, 1908, and the plaintiff had the privilege of paying all or any part of the consideration at any time previous to that date. Deferred payments bore interest at 7 per cent per annum, and the interest was due and payable on November 1st of each year. The contract required the plaintiff to sow, harvest and thresh the crops at his own expense, and immediately after threshing the same, but not later than November 1st in any year, * * * to deliver in the elevator or in the cars at the nearest station, to the order and in the name of the first party or his duly authorized agent, one half in kind, and as it comes from the machine of all the wheat or other grain grown upon said land ,which grain or produce shall be sold by the first party, or his duly authorized agent, and the proceeds applied first, toward the payment of interest then due, and the balance toward the purchase price of said premises then remaining due and unpaid under this agreement." The contract authorized the defendant, at his election, to declare the contract forfeited by giving notice in the manner therein specified in case the plaintiff defaulted in delivering the grain, or in making the payments for twenty days after the grain was threshed or after the payments were due.

The complaint alleges full performance by plaintiff of the conditions of the contract for the years 1902, 1903 and 1904, and sets forth the several payments made thereon, and the date of each payment. It also alleges that in October, 1904, the plaintiff notified the defendant that he desired to pay all that remained of the purchase price and to procure a deed; that on November 21st, thereafter, he deposited the sum of $6,350 in the First National Bank of Carrington to be paid to the defendant upon receipt of a deed, and caused defendant to be notified of such offer; that on November 28th he tendered said sum to defendant, which was refused; that on December 10th he tendered the sum of $6,400; that defendant

refused to accept payment, and refused and still refuses to execute and deliver a conveyance. The plaintiff also alleges that he is still ready, willing and able to make full payment, and that he has brought into court and deposited for that purpose the sum of $6,600. The defense set up in the answer is that the defendant effectually canceled and annulled the contract on November 12 ,1904, by serving a notice of forfeiture on that date which declared the contract canceled and terminated upon the following grounds: (1) Plaintiff's failure to deliver a full one-half of the grain grown in 1904; and (2) fraud and deceit inducing the execution of the contract. Judgment was entered for plaintiff and defendant has appealed therefrom and demands a review of the entire case in this court under section 5630, Rev. Codes 1899.

As to a large number of collateral facts, the testimony is contradictory, and in many respects utterly irreconcilable. The facts, however, which in our opinion control the case, are not in conflict. The execution of the contract is admitted. There is no dispute as to the amounts which have been paid upon it, or as to the good faith and sufficiency of the several tenders, or that the amount deposited in court fully covers the balance due upon the contract. The defendant urges three grounds in this court in support of his contention that specific performance should not be decreed. He contends (1) that the contract was annulled on Novembed 12, 1904, by the service of the declaration of forfeiture; (2) that he was induced to enter into the contract by fraud and deceit (this being urged as a defense to the action as well as one of the grounds of forfeiture), and (3) that the action is not prosecuted by the real party in interest. We are agreed that defendant's contention cannot be sustained upon any of the several grounds upon which it is based.

The attempted forfeiture cannot be upheld upon either of the two grounds set forth in the notice. As to the first ground it may be admitted that there was a breach in plaintiff's failure to deliver the full one-half of the grain within the time specified in the contract. It is clear, however, that the breach was not grossly negligent, willful or fraudulent and it was not attended or followed by any injury which is not fully compensated by the subsequent payment of interest on the amount unpaid. The land in question is near Carrington. The plaintiff resides at Jamestown. It appears that in the year 1904, the land was occupied by one Fritz, who farmed it upon shares as plaintiff's tenant. Under the terms

of the lease plaintiff was to receive one-half of the crop, which was the same amount the plaintiff was required to deliver to the defendant under his purchase contract. It does not appear just when threshing was commenced, but it was not finished until October 30th. Fritz reported that by machine measure the total number of bushels of grain threshed was as follows: Barley, 2,160 bushels; wheat, 5,205 bushels; oats, 2,394 bushels; flax, 901 bushels. On September 21st the plaintiff sent a draft for $273.72 to the defendant as the proceeds of a shipment of barley. This was accepted and indorsed upon the contract. In the latter part of September the defendant appointed one C. H. Olson as his agent to look after the shipment and sale of the half of the grain which the contract required to be delivered to him. Olson's appointment as agent was contained in the following letter signed by the defendant and addressed and delivered to the plaintiff: "Mr. W. L. Bennett. Dear Sir:—I want the balance of the grain in section 35 shipped in my name and the shipping bills turned over to Mr. C. H. Olson. You will consider him as my agent and furnish him information as to grain threshed and when you ship." Olson's agency authorized him to sell the grain and remit the proceeds. In pursuance of this agency he turned over to the defendant from the proceeds of shipments $521.14 on October 10th, and $1,309.40 on October 22d; and these amounts were indorsed upon the contract as of the dates above stated. Early in November Olson received a draft for $230.16, being a balance upon a previous shipment. On November 10th he received from the plaintiff the sum of $725.68. At that time all of the grain had not been delivered either in the cars or to the elevator. The sum last named was paid by plaintiff as full settlement for the amount not delivered and in full settlement for defendant's share of the crop of 1904. This latter payment, with the amounts which Olson had previously received, amounted to $2,786.38, and he wrote out and delivered to plaintiff the following receipt: "Received of W. L. Bennett two thousand seven hundred eighty-six 38-100 dollars, being in full settlement for balance one-half of crop for year 1904, Sec. 35-146-66. S. L. Glaspell. C. H. Olson, Agent." The settlement was made at Carrington and was based upon the report of Bennett's tenant, Fritz, as to the amount of grain threshed, the reports of shipments and sales, and a measurement of the grain still on hand on the farm, in which Olson participated. On the following day Olson received by mail the notice of forfeiture which the defendant had prepared, and

pursuant to the latter's instructions, caused it to be served. At this time he had in his possession the draft for $230.16, and the $725.68 which was paid upon the settlement. These sums were subsequently tendered to defendant and rejected. Plaintiff also refused to accept a return of these payments, and during the progress of the trial, the total amount represented by these payments, $955.84, was deposited in court for the defendant's use and subject to the order of the court.

The defendant's claim that all of his share of the grain was not delivered or paid for rests upon the testimony of Fritz, who was a witness for defendant. He testified in substance that a quantity of grain consisting of 75 bushels of oats and about 300 bushels of barley was used for feed upon the farm; that this and also 92 bushels of wheat and 72 bushels of flax was not taken into account or included in the settlement. The defendant contends that Olson exceeded his authority in making the settlement and that it is not, therefore, binding upon him; further that Olson was guilty of duplicity in making it and in doing many other things in connection with his agency. In our opinion these questions are not vital. It may be admitted that there was a shortage in the quantity of grain delivered and paid for; further, that Olson exceeded his instructions in making the settlement, and that he was otherwise unfaithful to the instructions of his principal. The controlling question, in determining the effect of the attempted forfeiture, is whether the plaintiff's failure to comply with the contract in the particular complained of, was grossly negligent, willful or fraudulent. Section 4970, Rev. Codes 1899, provides that: "Whenever by the terms of an obligation a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom upon making full compensation to the other party, except in case of a grossly negligent, willful or fraudulent breach of duty." That the plaintiff is entitled to be relieved from the alleged forfeiture under the equitable rule announced in the above section is, we think, apparent from the facts already stated. The evidence shows that at all times he desired to fulfill the contract. The contract required him to deliver one-half of the grain in the defendant's name or the name of his duly authorized agent. The defendant appointed Olson, stating in his letter to plaintiff, "you will consider him my agent." Thereafter the plaintiff dealt with Olson as one having full

authority. At the time the settlement was made he had turned over to him grain from which the latter had realized $2,050.70, and $1,830.54 of this had been turned over to the defendant who indorsed it upon the contract and still retains the same. The quantity of grain not included in the settlement is not large and considering the manner in which the amount had to be determined it is fairly certain that the omission was not intentional. In making the settlement the plaintiff met and accepted the terms offered by defendant's agent, relied upon his authority to make it, and in doing so he acted in good faith. A forfeiture under these circumstances would be exceedingly inequitable and cannot be sustained.

As to the second ground set out in the notice of forfeiture, i. e., fraud and deceit inducing the execution of the contract, it is sufficient to say that it is not named in the contract as one of the grounds upon which it may be forfeited. Forfeitures are sustained only when the parties have contracted therefor, and the terms of a contract will not be extended to sustain forfeitures upon other grounds than those provided for in the contract. See Cughan v. Larson, 13 N. D. 373, 100 N. W. 1088, and authorities cited. The remedy of one whose assent to a contract was not free because of fraud is not obtainable by forfeiture (for that assumes that the contract is valid), but is secured through a rescission of the contract or defense against its enforcement. This ground was not, therefore, available for forfeiture, and the defendant has not attempted to rescind.

This brings us to his second proposition, which is presented in a supplemental brief, and that is that in any event fraud and deceit in procuring the execution of a contract is available as a defense against its enforcement, and for that reason specific performance should not be decreed in this case. As applied to contracts which are voidable for fraud and which have not been affirmed, the rule is, we think, as contended for. But under the facts of this case it has no application. The defendant, with full knowledge of the facts upon which he relies to sustain his claim of fraud, accepted and retained and still retains benefits received under it. By doing this he affirmed it and cannot therefore now assail its validity. See sections 3842, 3843, 3864 and 3865, Rev. Codes 1899. The alleged fraud upon which the defendant relies, rests upon his claim that one W. E. Hoops, an attorney at law, who was his agent in negotiating the sale to plaintiff, without defendant's

knowledge, authority or consent, made an oral arrangement with the plaintiff for a half interest in his purchase, whereby they became and have since continued to be partners. There is a sharp conflict in the testimony as to whether defendant knew of this agreement when he made the sale, or for a long time thereafter. Hoops testifies positively that the agreement was made with the full knowledge of defendant, and in fact at his suggestion as a means of effecting the sale to Bennett. Olson testified to a number of conversations with defendant in which the latter admitted that he knew of the relation existing between Hoops and Bennett; and there is some documentary evidence which in a measure corroborates the testimony of these witnesses. What the fact is we shall not attempt to determine. It is not necessary. The most that defendant claims is that the contract was voidable, and in doing so he does not claim that there was either actual fraud or injury. The defendant admitted in his testimony that no injury resulted, but that on the contrary the agreement between Hoops and plaintiff was of material aid to the latter in carrying out the contract. Neither does the defendant claim that he was influenced in any way to his prejudice or otherwise by the alleged failure of his agent to disclose the fact of the agreement.

The sale was in fact made by the defendant personally. He fixed the price and terms of sale, and the contract was written and signed by him personally. The relation of Hoops to the sale was merely that of a real estate broker without authority to make a contract for his principal. To sustain his contention that the contract is voidable and that he may defend against its enforcement, defendant relies upon the doctrine laid down in Anderson v. Bank, 5 N. D. 80, 64 N. W. 114; Clendenning v. Hawk, 10 N. D. 90, 86 N. W. 114, and similar cases, and the rule which is stated in Pomeroy on Equity Jurisprudence, section 959, in the following language: "In dealing without the intervention of his principal, if an agent for the purpose of selling property for the principal purchase it himself, or an agent for the purpose of buying property for the principal buys it from himself, either directly or through the instrumentality of a third person, the sale or purchase is voidable. It will always be set aside at the option of the principal. The amount of consideration, the absence of undue advantage, or other similar features, are wholly immaterial. Nothing will defeat the principal's right of remedy except his own con-

firmation after full knowledge of all the facts." To what extent, if at all, the doctrine announced in the foregoing rule and the cases referred to is applicable to this case we need not determine. It may be assumed that Hoops concealed his relation with Bennett from the defendant, and that this fact alone gave the defendant the right to disaffirm the contract at his option. This, however, avails him nothing, for the record shows that prior to the commencement of this action he elected to affirm the contract. On October 22, 1904, he received from Olson $1,309.40, knowing that it was derived from a sale of the crops grown under the contract. He admitted in his testimony that when he received this payment he had full knowledge of the agreement between his agent Hoops and the plaintiff. With that knowledge he accepted the money and still retains it. This was an unequivocal affirmance of the contract, and he cannot therefore now challenge its validity.

The contention that the record shows that the plaintiff is not the real party in interest is without merit. This claim is apparently based upon the assumption that Hoops and plaintiff together made the purchase from defendant and that Hoops should therefore be made a party. This is erroneous. The defendant's contract is with plaintiff only. Hoops is not a party to it. He has no rights under the contract, and upon the witness stand expressly denied having any interest in it. His rights, whatever they are, rest upon his oral agreement with the plaintiff which is entirely distinct from the contract in suit. The trial court found the balance due upon the contract was $6,549.10, in addition to the $955.84 paid into court by Olson, or $7,504.94 in all, and this sum is conceded to be correct. Through what is admitted to be an error in fixing the amount to be paid to the defendant from the money deposited in court, upon the execution of the deed by him, the trial court directed that the $955.84 paid to Olson and refused by defendant and later deposited in court should be deducted from the above sum. This was error. The defendant is entitled to the full amount due upon his contract, to wit, $7,504.94; otherwise, there is no complaint as to the judgment.

The trial court will make the correction above indicated, and, as corrected, the judgment will be affirmed. All concur.

(107 N. W. 45.)

JOHN TRACY, AS ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF FRANK J. YOUNG, DECEASED, AND SUSIE M. SMITH, FORMERLY SUSIE M. YOUNG, AND JOSEPH LORENZ v. HENRY O. WHEELER AND WILLIAM A. SCOTT, ADMINISTRATOR OF DAVID A. MURRAY, DECEASED.

Opinion filed April 25, 1906.

Equity Will Not Cancel a Mortgage Solely Because Outlawed.

Applying the maxim that "he who seeks equity must do equity," it is *held*, that a court of equity will not cancel a real estate mortgage securing a just debt, which concededly has not been paid, at the suit of the mortgagor, or one standing in his shoes, when the only ground urged for such relief is that the statute of limitations is available as a defense against its foreclosure.

Appeal from District Court, Barnes county; *Glaspell*, J.

Action by John Tracy, administrator, and others, against Henry O. Wheeler and William A. Scott. Judgment for plaintiffs and defendants appeal.

Reversed.

J. E. Robinson, for appellants.

Winterer & Winterer and *Lee Combs*, for respondents.

YOUNG, J. The purpose of the plaintiff's action is to remove a cloud from plaintiff's title. The complaint alleges: "That the defendants on behalf of the estate of David A. Murray, deceased, claim a lien or incumbrance on said real estate, adverse to these plaintiffs, which said lien or incumbrance is further claimed by said defendants by virtue of a certain mortgage made, executed and delivered by one William N. Buswell and Margaret A. Buswell, his wife, to the said David A. Murray, covering said real estate, which mortgage bears date November 10, 1882, and was recorded in Book M of Mortgages, on page 236, in the office of the register of deeds of the territory of Dakota, now state of North Dakota, on November 25, 1882, at nine o'clock a. m." "That said mortgage does not constitute a lien * * * and is invalid," and "constitutes a cloud upon the title of plaintiffs"—and prays (1) "that said claim be adjudged null and void: (2) that the title be quieted in these plaintiffs; (3) for general relief." The defendants' answer admitted that they held the mortgage set up in paragraph 6 of the complaint, but denied its invalidity. The

trial court canceled the mortgage, and the case is here for trial de novo upon defendants' appeal.

There is no dispute as to the facts. The only ground urged for cancellation is that proceedings for the foreclosure of the mortgage are barred. The mortgage was given on November 10, 1882, and secures a note for $700, due November 10, 1887. On November 30, 1899, Margaret A. Buswell, the mortgagor, gave a quit claim deed to her daughter, Susie M. Young, for a nominal consideration of $25. The testimony shows that the land is worth about $2,000. All of the five witnesses for plaintiffs testified to the fact of nonpayment of the debt. Mrs. Buswell and her daughter, Susie M. Smith, one of the plaintiffs herein, testified that nothing had been paid since October 1, 1885, when an interest payment was made; and it is stipulated in the record that the debt has not been paid, and it appears that the plaintiff knew at all times that the debt was not paid. She received the quitclaim deed from her mother with that knowldge. It is clear that she is in no better position to ask relief at the hands of a court of equity than her mother, the mortgagor. For the purposes of this case we may assume, without deciding the question, that the statute of limitations is available as a defense against the enforcement of the mortgage either by action or power of sale. The majority of this court has reached the conclusion, upon a rehearing, that the plaintiff must fail Equity and good conscience require that she should pay the debt secured by the mortgage as a condition to its cancellation. The maxim "that he who seeks equity must do equity" voices a just and universal rule in determining the equitable rights of suitors, and should always be applied in cases like this. The action, even if treated strictly as a statutory action to determine adverse claims, is equitable (6 Pomeroy's Equity Jurisprudence, section 735), and is governed by equitable principles. The plaintiff seeks equity. They must do equity. Every man should pay his just debts. It is right that he should do so. The fact that he may not be coerced to discharge them by legal means affects only the legal character of his obligation. It does not alter the primary fact that he owes an obligation which in equity and good conscience he should pay. The Supreme Court of California, in applying this principle in a similar case (Booth v. Hoskins, 75 Cal. 276, 17 Pac. 227), said: "Common honesty requires a debtor to pay his just debts if he is able to do so, and courts, when called upon, always enforce such

payments if they can. The fact that a debt is barred by the statute of limitations in no way releases the debtor from his moral obligation to pay it. Moreover, one of the maxims which courts of equity should always act upon it, as suggested by the court below, that 'he who seeks equity must do equity.'" In accordance with this rule, it was held that, "where a mortgagor of land seeks to quiet title as against the mortgage deed, he will be required to pay the mortgage debt, regardless of whether or not the debt is barred by the statute of limitations." Merriam v. Goodlet (Neb.) 54 N. W. 686; Loney v. Courtnay, 24 Neb. 580, 39 N. W. 616; Brewer v. Merrick, 15 Neb. 180, 18 N. W. 43; Hall v. Hooper, 47 Neb. 111, 123, 66 N. W. 33; Booth v. Hoskins, 75 Cal. 271, 17 Pac. 225; Johnston v. S. F. S. Mine, 75 Cal. 135, 16 Pac. 753, 7 Am. St. Rep. 129; De Cazara v. Orena, 80 Cal. 132, 22 Pac. 74; Brandt v. Thompson, 91 Cal. 458, 27 Pac. 763; Boyce v. Fisk, 110 Cal. 107, 116, 42 Pac. 473; N. Y. B. & L. Ass'n v. Cannon, 99 Tenn. 344, 41 S. W. 1054; Cassell v. Lowry (Ind. Sup.) 72 N. E. 640, and cases cited; Spect v. Spect, 88 Cal. 437, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314; Driver v. Hudspeth, 16 Ala. 348; Gage v. Riverside Trust Co. (C .C.) 86 Fed. 984. See, also, Cole v. Savage (N. Y.) Clarke Ch. 179; Grinder v. Nelson, 9 Gill (Md.) 299, 52 Dec. 694; Barke v. Earley, 72 Iowa, 278, 33 N. W. 677; 1 High on Injunction (4th Ed.) section 452; 1 Story, Equity (13th Ed.) 65, 305; 1 Beach on Equity, section 439; 2 Jones on Mortgages, section 1806.

This doctrine was applied by this court in Satterlund v. Beal, 12 N. D. 122, 95 N. W. 518. In that case the plaintiff sought to cancel a mortgage against which the statute had run. The defendant counterclaimed for its foreclosure. The plaintiff attempted to plead the statute, but his pleading was insufficient. Upon a trial de novo, the court denied the prayer for cancellation and awarded judgment of foreclosure. The doctrine that a mortgage will not be canceled merely because the statute of limitations has run against an action to enforce it, and without payment of the amount justly due thereon, is of general acceptance. Our attention has been called to but two cases wherein cancellation has been awarded without payment. In Selby v. Sanford (Kan. App.) 54 Pac. 17, a mortgage was canceled on the sole ground that the statute had run against it. The opinion makes no reference to the equitable rule which is applicable to such cases. The case rests neither upon

reason or authority. In Kingman v. Sinclair, 80 Mich. 427, 45 N. W. 187, 20 Am. St. Rep. 522, a mortgage given 33 years previously by the holder of an equitable title under a state certificate, was canceled at the suit of the fee owner, who had been in possession for 24 years and had no knowledge of its existence until a very short time before he brought his suit. It was not clear that the debt had not been paid. The court held under the circumstances of that case the mortgage should be canceled without exacting payment. That case, in our opinion, does not militate against the rule laid down in the cases above cited. In this case the fact that the debt is not paid is conceded. The plaintiffs are entitled to relief only upon condition that they pay it. The judgment will be reversed, and the trial court is directed to enter an order permitting the plaintiffs to pay into court for defendant's use, within 30 days from the date of such order, the amount of the mortgage debt, and upon such payment being made to enter judgment of cancellation and in default of such payment within such period to enter judgment dismissing plaintiffs' action.

MORGAN, C. J., concurs.

ENGERUD, J. (dissenting). I am unable to concur in the conclusions of my associates in this case. It seems to me that their reasoning is unsound, because the case is not within the reason for the rules applied. The action is one to determine adverse claims under sections 5904-5913, Rev. Codes 1899, as amended by chapter 5, p. 9, Laws 1901. This was conceded by the appellant until the first opinion was handed down in this case. The appellant then petitioned for a rehearing, claiming, among other things, that the action was not one to determine adverse claims, as it was assumed to be in the first opinion. Further consideration of the case on rehearing has served to confirm me in the conviction that the first opinion was right on this question, as well as on all the questions involved. This dissent will therefore be largely a reiteration of the proposition upon which we all then agreed.

The complaint, although otherwise in statutory form, unnecessarily disclosed that defendants claimed to have a lien on the land by virtue of the mortgage in question; but the complaint did not admit that it was then or originally a valid lien. The prayer for relief was that prescribed by the statute, to the effect that the defendants set forth their adverse claims, whatever they were, to the end that their validity be determined, and plaintiffs' title

be quieted. The defendants answered, admitting that the only adverse claim they had was the mortgage referred to in the complaint, and alleged that it was a valid lien in their favor. They included a counterclaim in their answer, praying that the plaintiff's title (which it averred was based on a void tax deed) should be adjudged void, and that the defendants' mortgage be adjudged a valid lien, but did not pray for foreclosure. The unnecessary allegation in the complaint as to what plaintiff believed was the nature of defendants' adverse claim did not change the nature of the action. Blakemore v. Roberts, 12 N. D. 394, 96 N. W. 1029. It was utterly insufficient as a bill in equity to cancel a mortgage, and it was not treated as such by the parties. The defendants were not by the allegations of the complaint limited to the litigation of the particular adverse claim mentioned in the complaint. Nor did the reference to the mortgage relieve the defendants of the necessity of pleading any adverse claim, which they might have by mortgage or otherwise, under penalty of being barred as to such undisclosed claim, if any existed. The form of the answer shows unequivocally that the defendants construed the complaint to be one in an action to determine adverse claims.

This action is one provided by statute, whereby the plaintiff can require all adverse claimants to come into court and establish, if they can, that they have some valid adverse claim, by lien or otherwise, upon the premises in question. The only fact necessary for the plaintiff to prove or plead, in the first instance, is that he has some estate in or lien upon the property. In other words, he is required to show, if the fact is denied, that he has the right to maintain such an action. The defendant must then establish prima facie the adverse claim which he pleads. Now, it seems to me that it is merely to state a truism to say that, if the adverse claim pleaded is a lien, it must be an enforceable one—a lien which the defendant can use as a means of compelling payment of the debt it secures in some appropriate action or proceeding instituted for that purpose. A lien which exists only on paper, but which cannot be enforced, is for all practical purposes no lien. It is, like a shadow, without substance. As said by Chief Justice Corliss in Wells County v. McHenry, 7 N. D. 246, at page 265, 74 N. W. 241, at page 248: "A lien that cannot be enforced is no lien at all." In Burwell v Tullis, 12 Minn. 572 (Gil. 486), a case very similar to this, Chief Justice

Wilson said, speaking for the court: "The difference between divesting the lien and forever denying a remedy to enforce it is a mere verbal distinction without any practical or real difference. The legislative intent and practical operation of the law would be the same in both cases; the denial of the remedy to enforce the lien being the extinguishment of the lien itself." The majority opinion postulates that all remedies to enforce this mortgage are barred by the statute of limitations. We all agree that the remedy by action is barred; and the Chief Justice and myself agree that this defense to an action to foreclose is available as a ground for an ex parte injunctional order against the exercise of the power of sale under section 5845, Rev. Codes 1899. Our reasons for this conclusion can be more appropriately stated in the accompanying case of Scott v. District Court (just decided) 107 N. W. 61.

It is true that the statute operates on the remedy only, and it is often said that the obligation remains, even though the remedies are barred. The obligation remains only in a limited sense. Although all remedies are barred, the obligation, though outlawed, is a good and sufficient consideration to support a new promise; and an action to enforce it may also be maintained after the time limited by the statute, unless the defendant pleads the statute in bar. The rule that the statute is tolled by a new promise and is waived by the defendant's failure to avail himself of it is a logical result of the theory upon which such statutes are based. The reason for the enactment of statutes of limitations is that it is contrary to public policy to permit the litigation of stale demands. The object of the statute is to compel claimants to enforce their claims while the transaction out of which the claim arose is fresh, and while the best evidence of the facts involved is available. The courts are forbidden to undertake the investigation and determination of the merits of a cause of action after the time limited, because after so long a time it is presumed that the evidence in relation to the transaction is not reliable. There is no ground for this presumption, however, when the defendant has acknowledged the validity of the claim by a new promise in writing, or a partial payment within a less period of time before commencement of the action than is required to raise the presumption. So, also, the defendant's failure to rely on the statute is a waiver of the defense, because such failure to urge it is

taken as an acknowledgment that reliable evidence as to the merits is still available. But in the absence of such new promise evidence by a writing or partial payment, and in the absence of a waiver of the defense, the court is forbidden to inquire into the merits of the claim. This being so, it is self-evident that the court cannot presume that the outlawed claim is valid. There is no presumption for or against the validity of the claim. The court is forbidden to hear proof or inquire as to the validity or invalidity of the demand.

Right here, it seems to me, lies the fallacy of the majority opinion. They assume that the mortgage is valid. It is only by making that assumption that it is possible to assert that equity requires the payment of it as a condition precedent to equitable relief. As stated above, this assumption is unwarranted, and consequently the entire argument of the majority falls to the ground. If the mortgage is presumptively valid, as asserted by my Brethren, it seems to me that consistency requires that the presumption should be carried to its logical conclusion. If the mortgage is valid, the appellants are entitled to a decree establishing and confirming their lien, and also to a decree declaring Tracy's tax deed invalid, instead of being dismissed from the court without relief if the plaintiff does not pay. Again, if the mortgage is presumptively valid, then clearly it is not a conclusive presumption. The defendant should be permitted to show the contrary. But that would involve a trial of the merits. My Brethren seem to agree that such a trial is not permissible. The result, then, is that the mortgage is presumed to be valid, and the respondent is denied an opportunity of showing the contrary. In other words, the presumption is in effect conclusive, after the limitation statute has barred all remedies, unless the respondents forego their statutory defense. The respondents must choose between the horns of a dilemma. They must either forego the statutory right to decline to litigate an outlawed mortgage, or they must pay it in order to remove it as a cloud on their title. Viewed from a practical standpoint, the rule as established by the majority seems to me absurd. The mortgage is an unenforceable one, because public policy will not permit any inquiry into the merits of the claim. It must remain, however, as an eternal cloud on the title, unless the owner of the property will consent to litigate the merits notwithstanding the statute, or pay what the mortgagee sees fit to demand. Such was the conclusion

reached by the Supreme Court of Indiana in Cassell v. Lowry, 72 N. E. 640, which, by the way, is the only case among those cited which supports the majority opinion. There is no parallel between a suit to determine adverse claims and an ordinary suit in equity to cancel a mortgage or lien for specific reasons. The pleading in such a case necessarily admits that the lien or other adverse claim attacked is valid, unless invalid for the reasons pleaded; and the attacking party assumes the burden of establishing the specific invalidity alleged.

Two reasons are given for declining to afford equitable relief from on outlawed mortgage in that form of action: First, it is said the statute of limitations is an odious and inequitable defense; second, it is said that the statutory bar is "a shield and not a sword," and hence must be relied upon as a defense and not as a ground for affirmative relief. Neither of these reasons is applicable in this state to an action to determine adverse claims. The idea once prevailed that the statute of limitations was not a meritorious defense, but that idea has long since been abandoned by nearly all courts, and has been expressly repudiated in this state. Wheeler v. Castor, 11 N. D. 347, 92 N. W. 381, 61 L. R. A. 746. A court of equity is as much bound to observe and enforce the statute as a court of law. The reason for prohibiting litigation of stale demands is just as cogent in one court as in the other. Moreover, to exact payment of an outlawed mortgage on the theory that he who seeks equity must do equity necessarily postulates that the mortgage is presumptively valid. As already stated, this assumption is unwarranted. The second reason for declining relief in such cases—that the statute is a shield and not a sword—may be sound if properly applied; but it is not applicable to this form of action. It goes only to the form of the remedy, not to the substantial right. The statute is a protection against the litigation of stale demands, and hence the statute requires the party relying on it to plead the statute. It is well settled that this provision of the statute means that the statute of limitations must be pleaded as a defense if there is an opportunity to do so. If an outlawed demand is pleaded in an answer, then the statute must be pleaded in the reply; but, if the rules of procedure do not provide for a reply, then the statutory bar need not be pleaded, but may be relied upon and urged at the trial. Enc. of Pl. & Pr. vol. 13, p. 187; Dreutzer v. Baker, 60 Wis. 179, 18 N. W. 776; Cur-

tiss v. Sprague, 49 Cal. 301. Under sections 5901 and 5911, Rev. Codes 1899, as amended by chapter 5, p. 9, Laws 1901, no reply was required in this case. In this action the defendants were cited to appear and establish whatever adverse claim they might have. They appeared and sought to have their alleged mortgage established as a valid adverse claim, and also sought to have the tax deed of plaintiff Tracy declared void. They had no right to this relief unless they could estblish an enforceable mortgage. The plaintiff had the right given them by statute to defeat the mortgage by urging the limitation statute as a bar to any inquiry into the merits of the adverse claim. They did not thereby admit the validity of the mortgage. They merely availed themselves of the statute as a shield against any inquiry into the merits of the adverse claim.

I said above that the Indiana case (Cassell v. Lowry [Ind. Sup.] 72 N. E. 640) was the only case in point cited in the majority opinion. It will be found upon examination that all the cases cited (except the Indiana case and the Califorina cases) were suits where the lien was attacked for specific reasons, and hence, as stated above, the attacking party admitted the validity of the adverse claim unless he established the specific invalidity alleged. In such cases, of course, the plaintiff must fail, because he cannot use the statute of limitations as a sword. Some of the cases from California were actions to determine adverse claims. In those cases, however, the defendant answered and alleged title in himself by virtue of apparently absolute deeds. The plaintiff, claiming that these deeds were in fact mortgages, had the burden of showing that these apparently absolute deeds were in fact given as security; and hence he could not be relieved of them except by performing the conditions of the contract pursuant to which they were given. I fully agree with the conclusions announced in those cases. They are clearly distinguishable from the case at bar. In those cases the plaintiff had the burden of showing that the deed was not what it purported to be, and, in order to be relieved of the deed, he must redeem the mortgage which his own proof showed the deed to be. In other words, he was in the same position he would have been in if he had brought an ordinary suit in equity to cancel the deeds. In this case the plaintiff simply asserts his statutory right to decline to litigate the merits of an outlawed lien pleaded by defendant, who has the burden of proving its validity

and the amount due thereon. It is doubtful if a plaintiff could under the California statute get relief from a mere lien in this form of action. The California statute relating to such an action was similar in terms to the statute of this state when Power v. Bowdle, 3 N. D. 107, 54 N. W. 404, 21 L. R. A. 328, 44 Am. St. Rep. 511, was decided, wherein it was held that a lien was not an adverse estate or interest, and hence a lien would not be barred by a judgment for plaintiff in that form of action. Our statute was amended after the decision in Power v. Bowdle so as to include liens.

I think the majority opinion is unsound in principle and violates both the letter and spirit of the statute of limitations, and is supported by no authority except the Indiana case. Even in that case the court said (72 N. E. 641): "It must be understood that our decision is limited to the right of a debtor himself to have his title to land quieted where it appears that the purchase money is unpaid." Thus the court which rendered that decision expressly declare that it should not be taken as a precedent in a case like the one at bar, when the plaintiff is not the debtor. I confess, however, that I do not see any good ground for such a distinction. It seems to me that my associates have not only misapplied the maxim that "he who seeks equity must do equity," but have overlooked, and consequently have failed to give effect to those two other equally important maxims, "Equity aids the vigilant, not those who sleep on their rights," and "Equity follows the law." It must be borne in mind that modern statutes of limitation do not create any presumption of payment, satisfaction or other extinguishment of the claim in litigation, and that the statute is equally binding on a court of equity as on a court of law. The old controversy as to whether equity applied the principles of the statute of limitation by analogy or in obedience to the statutory rule was settled long ago in favor of the latter view. Angell on Limitations, sections 25-27. As already shown, there is no presumption of extinguishment by reason of the expiration of the limitation period. Proof of nonpayment, therefore, is no reason for declining to apply the law. Quite the contrary. Nonpayment simply shows nonacknowledgement. Relief is barred by the statute, because it is against public policy to try the merits of a stale demand. This is the reason why courts of equity would not entertain a stale claim, even though not within the letter of the statute. The legislature having fixed the time required to constitute a bar by reason of the claimant's neg-

lect to enforce his rights, it is the plain duty of a court of equity to not only enforce the policy of the statute, coinciding as it does with equitable principles, but to accept the statutory limitation period as the controlling one in equity. This is so whether the limitation statute in terms applies to equity courts or not, because "equity follows the law." Angell on Liens, sections 25-27; Pomeroy's Eq. Jur. (3d Ed.) vol. 1, section 419. Manifestly the same principles apply, whether the stale claim is one asserted by the plaintiff or defendant. "When the reason is the same, the rule should be the same." Rev. Codes 1899, section 5073.

I further maintain that this decision violates the spirit and intent of section 5845, Rev. Codes 1899. It is plain that this statute was enacted for the purpose of placing the remedy of foreclosure under the power on the same footing as an action to foreclose, that is, to enable the mortgagor to summarily require the foreclosure to be made by action, if there is any dispute as to the validity of the mortgage, or the amount due on it, and also to enable the mortgagor to prevent a sale under the power, if a foreclosure by action could not be had. The policy of the law plainly was to require all disputed questions concerning the mortgage, or the amount due thereon, to be litigated in an action to foreclose, instead of compelling resort to the more circuitous suit in equity to enjoin the sale under the power. To permit the mortgagee to establish the validity and amount of his mortgage in this form of action, after the mortgagee by his own laches has lost the right to enforce his mortgage by action or otherwise, it seems to me, is a flagrant disregard of the will of the legislature. If the mortgagee is forbidden to enforce his mortgage because it is contrary to public policy to permit the merits of so stale a claim to be tried in an action to foreclose, why should that reason by ignored in this action? How can the court consistently adjudge valid a mortgage which cannot be enforced, and as to the merits of which it is forbidden to inquire, unless the mortgagor waives the statutory bar? The reasons which forbid the litigation of an outlawed mortgage are just as true in this action as in any other, and a mortgage containing a power of sale is just as much within the reason as a mortgage not containing that stipulation.

It may be urged that the remedy under the power is not barred until an injunction under section 5845 has been granted. The same argument would apply with equal force in the case of an

outlawed mortgage having no power of sale. The only remedy on such a mortgage would be by action. In either case the statute of limitations, to be available, must be asserted by the party who desires its protection. Failure to plead it, or assert it in some other appropriate manner, is a waiver of its protection. So a failure to obtain an injunction under section 5845 would be a waiver of the objection. If the argument were sound, it would logically follow that a judgment dismissing an action to foreclose on the ground that the action was barred by the statute would leave the mortgagees free to foreclose under the power, and hence such a judgment would not relieve the premises of the lien. I hardly think any one would seriously assert such a proposition. It seems clear to me that where, as in this case, the defendant is seeking to establish a lien, which is confessedly unenforceable unless the plaintiffs waive their statutory defense, it would be absurd to recognize and establish its validity, when the plaintiffs have unequivocally asserted their intention to avail themselves of the statute in bar of any attempt to enforce it. Suppose these mortgagees had brought this action to determine adverse claims, as our statute permits mortgagees to do; would it be contended that the defendant landowners could not have defeated the action by pleading and proving that the mortgage was outlawed? Shall the rule be different simply because the mortgagee is defendant, instead of plaintiff? In either case the mortgagee has the burden of proving his lien. The issues are identical, and so, also, is the relief he is entitled to. I can see no reason for attributing to the outlawed lien any greater potency, or viewing it with more tenderness, when the mortgagee, as plaintiff, claims a right under it, than when he asserts the same right as a defendant? My views are supported by Selby v. Sanford (Kan. App.) 54 Pac. 17, and Archambau v. Green, 21 Minn. 520. (107 N. W. 68.)

W. A. Scott and H. O. Wheeler v. The District Court of the Fifth Judicial District of Barnes County et al.

Opinion filed April 28, 1906.

Tax Title Purchaser Cannot Enjoin Mortgage Foreclosure.

1. A purchaser of land at a tax sale cannot avail himself of the ex parte remedy provided by section 5845, Revised Codes of 1899, to enjoin the foreclosure of a mortgage.

Same — Defense of Statute of Limitations.

2. That an action to foreclose a mortgage is barred by the statute of limitations is one of the defenses which may be shown as a ground for enjoining a foreclosure by advertisement under section 5845 of the Revised Codes of 1899.

Same — Constitutional Law — Due Process of Law — Impairment of Contract.

3. Although the law now appearing as section 5845, Revised Codes of 1899, was first adopted by the legislature of Dakota territory in 1883, after defendants' mortgage containing the power of sale was given, the obligation of the mortgagee's contract was not thereby impaired; nor was the mortgagee thereby deprived of any property right without due process of law.

Same — Enjoining Mortgage Foreclosure by Action — To Whom Remedy Available.

4. The term "mortgagor," as used in section 5845, Revised Codes of 1899, includes within its meaning any person claiming title to the mortgaged premises under and in privity with the original mortgagor.

YOUNG, J., dissenting in part.

Certiorari by W. A. Scott and H. O. Wheeler to the District Court of the Fifth Judicial District for the county of Barnes and others to review an injunction.

Injunction vacated.

J. E. Robinson, for petitioners.

The fact that an action to foreclose a mortgage by action is barred by the statute of limitations, in no way affects foreclosure by advertisement. Hayes v. Frey et al., 11 N. W. 695; Stevens v. Osgood et al., 100 N. W. 161; Gulcher v. Brisben, 20 Minn. 453; Menz v. Hintil, 44 S. C. 385; Cone v. Hyatt, 44 S. E. 678.

The act of the legislature, providing an ex parte injunctional order to restrain the foreclosure of a mortgage, is unconstitutional; it impairs the obligation of contracts and divests the mortgagee of contractual property rights without due process of law. Power v. Larabee, 2 N. D. 141, 49 N. W. 724; Stuart v. Palmer, 74 N. Y. 181; Philadelphia v. Miller, 49 Pa. 444; Harwood v. N. Brookfield, 130 Mass. 561; Cooley on Con. Lim., chapter 11; Den et al. v. Hoboken Land & Imp. Co., 59 U. S. 272, 15 L. Ed. 372; Rees v. Watertown, 86 U. S. 107, 22 L. Ed. 72; Gilman v. Tucker, 13 L. R. A. 304; Hayward v. Judd, 4 Minn. 375, 383, 388.

A tax title purchaser cannot enjoin a foreclosure by advertisement. 8 Enc. Law, 222; Comstock v. Comstock, 24 Mich. 39;

Summers v. Bromley, 28 Mich. 125; Roberts v. Wood et al., 38 Wis. 60, 68; Wilkinson v. Green, 34 Mich. 220; Pelton v. Farmin et al., 18 Wis. 222; Bell v. Pate, 47 Mich. 468, 11 N. W. 275; Banning v. Bradford, 21 Minn. 308, 310, 311.

Herman Winterer and *Lee Combs,* for respondents.

Upon the return of a writ of certiorari, the appellate court can only determine whether the inferior court or tribunal exceeded or pursued its authority. State ex rel. American Exp. Co. v. State Bd. of Assessment and Equalization, 3 S. D. 338, 53 N. W. 192; Sioux Falls Nat. Bank v. McKee, 50 N. W. 1057; Henshaw v. Bd. of Supervisors of Butte County, 19 Cal. 150; Murray v. Bd. of Supervisors of Mariposa County, 23 Cal. 493; People v. Dwinelle, 29 Cal. 633; Finch v. Bd. of Supervisors of Tehama County, 29 Cal. 454; People v. Johnson, 30 Cal. 98; Winter v. Fitzpatrick, 35 Cal. 269; Central Pac. R. Co. v. Bd. of Equalization, 43 Cal. 365; State v. Smith, 101 Mo. 171; State v. Second Judicial District Court, 39 Pac. 316.

Tax deed did not give a title superior to the mortgage lien. Miller v. Anderson et al., 47 N. W. 957; Bibbins v. Clark et al., 57 N. W. 884; O'Neill v. Dringer, 31 N. J. Eq. 507; Gull River Lbr. Co. v. Brock et al., 73 N. W. 430, 7 N. D. 135; Chapter 90, Laws of N. D., 1890.

ENGERUD, J. This is a writ of certiorari issued by this court to inquire into the validity of an injunction order issued by the district court under section 5845, Revised Codes of 1899, to enjoin a foreclosure by advertisement of a real estate mortgage. This same injunctional order was sought to be reviewed on appeal, but we held that the order was not an appealable one. Tracy v. Scott, 101 N. W. 905, 13 N. D. 577. The mortgage in question was executed and recorded in November, 1882, and was given to secure the payment of a note for $700 and interest, due November 10, 1887. The mortgage contained the usual power of sale in case of default. The plaintiffs, Wheeler and Scott, are the legal representatives of the deceased mortgagee. As such they commenced to foreclose the mortgage under the power of sale. One John Tracy is the administrator of the estate of Frank J. Young, deceased. After the foreclosure proceedings were commenced, said Tracy, as such administrator, obtained from the judge of the district court an ex parte injunctional order, under section 5845,

Revised Codes of 1899, to enjoin the foreclosure by advertisement. on the ground that an action to foreclose the mortgage had become barred by the statute of limitations. Wheeler and Scott then applied to the district court to vacate said injunctional order, on the ground that it was improvidently issued, but their application was denied. Thereupon this proceeding was instituted.

The plaintiffs contend that section 5845 impairs the obligation of the contract evidenced by the mortgage, and deprives the owner of the mortgage of his property without due process of law, and is therefore unconstitutional. Plaintiffs further contend that the statute of limitations is not one of the defenses which are ground for enjoining the exercise of the power of sale under section 5845, and they finally assert that Tracy, as the legal representative of Frank J. Young, deceased, the tax title purchaser, is not entitled to the benefits of section 5845, because he is neither the mortgagor nor in privity with the mortgagor. We think the last point is well taken. Section 5845 provides that the mortgagor, his agent or attorney, may obtain the ex parte injunctional order. The tax title purchaser, under the laws of this state, is not in privity with the mortgagor. He derives his title from the state, which conveys the lands in the exercise of its taxing power. The tax deed, if valid, passes an absolute title in fee simple, and terminates all prior estates and liens held by individuals. A tax title purchaser is not within the spirit of this statute. If his title is valid, it is a complete bar of the mortgage lien. A foreclosure before or after the tax sale or tax deed could not affect the right of the tax title purchaser. The injunctional order in question was therefore erroneously issued, and should be vacated.

Discussion of the other questions presented by the record is not strictly necessary to the decision of this case. The same questions, however, arose in Tracy v. Wheeler, and our views thereon were expressed in the first opinion in that case. The Chief Justice and the writer still adhere to the conclusions then announced, and as the writer's dissent in Tracy v. Wheeler is based upon the assumption that the remedy under the power of sale may be perpetually barred, on the ground that the remedy by action is outlawed, it is proper to state the reasons for that conclusion. Those reasons may be restated more appropriately in this case than in the other. Section 5845, Rev. Codes of 1899, provides a summary proceeding by means of which the mortgagor and those

claiming in privity with him may avail themselves of the limitation statute as a bar against the exercising of the power of sale. That section reads as follows: "When the mortgagee, or his assignee, has commenced proceedings for the foreclosure of a mortgage by advertisement, and it shall be made to appear by the affidavit of the mortgagor, his agent or attorney, to the satisfaction of a judge of the district court of the county where the mortgaged property is situated, that the mortgagor has a legal counterclaim or any other valid defense against the collection of the whole or any part of the amount claimed to be due on such mortgage, such judge may by an order to that effect, enjoin the mortgagee or his assignee, from foreclosing such mortgage by advertisement, and direct that all further proceedings for the foreclosure be had in the district court properly having jurisdiction of the subject matter; and for the purpose of carrying out the provisions of this section, service may be had upon the attorney or agent of the mortgagee or assignee." The effect of this law is to subject the mortgagee's right to exercise the power of sale to the right of the mortgagor to forever prevent that method of foreclosure, so as to enable the latter to plead and prove, in an action to foreclose, any defense or counterclaim he may have. The defense which the mortgagor may thus avail himself of clearly includes the defense of the statute of limitations. A defense is any fact or state of facts which will defeat in whole or in part, a cause of action. 2 Words and Phrases, p. 1939. The statute plainly means that a foreclosure under the power of sale shall be forever enjoined by order of the district court, if it appears prima facie from the affidavits submitted that the mortgagor has any defense or counterclaim, which, if pleaded and proved in an action to foreclose the mortgage, would defeat the action or reduce the amount claimed to be due on the mortgage. It is asserted in argument that the "legal counterclaim or other valid defense," which may be shown to enjoin the exercise of the power, means a counterclaim or defense against the exercise of the power. The statement of the argument is sufficient to show its absurdity. There cannot, in the nature of things, be such a thing as a counterclaim or defense against the exercise of the power, which is an ex parte, nonjudicial proceeding. Relief against a foreclosure by advertisement must necessarily be obtained by some action or judicial proceeding, in which the party seeking relief is the moving party, and a defense

or counterclaim can only be conceived of as something asserted by a defendant to defeat an action or similar judicial proceeding instituted against him by the other party.

It is contended, however, that section 5845 contemplates the granting of an injunction only on a showing of a state of facts which would have been good ground for affirmative relief in a suit in equity to enjoin the foreclosure. If the legislature had so intended, it would have been an easy matter to express that intention in clear language. The language used negatives any such intention. It declares that the injunction shall be granted on a prima facie showing of "a legal counterclaim or any other valid defense against the collection of the whole or any part of the amount claimed to be due on such mortgage." As already stated, this language can only mean that any facts which prima facie would defeat an action or similar judicial proceeding for the collection of the debt by foreclosure shall be available to prevent the exercise of the power; and the defense of the statute of limitations is as effective for that purpose as any other defense. We know of no reason for arbitrarily excluding from the provisions of the law the defense of the statute of limitations. That defense is one which defeats the collection of the debt. The statute does not say that the injunction shall be granted only when it is made to appear prima facie that the mortgagor has a good ground for a suit in equity to enjoin the foreclosure under the power. That statute declares that prima facie proof of "a legal counterclaim or any other valid defense" shall be ground for injunction. The use of the word "counterclaim" emphasizes the meaning that the act has reference to something which may defeat recovery on a cause of action; and the more comprehensive words, "or any other valid defense," under a familiar rule of construction must be construed in pari materia with what precedes—i. e., any defense, whatever its character, which will have the same effect as a counterclaim to defeat in whole or in part the cause of action or judicial proceeding. It is needless to say that the right to foreclose by advertisement is not a cause of action. Nor is that ex parte proceeding an action or judicial proceeding. It is perfectly clear, therefore, that the counterclaim or defense spoken of in the law cannot be so justly narrowed in meaning as to be held to refer to an equitable ground for enjoining an ex parte and nonjudicial proceeding. It would be an inconsistency on the part of the legislature to permit

the merits of the mortgagee's lien to be litigated, simply because it contained a power of sale, after an action to foreclose is barred. The statutory bar was created because it was unsafe to permit litigation of the merits after ten years from the time the cause of action accrued. This reason is just as applicable to a mortgage containing a power of sale as to one without it. The fact that the statute plainly shows the intent of the legislature that all disputed questions should be litigated in an action to foreclose also shows that it was the intent that the power should not be exercised (if the mortgagor objected) after the time limited for such litgation had expired. To hold otherwise would convict the legislature of an inconsistency, and the language of the act does not require or justify such a construction. The Supreme Court of South Dakota, in Stevens v. Osgood (S. D.) 100 N. W. 161, held that the statute of limitations was not a defense available under this law; but for the reasons stated we cannot approve that construction. Moreover, the decision in that case leads to astonishing results, which wholly frustrate the salutary objects intended by limitation laws. The effect of that decision is to deprive the mortgagor altogether of the defense of the statute of limitations against an action to foreclose a mortgage containing a power of sale. It is apparent that the same argument advanced in that case to defeat the plea of the statute is equally cogent in any foreclosure action where the mortgage contained a power of sale. If it is true that the court can ignore the statutory defense because the power of sale was improperly enjoined, on the theory that the mortgagor is given by the judgment only what he was entitled to get by exercising the power, it is necessarily also true that the statutory defense may be ignored on the same theory, even if the power had not been enjoined. In either case the plaintiff is getting only what the exercise of the power would give him.

Then, again, suppose the mortgagor obtains an injunction on a showing of some defense or counterclaim affecting the validity of the mortgage or the amount due thereon; and at the time the injunction is obtained an action to foreclose is barred. In such a case, it seems the South Dakota court would ignore the plea of the statute and would proceed to determine the truth or falisity of the counterclaim or defense, and, if either was not sustained, would decree a foreclosure. Either that must be done, or the ex parte affidavit and injunction must be accepted as incontestable evidence

that the mortgage is invalid, because there is no method by which to test the truth of the ex parte showing. If the law is capable of the latter construction, then it is clearly unconstitutional, because it puts it in the power of the mortgagor to absolutely destroy all remedies on the mortgage by an ex parte showing, without any opportunity of showing the falsity of his claim. It must be remembered that the truth of the injunctional affidavit cannot be attacked by counter affidavits, because that would involve a trial of the merits of the case on the motion. McCann v. Mort. Bk. & Investment Co., 3 N. D. 172, 54 N. W. 1026. The object of limitation laws is to prevent agitation of stale demands when, by reason of lapse of time, evidence by which to establish the cause of action or defense may be lost or difficult to procure. The reason for such laws is just as applicable to a mortgage containing a power of sale as to any other. If the validity of the mortgage or of the alleged defense is to be open to litigation notwithstanding the lapse of time, in order to give effect to the fancied perpetuity of a power, there is little use in limitation laws on mortgage foreclosures by action in this state, because there are very few mortgages which do not contain a power of sale. The effect of the South Dakota decision is to amend the limitation laws by judicial fiat. The legislature has declared that an action on the mortgage shall be barred in ten years. The South Dakota court assumes the power to amend that law, so as to make it read that an action on the mortgage is barred in ten years provided it contains no power of sale. If the proper construction of the law were debatable, then clearly that construction ought to be adopted which will avoid the difficulties resulting from the South Dakota case, and which will promote and effectuate the general policy of our limitation laws, rather than a construction which will lead to absurd results and frustrate the general policy of our legislation. This reason alone, it seems to us, is sufficient to turn the scale in favor of the construction we all agreed upon in the first opinion, if the proper construction is a debatable question. The term "mortgagor" includes any person who has an interest in the mortgaged premises, subject to the mortgage, claiming under the mortgagor in privity with him. The statute is a remedial one, and as such should receive a liberal construction, "with a view to effect its objects and to promote justice," even if that rule of construction were not made obligatory upon the court by section 5147, Rev. Codes 1899. Jones v. Loan

& Trust Co., 7 S. D. 122, 63 N. W. 553. We think the intent of the law was to enable the mortgagor and those claiming under him to prevent any foreclosure under the power of sale whenever an action to foreclose could not be successfully maintained for any reason. We think the law was also intended to give the mortgagor the right to demand that any defense or counterclaim he might have should be litigated in an action to foreclose, and not in a suit in equity instituted by him to enjoin a foreclosure under the power.

It is finally urged that section 5845 is unconstitutional because it impairs the obligation of contracts and deprives the owner of the mortgage of his property without due process. With respect to mortgages created after the enactment of the law, it is too clear for argument that neither of these constitutionad provisions were violated. In those cases the stipulation for the power of sale was made subject to the conditions imposed by the existing law. The mortgage in question, however, was given before the law was enacted. The provisions now embodied in section 5845, Revised Codes, became a part of our law in 1883, by chapter 61, p. 144, of the Laws of Dakota Territory for that year. When this mortgage was given in 1882, the conditions under which and the manner in which a foreclosure under the power of sale must be exercised were prescribed by statute, and were substantially the same as at present, with the exception of the provision now appearing in section 5845, Revised Codes. Moreover, the statute, then, as now, provided that a power of sale in a mortgage of real property "can be exercised only in the manner prescribed by the Code of Civil Procedure." Comp. Laws, section 4353. The legislature thereby expressly reserved the power to control and regulate the exercise of that remedy. The stipulation in the mortgage for this method of foreclosure was that the remedy should be exercised "agreeably to the statute in such case made and provided." The statute therein referred to means the law which might be in force when the mortgagee resorted to the remedy. James v. Stull, 9 Barb. (N. Y.) 482; Webb v. Lewis, 45 Minn. 285, 47 N. W. 803. So construed, it is plain that the stipulation for the remedy contemplated that it should be subject to future legislation as to the manner of exercising it.

But, even if the stipulation were construed to refer to the then existing laws, the remedy was not thereby placed beyond the

constitutional power of the legislature to regulate it. The power of sale was a mere remedy, subject to the control of the legislature. The fact that the contract stipulated for this cumulative remedy did not make it any more sacred than any other remedy. It was merely one of the means by which the obligation evidenced by the mortgage contract could be enforced. It was not the contract obligation which the constitution forbids the impairment of. James v. Stull, 9 Barb. (N. Y.) 482; Webb v. Lewis, 45 Minn. 285, 47 N. W. 803; Conkey v. Hart, 14 N. Y. 22; Worsham v. Stevens (Tex. Sup.) 17 S. W. 404; Bird v. Keller, 77 Me. 270. The legislative power over remedies is not unlimited. A statute which, although professing to effect the remedy only, should in fact materially impair the means of enforcing the contract, would infringe the constitutional prohibition against the impairment of contract obligatons. Antoni v. Greenhow, 107 U. S. 769, 2 Sup. Ct. 91, 27 L. Ed. 468. The law in question, however, does not materially change the previously existing remedies to the detriment of the mortgagee. In the absence of such a law, the mortgagor, if he wished to contest the right of the mortgagee to exercise the power of sale, could seek relief in a suit in equity to enjoin the sale, and obtain an injunction pendente lite. In such a suit, although the position of the parties would be reversed, the issues would be substantially the same as in a suit to foreclose. The issues would be tried in the same way, and the same, or substantially the same, relief could, and generally would, be decreed as in a foreclosure suit. The law in question, so far as it affects the remedy, merely provides in effect that, in case of contest concerning the right to exercise the power of sale, that contest shall be heard and its merits determined in a suit to foreclose, instead of requiring the same questions to be litigated in a suit for an injunction. To the extent that the law in question indirectly renders the statute of limitations available as a bar to the exercise of the power, it grants the mortgagor a right which did not exist before; but it is too plain to require discussion that the obligation of the contract was not hereby impaired. The statute, in effect, required the creditor to exercise his power of sale within the period allowed for an action to foreclose, and his neglect to do so subjected him to the possible forfeiture of the right, if the debtor saw fit to avail himself of the statutory remedy.

The objection that the law violated the due process clause hardly

merits discussion. When the law was passed the mortgage was not due. The mortgagee had all the time from 1883 to 1897 to foreclose his mortgage by action or by advertisement. The legislature of 1883 had undoubted power to pass a law which would have unconditionally barred the right to foreclose under the power, if the right was not exercised within a given time in the future after the right accrued. Upon what ground, then, can it be urged that it was beyond the legislative power to declare that the right should be denied, if not exercised within the time allowed for foreclosure by action, provided the mortgagor chose to take advantage of the law? This decision does not conflict with Clark v. Beck (N. D.) 103 N. W. 755. In that case the plaintiff asserted that the foreclosure by advertisement upon which defendant's title rested was void because the foreclosure took place more than ten years after the right to foreclose accrued, and after chapter 120, p. 152, Laws of 1901, took effect. It was claimed that chapter 120, p. 152, Laws of 1901, amending the statute of limitations, was retroactive, and therefore the sale in that case was a nullity, because it was made after the time within which the amended statute permitted the power of sale to be exercised. The argument was that the amended statute, by limiting the time for foreclosure under the power, unconditionally destroyed the right to exercise the power after the time limited, and that it was not necessary for the mortgagor to invoke the statute in bar of the remedy before the sale. We simply held that the amendment should not be given a retroactive construction for the reasons therein stated. In that case the mortgagor had not availed himself of the provisions of section 5845, and that section was not involved in the case. When we said that prior to 1901 there was no statute limiting the time for foreclosure by advertisement, we had reference to such laws as that of 1901, which it was claimed directly and expressly limited the life of the power. There is a wide distinction between a law which expressly limits the life of the power to foreclose by advertisement, and which is therefore self-executing and destroys the power by mere lapse of time, and a law like section 5845, which merely provides a method by which the party may place himself in a position to avail himself of a limitation law to bar the foreclosure. The difference between the nature and effect of the two kinds of laws destroys all force there might otherwise be in an argument that the enactment of chapter 120, p. 152, Laws of 1901, indicated the

legislative supposition that there was no law by which the right to exercise the power of sale could be barred. There was no law which would directly by its own force have that effect. In the absence of a law like the amendment of 1901, a foreclosure by advertisement could be lawfully made after an action was barred, providing the mortgagor did not discover the proceeding in time to get an injunction before sale. This defect in legislation was a good and adequate reason for the attempt made in 1901 to remedy it.

The injunctional order is vacated, and plaintiffs will recover their taxable costs and disbursements from defendant Tracy. All concur.

YOUNG, J. (dissenting in part.) The question presented to this court for decision in this case is whether the ex parte order of the district court, which enjoined the plaintiffs from foreclosing the mortgage in question by advertisement under the power of sale contained therein, should be affirmed or reversed. I agree with my associates that it must be reversed, and for the reason stated, namely, upon the ground that the restraining order was issued upon the application of a person who had no right under the statute (section 5845) to make the application. I do not agree with the further views expressed in the opinion, wherein it is held indirectly, but in effect, that section 5200, which limits foreclose actions to ten years, is also applicable to foreclosures by advertisement. Section 5200 has no application to foreclosures by advertisement. This section fixes a limitation for actions only. It was so held by this court in the recent case of Clark v. Beck, 14 N. D. 287 103 N. W. 755. In 1901 the legislature amended this section so as to cover foreclosure by advertisement; but we held, in the case just referred to, that the amending act (chapter 120, p. 152, Laws 1901) operates prospectively, and does not apply to mortgages previously executed, and that section 5200, "limiting to ten years the time for commencing an action to foreclose a real estate mortgage, has no application to a proceeding to foreclose by advertisement." This is necessarily true, for a foreclosure by advertisement is not a proceeding in court. It is not an action. Statutes limiting the time for foreclosing by action have therefore no application to a foreclosure under the power of sale. The cases are uniform in so holding. Golcher v. Brisbin, 20 Minn. 453 (Gil. 407); Hayes v. Frey, 54 Wis. 503, 11 N. W. 695; Dimmit County v. Oppenheimer (Tex. Civ. App.) 42 S. W. 1029; Menzel v. Hinton, 44 S. E. 385;

132 N. C. 660, 95 Am. St. Rep. 647; Cone v. Hyatt, 132 N. C. 810, 44 S. E. 678; Stevens v. Osgood (S. D.) 100 N. W. 161; Bank v. Guttschlick, 14 Pet. 18, 10 L. Ed. 335; Goldfrank v. Young, 64 Tex. 432, and cases cited; Miller v. Coxe, 133 N. C. 578, 45 S. E. 940.

I do not understand that the majority opinion expressly overrules the recent views of this court in Clark v. Beck, and above quoted, or that it is now intended to flatly hold that section 5200 places a limitation upon the right to foreclose by advertisement. Still the opinion is expressed that this present remedy for the collecting of plaintiffs' claim, which it is sought to enjoin (and it is a valuable one and rests upon contract), is barred, and that, if the application for the restraining order had in this case been made by the proper person, it would have been the duty of the court to restrain the exercise of the power. In short, as I view it, the majority conclude that the remedy under the power is barred, and this without a statute barring the remedy which is enjoined by the order. The reasoning by which this conclusion is reached does not appeal to me as sound. I cannot understand how a remedy can be barred in the absence of a statute barring it, and yet that result is reached in the majority opinion. As already stated, section 5200 does not relate to foreclosures by advertisement, but to foreclosures by action only, and there is no other statute of limitation which can be said to apply. It will appear, upon a casual inspection of section 5845 under which the restraining order was obtained that it is not a statute of limitations. This section merely provides a substituted method for obtaining the relief against the exercise of a power of sale by a summary and ex parte proceeding which was formerly obtained by an action in equity. It authorizes the issuing of the restraining order when it appears "to the satisfaction of a judge of the district court * * * that the mortgagor has a legal counterclaim or other valid defense against the collection of the whole or any part of the amount claimed to be due on such mortgage." This section makes no reference to a statute of limitations or to any other defense by name, and there is nothing in it which would sustain a claim that it creates any new defenses. It simply provides a summary method for restraining the remedy by advertisement upon a showing "that the mortgagor has a legal counterclaim or other valid defense against the collection of the whole or any part of the amount claimed to be due on such mortgage. The defenses which will defeat the exercise of the power of sale must be

found outside of this section. Payment in full of the debt secured by the mortgage will wholly defeat its exercise. Payment in part will defeat it pro tanto. Other defenses might be named which would have the same effect. Such defenses go to the cause of action itself, and would defeat all remedies without regard to periods of limitation. A statute limiting the period for foreclosing by advertisement, if we had such a statute, would also be a defense against the collection of the claim by that remedy, and would be a sufficient ground for a restraining order under this section. For a statute of limitations is a defense, but, unlike the defense of payment and similar defenses, it does not go to the cause of the action, but solely to the remedy for enforcing it. It will be observed that a defense which goes to the cause of action defeats all remedies, but a statute of limitations, which is a defense to a particular remedy only, is a defense only to that remedy, and is not a defense against the collection of the claim by another and a different remedy. It will not do, therefore, to say that, because the remedy for the collection of the claim by a foreclosure action is barred by section 5200 the remedy for the collection of the claim under the power of sale is also barred; and I do not understand that my associates intend to take this position. This must be so, for the remedies are independent, and they have not the same limitation. One is limited, and the other is not.

The matter of limitations upon remedies belongs to the legislature. It may fix different periods for different remedies, or it may limit some and leave others without a limitation in its discretion. The court's duty is only to give effect to such limitations as have been fixed when they are properly invoked. For instance, the plaintiffs' claim is secured by the mortgage in question and is evidenced by a promissory note for $700. For the collection of this claim the plaintiffs have three distinct and independent remedies: (1) An action on the note, which is limited to six years from its maturity. Section 5201. (2) An action to foreclose the mortgage, limited to ten years. Section 5200. (3) The remedy under the power of sale, upon which the legislature has placed no limitation. My associates conclude that when an affidavit shows that an action to foreclose is barred, it states a defense against the collection of the claim within the meaning of section 5845, and that the remedy under the power of sale should therefore be enjoined. The argument in substance is this: Section 5845 author-

izes the issuance of an order restraining a foreclosure by advertisement upon a showing that the mortgagor has a valid defense to the collection of the claim secured by the mortgage. The statute limiting the collection of the claims secured by a mortgage by an action of foreclosure (section 5200) will, when pleaded, defeat the action, and is thus a defense to the collection of the claim. The argument is plausible, but is, I think, fallacious. The error lies in the assumption that a defense to the collection of a claim by one remedy is necessarily and always a defense to its collection by all remedies, and that, when a defense is shown, it is a defense in all cases. This is true as to defenses which go to the cause of action itself, like the defense of payment. Such a defense will, of course, defeat all remedies, and would, in this case, defeat all three of plaintiffs' remedies. And because this is true as to defenses which go to the cause of action, my associates apparently conclude that it is true as to all defenses, including the statute of limitations. It is, however, palpably fallacious as applied to defenses which go to the remedy merely, as does a statute of limitations. In the latter case, the fact that one remedy for the collection of a claim is barred does not bar any other remedy which the claimant may have. To illustrate by the present case: An action on the note is barred six years from its maturity. The foreclosure action is barred in ten years, and there is no statute limiting the remedy under the power of sale. Now, let me ask, would the fact that the note is more than six years past due be a defense to an action to foreclose the mortgage? It will be admitted that it would not. And why? Is it not a defense to the collection of the claim? This will also be admitted. It will be properly answered that it is a defense to the collection of the claim by another remedy, an action on the note, but that it is not a defense to the collection of the claim by a foreclosure action, which is the remedy sought to be defeated, and is therefore not a defense to it. Again, I may ask, would an affidavit showing that an action on the note is barred state a sufficient ground for enjoining a foreclosure under the power of sale? Again it will be answered that it would not. And why? It is a defense against the collection of the claim by an action on the note, just as the ten-year statute is a defense against the foreclosure action. The reason for the answer is the same as in the preceding illustration. The limitation relied upon applies to an action on the note and not to a foreclosure under the power, which

is the remedy being pursued for the collection of the claim. This being true, how can it be said that an affidavit merely showing that a foreclosure action is barred states a defense against the collection of the claim by a foreclosure under the power of sale, which is the remedy which the defendants seek to defeat, and which my associates hold should have been enjoined upon this showing, if the proper application has been made.

I have been unable to find any satisfactory reason to sustain the conclusion expressed in the majority opinion. It directly defeats the collection of plaintiffs' claim by means of their remedy under the power of sale, and there is no statute limiting it, solely upon the ground that the affidavit shows that the defendants have a defense against the collection of the claim by a foreclosure action, which is another and different remedy. The remedies are independent. One is limited and the other is not. The statute which will defeat one will not, or, at least, should not, defeat the other. Creditors are entitled to the aid of whatever remedies they may have by law or contract to collect their claims, and should not be deprived of them unless they are barred by statute. There is no statute barring the exercise of the power of sale in the mortgage involved in this case, and they should be permitted to have the benefit of this remedy. Section 5845 was adopted by the territorial legislature in 1883 and has continued in force in this state and in South Dakota. The Supreme Court of South Dakota had this section under consideration in Stevens v. Osgood (S. D.) 100 N. W. 161, and their conclusion was that the bar to one remedy does not bar the other, and that the right to foreclose under the power is not defeated by the fact that the statute has run against an action to foreclose. That court said: "As the statute of limitions applies merely to the remedy by action, and does not discharge the debt or raise a presumption of payment, the lien of a mortgage on real property, containing a power of sale, is not destroyed, nor the right to foreclose lost by the mere lapse of sufficient time to prevent a foreclosure in court." The majority opinion criticizes the conclusion of the South Dakota court because it accords to mortgagees an unlimited right to foreclose under the power of sale, rather than the grounds upon which that conclusion is based. Manifestly the criticism is misdirected. As previously stated, the matter of limiting remedies belongs to the legislature. It may limit some and leave others unlimited. The wisdom of its

acts may be doubted, but the courts cannot disregard them, and they have no authority to create a limitation where the legislature has declined to do so. In my opinion the South Dakota court very properly declined to defeat the remedy under the power of sale by applying a statute of limitations which was not applicable. The conclusion of my associates rests largely upon section 5845. If this section has the potency ascribed to it by them—i. e., to directly operate as a bar, and thus accomplish the same result as a statute of limitation—the legislature did an idle act in 1901 in amending section 2100; for, in the majority view we have had in effect in this jurisdiction a ten-year statute of limitations applicable to foreclosures by advertisement for almost a quarter of a century. This evidently was not the view of the legislature of 1901. It was not the view of the Supreme Court of South Dakota, and I do not think it should be declared by this court to be the law of this state. Although the question is not directly involed in this case, it has been considered in the above opinion, and I cannot, in justice to myself, permit the views expressed to go down without indicating to some extent my disapproval.

(107 N. W. 61.)

THE STATE OF NORTH DAKOTA v. GEORGE R. LONNE.

Opinion filed May 4, 1906.

Information — Alternative Allegations.

1. Section 7462, Rev. Codes 1899, defines the crime of embezzlement as the fraudulent appropriation of property, or secreting the property with intent to fraudulently appropriate it. The information charged the defendant with fraudulently appropriating property or secreting it with fraudulent intent to appropriate it. *Held* bad on demurrer, as not charging the offense with certainty.

Same.

2. Where the statute specifies several things disjunctively, as constituting an offense, the general rule is that to charge the several things disjunctively in an information renders the charge uncertain, and therefore subject to demurrer.

Same.

3. Section 8042, Rev. Codes 1899, is not applicable to such an information, as the words connected by the disjunctive are not used to describe the means of the commission of the offense.

Embezzlement — Elements of Offense.

4. The fraudulent appropriation of property or the secreting of it with fraudulent intent to appropriate it as described in the statute are different acts or facts that constitute the crime of embezzlement, and are not the means of committing that offense.

Appeal from District Court, Griggs county; *Winchester,* J.

George R. Lonne was convicted of embezzlement, and appeals. Reversed and remanded.

H. R. Turner and *Turner & Wright,* for appellant.

Where the statute enumerates several acts disjunctively which separately or together constitute an offense, if the indictment or information charges more than one of them, it must do so conjunctively. People v. Cooper, 53 Cal. 47; People v. Frank, 28 Cal. 507; People v. De La Guerra, 31 Cal. 460; Wharton's Cr. Pl. & Pr. (9th Ed.) 161.

C. N. Frich, Attorney General, *Frank R. Gladstone,* State's Attorney, and *Lee Combs,* for respondent.

The information states two different ways of committing the same offense, which is permitted. Rev. Codes 1899, section 8042. State v. Watrous, 13 Iowa, 489; State v. McPherson, 9 Iowa, 53; State v. Barrett, 8 Iowa, 536; State v. Vaughn, 5 Iowa, 369; Burdine v. State, 25 Ala. 60; also People v. Ah Woo, 28 Cal. 206; 10 Enc. Pl. & Pr. 536.

MORGAN, C. J. The defendant was convicted of the crime of embezzlement and appeals from the order denying his motion for a new trial. Upon his arraignment in district court, the defendant demurred to the information upon the ground, among others, that the facts stated therein did not constitute the crime of embezzlement or any other public offense. The overruling of the demurrer is specified and assigned as error in this court. The precise objection to the information is that the facts are therein stated in the alternative and that the facts are for that reason so indefinitely stated, that no crime is charged.

The information is as follows, so far as material to the consideration of this point: That the defendant did commit the crime of embezzlement as follows; to wit, that defendant "did then and there willfully, knowingly, fraudulently and feloniously appropriate or secrete with a fraudulent intent to appropriate, the money afore-

said, to his own use or purpose," etc. It is claimed by the appellant that section 7462, Rev. Codes 1899, on which the information is based, describes the two acts or facts under which the offense of embezzlement may be committed, and these facts must be positively stated and cannot be stated in the disjunctive. Said section is as follows: "If any person, being an officer * * * of any * * * corporation * * * fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust any property which he has in his possession or under his control in virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, he is guilty of embezzlement." A reading of this section shows that the offense of embezzlement may be committed by two separate and different acts or facts: (1) A fraudulent appropriation of property. (2) Secreting property with a fraudulent intent thereafter to appropriate it. By charging the offense as having been committed either by the appropriation of the property fraudulently or by secreting it with a fraudulent intent to appropriate it, the charge loses the certainty required in an information. The offense becomes complete when the act of appropriating the property is fraudulently done or when the act of secreting the property is done with a fraudulent intent to appropriate it. Section 8040, Rev. Codes of 1899, prescribes that an information or indictment must be direct and certain as to the offense charged and as to the particular circumstances of the offense charged when they are necessary to constitute a complete offense. Section 8039, Rev. Codes 1899, provides that an information or indictment must contain a statement of the facts 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. The information lacks that definiteness and certainty contemplated by these sections. It is impossible to determine whether the information charges embezzlement by fraudulent appropriation, or embezzlement by secreting the property with intent to fraudulently appropriate it thereafter. A conviction under this information would not determine whether it was for fraudulently appropriating the property or for secreting the property with intent to appropriate it. Bishop on Criminal Procedure lays down the rule relating to informations drawn under similar statutes as follows: "Sec. 586. To repeat what was explained in another connection. If a statute makes criminal the doing of this or that, mentioning several things disjunc-

tively, there is but one offense which may be committed in different ways, and in most instances all may be charged in a single court. But the conjunctive 'and' must ordinarily in the indictment take the place of 'or' in the statute, else it will be ill as being uncertain. And proof of the offense in any one of the ways will sustain the allegation. On the other hand the indictment may equally well charge what comes within a single one or more clauses, less than all, of the statutes and still it embraces the complete proportions of the forbidden wrong." See, also, Clifford v. State, 29 Wis. 327; Commonwealth v. Grey, 2 Gray (Mass.) 51, 61 Am. Dec. 476; State v. Dale, 8 Or. 229; State v. Moran, 40 Me. 129; Wharton on Criminal Pl. & Pr. (9th Ed.) section 161; Stevens v. Commonwealth, 6 Metc. (Mass.) 241; State v. Fancher, 71 Mo. 460; Tompkins v. State, 4 Tex. App. 161; Hart v. State, 2 Tex. App. 39. These cases show that the use of the disjunctive "or" is not generally permissible in an information where a statute makes it a crime to do any one of several things therein mentioned disjunctively. There are some exceptions to this general rule, but they cannot be applied in this case. For instance if the word "or" is used in the information in the sense of "to wit," it is not objectionable. If "or" is used to connect synonymous words or phrases, the general rule does not apply.

The state contends that the use of the disjunctive is permissible for the reason that it only connects the words describing the different means by which the offense of embezzlement may be committed. It is maintained that section 8042, Rev. Codes 1899, which reads as follows, applies: "The information on the indictment must charge but one offense, but the same offense may be set forth in different forms or degrees under different counts; and when the offense may be committed by the use of different means, the means may be alleged in the alternative in the same count." We do not think that this section is applicable to this case. As stated before, section 7462, supra, defines embezzlement, and the crime may be committed either by appropriating the property or secreting it fraudulently. An information can be based on the fraudulent appropriating or upon the secreting with intent to appropriate. The means of committing the embezzlement is not the appropriating or the secreting of the property. The secreting or the appropriation are substantive acts and facts that may separately constitute the offense. Goodhue v. People, 94 Ill. 37; State v. Clarkson, 59 Mo.

149. Our conclusion is that the words "appropriate" and "secrete" as used in the statute are descriptive of different acts by which the offense may be committed, and are not intended to describe the means by which the embezzlement is committed. The word "means," as used in that section, is to be defined as synonymous with the word "agency" or "instrumentality." It was error to overrule the demurrer.

The order denying the motion for a new trial is reversed, and the case remanded for further proceedings according to law. All concur.

(107 N. W. 524.)

A. G. BECKER & CO. v. THE FIRST NATIONAL BANK OF HARVEY.

Opinion filed May 7, 1906.

Appeal — Review — Harmless Error.

1. It is not prejudicial error to exclude certain testimony when the record shows proof of the facts attempted to be shown by such testimony and such facts are undisputed.

Banks — Liability for Negligence Only When Damages Follow.

2. If a bank violates instructions or is guilty of negligence or misconduct and fails to collect a claim sent to it for collection, it will be liable only for the actual loss caused by its negligence or misconduct.

Appeal from District Court, Wells county; *Burke*, J.

Action by A. G. Becker & Co. against the First National Bank of Harvey. Judgment for defendant and plaintiff appeals.

Affirmed.

Anton Grethen, for appellant.

Hanchett & Wartner, for respondent.

MORGAN, C. J. The complaint alleges that the Friedman Automobile Company made a sight draft upon the firm of Blanding & Fischer of Fessenden, N. D., for the sum of $504, the unpaid balance of the purchase price of an automobile, and received said sum thereon, less collection fees, upon depositing the same with the plaintiff, a banking corporation of Chicago, Ill., and indorsing the same to it. There was attached to the draft a bill of lading issued by the railroad company over whose road the automobile was

shipped, to the order of said automobile company for the automobile, consigned to itself at Fessenden, N. D. The plaintiff bank sent the draft, with the bill of lading attached, to the defendant bank with instructions to collect the same, and not to deliver the bill of lading to said Blanding & Fischer until the draft was paid in full. The complaint further alleges "that said defendant received the said bill of exchange and the said bill of lading, * * * and did thereupon, in violation of the instructions given it as aforesaid, and in collusion with said firm of Blanding & Fischer, fraudulently deliver said bill of lading to said firm without payment of said bill of exchange and said firm of Blanding & Fischer by means of the possession of said bill of lading received said merchandise from said railroad company, and has ever since kept the same and has never paid said bill of exchange or any part thereof and said bill of exchange is still in the possession of said defendant, and this plaintiff has never received payment therefor or any part thereof, although often demanded, whereby the plaintiff lost its security for said bill of exchange and has been damaged to the amount of said sum of $504. * * *" The answer admits the receipt of the draft for collection and the receipt of the bill of lading attached thereto, and alleges that it presented the draft to Blanding & Fischer for payment, and payment was refused, unless they were permitted to examine the automobile; that defendant permitted said firm to examine it, and, after such examination, said firm refused to accept it and refused to pay the draft; that said automobile has ever since been in defendant's possession as plaintiff's agent. The trial court directed a verdict for the defendant at the close of the plaintiff's case. A motion for a new trial was duly made and denied. Judgment was entered on the verdict, and plaintiff has appealed from said judgment.

Two specifications of error are relied on: (1) The refusal of the court to receive in evidence two letters written by the defendant to the plaintiff in reference to the subject-matter of the litigation; (2) the direction of a verdict in defendant's favor. The first assignment of error may be disposed of without determining whether it was error to refuse to receive the letters in evidence. The letters are set forth in the abstract. On examination of them, in connection with the evidence and the pleadings, it appears that every material fact set forth or contained in the letters is shown by the evidence or admitted in the pleadings to be true. Hence no preju-

dice could follow their exclusion. The facts alleged in the complaint are not wholly sustained. The plaintiff has failed to show that it instructed the defendant not to deliver the bill of lading to Blanding & Fischer, unless upon payment of the draft, as alleged in the complaint. No such instructions were given. The evidence also shows that the automobile was consigned to Blanding & Fischer, and not to the automobile company, as alleged in the complaint. The defendant, however, admits that it delivered the bill of lading to that firm for the purpose of permitting a temporary examination of the machine, and that the firm got temporary possession of the machine by virtue of said bill of lading. The defendant insists that it had the right to surrender the bill of lading for the purposes mentioned, in view of the fact that it had received no instructions from the plaintiff in respect thereto. We are not called upon to determine that point. Conceding that the defendant exceeded its authority in regard to the delivery of the bill of lading, it does not follow that the plaintiff can recover the face value of the draft which it is claimed that the bill of lading was security for. If the defendant exceeded its authority or violated instructions or was guilty of negligence in the matter of the collection of the draft, and plaintiff was damaged thereby, the plaintiff could only recover the actual damages caused by the acts or omissions of the defendant. 21 Am. & Eng. Enc. Law (2d Ed.) p. 458; Mechem on Sales, section 518, and cases cited; Daniel on Neg. Instruments, section 329; First National Bank v. Fourth National Bank, 77 N. Y. 320, 33 Am. Rep. 618; Borup v. Nininger, 5 Minn. 523 (Gil. 417).

Plaintiff would be entitled only to be placed in the same position as it would have been in had the defendant strictly performed all of its obligations with reference to the collection of the draft. It appears from the record that Blanding & Fischer refused to pay the draft until they were given an opportunity to examine the machine. Thereupon defendants permitted an examination of the machine. The examination showed defects which caused them to refuse to accept the machine, and the same was delivered back to the defendant as plaintiff's agent, who has held it ever since. This leaves the parties in precisely the same situation, so far as damages are concerned, as they were in when Blanding & Fischer refused to pay the draft unless they were permitted to examine the machine. The title to the machine has not changed. The delivery of the machine to the purchaser was for a temporary purpose only.

There is no showing that the machine is in any different condition than it was in before it was delivered to the purchasers for a special purpose. The surrender of the bill of lading was of no consequence, as it is of no value intrinsically, and could serve no useful purpose to the plaintiff, inasmuch as it has the possession of the machine. The possession of the bill of lading served no purpose except to secure possession of the machine from the railroad company. The delivery of the bill of lading to the purchasers did not change the right to the possession of the machine, except temporarily, and did not affect the title at all. The title remained in the plaintiff at all times. It is therefore plain that no damages have been shown. There is no contention that the machine has been in any way injured. There is no showing that the purchasers are insolvent, and cannot be made to respond to damages for breach of the contract of purchase by their failure to accept the machine. If any special damages have been suffered by the plaintiff through the failure of the purchasers to accept the machine, if wrongful, plaintiff has a remedy. From a legal point, the relations of plaintiff and the purchasers have not changed by reason of the fact that the purchasers were given temporary possession of the automobile. No damages have been shown, and plaintiff has no cause of action until damages are shown to have been suffered by it through the fault of the defendant. We have examined the cases cited by the appellant in support of its contentions, but they are not in point. In all of them damages were proven to have followed the negligence or misconduct of the agent.

The judgment is affirmed. All concur.

(107 N. W. 968.)

G. H. LAFFY v. FRED GORDON.

Opinion filed May 8, 1906.

Appeal — Trial De Novo.

1. When an action involving both legal and equitable issues, which ought to be separately tried and determined, is tried to the court, all the issues being tried together, and a single judgment rendered, disposing of all the issues, the case is not triable de novo on appeal, under section 5630, Rev. Codes 1899, as amended in 1903 (Laws 1903, page 277, chapter 201). Cotton v. Butterfield (N. D.) 105 N. W. 236, distinguished.

Same — Case Triable by Jury.

2. In such an action wherein the determination of the equitable counterclaim does not conclude all issues on the law side of the case, and the equitable and legal issues are tried together, the case is one "properly triable with a jury," within the meaning of the proviso added to section 5630, Rev. Codes of 1899, by chapter 201, page 277, Laws of 1903, which withdraws such cases from the operation of section 5630.

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

Action by G. H. Laffy against Fred Gordon. Judgment for defendant and plaintiff appeals.

Affirmed.

Thomas H. Pugh, for appellant.

Chas. F. Templeton, for respondent.

ENGERUD, J. The complaint alleges four causes of action at law to recover damages for breach of contract made by defendant to and with the plaintiff. The answer puts in issue the alleged breaches as well as the damages claimed. The defendant also pleads certain legal counterclaims for damages by reason of alleged breaches of contract on plaintiff's part. The answer further sets up an equitable counterclaim in the nature of a bill in equity for the reformation of the written contract pleaded in the complaint; it being averred by defendant that said contract by reason of mutual mistake of the parties did not correctly state the real agreement. All the issues, both legal and equitable, were submitted to the district court for trial without a jury. The equitable issues were not separated from the legal ones for purposes of trial, but the entire case was tried, and the evidence introduced as if the issues were all of the same nature. The trial court held that the contract should be reformed, that plaintiff was entitled to no relief, and that defendant was entitled to a recovery of damages on one of his legal counterclaims. Judgment was duly entered accordingly. Plaintiff appealed from the judgment.

A statement of the case was settled containing all the evidence offered, and specifying that the appellant desired a new trial of all the issues as provided by section 5630, Rev. Codes 1899. The statement contains no specification of errors of law, or of insufficiency of evidence to justify the decision. Since the amendment in 1903 of section 5630, a case tried by the court without a jury is

not triable anew in this court if it was "properly triable with a jury" in the court below. Barnum v. Gorham Land Co., 13 N. D. 359, 100 N. W. 1079. The only part of this case properly triable without a jury consisted of the issues arising in the equitable counterclaim. All the other issues were legal, and were triable by a jury. The equitable counterclaim should have been first tried separately from the other issues and disposed of by a decree. Cotton v. Butterfield (decided last term) 105 N. W. 236. In the case just cited we were able to try the case anew, because, notwithstanding the irregular practice pursued, the pleadings disclosed that the determination of equitable counterclaim was conclusive of all the issues tendered by the cause of action at law alleged in the complaint, and the trial of the equity side of the case left nothing more to litigate. In this case, however, the trial of the equitable issues does not conclude all the legal issues. Inasmuch as the parties saw fit to try both the legal and equitable issues together, it is clear that the case was one "properly triable with a jury." We have, consequently, no jurisdiction to try the case anew on the evidence; and as the statement of the case contains no specifications of error, it must be disregarded. Barnum v. Gorham Land Co., supra. It is conceded that the conclusions of law and judgment are supported by and are in accord with the findings of fact.

The judgment is affirmed. All concur.

(107 N. W. 969.)

W. A. Marin v. C. A. Potter.

Opinion filed May 10, 1906.

Process — Impeachment of Return of Service — Mere General Denial Insufficient.

A mere general statement in an affidavit by the defendant that the summons and complaint were not personally served on him is not sufficient to overcome the proof of service afforded by an affidavit of service in regular form.

Appeal from District Court, LaMoure county; *Burke*, J.

Action by W. A. Marin against C. A. Potter. Judgment for plaintiff. From an order granting application to open default, plaintiff appeals.

Reversed, with directions to reinstate the judgment.

W. J. Mayer, for appellant.

Proof by affidavit can only be made by a statement of facts from which the ultimate conclusion may be drawn. 1 Enc. Pl. & Pr. 322; Noble v. Kreuzhamp, 111 Pa. St. 68; Bank v. Loucheim, 8 N. Y. Supp. 520; Thompson v. Best, 4 N. Y. Supp. 229; Powell v. Kane, 5 Paige, 265; Duanesburgh v. Jenkins, 40 Barb. 574.

M. C. Lasell, for respondents.

An affidavit denying personal service was not submitted to attack the jurisdiction but to show that respondent had no notice of the entry of judgment.

ENGERUD, J. This is an appeal by plaintiff from an order granting defendant's application to open a default judgment and serve an answer.

The judgment appears to have been regularly entered. The complaint is in the usual form for the recovery of the sum due in two promissory notes executed by defendant. The affidavit of service attached to, and filed with, the summons and complaint, is regular in form and shows that the summons and complaint were served upon the defendant personally in LaMoure county, on September 11, 1903, by handing to and leaving with the defendant true copies of said papers. On the margin of this affidavit appears a notation in the following words: "He would not accept the papers, and he dropped the summons and complaint on the ground." This notation is clearly no part of the affidavit, but a mere memorandum made on the margin by the party who made the service and affidavit. Even if treated as part of the affidavit it does not detract from the sufficiency of the service shown by the affidavit. On the contrary, it shows that the papers were handed to the defendant, and the latter saw fit to ignore the service by dropping the papers on the ground. That this was the fact is shown by the affidavit of Mr. Bakke, who made the service, which affidavit was presented to the court in plaintiff's behalf in opposition to the motion. This affidavit shows in detail what took place when the service was made. It shows that said Bakke demanded payment of the notes and reinforced his demand by threatening the defendant with a lawsuit to enforce payment. On defendant's refusal to settle, the summons and complaint were handed to defendant by Bakke, who at the same time stated what they were. The defendant there-

upon threw them upon the ground. If the service was made by Mr. Bakke as stated in the original affidavit of service and further explained in his second affidavit, filed in opposition to the motion, then clearly there was a good service. There is no contradiction of these affidavits, except the following generalization in the defendant's affidavit: "Affiant further deposes and says that no personal summons and complaint was ever made upon him, and that he had no knowledge of the pendency of this action until the above-described notice was received." The notice referred to was one mailed to defendant by plaintiff's attorney a few days before the date of defendant's affidavit.

Such a general statement is evasive and wholly insufficient to prove that the affidavit of service was false. The defendant contents himself with stating his conclusion that there had been no personal service. His ideas of what constitutes such service may be utterly erroneous. He does not state the evidentiary facts upon which he bases his denial of service, and he does not attempt to explain or deny the facts and circumstances sworn to by Mr. Bakke. Moreover his application to be permitted to answer on the ground of "excusable neglect," in failing to know that the action was pending is inconsistent with his assertion that there had been no service. We must hold, therefore, that the proof of service is not overcome, and the service shown is regular. The defendant offered no excuse for his failure to appear and answer in response to the summons except the assertion (if that may be termed an excuse) that he was not served with the summons. Having failed to prove the only ground relied on for relief, his motion should have been denied.

The order is reversed, with directions to deny the motion and reinstate the judgment. All concur.

(107 N. W. 970).

H. A. Libby v. Thomas Barry.

Opinion filed May 16, 1906.

New Trial — Insufficiency of the Evidence — Verdict.

1. This court will not reverse an order denying a motion for new trial for the alleged insufficiency of the evidence to justify the verdict, when the verdict is supported by evidence of a substantial nature.

An Oral Contract Not Superseded by Unexecuted Written One.

2. An oral agreement is not superseded by a mere proposed written agreement covering the same subject-matter, which is to take effect only upon the approval of all the parties thereto, and the latter is not signed, approved or acted upon by one of the parties.

New Impeaching Evidence Insufficient Ground for New Trial.

3. Newly discovered evidence which is not material to the issues, but is merely impeaching, is not, as a general rule, a sufficient ground for granting a new trial.

Appeal from District Court, Cavalier county; *Kneeshaw*, J.

Action by H. A. Libby against Thomas Barry. Judgment for plaintiff, and defendant appeals.

Affirmed.

Gordon & Wheeler, for appellant.

H. A. Libby, for respondent.

YOUNG, J. The plaintiff, an attorney at law, residing at Park River, in Walsh county, brought this action to recover a balance of $214.75, for legal services alleged to have been rendered in 1904, in defending the defendant's brother against a charge of murder, and for certain expenses connected therewith. His complaint sets forth three causes of action: (1) A claim of $55 for services rendered preliminary to the trial, and between April 20 and April 30, 1904; (2) a claim of $9.75 for moneys expended; and (3) a claim of $150 for an unpaid balance upon an alleged oral contract for a $700 fee, for his services at the trial, upon which $550 has been paid. The answer is a general denial of the allegations of the complaint, except that it admits the payment of the $550. The case was tried to a jury, and a verdict was returned for the amount demanded in the complaint. The defendant moved for a new trial, among other grounds, upon the ground (1) that the evidence is insufficient to justify the verdict, and (2) newly discovered evidence. The motion was denied, and judgment was entered upon the verdict. This appeal is from the judgment.

The grounds of the motion for a new trial which are urged for reversal in this court are those above stated. We are of opinion that neither of them can be sustained. As to the first and second causes of action, it is not disputed that the services were rendered, and that the moneys were paid out as alleged. The question in controversy was as to whether this was at the defendant's re-

quest. The plaintiff testified that it was, and the defendant that it was not. It was for the jury to determine what the fact was and its finding is conclusive upon that issue.

The finding of the jury must also be held to be conclusive upon the third cause of action, upon which the plaintiff was awarded $150 for the unpaid balance for services rendered at the trial. That the plaintiff rendered the services and did so pursuant to an agreement with the defendant is not disputed. The question, and it is a pure question of fact, is whether they were rendered under the oral contract for $700, as plaintiff alleges, or were rendered under a certain written contract as defendant claims, and to which we will hereafter refer. The record shows that the term of court for Walsh county, at which the trial was to occur was called for May 15, 1904. In the latter part of April, the defendant, who lived near Osnabrock in Cavalier county, went to Park River to engage the plaintiff as local counsel, and with the purpose at all times of securing an outside attorney to assist him. The plaintiff testified positively that a definite agreement was made for his services at the trial, and at an agreed compensation of $700, and that at or about this time the defendant paid him $500 in the form of a draft. After discussing the question of additional counsel, it was deemed advisable to secure either Tracy R. Bangs, of Grand Forks or W. E. Purcell, of Wahpeton, both of them having been connected with the case at a former trial. The defendant had already consulted Mr. Bangs with a view to securing his services and had been informed by him that he would assist at the trial for $1,000, with the understanding that local counsel would be furnished by the defendant. It was decided to try to secure the services of Mr. Bangs. The plaintiff stated, so the defendant testified, that he thought he could do better and could get Mr. Bangs' services for $700 or $800. Assuming that Mr. Bangs would accept that sum, and without authority from him, on April 25, 1904, a written instrument was drawn, in form a contract, between the defendant as party of the first part, and the plaintiff and Tracy R. Bangs as parties of the second part, wherein the second parties agreed to defend the case for $1,500 and expenses. The instrument was signed by the defendant and also by the plaintiff, who also signed the name of Tracy R. Bangs, "by H. A. Libby." Plaintiff at once informed Mr. Bangs what he had done, and the latter refused unequivocally to approve the contract, and stated that if he went into

the case it would only be under a separate contract with the defendant. After the defendant was informed of Mr. Bangs' refusal, he had a conference with the plaintiff, as a result of which, the plaintiff went to Wahpeton to secure the services of Mr. Purcell. The latter declined to enter the case. Defendant then went to Grand Forks and engaged Mr. Bangs.

The above statement of facts is sufficient to disclose defendant's contention as to the third cause of action, which is, that the written instrument above referred to, superseded the oral agreement and measures his liability. There is no merit in this contention. It would be true if the contract had in fact been assented to by Mr. Bangs, and the services rendered under it. But that is not the fact, and upon the record before us, a finding by the jury to that effect could not be sustained, for it is undisputed that Mr. Bangs positively refused to approve the proposed contract. He did not authorize it, and he did not ratify it. It requires no citation of authority to sustain the proposition that an oral agreement is not superseded by a mere proposed written agreement, covering the same subject-matter, which is not to become effective until approved by all the parties thereto, the latter not having been signed, approved or acted upon by one of the parties to the proposed contract. The defendant's claim that the services were rendered under the alleged written contract, being thus wholly without support, the only question was whether the plaintiff had an oral contract for $700. There is ample evidence in the record to sustain the finding of the jury upon this question, and it cannot be disturbed.

It is also clear that no error was committed in refusing to grant a new trial upon the ground of newly discovered evidence. The plaintiff in testifying to a conversation on May 11th with defendant, stated in substance that if he was not satified with the fee of $700, which had been agreed upon, he would return the draft which he had received on or about April 25th, and retire from the case. "I still have the draft which you gave me April 25th, in my pocket uncashed, and will not use it unless satisfactory to you. * * * I cashed the draft Mr. Barry gave me on April 25th, on the 11th day of May." It was shown by defendant's affidavits upon the motion for new trial, that the draft was in fact cashed April 26th, and that is not now disputed. Counter affidavits were filed by plaintiff for the purpose of explaining this discrepancy in his tes-

timony, but we have no occasion to go into them. It is essential among other things that newly discovered evidence, to be sufficient ground for a new trial, must be material. Subdivision 4, section 5472, Rev. Codes 1899.

Counsel for defendant contend that the only issue upon which the testimony relative to the offer to return the draft, was material, was upon the question as to whether the written instrument was repudiated or rescinded. It will appear from what we have already said that there is no question of rescission in the case. Rescission applies only to contracts and does not apply to mere proposals. There was no written contract to rescind, for Mr. Bangs, one of the parties to it, never assented to it.

The question as to whether the plaintiff offered to return the draft on the date named, or on any other date, had no bearing upon any issue in the case. The newly discovered evidence is purely impeaching and the general rule is that such evidence does not furnish a good ground for granting a new trial. Heyrock v. McKenzie, 8 N. D. 601, 80 N. W. 762; Stoakes v. Monroe, 36 Cal. 388; Hayne, New Trial & App. section 88; 14 Abbott's Enc. Dig. N. Y. 370, and cases cited, note 90; also 14 Enc. Pl. & Pr. 791; 1 Spelling, New Trial, section 220, and cases cited. The facts of this case do not take it out of the general rule.

We therefore conclude that the trial court did not err in overruling the motion for a new trial, and the order and judgment will be affirmed. All concur.

(107 N. W. 972.)

THOMAS DOUGHTY v. MINNEAPOLIS, ST. PAUL & SAULT SAINTE MARIE RY. CO.

Public Lands — Railroad Right of Way — Homesteader's Land — Definite Location of Road.

Opinion filed May 16, 1906.

The act of congress, approved March 3, 1875, c. 152, 18 Stat. 482 [U. S. Comp. St. 1901, p. 1568], granting a right of way over the public lands for the construction of railroads, confers no right to such easement in lands occupied by a homesteader, whose possessory right attached before the railroad was actually constructed and before its map of definite location had been approved by the Secretary of the Interior, although the company was qualified to take under the act and had determined by a final survey the exact location for its road across the settler's land before the latter acquired any rights.

Appeal from District Court, Foster county; *Burke*, J.

Action by Thomas Doughty against the Minneapolis, St. Paul & Sault Sainte Marie Railway Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

L. W. Gammons, F. Baldwin and *Alfred H. Bright*, of counsel, for appellant.

In some of the grants to aid railroad building there was a separate grant of right of way giving title as of the date of the grant the moment the line was located. St. J. & D. C. R. R. Co. v. Baldwin, 103 U. S. 426, 6 L. Ed. 578.

The first in time in proceedings to acquire title to public lands, if the latter are followed up, is first in right. Shepley et al. v. Cowan et al., 91 U. S. 338, 23 L. Ed. 424.

When a map of location is approved, the title rests as of the date of location. St. Paul & S. C. R. R. Co. v. W. & St. P. R. R. Co., 112 U. S. 720, 28 L. Ed. 872; Sioux City & St. P. R. R. Co. v. C. M. & St. P. R. R. Co., 117 U. S. 406, 29 L. Ed. 928.

S. E. Ellsworth, for respondent.

Until a grantee under act of congress of March 3, 1875, is specifically named and a definite location given to the line of the route, either by the filing and approval of a plat or profile of the time of route, or by actual construction and operation of the road, no rights accrue to the railroad company. Dakota Central R. R. Co. v. Downey, 8 Land Dec. 115; Jamestown and N. Ry. Co. v. Jones, 7 N. D. 619, 76 N. W. 227.

When a settler takes possession of a tract with a view to preemption before the map of definite location of a railroad right of way thereover has been filed and approved, the railroad company must condemn the possessory right of the preemptor. Jamestown and N. Ry. Co. v. Jones, supra.

Where a railroad company claims title to the right of way under the provisions of section 4 of the act of congress approved March 3, 1875, its rights attach at the date of the last act to be done by the railroad company, i. e., of the approval of the plat and profile of its time of route by the secretary of the interior. Circular of Commissioner Williamson, 2 Copp's Public Land Laws, 816; opinion Sec. Vilas, in R. R. Co. v. Downey, 8 Land Dec. 115; Circular

of Commissioner Stockslager, 12 Land Dec. 423; Red River & Lake of the Woods R. Co. v. Sture, 20 N. W. 229; Lilienthal v. Southern Cal. Ry. Co., 56 Fed. 701; Spokane Falls & N. Ry. Co. v. Zeigler, 61 Fed. 392; Larson v. Oregon Ry. and Nav. Co., 23 Pac. 974; Hamilton v. Spokane & P. Ry. Co. et al., 28 Pac. 408; Enoch v. Spokane Falls & N. Ry. Co., 33 Pac. 966; Chicago K. & N. Ry. Co. v. Van Cleave, 33 Pac. 472; Reidt v. Spokane Falls & N. Ry. Co., 34 Pac. 150; Denver & N. G. R. Co. v. Wilson, 62 Pac. 843.

Title acquired to public land by patent relates back and takes effect as of the date of the filing. Act of Congress of May 14th, 1880 (Supp. U. S. Stat. 140); Shepley v. Cowan, supra; Johnson v. Bridal Veil Lbrg. Co., 33 Pac. 528; Sturr v. Beck, 133 U. S 541, 10 Sup. Ct. Rep. 350.

ENGERUD, J. The plaintiff brought this action to recover from the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, compensation for injury to his land caused by the construction and operation of defendant's railway across the same. A jury was waived, and the action was tried to the court. Judgment was ordered and entered in favor of the plaintiff, awarding him damages in the sum of $1,000. The defendant appealed from the judgment.

The appellant's contention is that the facts found by the court show that the appellant railway company had acquired a right of way over the land in question by virtue of the act of congress, approved March 3, 1875, c. 152, 18 Stat. 482 [U. S. Comp. St. 1901, p. 1568], and that plaintiff took the land subject to defendant's easement therein. No other question is presented by the assignments of error. By failing to settle a statement of the case containing specifications of error and incorporate same in the printed abstract, the appellant must be held to concede that the findings are supported by the evidence. It is expressly conceded that the findings cover all material issues presented by the pleadings. The facts upon which defendant relies to establish its claim to immunity from liability are found by the court substantially as pleaded in the answer; so the question really is as to the sufficiency of the facts pleaded in the answer to show that the defendant had acquired an easement in the land under the act of 1875, before plaintiff's rights attached. On June 25, 1892, the plaintiff's application to enter the quarter section in question was presented to and accepted by the register and receiver of the United States

land office at Fargo. On July 1, 1892, the plaintiff took up his residence on the land under his homestead entry and in all things complied with the federal homestead laws. On November 4, 1899, a patent conveying the title to him was issued. That instrument makes no mention of any easement in favor of the railroad. The defendant railway company was organized in 1891. Its articles were filed with the secretary of the interior on March 26, 1891, and approved by him on April 15, 1891; and it thereby became entitled to the benefit of the act of March 3, 1875. In October, 1891, the company made a preliminary survey of its proposed line of railway across the land; and on May 13, 1892, completed its final survey, definitely fixing the line of its proposed road over the quarter section. The line as surveyed was marked by stakes driven into the ground 100 feet apart, indicating the centre of the roadway to be constructed. The definite location of the route as fixed by this survey was approved and adopted by the company's board of directors on June 17, 1892; being eight days before the plaintiff made his homestead filing. The map or profile of its road as thus definitely located was filed in the local land office at Fargo on July 20, 1892, and received the approval of the secretary of the interior on October 14, 1892. In the latter part of July, 1892, the company constructed its road across the land, on the line as surveyed, and ever since has operated its railway over the roadway so constructed, using and appropriating for that purpose a strip 200 feet wide, 100 feet on each side of the center of the track.

This court held in Jamestown & Northern Railway Co. v. Jones, 7 N. D. 619, 76 N. W. 227, that the benefits of this act of 1875 could be acquired only by compliance with all the conditions imposed by section 4 of that act (18 Stat. 483 [U. S. Comp. St. 1901, p. 1569]), and that a settlement upon the land by a claimant under the federal land laws after the construction of the road, but before approval of the map of definite location, defeated the company's acquisition of a free right of way under the act, as against the settler in possession. That decision was reversed by the United States Supreme Court in Jamestown & Northern Railway Co. v. Jones, 177 U. S. 125, 20 Sup. Ct. 568, 44 L. Ed. 698. That court held that the grant took effect when a grantee qualified to take had definitely located the right of way claimed under the grant. It was held that the actual construction of the road constituted such definite loca-

tion. In the case at bar, the actual work of construction was not begun until after plaintiff's possessory rights accrued. Consequently, if actual construction is the first act sufficiently identifying the definite location of the right of way, then the judgment must be affirmed because the decision of the United States Supreme Court in the Jamestown & Northern case clearly establishes that the grant takes effect, from the date of the definite location and not before. To the same effect is also the decision in Washington & I. Railway Co. v. Osborne, 160 U. S. 103, 16 Sup. Ct. 219, 40 L. Ed. 346. Appellant contends that the final survey definitely locating the right of way is an act on the part of the company which, when promptly followed up by actual construction, is sufficient to constitute a definite location. The argument appeals to us with much force. The necessary inference from the language used by Mr. Justice McKenna, however, in the Jamestown & Northern case is, it seems to us, that actual construction is the only sufficient act, other than compliance with section 4, to constitute a definite location, and the right of way does not exist before actual construction, unless the company's profile map has been approved by the secretary, before the settler's rights attached. That decision is conclusive upon us, and it would be neither proper nor profitable for this court to set forth its own views as to whether or not the language used in that decision ought to be modified.

The judgment appealed from must therefore be affirmed. All concur.

(107 N. W. 971.)

Florence I. Kerr v. The City of Grand Forks.

Opinion filed January 24, 1906. Rehearing denied March 15, 1906.

Amendment After Notice of Trial — Change of Cause of Action.

1. An amendment of a complaint after the cause has been set for trial may be permitted, although the cause of action be technically changed in reference to the plaintiff's claim.

Same.

2. In considering the granting or refusing of such amendments, the test is, not whether the cause of action is changed in a technical sense, but whether the amendment should be allowed in furtherance of justice.

Amendment of Complaint — New Notice of Trial.

3. In cases where an amendment is allowed after the cause is properly on the trial calendar, and has been set for trial on a day certain, no new notice of trial or note of issue need be served or filed.

Harmless Error.

4. The overruling of objections to the following question: "Is a broken leg like that liable to be weak and cause trouble if used much?" is not prejudicial error in view of the negative character of the answer.

Opinion Evidence — Hypothetical Question.

5. The overruling of an objection to the following question: "Doctor, assuming that she broke the leg by reason of the fall that she suffered on the sidewalk, would such a fall or might such a fall cause internal injuries or strains which would produce pains of a character that she was complaining of?" is not error.

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

Action by Florence I. Kerr against the city of Grand Forks. Judgment for plaintiff, and defendant appeals.

Affirmed.

Geo. A. Bangs, for appellant.
Frank B. Feetham and *Scott Rex*, for respondent.

MORGAN, C. J. The plaintiff was injured by a fall upon a sidewalk of the defendant and brings this action to recover damages caused thereby. The first error assigned is that the court allowed the plaintiff to amend the complaint before going to trial. The original complaint pleads an ordinance of the defendant city prescribing the manner in which sidewalks shall be constructed. Paragraph 3 of the complaint was as follows: "That upon the westerly side of 7th street between Selkirk and Cheyenne avenues and opposite the lots known as No. 307 and No. 309 N. 7th St., the sidewalk is not laid in accordance with the provisions of said city ordinance above quoted, but on the contrary the sidewalk does not conform to the grade of said city street, established by the city engineer and approved by the city council, and in that said sidewalk is not laid gradient throughout the entire side of said block, but that upon said walk there is a descent of from 6 to 10 inches in height, opposite to the numbers above indicated, slanting down from a higher to a lower walk in an exceedingly dangerous manner and in absolute contravention of the terms of said ordinance." Paragraph 4 of the original com-

plaint was as follows: "That on the 20th day of March, 1903, the said sidewalk on the westerly side of North Seventh street, between Selkirk and Cheyenne avenue in said city, was a public walk, under the control of said defendant and that it was the duty of the defendant to see that the same was erected in a proper manner and kept in proper repair as one of the public ways of the city." The complaint further alleged: "That such accident was caused by reason of the defective, unsafe and dangerous walk at said point, in that said walk was not laid gradient, as hereinbefore described, which exposed a surface which was dangerous at all times and when wet or icy or covered with soft snow was an exceedingly dangerous walk. That at the time of such accident such dangerous place was concealed by loose light snow and underlying such light snow and upon the slanting piece of walk was a coating of ice. That this plaintiff while walking upon and over said sidewalk at said point on account of such dangerous, unsafe and defective condition of said walk, was caused to slip upon said inclined and slanting surface of said walk and to fall heavily and that by reason thereof she sustained severe injuries as follows." The complaint further alleged that the ordinances provided that it was the duty of the city to keep the sidewalks "free and clear of ice and snow." The amendments to the complaint which were allowed before the trial were as follows: By adding to paragraph 3, after the word "block," the words, "and was not laid gradient when constructed." And the following words at the end of said paragraph: "which defect has continued for a number of years last past and of which defect the defendant had due notice." Further, by adding to paragraph 4 the following: "And that said defendant negligently and carelessly permitted the said walk described in paragraph 3, to be constructed with a sharp slope of six inches or more rise and negligently permitted the same to remain in such defective condition well knowing that such walk as so constructed and used was unsafe for the use of pedestrians." Defendant objected to the amendment on the ground that it entirely changed the cause of action. The contention is that the original cause of action was one for damages arising out of the failure of the city to enforce its ordinances relating to the construction of sidewalks, and that the amended complaint states a cause of action against the city for negligence in permitting the sidewalk to remain in a defective and dangerous condition

for an unreasonable time after notice of the existence of such condition. We are far from conceding the soundness of this contention. The original complaint, when liberally construed, seems to outline a cause of action growing out of a defective construction of the walk and permitting it to remain in that condition. The allegations are not definite in that regard, but the intention of the pleader to do so is evident. The original complaint and the amended complaint allege the same injury through a defect of the same sidewalk. Whether the two technically allege a different cause of action is immaterial. The statute permits such amendments in furtherance of justice. Section 5297, Revised Codes of 1899. The amended complaint makes it clear that the negligence of the city in constructing the walk and negligently permitting it to continue in a dangerous and defective condition was relied upon as the cause of the injury.

Conceding, however, that the amendment set forth a different cause of action in the strict technical sense, it was properly allowed. The amendment did not substantially change the plaintiff's claim. This court has recently had a similar amendment under consideration and after mature deliberation held that an amendment changing a cause of action from one based on the common-law liability of a railway company to one based on the failure to comply with the statutory duty to fence its right of way was properly allowed in justice court. In that case it was said: "The object of statutes of this character is to facilitate and insure a full, fair and speedy determination of the actual claim or defense on the merits by requiring the court to permit the pleadings to be amended if for any reason they do not fully and fairly present all the facts essential to the real merits of the claim or defense. It is clear, therefore, that an amendment of the complaint is not objectionable merely because it introduces a new or different cause of action in the technical meaning of that term." Rae v. Railway Co. (N. D.) 105 N. W. 721. That case is decisive of this, and is adhered to as a correct construction of the statute, which should always be liberally construed in favor of the amendments. It cannot be successfully contended that the amendment was a surprise to the defendant which would justify the postponement of the trial. The defendant's attorney was served with a copy of the amended complaint three days before the day that had been fixed for the trial of the action. When

the amendment was granted by the court, the plaintiff's attorney consented, and the court offered to set the cause at the foot of the calendar, which would have postponed the trial seven to ten days from the allowance of the amendment. Defendant's attorney did not accept the offer, preferring to stand on the affidavit on which he based his request for a continuance. Under the circumstances the affidavit showed no meritorious ground for a continuance over the term, and it was not error to proceed with the trial. Postponements are always in the court's discretion, and there certainly was no abuse thereof in this case.

The defendant assigns as error to refusal of the court to strike the cause from the calendar on his motion. The ground of this motion was that no notice of trial had been served, nor a new note of issue filed after the amended complaint was allowed. The statute governing notices of trial provides, among other matters, not material here, that "there need be but one notice of trial and one note of issue, and the action must then remain on the calendar until disposed of." No cases are cited in support of the contention except the decisions of the courts of New York. The New York statute is materially different and does not contain the controlling provision in favor of the district court's ruling that "there need be but one notice of trial." It is difficult to construe this provision with effect if every amendment of the complaint must be followed by a new notice of trial. It would necessitate reading an exception into the statute to so hold. The Supreme Court of South Dakota has held adversely to defendant's contention under the same statute. J. I. Case Threshing Machine Co. v. Eichinger (S. D.) 91 N. W. 82.

Exception was taken to the overruling of an objection to the following question asked of a physician: "Is a broken leg like that liable to be weak for a while and cause trouble if used much?" The use of the word "liable" is objected to as permitting a possibility to be considered in estimating damages. In an instruction the word would be improper as results that will follow with reasonable certainty only are to be considered in fixing the damages to be allowed. The use of this or similar words in questions is generally improper, but the answer to the question makes it clear that no prejudice could result from asking the question. The answer was: "It ought not after it was perfectly united, it ought not to cause much trouble. There might be slight pain at the

point of fracture, but in reasonable time it ought to be entirely well." The testimony showed that the fractured bone had thoroughly united and that nine months had elapsed between the injury and the trial. The answer was not indefinite as to the continuing effects of the injury in cases generally. The effect of the answer was that the leg would not be weak nor cause trouble after a reasonable time after the bone had perfectly united.

Objection was made to the following question and overruled: "Doctor, assuming that she broke the leg by reason of the fall that she suffered on the sidewalk, would such a fall, or might such a fall cause internal injuries or strains that would produce pains of the character that she was complaining of?" The witness answered: "It might be possible." Prior to giving this answer the witness had testified on cross-examination concerning these other injuries or strains in the plaintiff's side and back, and had treated her for the same. The plaintiff had testified that she had suffered such pains and that they were caused by the fall. The question objected to related solely to the cause of such pains and whether they were or might be the result of the fall. It was nothing more than a hypothetical question propounded to an expert witness as to the cause of pains concerning which the plaintiff had testified, and was corroborative of her answers to some extent.

Two other questions were objected to and the objections overruled. They were similar to those just considered. To one of them the answer was not prejudicial if the question be conceded to be objectionable. The other pertained to the cause of certain existing conditions which had been testified to by the plaintiff, and did not refer to the further continuance of such conditions.

The judgment is affirmed. All concur.

(107 N. W. 197.)

THE FIRST NATIONAL BANK OF LISBON v. BANK OF WYNDMERE.

Opinion filed June 28, 1906.

Bills and Notes — Payment of Forged Check — Recovery Back.

1. The drawee of a forged check who has paid the same without detecting the forgery, may upon discovery of the forgery, recover the money paid from the party who received the money, even though the latter was a good faith holder, provided the latter has not been misled or prejudiced by the drawee's failure to detect the forgery.

Same — Burden of Proof.

2. The burden of showing that he has been misled or prejudiced by the drawee's mistake in such a case rests upon him who claims the right to retain the money for that reason.

Appeal from District Court, Richland county; *Allen*, J.

Action by the First National Bank of Lisbon against the Bank of Wyndmere. Judgment for defendant, and plaintiff appeals. Reversed.

Rourke, Kvello & Adams, for appellant.

A party who pays a forged check does so at his peril; and, if by means of his indorsement and use of the same he thereby obtains money from another he is liable for the money so received. First National Bank of Crawfordsville v. Indiana National Bank of La Fayette, 30 N. E. 7, 808, 51 A. S. R. 221; Ellis v. Ins. Co., 4 Ohio. St. 682, 64 Am. Dec. 610; Bank v. Franklin, 17 A. S. R. 884; Germania Bank v. Boutell, 62 N. W. 327, 57 Am. St. Rep. 519; First National Bank of Orleans v. State Bank of Alma, 36 N. W. 289; McKelroy v. Sou. Bank of Ken., 14 La. Ann. 458, 74 A. D. 438; Nat. Bank of North America v. Bangs, 106 Mass. 441, 8 A. R. 349; Souvant v. San Antonio National Bank, 63 Tex. 610; First National Bank v. Ricker, 71 Ill. 439; 22 A. R. 104; Bowles on Banks and Depositors, section 189; 2 Parsons, Notes and Bills, 80; note 17, A. S. R. 890.

The party seeking recovery need give only reasonable notice after he discovers the forgery. 2 Daniel, Neg. Inst., section 1372; 2 Morse, Banks and Banking, section 487; Ellis v. Insurance Co., supra; cases cited in note, 17 A. S. R. 899.

Purcell & Divet, for respondent.

A payee bank cannot recover of a good faith holder. First Nat'l Bank of Marshalltown v. Marshalltown State Bank, 77 N. W. 1045; Neal v. Coburn, 92 Me. 139, 69 Am. St. Rep. 495; Chiam v. Bank, 36 S. W. 387; Moody v. Bank, 46 S. W. 660; Bank v. Perton, 39 S. W. 223; Woods v. Bank, 40 S. E. 720; Price v. Neal, 3 Burrows, 1355; Redington v. Woods, 45 Cal. 406; Bank v. Parker, 71 Ill. 430; Bank v. Bank, 13 S. W. 339; Bank v. Bank, 38 N. E. 739; Ins. Co. v. Bank, 60 N. H. 442; Bank v. Bank, 10 Vt. 141; Nat'l Park Bank v. Ninth Nat'l Bank, 46 N. Y. 77; Germania Bank v. Boutell, 62 N. W. 327; 5 Am. & Eng. Enc. Law (2d Ed.)

1071; Bank of the U. S. v. Bank of the State of Georgia, 10 Wheat. 333, 8 L. Ed. 334; Bank v. Bank, 17 Mass. 41.

ENGERUD, J. This is an appeal from an order sustaining a demurrer to the complaint on the ground that it does not state a cause of action. The complaint states the following facts: The plaintiff and defendant are banking corporations, located, respectively, at Lisbon and Wyndmere, in this state. On July 1, 1905, the defendant caused to be presented to plaintiff for payment a forged check purporting to have been drawn by Bixby & Marsh upon the plaintiff bank in favor of Theodore Larson for $60.25, dated June 27, 1905, and indorsed in blank by the payee. It also bore the indorsement of the defendant, and each of the several banks through whose hands it had passed in the usual course of transmission from defendant to plaintiff. Each indorsing bank had expressly guaranteed the genuineness of previous indorsements. Bixby & Marsh were depositors in plaintiff bank, and had to the credit subject to check a sufficient amount to pay the check in question. The plaintiff bank, believing the check genuine, paid it and charged it to the account of Bixby & Marsh. The name of this firm had been forged, but this fact was not discovered until July 20th when Bixby & Marsh, who were ranchmen living more than 20 miles from Lisbon, called at the bank and examined the canceled vouchers. Bixby and Marsh declined to allow credit to plaintiff for the spurious voucher. Immediately on that day, the plaintiff notified the defendant bank of the forgery, and demanded repayment; at the same time returning the forged check to defendant. The defendant refused to refund. Judgment is demanded for the amount of the check and interest.

The question presented by this case is one that has never heretofore come before this court. It will be noticed that the complaint does not charge the defendant with any bad faith or neglect of duty in indorsing and putting in circulation the forged check, and we must therefore assume that the defendant indorsed, and caused the check to be presented for payment in good faith in the mistaken belief that it was genuine. The plaintiff upon whom the check was drawn, accepted and paid the check under the same mistaken belief that the drawer's signature was genuine. If we had not read the numerous cases which have been cited dealing with this question, we would have thought the proposition was a very plain one, readily solved by the application of fundamental principles

of law and common sense. The plaintiff had received from the defendant without consideration a sum of money which it was not rightfully entitled to, and the sole moving cause which induced the exchange of money for the spurious check was the mutual mistake of the parties to the transaction with respect to the genuineness of the writing. In the absence of any showing that the defendant had been misled or prejudiced by the plaintiff's mistake so as to render it inequitable to compel repayment, the defendant ought to refund the money had and received. Unfortunately, however, this just and simple solution of what seems to us a plain proposition, has not generally prevailed. A number of courts have laid down the unqualified rule that where the drawee of a check to which the name of the drawer has been forged, pays it to a bona fide holder, he is bound by the act, and cannot recover the payment. National Park Bank v. Ninth National Bank, 46 N. Y. 77, 7 Am. Rep. 310. The reason generally assigned to justify the adoption of this rule is stated in Germania Bank v. Boutell, 69 Minn. 189, 62 N. W. 327, 27 L. R. A. 635, 51 Am. St. Rep. 519, as follows: "The money of the commercial world is no longer coin. The exchanges of commerce are now made almost entirely by means of drafts and checks. It was largely in deference to this fact that the recovery of money paid on paper of this kind to which the drawer's signature was forged, was made an exception to the general rule as to the recovery of money paid under a mistake of fact. In view of the use of this class of paper as money, it was considered that public policy required that as between the drawee and good-faith holders, the drawee bank should be deemed the place of final settlement, where all prior mistakes and forgeries should be corrected and settled once for all, and if not then corrected, payment should be treated as final; that there must be a fixed and definite time and place to adjust and end these things as to innocent holders; and that time and place should be the paying bank and the date of payment and that if not done then, the failure to do so must be deemed the constructive fault of the payee bank, which must take the consequences." According to this line of cases the whole duty and risk of determining the genuineness of a draft or check rests upon the drawee, and as Lord Mansfield is reported to have said in Price v. Neal, 3 Burr. 1354, the holder "need not inquire into it," provided he acquired the paper for value in good faith. Bank of St. Albans v. Farmers' & Me-

chanics' Bank, 10 Vt. 141, 33 Am. Dec. 188; Neal v. Coburn, 92 Me. 139, 42 Atl. 348, 69 Am. St. Rep. 495; Deposit Bank v. Fayette National Bank, 90 Ky. 10, 13 S. W. 339, 7 L. R. A. 849; Bernheimer v. Marshall, 2 Minn. 78 (Gil. 61), 72 Am. Dec. 89. Of this extreme view it is well said in 2 Morse on Banking (4th Ed.) section 464: "This doctrine is fast fading into the misty past, where it belongs. It is almost dead, the funeral notices are ready, and no tears will be shed, for it is founded in misconception of the fundamental principles of law and common sense."

Most of the courts now agree that one who purchases a check or draft is bound to satisfy himself that the paper is genuine; and that by indorsing it or presenting it for payment or putting it into circulation before presentation he impliedly asserts that he has performed this duty. Consequently it is held that if it appears that he has neglected this duty, the drawee, who has, without actual negligence on his part, paid the forged demand, may recover the money paid from such negligent purchaser. The recovery is permitted in such cases, because, although the drawee was constructively negligent in failing to detect the forgery, yet if the purchaser had performed his duty, the forgery would, in all probability, have been detected and the fraud defeated. Gloucester Bank v. Salem Bank, 17 Mass. 33; Bank of U. S. v. Bank of Georgia, 10 Wheat. 333, 6 L. Ed. 334; National Bank of America v. Bangs, 106 Mass. 441, 8 Am. Rep. 349; First National Bank of Danvers v. First National Bank of Salem, 151 Mass. 280, 24 N. E. 44, 21 Am. St. Rep. 450; First National Bank v. Ricker, 71 Ill. 439, 22 Am. Rep. 104; Rouvant v. Bank, 63 Tex. 610; Bank v. Bank, 30 Md. 11, 96 Am. Dec. 554; People's Bank v. Franklyn Bank, 88 Tenn. 299, 12 S. W. 716, 6 L. R. A. 724, 17 Am. St. Rep. 884; Ellis & Morton v. Trust Co., 4 Ohio St. 628, 64 Am. Dec. 610; Bank v. Bank, 58 Ohio St. 207, 50 N. E. 723; Bank v. Bank, 22 Neb. 769, 36 N. W. 289, 3 Am. St. Rep. 294; Canadian Bank v. Bingham, 30 Wash. 484, 71 Pac. 43, 60 L. R. A. 955. While all these authorities agree that negligence on the part of the purchaser in taking a forged check subjects him to liability for the loss, they are not in accord as to what constitutes such negligence. These authorities, it seems to us, have had the effect of substituting uncertainty and confusion for a rule which, although manifestly arbitrary and unjust, had at least the merit of simplicity and clearness. It must be conceded that the majority of the

courts that have passed on the question are committed to the doctrine that the drawee who has paid a spurious check can recover the payment from a good-faith holder only when the latter had been negligent. If the law of this state is to be determined by the mere weight of authority alone, as evidence by the decisions in other states, then we should be constrained to hold that this complaint shows no liability on defendant's part, because it does not show that the defendant has been in any degree negligent.

However valuable the decisions of courts in other jurisdictions may be as guides to aid us in coming to a correct decision, it cannot be admitted that such decisions, however numerous and uniform, conclusively establish the law in this jurisdiction. They are, after all, only arguments in support of the views entertained by the judges who uttered them. Unless the doctrines advocated by them have become part of the law of this state by the adoption of them by positive law or general usage and opinion, they must be received and considered by us merely as arguments to be weighed, and adopted or rejected according as we deem them sound or unsound. If, in our opinion, a doctrine advocated by the courts of other states is an unwarranted departure from the fundamental principles of law, it is our duty to reject it, unless the rule so advocated, even though fundamentally erroneous, has become part of our common law by general usage and custom; or has been expressly or impliedly made part of our law by statute. There has been no statutory adoption of such a rule, and we have no hesitation in saying that there is no general usage or custom prevailing in this state that the checks and drafts of individuals shall circulate, and be treated and dealt with as bank or government currency. Yet, as indicated by the language quoted from the Minnesota decision (Germania Bank v. Boutell, supra), the rule that the drawee must save in exceptional cases, bear the consequences of his mistake in honoring a spurious check, was adopted in deference to such a supposed usage. The fact that the cases advocating this doctrine all cite as authority Bank of U. S. v. Bank of Georgia, 10 Wheat. 333, 6 L. Ed. 334, and Gloucester Bank v. Salem Bank, 17 Mass. 33, which involve forged bank notes, shows that the rule rests on the assumption that the checks and drafts of individuals are to be placed in the same class with bank bills which are issued and intended to circulate as money. There is no statute or business usage in this state to warrant that assumption. The decisions which ad-

vocate the rule that a drawee may recover in case of negligence on the part of the holder who presents and receives payment of a spurious check, all recognize the fallacy of those decisions which apply the same rule to checks and drafts as is applicable to bank notes which circulate as money. Yet, strange to say, nearly all of them expressly or impliedly accept as true the proposition that a drawee of a check or draft should be excepted from the operation of that fundamental rule which permits one who parts with money by mistake to recover it from one who in equity and good conscience ought not to retain it. They simply hold that this exception should not apply in cases where the purchaser or indorsee was negligent in not taking proper precautions to guard against forgery. It is evident at a glance that this proposition, which these cases thus accept as proper, has no other foundation than the same premise which they very properly hold to be fallacious—namely, that checks and drafts on banks or individuals should be governed by the same rules as apply to bank notes which circulate as money. If it is conducive to the best interests of the business world to put checks and drafts on the same footing as bank currency, and if it would tend to make checks and drafts a more safe and convenient circulating medium of exchange, to shift the whole risk of loss by forgery upon the drawee instead of letting it rest upon those who are credulous enough to assume the risk of parting with value for such paper, the legislative branch of the government can be trusted to establish that rule, if such a radical departure from fundamental principles of law is deemed wise. The court has no power to do so.

Being convinced, as we are, that this doctrine advocated by the great majority of the cases which have come to our attention, to the effect that a drawee of a check should be excepted from the ordinary rules relating to the right to recover money paid by mistake, is unsound and has never been adopted in this state by usage or statute, it would be nothing less than usurpation of legislative power by this court to declare that rule to be the law of this state because courts in other states have so held. That the rule in question is unsound in principle and unjust, is almost universally admitted, and the courts are showing an increasing tendency to discard it. We think, therefore, that we are showing no disrespect to precedent in taking the stand towards which the modern decisions are unmistakably tending, and from which it is generally

conceded there should have never been any departure. We, therefore, reject as unsound the doctrine that a drawee of a check should be excepted from the general rule in relation to the recovery of money paid by mistake. The drawee is presumed to know the signature of the drawer of the check or draft; and the holder of such check or draft who has acquired it in good faith has the right to act in reliance on that presumption, provided he himself has omitted no duty, the performance of which would have prevented the success of the fraud. Consequently, if the drawee pronounces the check genuine by paying it or otherwise honoring it, the holder who has acted in good faith and without negligence, may safely rely upon the judgment of the drawee, and act accordingly. The drawee cannot, under such circumstances, recall his acceptance or payment to the detriment of the party who has rightfully relied upon his decision. In such a case the party who received the money has the superior equity, and he may justly retain the money, although he was not originally entitled to receive it.

But, as is usually the case, when the party who has collected the check had previously cashed it or taken it in exchange for commodities, there is no reason why he should not refund. Every one with even the least experience in business knows that no business man would accept a check in exchange for money or goods unless he is satisfied that the check is genuine. He accepts it only because he has proof that it is genuine, or because he has sufficient confidence in the honesty and financial responsibility of the person who vouches for it. If he is deceived he has suffered a loss of his cash or goods through his own mistake. His own credulity or recklessness, or misplaced confidence was the sole cause of the loss. Why should he be permitted to shift the loss due to his own fault in assuming the risk, upon the drawee, simply because of the accidental circumstance that the drawee afterwards failed to detect the forgery when the check was presented? Our views find much support in many of the cases which still cling more or less tenaciously to the negligence rule, notably the following: Bank v. Bank, 151 Mass. 280, 24 N. E. 44, 21 Am. St. Rep. 450; Ellis & Morton v. Trust Co., 4 Ohio St. 628, 64 Am. Dec. 610; Bank v. Bank, 88 Tenn. 299, 12 S. W. 716, 6 L. R. A. 724, 17 Am. St. Rep. 884; Bank v. Bingham, 30 Wash. 484, 71 Pac. 43, 60 L. R. A. 955; Bank v. Bank, 22 Neb. 769, 36 N. W. 289, 3 Am. St. Rep. 294; Bank v. Bank (Ind. App.) 30 N. E. 808, 51 Am. St. Rep. 221; The case of

McKleroy & Bradford v. Southern Bank, 14 La. Ann. 458, 74 Am. Dec. 438, directly supports our views, and we are gratified to note that our views are in accord with those generally advocated by the text-writers. We, therefore, hold that drawees of checks and drafts are not to be excepted from the general rule which permits the recovery of money paid by mistake. We hold that a drawee who has by mistake paid a spurious check or draft may recover the money paid unless the party receiving the money has been misled to his prejudice by the drawee's mistake. If any such facts exist, they are best known to the defendant, and it is his duty to prove them. The complaint discloses prima facie cause of action by alleging the payment by mistake.

The order appealed from must be reversed, and the demurrer overruled. All concur.

(108 N. W. 546.)

THE HOUGHTON IMPLEMENT COMPANY, A CORPORATION, v. FRANK VAVROSKY.

Opinion filed November 5, 1906. Rehearing denied December 12, 1906.

Pleading — Answer — Conclusion.

1. An answer states no defense when no facts are set forth as a basis for the conclusions pleaded.

Sales — Warranted to Work Satisfactorily.

2. A written warranty that an engine will work satisfactorily and develop specified power is a warranty that the engine will work satisfactorily in all respects, and the warranty is not limited to the development of power only.

Same — Construction.

3. A warranty that a machine will work satisfactorily means that it will work satisfactorily to the purchaser.

Same — Rescission — Disaffirmance and Return of Property.

4. A rescission of a contract of sale on an engine cannot be consummated by a mere disaffirmance thereof, but such disaffirmance must be followed by a return of the engine unless a return be waived by the seller or the contract otherwise provides.

Judgment Notwithstanding the Verdict.

5. A motion for judgment notwithstanding the verdict should not be granted unless the record shows not only that the verdict is not sustained by the evidence, but also that there is no reasonable probability that defects in proof or pleadings can be remedied on a new trial.

Appeal from District Court, Walsh county; *Goss*, J.

Action by the Houghton Implement Company against Frank Vavrosky. Judgment for defendant, and plaintiff appeals.

Reversed.

J. H. Bosard, for appellant.
Jeff M. Myers, for respondent.

MORGAN, C. J. This is an action on an alleged breach of a contract for the sale of a gasoline engine. The plaintiff was the general agent of the Kansas City Hay Press Company, the manufacturer of the engine, and is now the owner of the contract made by defendant with said Kansas City Hay Press Company, and of the indebtedness alleged to be due under said contract. The complaint alleges the giving of an order by defendant for said engine and

the delivery thereof to him, and that he has failed and refuses to execute and deliver notes for the purchase price of said engine, and a mortgage to secure the same as agreed to on the order, and refuses to pay said debt to plaintiff's damage in the sum of $1,600.

The answer admits the giving of the order and the delivery of the engine to him and the refusal to execute the notes and mortgage. As a defense it is alleged that the order contained an express guaranty that the engine would give perfect satisfaction, if properly handled. That the engine was purchased to be used as a sample engine by defendant as agent for the Kansas City Hay Press Company, at Pisek, N. D. That, upon testing said engine, it was ascertained that it was not at all as represented and "that it is wholly lacking in power to do the work of the ordinary 18-horse-power engine, and that it was of no use as a general purpose threshing engine. That when defendant ascertained that the engine did not comply with the warranty upon which it was ordered, he notified the Kansas City Hay Press Company and the plaintiff that he would not settle for the same. Plaintiff thereupon agreed that it would procure the Kansas City Hay Press Company to overhaul said engine, and put it in first-class shape to do the usual work of the ordinary 18-horse-power threshing engine before the commencement of the threshing season of 1902, and that plaintiff failed to do so until nearly the close of said threshing season of 1902. That, in consequence of said failure to repair said engine within the time specified, defendant notified the plaintiff that he would not settle for nor accept said engine, and that he held it subject to its order. The jury found for the defendant. A motion for a new trial, and a motion for judgment notwithstanding the verdict were made and denied. The denying of these motions and alleged errors in the admission of certain evidence on the trial are urged as grounds for a reversal of the judgment.

The guaranty under which the machine was sold was in the following language: "We fully guaranty our engines to give perfect satisfaction if properly handled, and every engine shipped to develop its full rated actual power at brake, and in case of its being questioned, we will send a man at any reasonable distance to take the brake test, which shall be done by standard methods, and in case we fail to demonstrate its full rated power, providing the engine is in proper order, we will remove same or replace it

with another that will give the power, all at our own expense. The purchaser, however, to stand the expense, if, on the other hand, we do demonstrate that the power is as represented." Plaintiff contends that this is a guaranty of the capacity of the engine only, and that if the evidence shows that the engine developed its full rated actual power at brake, then the warranty was fulfilled and the defendant could not have been in good faith dissatisfied with the engine. We do not think that this is a reasonable construction of the warranty. The warranty covers two distinct matters. The first refers to the engine generally, and that it would work to defendant's perfect satisfaction; (2) that it would develop its full rated actual power at brake upon a test. This construction of the warranty gives effect to each clause thereof. It would be a forced construction to hold that the second part of the warranty is a limitation upon the first, as that would render the first clause meaningless. If, upon a test of the engine it developed its full rated power at brake, the warranty would be fulfilled, without regard to the fact whether it worked satisfactorily or not. Other causes might render the work of the engine unsatisfactory, although it might develop the capacity of power warranted. The warranty that the engine would work satisfactorily means that it would work satisfactorily to the purchaser. See Garland v. Keeler (N. D.) 108 N. W. 484, and cases cited. Also. Stutz v. Loyal Hanna Coal & Coke Co., 131 Pa. 267, 18 Atl. 875; Singerly v. Thayer, 108 Pa. 291, 2 Atl. 230, 56 Am. Rep. 207; Haney-Campbell Co. v. Preston Creamery Ass'n, 119 Iowa, 188, 93 N. W. 297; B. & O. Ry. Co. v. Brydon, 65 Md. 198, 611, 3 Atl. 306, 9 Atl. 126, 57 Am. Rep. 318. It is claimed that the defendant did not plead in his answer that the engine did not work satisfactorily except as to its incapacity to develop sufficient power. The answer does not plead in express terms that the engine did not do satisfactory work. The answer alleges that the engine "was of no use as a general purpose threshing engine," and that it wholly failed to comply with the warranty, but no facts are pleaded on which a claim can be based in good faith that the engine did not do satisfactory work aside from its failure to develop its rated power, equal to an 18-horse-power engine. The answer, therefore, did not allege facts on which a failure of the warranty in this respect could be predicated.

The evidence shows beyond any question that the engine failed to work satisfactorily during the threshing season of 1901. This fact is of no consequence in view of the fact that the plaintiff agreed to either furnish an engine capable of more power, or to repair the one in defendant's possession so that it would develop more power, and to do so in time for the threshing season of 1902 Hence the stipulations of the warranty were waived by mutual consent in 1901, and the engine allowed to remain in defendant's possession until the 1902 season. The defendant claims that the plaintiff failed to comply with this new contract until after the threshing season had nearly passed in 1902. Plaintiff claims that defendant was to give it thirty days' notice before the time that he would want the engine repaired or replaced. Plaintiff claims that this notice was not given. It is unnecessary to determine which of these contentions is true. It may be conceded for the purpose of this appeal that both contentions would be decided in defendant's favor. There must be a new trial, in any event. The defendant has not returned the engine to the plaintiff, pursuant to the contract, nor has the plaintiff waived such return. The defendant claims that he rescinded the contract, and insists in his argument that the engine was sold to another party in the fall of 1901, and that plaintiff authorized such sale, and that no return of the engine was therefore contemplated by the parties under the new agreement, and that the original contract was thereby waived. The evidence will not sustain the fact that a sale was made in 1901. There was considerable correspondence in respect to a sale, but defendant's evidence shows conclusively that there was no such sale. From a certain letter written by defendant to plaintiff on October 22, 1901, that fact might be inferred if the letter is alone examined. Defendant's evidence, however, completely refutes such inference. Defendant testified on the trial as follows: "I wrote them about it, and I said they had to do something over that engine if they wanted me so I could sell it before harvest, so that they could try it, fix it, or do something with it. That was soon after the 8th of May, 1902." This testimony refutes the inference contained in his letter of October 22, 1901, where he say that "parties will settle for engine as soon as it runs satisfactorily," and shows that the engine was in his possession and for sale by him about May, 1902.

The evidence shows that the engine was repaired in the fall of 1902, but defendant still refused to settle for it, and based his refusal solely on the ground that it was not repaired before the threshing season had commenced. He claims that he rescinded the contract for that reason. No effort was made to show that the engine was returned. No rescission would be effectual unless the engine was returned. Defendant cannot retain the engine, and resist payment of the price. Upon failure of the plaintiff to repair the engine in pursuance of the new agreement, if such was the case, defendant should have promptly returned the engine unless a return was waived. There is no evidence of such waiver so far as a return under the new contract is concerned. For that reason a new trial should have been granted. Whether there was competent evidence under which the jury might have found that the engine failed to comply with the warranty as to the development of the power therein specified, it is not necessary to determine, nor is it necessary to consider the assigned errors in the admission of evidence. It was not error to deny the motion for judgment notwithstanding the verdict. The evidence does not show that the defendant cannot recover a verdict in his favor under any conditions. A judgment notwithstanding the verdict can be rendered only in cases where it appears that a party is precluded from recovering by reason of some conclusive fact, not subject to amendment or of being supplied on another trial. Richmire v. Andrews & Gage El. Co., 11 N. D. 453, 92 N. W. 819; Meehan v. G. N. Ry. Co., 13 N. D. 432, 101 N. W. 183.

The judgment is reversed, a new trial granted, and the cause remanded for further proceedings according to law.

KNAUF, J., concurs. ENGERUD, J., absent and not participating in the decision.

(109 N. W. 1024.)

IN THE MATTER OF THE ESTATE OF DAVID LEMERY, DECEASED. MINNIE MATHIE ET AL. v. MARY EMMA LEMERY.

Opinion filed January 23, 1906. Rehearing denied March 13, 1906.

County Courts — Form and Contents of Judgment.

1. In county court the final decree consists of the findings of fact, conclusions of law and statement of the relief awarded, and all these should be embodied in one document, signed by the judge, and filed.

Same.

2. In a proceedings in the county court for the probate of a will, the county court, following the practice prevailing in the district court, made and filed findings and conclusions, and subsequently made and filed a separate document purporting to be the judgment. *Held,* that this so-called judgment should be regarded as a completion or amendment of the previous document containing the findings, and that both documents, taken together, constitute the final decree.

Appeal — Notice — Construction.

3. A notice of appeal, dated and served after the perfection of the decree, clearly indicating that the appellant desired to appeal from the whole final decree in said proceedings, and describing the decree as one dated the day the findings and conclusions were filed, should be construed to be a notice of appeal from the final decree, and not from the findings and conclusions alone.

Same — Amendment of Notice.

4. The county court has power, in furtherance of justice, to permit the service of an amended notice of appeal to the district court, after the statutory time for appeal has expired, where the appeal was taken in good faith in the proper time, but by mistake the original notice was technically defective by reason of the omission of some of the necessary parties.

Appeal from District Court, Grand Forks county, *Fisk,* J.

In the matter of the estate of David Lemery, deceased. From an order denying the probate of the will, Mary Emma Lemery appealed to the district court, and from an order of the district court, refusing to dismiss the appeal, Minnie Mathie and others appeal.

Affirmed.

Skulason & Skulason, for appellants.

An appeal in county court does not lie from findings and conclusions, but only from a decree or order affecting a substantial right. Setions 6254, 6223 and 6235, Rev. Codes 1899.

If the findings and conclusions are construed as an order for judgment, an appeal does not lie. 2 Cyc. 616, 624; In re Weber, 4 N. D. 119, 59 N. W. 523, 28 L. R. A. 621; Field v. Great Western El. Co., 5 N. D. 400, 67 N. W. 147; In re Eaton, 4 N. D. 514, 62 N. W. 597; Oliver v. Wilson, 8 N. D. 590, 80 N. W. 757; Sheppard v. Pettit et al., 14 N. W. 511; Webster Glover Co. v. St. Croix, 24 N. W. 417; Robinson v. Mutual Life Co., 49 N. E. 645.

Failure to make the executors and petitioners parties to the appeal is fatal. 2 Cyc. 762, 763; 2 Enc. Pl. & Pr. 182; section 6255.

Rev. Codes; In re Wheaton's estate, 32 Pac. 970; Hiram Bellows' Estate, 60 Vt. 224.

Standish & Barry and *Tracy R. Bangs,* for respondent.

The executors not having a substantial interest in the appeal were not proper parties. Hewitt's Appeal, 58 Conn. 226; Dickerson's Appeal, 55 Conn. 223; Andres v. Andres, 46 N. J. Eq. 528; Parker v. Reynolds, 32 N. J. Eq. 293; People v. N. Y. Central Railway, 29 N. Y. 418; Rahn v. Gunnison, 12 Wis. 528.

An executor receives his authority from the appointment by the court and not from the will. Wall v. Bissell, 125 U. S. 382, 31 L. Ed. 772; Carpenter v. Going, 20 Ala. 587; Hartnett v. Wendell, 60 N. Y. 346; Rand v. Hubbard, 4 Metc. 252; Gay v. Minot, 3 Cush. 352; Stagg v. Green, 47 Mo. 500; Schoenberger's Ex'rs. v. Institution, 28 Pa. St. 459-66; Kittridge v. Folsom, 8 N. H. 98; In re Flandrow, 92 N. Y. 256.

ENGERUD, J. This is an appeal from an order of the district court denying a motion to dismiss an appeal to that court from the county court.

1. N. Gallagher and W. A. Scouton filed a petition in the county court for the probate of the alleged last will and testament of one David Lemery, deceased, which said alleged will named said petitioners as executors thereof. The present appellants opposed the probate of the will, and Mrs. Lemery joined with the petitioners in the effort to establish the validity thereof; she being the principal beneficiary thereunder. A hearing was had in the county court, and on January 23, 1905, that court made and filed a certain document styled "Findings of Fact and Conclusions of Law," in which the findings of the county court on all the issues of the contest were set forth, together with its conclusion of law to the effect that the contestants of the will were "entitled to judgment that the petition for probate be dismissed, with costs," and "that said pretended will is null and void, and that the same be canceled of record and that probate thereof be refused." Thereafter, on the 25th day of January, 1905, without the knowledge of this respondent or her attorneys, a so-called "judgment" was entered in the county court, which was a document in the form required for a judgment in the district court pursuant to findings and conclusions. After the recitals of appearances, etc., it reads as follows: "Now, by virtue of the power vested in this court and in pursuance of the

premises, it is hereby adjudged and decreed that the petition for the probate of said pretended will be, and the same is hereby dismissed and denied, that said pretended will is null and void, and that the probate thereof be, and the same is, hereby denied and refused, and that the same be canceled of record. It is further adjudged that the said contestants have and recover of the said proponents their costs and disbursements in said contest, taxed and allowed at the sum of $67.90." On the next day after the entry of this "judgment," the findings of fact and conclusions of law were served on the attorneys for the proponents of the will, but no notice of the entry of this judgment was served. Thereafter, and on February 7, 1905, Mary Emma Lemery, by her attorneys, served on all the adverse parties a notice of appeal to the district court, and also filed the proper undertaking. The notice of appeal states that the appeal is taken from an order made and entered in the above-described probate proceedings by the county court on January 23, 1905, directing that a certain will, signed by said deceased and offered for probate, be held to be null and void and denied probate, "and the said appeal is taken upon the questions of law and of fact, and in general upon everything involved in determining the legality of said will, and of its being a will of said deceased."

On the 27th of February, 1905, attorneys for the respondents on that appeal served notice that they would apply to the district court on March 7, 1905, for an order dismissing the pretended appeal. The grounds for such motion were that there was a defect of parties appellant on said pretended appeal, in that the petitioners for the probate of the will, Gallagher and Scouton, were not joined as parties appellant therein, and that said pretended appeal had been taken from the findings of the county court, and not from the judgment in said matter, and that said findings and conclusions were not an appealable order. Before this motion was heard the attorneys for Mrs. Lemery applied to the county court for leave to amend the appeal, and to extend the time within which to perfect the same, by being permitted to serve upon Gallagher and Scouton an amended notice of appeal, which would include said petitioners as parties, and also describe the judgment entered January 25, 1905. The court, on March 1, 1905, made an order granting this application and directing that the amended notice of appeal be served upon Gallagher and Scouton and the

other parties in the contest, and that the time for so doing be extended to March 7, 1905. The order also required a further undertaking on appeal. Mrs. Lemery complied in all respects with this order by serving the notice on each of said parties and filing the required additional undertaking on March 2, 1905; and all the papers in relation to these proceedings for amendment were by the county court transmitted to the district court, and were on file at the time the motion to dismiss the appeal was heard.

In support of the motion to dismiss the appeal, counsel argues that the first notice of appeal was merely an attempt to appeal from the findings of fact and conclusions of law, and hence was neither an appeal nor an attempt to appeal from any order or final decree of the county court. This point is not well taken. Counsel calls our attention to section 6296, Rev. Codes 1899, which standing alone, seems to imply that a decree or judgment is to be entered in the county court, separately from the findings and conclusions, the same as in district court. This section, however, must be read in connection with section 6233, which defines what a decree or final order is. It is clear that the "judgment" referred to in section 6296 is the same as or a part of the decree or final order defined in section 6233, as "the final determination of the rights of the parties." It is plain from the reading of section 6233 that the findings of fact, conclusions of law, and the matters which would in district court belong in the judgment are to be embodied in a single document, which constitutes the decree from which an appeal may be taken, under section 6254, Rev. Codes 1899. The method of rendering and entering a decree in county court is wholly different from that prescribed for the district court by the Code of Civil Procedure. In the county court there is no order for judgment. Nor is there any "judgment book" in which the decree or judgment must be entered in the first instance, and which entry is the act which constitutes the rendition of the judgment of the district court. In the district court the original judgment is the record entered in the judgment book, and a copy of this record is attached as a separate document to those containing the findings, pleadings and other papers, which together constitute the judgment roll. In the county court, the findings, conclusions and the statement corresponding to the judgment in the district court are embodied in a single document which constitutes the decree. This decree, after it is made and filed, is transcribed or copied into

a record book in which all orders affecting substantial rights, as well as probated wills, etc., are also recorded. Rev. Codes 1899, section 6193, subdivision 3. In short, in county court, the document signed by the judge and filed, embracing findings, conclusions and judgment, is the original decree, and the record book merely contains a copy, while in district court the reverse is true. It is therefore plain that the decision in re Weber, 4 N. D. 119, 59 N. W. 523, 28 L. R. A. 621, has no application to this case.

The fact that the amount of costs had not been taxed, and were therefore not stated in the decree of January 23d, when it was rendered, is not material. Whether or not the omission of the amount allowed as costs would defeat an appeal we need not decide. See, however, Williams v. Wait, 2 S. D. 210, 49 N. W. 209, 39 Am. St. Rep. 768. The appeal was taken after the costs had been taxed and inserted in the subsequent judgment of January 25th, and we are agreed that that so-called judgment must be held to be a mere completion or amendment of the final order previously made. The decision made on January 23, 1905, was a complete adjudication of the rights of the parties, although somewhat informal and indefinite as to the persons liable for costs. It states clearly that the proceeding was dismissed, with costs. The amount of costs was a mere incidental matter, and could be ascertained and inserted after the decree was rendered, either in a blank left in the decree for that purpose, or the decree could be amended so as to show the amount. The decree ought to have named the persons liable for costs. It follows that the judgment of Januthy 25, 1905, may be regarded as a mere amendment of the decree. It is either that or a nullity, because there can be only one final decree, and, as already stated, that final decree consists of the findings, conclusions, and the statement of the relief granted. All these things ought to be embodied in a single document; but if, by reason of irregular practice, that has not been done, there is either no decree or the several documents must be taken as parts of the single final decree. In this case the record shows that all the issues have been finally determined, and what the final determination was, even as to the incidental amount of the costs. For that reason we hold that the so-called judgment should be considered as a mere completion or amendment of the decree rendered on January 23d. The first notice of appeal clearly showed that the appellant desired to appeal from the final decree in

the case. We think it was proper to describe that decree as one rendered January 23, 1905; but, even if the date was erroneously stated, it would not invalidate the appeal, as the language of the notice left no room for doubt that the appeal was from the final decree. 2 Enc. Pl. & Pr. pp. 216, 217.

It is unnecessary to consider the point urged by counsel that the first appeal was ineffectual because Messrs. Gallagher and Scouton, the original petitioners, who offered the will for probate, were not made parties to the appeal from the county court. The omission of these parties, if it was an error, was cured by the amendment of the appeal proceedings pursuant to the permission to do so granted by the county court on March 1, 1905. Section 6259, Rev. Codes 1899, provides: "When the appellant seasonably and in good faith serves a notice of appeal on some of the parties, but through mistake or excusable neglect, fails to obtain service on all, or in like manner omits to do any other act necessary to perfect the appeal or effect a stay, the county court, upon proof of the facts by affidavit, may, in its discretion, extend the time for perfecting the service or other act and permit an amendment accordingly upon such terms as justice requires." The sufficiency of the facts shown to the county court in support of the application to amend the appeal is not questioned, and in view of the facts disclosed by the record we think the omission of the petitioners from the first notice was excusable, even if they were technically necessary parties.

The order appealed from is affirmed. All concur.
(107 N. W. 365.)

ROY BELEAL, BY E. J. BELEAL, HIS GUARDIAN AD LITEM, v. NORTHERN PACIFIC RAILWAY COMPANY.

Opinion filed May 31, 1904.

Master and Servant — Common Law Liability — Injury to Servant.

1. The evidence shows that there was no common-law liability on the part of the defendant for the plaintiff's injury.

Same— Railroad Employes — Negligence of Co-Employes.

2. Chapter 131, page 178, Laws 1903, making railroad companies liable to an employe for injuries caused by the negligence of a co-employe, applies only to those employes engaged in operating the

railroads, and so exposed to the peculiar damages attending that business.

Same.

3. The work in which the plaintiff and his fellow servant were engaged was not that kind of work to which the statute applies

Appeal from District Court, Barnes county; *Burke,* J.

Action by Roy Beleal, by E. J. Beleal, his guardian ad litem, against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant appeals.

Reversed, and judgment ordered for defendant.

Ball, Watson & Maclay, for appellant.

It was unnecessary to warn plaintiff of dangers which were obvious and which he understood, and the rule applies to minors. Naylor v. C. & N. W. Ry. Co., 11 N. W. 24; Casey v. St. P., M. & O. Ry. Co., 62 N. W. 624; Berger v. St. M. & M. Ry. Co., 38 N. W. 814; Burkley v. Gutta Percha & Rubber Mfg. Co., 21 N. E. 717; Ogley v. Miles, 34 N. E. 1059; Hickey v. Taafe, 12 N. E. 286; Downey v. Sawyer, 32 N. E. 654; De Souza v. Stafford, Mills, 30 N. E. 81; Hightower v. Gray, 83 S. W. 254; Williamson v. Sheldon Marble Co., 29 Atl. 669; Tinkham v. Sawyer, 27 N. E. 6; Herold v. Pfister, 66 N. W. 355; Terry v. Schmidt, 115 Fed. 627; Cirach v. Woolen Co., 15 N. E. 579; Levy v. Bigelow, 34 N. E. 128.

A master need furnish only such appliances as are suitable to accomplish the work. Richards v. Rough, 18 N. W. 785; Sweeney v. Berlin & Jones Envelope Co., 358; Delaware River Works v. Nuttel, 13 Atl. 65; Naylor v. C. & N. W. Ry. Co., supra.

Chap. 131, Laws of 1903, is unconstitutional and void in toto or its purpose and scope must be referred to "railroad hazards" proper. Lavall v. St. P., M. & M. Ry. Co., 41 N. W. 974; Pearson v. C. M. & St. P. Ry. Co., 41 N. W. 34; Johnson v. St. P. & D. Ry. Co., 45 N. W. 156; Weisel v. Eastern Ry. of Minn., 82 N. W. 576; Herrick v. Same, 127 U. S. 210, 8 Sup. Ct. Rep. 1176.

In Minnesota cases holding railroad companies liable, the line of demarcation limiting liability to hazards peculiar to railroads is consistently maintained. Bloomquist v. Gt. N. Ry. Co., 67 N. W. 804; Leier v. Transfer Co., 65 N. W. 269; Nichols v. C. M. & St. P. Co., 62 N. W. 386; Steffenson v. C. M. & St. P. Co., 47 N. W. 1068; Smith v. St. P. & D. Co., 46 N. W. 149; Schus v.

Bowers-Simpson Co., 89 N. W. 68; Iowa sustains the same rule. Pierce v. Cent. Ia. Ry., 34 N. W. 783; Frandson v. Railway Co., 36 Iowa, 372; Deppe v. Ry. Co., 36 Iowa, 52; Nelson v. C. M. & St. P. Ry. Co., 35 N. W. 611; Rayburn v. Cent. Iowa Ry. Co., 35 N. W. 606; Schroeder v. Ry. Co., 47 Iowa, 375.

The statute of Iowa was adopted in Kansas, and the same construction given it there. Missouri, etc., Ry. Co. v. Haley, 25 Kan. 26.

Lee Combs, for respondent.

Where a master orders a servant into dangerous service, without proper warning or instructions, and sometimes where they are given, the employer would be answerable for the minor's injury. 4 Thompson on Neg., section 3818; McMillon Marble Co. v. Black, 14 S. W. 479; Turner v. Norfolk & W. Ry. Co., 22 S. E. 83; Wolski v. Knapp, Stout & Co., 63 N. W. 87; Palmer v. Mich. Cent. R. R. Co., 49 N. W. 613; Allen v. Jakel, 73 N. W. 555; Hoffman v. Adams, 64 N. W. 7; Kailar v. N. W. Bedding Co., 48 N. W. 779.

Whether the minor warned was negligent, or whether there was negligence of the master in failing to warn and instruct, are questions for the jury. Chopin v. Badger Paper Co., 53 N. W. 452; N. Y. Biscuit Co. v. Rouss, 74 Fed. 608; Chicago Am. Pressed Brick Co. v. Reinnieger, 29 N. E. 1106, 33 Am. St. Rep. 249; Hanson v. Ludlaw Mfg. Co., 38 N. E. 363.

The master must provide and maintain reasonably safe places and instrumentalities in which and with which to work. Mayer v. Leibman, 44 N. Y. Sup. 1064; Shoemaker v. Bryant Lbr. Co., 68 Pac. 380; Meyer v. Morgan, 52 N. W. 174; Thomas v. Ross, 75 Fed. 552; Peerpont Fireproof Const. Co. v. Hansen, 69 Ill. App. 659; Knickerbocker Ice Co. v. Bernardt, 95 Ill. App. 23.

Chap. 131, Laws of 1903, is constitutional. Ga. etc., Co. v. Goldwire, 56 Ga. 196; Marsh v. S. Car. R. Co., 56 Ga. 274; So. R. Co. v. Johnson, 114 Ga. 329; Ga. R., etc., v. Hicks, 22 S. E. 613.

Limiting the operation of the law to railroad business proper, it is constitutional. Mo. Pac. R. Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. Rep. 1161, 32 L. Ed. 107; Minn. & St. L. Ry. Co. v. Herrick, 127 U. S. 109, 8 Sup. Ct. Rep. 1176; Ch., M. & St. P. Ry. Co. v. Artery, 137 U. S. 515, 11 Sup. Ct. 129; Chicago, Kan. & W. Ry. Co. v. Pontius, 157 U. S. 209, 15 Sup. Ct. 185.

Persons assisting in loading and unloading railroad material, fixing a dead engine are within the rule as to liability for neglect of coemployes. A. T. & S. F. Ry. Co. v. Koehler, 15 Pac. 567; A. T. & S. F. Ry. Co. v. Brassfield, 32 Pac. 814; Ch., R. I. & P. R. Co. v. Stahley, 62 Fed. 363; 11 C. C. A. 88; Butler v. Ch., B. & Q. R. Co., 54 N. W. 208; Mikkelson v. Truesdale, 65 N. W. 260.

ENGERUD, J. This is an action brought by a minor, who is represented by a guardian ad litem, to recover damages for an injury suffered while in the employ of the defendant railroad company, for which injury he claims the company is liable. He alleges that the injury was caused by negligence for which the company is liable on common-law principles, and also claims that the defendant is liable under chapter 131, p. 178, Laws 1903, because the injury was caused by the negligence of a fellow servant. The trial court denied defendant's motion for a directed verdict, and submitted the question of liability to the jury. There was a verdict for plaintiff, and judgment accordingly. The court denied defendant's alternative motion for judgment notwithstanding the verdict, or for a new trial. The defendant appealed from that order.

The appellant assigns as error the denial of said several motions, and the assignments also question the propriety of the instructions to the jury. There is no dispute as to the facts. The plaintiff, at the time of the injury, December 31, 1903, was 16 years of age and lived with his parents at Valley City, where the accident occurred. He was large and strong for a boy of his age, and intelligent. Some time before the accident, the company had a force of men, in charge of a foreman, at work cutting and removing ice from the Sheyenne river at Valley City, and loading it into cars for the use of the company. The plaintiff was engaged to assist in this labor and had been at work three days before the accident. The blocks of ice were taken from the river to a platform or staging on the bank about 8 feet high. The platform was about 20 feet from the track. The ice was conveyed from this platform to the cars by sliding it down one or the other of three open chutes extending from the platform to the track. A car was placed at the lower end of each chute, so that three cars could be loaded at the same time. Guard rails were fastened on the edges of each chute so as to prevent the blocks of ice from falling off on the sides. The lower end of the chutes did not extend to the edge of the car that was being loaded. The blocks of ice were often broken and crushed in the chute, and it was necessary to have a means

of disposing of the crushed and broken pieces of ice which were constantly accumulating at the bottom of the chute. In order to do this the chutes were so constructed as to leave a space about two feet wide between the lower end of the chute and the edge of the car. When the car was in position, beams were laid across so as to bridge this space. These beams had to be removed and replaced every time a loaded car was to be taken away and an empty one put in position for loading. The broken and crushed ice was pushed or shoveled off the sides of this temporary platform, and a man had to be kept at work on the ground beneath to prevent its accumulation in sufficient quantities to block the track. The plaintiff was so engaged when he was injured by a large block of ice falling upon him, badly crushing and lacerating the muscles of his left leg. The block of ice had been broken in the chute and was unfit to be loaded. One of the workmen above had therefore pushed it off the said temporary platform without warning the plaintiff, who was at work below. Plaintiff asserts that it was an act of negligence, for which the defendant is liable, that no guard rail was constructed so as to prevent the broken ice from being pushed off the platform. This contention is manifestly untenable. Such a guard rail would have defeated the purpose for which the temporary platform was constructed. Moreover, the danger to one underneath would have been just as great whether the ice was pushed off or lifted or thrown off, provided, in either case, there was no warning.

The contention that the defendant is liable because the foreman put this boy to work in this hazardous position, without warning him of the danger, is equally untenable. A boy 16 years of age of ordinary intelligence could not possibly fail to know and appreciate the danger of working underneath the edge of the platform. Any amount of explanation of these dangers would convey no more information than his eyes disclosed. The injury was not the result of any lack of knowledge of the risk, but was wholly due to the negligence of the man above, who pushed the heavy piece of ice off without warning to the boy below.

There was no evidence whatsoever of any negligence imputable to the defendant as a master, on common-law principles. The defendant is liable only, if at all, by reason of the provisions of chapter 131, p. 178, Laws 1903: "Every railroad company organized or doing business in this state shall be liable for all damages done

to any employe of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers, or other employes, to any person sustaining such damage; and no contract which restricts such liability shall be legal or binding." With the exception of the last clause, this statute is a verbatim copy of the Kansas law on the same subject. Comp. Laws Kan. 1879, c. 84, section 20. Though differing slightly in phraseology, it is, in substance, identical with the statute which was in force in Iowa from 1862 to 1872 (section 7, c. 169, p. 198, Laws Iowa 1862), and with the statute enacted in Minnesota in 1887, which is still in force in that state (chapter 13, p. 69, Laws Minn., 1887). It is quite clear, from the title of the act, as well as from the fact that it was evidently borrowed from a sister state where it had been construed, that the word "agent" was not used in a strict sense, but was intended to include employes within its meaning. Giving the word "agent" that meaning, it is clear that the act, if applied literally, is broad enough to impose upon the defendant road company liability for the negligence of the plaintiff's fellow servant. The appellant contends, however, that the language of the act cannot be taken literally. Counsel insists that the act imposes this extraordinary liability upon a railroad corporation only in those cases where an employe is injured by the negilgence of a fellow servant while engaged in some railroad employment which exposes the employes to those hazards which are peculiar to the use and operation of railroads. We agree with counsel's contention. The fact that the statute was evidently borrowed from a sister state, where it had received a settled construction more than 20 years before it was adopted here, is very persuasive evidence that the legislature intended to adopt the construction which the parent statute had received. This law was construed in Kansas in 1881, in the case of Missouri Pac. Ry. Co. 1. Haley, 25 Kan. 35. That court said that the act was borrowed from the Iowa act of 1862, and that, following the construction placed upon it in Iowa, it should be construed to embrace only those persons more or less exposed to the hazardous business of railroading. That construction has been adhered to ever since in that state. The Iowa act of 1862, from which the Kansas act was derived, was construed by the Iowa Supreme Court in 1872, in Deppe v. Railway Co., 36 Iowa, 52. It was held in that case that, if the act were construed literally "so as to apply to all persons in the employ of railroad

corporations, without regard to the business they were employed in, then it would be a clear case of class legislation, and would not apply upon the same terms to all in the same situation." It was accordingly held that the act only applied to employes engaged in a service exposed to the perils incident to the use and operation of railroads. This law was amended in 1873 so as to expressly limit the operation of the act to injuries suffered while engaged in the use and operation of the railroad. Bucklew v. Railway Co. (Iowa), 21 N. W. 103. The Minnesota statute on the subject was adopted in 1887 (chapter 13, page 69, Laws Minn. 1887), and is, in substance, the same as our law, differing only slightly in phraseology. The question as to its construction and constitutionality was squarely presented to the Supreme Court of that state in Lavallee v. Railroad Co., 40 Minn. 249, 41 N. W. 974, decided in 1889. The court held that the act applied "only to those employes engaged in operating the railroads, and so exposed to the peculiar dangers attending that business." That decision has been adhered to ever since in that state through a long line of decisions. There is a strong presumption that our legislature, in adopting the law, knew the construction such a law had received in the state or states from which our law was apparently borrowed, and that presumption affords strong evidence that the legislature intended that it should receive the same construction here. We should, however, hesitate to go outside the language of the act, where its language is unambiguous, for evidence of legislative intent, were we not convinced that to give effect to the act literally would convict the legislature of transgressing the constitutional inhibitions against class legislation.

The state constitution (section 11) declares that "all laws of a general nature shall have a uniform operation." A similar prohibition against class legislation is contained in the last clause of section 20: "Nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens." The object and meaning of these constitutional provisions has been passed upon so often and is so well understood that a discussion of that subject is unnecessary. Corporations are protected by them as well as natural persons. Gulf, etc., Ry. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666. The prohibition against what is popularly styled "class legislation," does not prohibit proper classification or discrimination for

the purpose of legislation. It is not necessary that a law shall operate upon all alike, but, as indicated by the clause quoted from, it must operate alike upon all who are in like situation. The law need not have a universal operation, but it must be uniform. Proper classification is permitted, but arbitrary and unreasonable discrimination is forbidden. Vermont Loan & Trust Co. v. Whithed, 2 N. D. 82, 49 N. W. 318; Edmonds v. Herbrandson, 2 N. D. 270, 50 N. W. 970, 14 L. R. A. 725; Angell v. Cass Co., 11 N. D. 265, 91 N. W. 72. As said by Mr. Justice Brewer, in Gulf, etc., Ry. Co. v. Ellis, 165 U. S. 155, 17 Sup. Ct. 257, 41 L. Ed. 666, in discussing the propriety of discrimination in legislation: "That [classification for legislation] must rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

There can be no doubt that the business of running trains, keeping the tracks in repair, and other similar work connected with the use and operation of railroads—that class of work which may be called railroad work proper—is of a peculiarly hazardous nature, and for that reason may be properly placed in a class by itself to that extent, for the purpose of imposing on the master a greater liability to the employes so engaged and giving the latter greater rights against the master in case of injury, than in other occupations. Such laws have been uniformly sustained. Railway Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; Railway Co. v. Montgomery (Ind. Sup.) 49 N. E. 582, 69 L. R. A. 875, 71 Am. St. Rep. 301; Callahan v. Railway Co., 170 Mo. 473, 71 S. W. 208, 60 L. R. A. 249, 94 Am. St. Rep. 746, and cases cited. Such a classification is proper because the peculiar nature of the work furnishes a proper basis therefor. The statute in question, however, taken literally, as respondent would have us do, purports to put railroad corporations in a class by themselves, simply because they are such corporations, and imposes upon them a liability from which other corporations under like circumstances are exempt, and extends to employes of a railroad, regardless of the nature of their work, certain rights which other laborers engaged in the same kind of work do not enjoy. Take this case as an illustration: There are many other companies besides railroad companies which lay up ice in large quantities for use in their business. If an ice company or a meat packing concern had had

this force of men at work at the same time and place and with the same apparatus, and the injury had been inflicted under the same circumstances, the master would not have been liable for the negilgence of plaintiff's fellow servant. The liability of the ice company or the packing house as a master would be less than that of the railroad company, and the employe of the latter would have more means of redress for his injury than the employe of some other kind of corporation. There is absolutely no difference in the nature of the work, or in the relative situation or condition of the master and employe, between a railroad company and any other company gathering ice for its use. As said by Chief Justice Gilfillan, in Lavallee v. Railroad Co., supra: "But no just reason can be suggested why such difference should be founded, not on the character of the employment, nor of the dangers to which those employed are exposed, but on the character only of the employer." We may add that there is no just reason for such an arbitrary discrimination in favor of the employes of the one class of corporations and against those of another. In Georgia and Wisconsin, it was held that such a discrimination was valid. Ga. Ry. Co. v. Ivey, 73 Ga. 504; Ditberner v. Railway Co., 47 Wis. 138, 2 N. W. 69. In our opinion those decisions wholly fail to answer the objection to such discrimination on the ground of class legislation. The Wisconsin case involved an injury suffered in railroad work proper, and the broad ground taken in that case was unnecessary. It is noticeable, too, that the law involved in that case was repealed in 1880, and the new law on the subject limits the liability of the company so as to make it answerable only for the acts of that class of employes who are engaged in railroad work proper. Sanborn & B. Ann. St. Wis. section 1816a. So far as we have discovered, that limitation is recognized in every state where such laws are in force (with the exception of Georgia), either by the express language of the act or by judicial construction. It is apparent that cases may often arise in which it is a matter of some difficulty to determine whether or not the injury was suffered while engaged in that class of railroad work to which the act applies. This case, however, presents no difficulty in that respect. The fact that the ice was being gathered for the use of the railroad company does not make the work any more hazardous than it would be if some other corporation were the master. It clearly had no connection with the class of railroad work to which the act applies.

For these reasons, we hold that the undisputed evidence conclusively shows that the defendant is not liable for the injury complained of.

The order appealed from is reversed, and the district court will be directed to order judgment for defendant, notwithstanding the verdict. All concur.

(108 N. W. 33.)

STATE OF NORTH DAKOTA, EX REL. CHARLES H. MITCHELL v. M. S. MAYO AS TREASURER OF CASS COUNTY, NORTH DAKOTA.

Opinion filed June 1, 1905.

Municipal Corporations — Organization.

1. Chapter 62, page 91, Laws 1905, relating to the organization and government of cities, is a revision and amendment of the general law on that subject, and it became operative upon all cities previously organized under the general law, without any action by such cities.

Constitutional Law — Class Legislation — City Taxes — Penalty and Interest.

2. Section 124 of chapter 62, page 122, Laws 1905, to the extent that it requires the county treasurer to pay over, to cities organized under the general law, the interest and penalties on city and city school taxes collected by the county treasurer, is an unjust and arbitrary discrimination in favor of the taxpayers in such cities against those of other taxing districts, and is therefore invalid, because in contravention of the constitutional inhibitions against class legislation.

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

Application by the state, on the relation of Charles H. Mitchell, for writ of mandamus to M. S. Mayo, treasurer of Cass county. Judgment for relator, and defendant appeals. Reversed.

Barnett & Richardson, for appellant.

Seth Newman, for respondent.

ENGERUD, J. This is a proceeding by mandamus, brought in the name of the state, by the relator, as treasurer of the city of Fargo, to compel the defendant, as treasurer of Cass county, to pay over to the relator the amount of interest and penalties on the city and city school taxes, collected for said city by the defendant. The relator bases his right to the relief demanded upon section 124 of chapter 62, p. 122, Laws of 1905. That section reads as fol-

lows: "The county treasurer of such county shall collect and enforce the collection of the city and school tax with and in the same manner as other taxes, and shall pay over to the city treasurer on the first of every month on demand, all such taxes so collected during the preceding month, with interest and penalties collected thereon, and shall forthwith notify the city auditor of the amount so paid over. He shall take duplicate receipts for all such amounts so paid to the city treasurer, one of which shall be forthwith sent to the city auditor." Chapter 62, p. 91, Laws 1905, of which the section quoted is a part, is entitled "An act for the organization and government of cities and to provide for the limitation of action to vacate special assessments heretofore made." It was approved February 28, 1905, and, by virtue of an emergency clause, took effect immediately upon its approval. The defendant admits that he collected and refused to pay over the interest and penalties in question, but denies that the relator is entitled thereto for several reasons, only two of which we deem it necessary to discuss. These two propositions are: First, that chapter 62, p. 91, Laws 1905, does not become operative upon the city of Fargo until its inhabitants adopt its provisions by reorganizing under this law; second, that section 124, so far as it purports to give the interest and penalties on city and city school taxes to the city, is unconstitutional. The trial court heard the evidence submitted and awarded a peremptory writ of mandamus as prayed for by relator. The defendant appealed from the judgment. A statement of the case was settled, wherein the appellant demanded a new trial of all issues, and also specified certain alleged errors of law. A question arose on the argument, as to whether this court should try the case anew, under section 5630 (Rev. Codes, 1899), or review it on the specifications of error. It is unnecessary to decide that question, because the propositions which we deem decisive of the case are such that they appear upon the face of the judgment roll without any statement of the case. The facts are not in dispute. It is simply a question as to whether the facts alleged and found entitle the relator to a peremptory writ of mandamus.

We shall take up the defendant's propositions in the order above stated. The appellant's argument is that chapter 62 is wholly a new law for the organization and government of cities; that is, to take effect only when the inhabitants of a previously organized village or city shall see fit to organize under it. They con-

tend that cities organized under the general law of 1887 continued under that law until they elected to abandon that form of organization and reorganize under the new law of 1905. Such a construction of this law is wholly untenable. A bare inspection of its provisions discloses that it is a mere revision and amendment of the general law heretofore in force relating to the organization and government of cities. That law was first enacted in 1887, as chapter 73, p. 190, Laws 1887. It was incorporated in the Revised Codes of 1895 as chapter 28 of the Political Code. A few changes were made by that revision, and there have been several amendments since. Comparison of the act of 1905 with the law theretofore in force discloses that the new act repeals all former laws on the subject and re-enacts them with some changes, most of which are in minor particulars. The most important changes made are in relation to the procedure in levying and collecting special assessments for local improvements. In all its main features the general law relating to the organization and government of cities remains the same as it was before. The new act has corrected many inconsistencies and defects apparent in the former law, and has brought together and made into a single statute the original city organization act and all subsequent amendments, including those made by the legislature of 1905. The title of the law would have been more appropriate if it had been styled "An act revising and amending chapter 28 of the Political Code as amended since 1895." The law embodied in the act is new only to the extent that it changes the law formerly existing. To the extent that it re-enacts the provisions of the former law, it is a mere continuation of those provisions. Lumber Co. v. Lee, 7 N. D. 135, 73 N. W. 430; City of Fargo v. Ross, 11 N. D. 369, 92 N. W. 449. That this was the intent of the legislature is stated in express terms in section 192 of the act.

Fargo is a city organized under the general law, and hence the revision of that law is operative on the city without any action by the municipality. The relator is entitled to the relief prayed for, unless the provisions of section 124 contravene some constitutional limitation. Under the laws of this state, the collection of all taxes, including special assessments for local improvements in cities, is committed to the officers of the county in which the property taxed is situated. The taxes levied by the several cities, villages, townships and school districts are reported to the county

auditor, who enters them upon the tax lists together with the state and county taxes. The county treasurer is charged with the duty of collecting all the taxes so listed. For the purpose of collection, the aggregate of the items of each year's tax charged against any person or corporation, if the tax is on personal property, or against each description of land, if the tax is on real estate, is treated as a single entire demand, payable as such at a specified time. Certain interest and penalties for nonpayment are imposed and are fixed at a certain per cent. of the total amount of the taxes so listed, treated as a single demand, and are, of course, collected with and as part of the taxes proper. For the purpose of collection they are, indeed, part of the tax. Railway Co. v. Amrine, 10 Kan. 318; Burlington v. Railway Co., 41 Iowa, 134. Although the interest and penalties are properly treated as part of the tax for the purpose of collection, they do not strictly attach pro rata to each specific item or kind of tax which goes to make up the aggregate taxes upon which they are computed, so that the total interest and penalty must necessarily be apportioned pro rata to the several items of taxes charged, and be treated as an inseparable part of each item. The interest and penalty are imposed not by the several taxing districts, but by the laws of the state. They are not taxes in the strict sense, but are imposed for the purpose of inducing prompt payment of the taxes proper. The disposition of them, therefore, is within the control of the legislature. Board of Sedgwick v. Wichita (Kan. Sup.) 64 Pac. 621; City of New Whatcom v. Roeder (Wash.) 61 Pac. 767; Crookston v. County Com., 79 Minn. 283, 82 N. W. 586, 79 Am. St. Rep. 453.

The powers of the legislature in this respect must be exercised, however, in conformity with, and subject to the limitations imposed by, the constitution. When the act of 1905, now in question, was passed, the disposition of the interest and penalties on taxes was controlled by section 1260, Rev. Codes 1899, which reads as follows: "All penalty and interest collected on taxes shall belong to the county and become a part of the general fund, or such other fund as the county commissioners may direct; except the penalty and interest collected on special assessments due to cities, and all such penalties and interest shall be paid to the city thereunto entitled." This provision was adopted in 1899 (chapter 4, p. 8, Laws 1899), as an amendment of section 75 of the 1897 revenue law (Laws 1897, p. 285, c. 126), and restores substan-

tially the provisions on the same subject in the 1890 revenue law (section 69, c. 132, p. 376, Laws 1890). Under this provision, all the taxpayers throughout the county are alike benefited by the revenues derived from this source. It goes to reduce the amount necessary to levy on all the taxable property in the county for the general fund. If section 124 of the act of 1905 is effective as a modification of section 1260, Rev. Codes 1899, the unjust discrimination resulting therefrom in favor of city taxpayers and against taxpayers in the rural districts is apparent. The city taxpayers will share pro rata in the benefits of reduced taxation for the county general fund resulting from the contributions to that fund by the taxpayers of the villages, townships, and rural school districts throughout the county; but the latter are to be excluded from any share in like collections from the city taxpayers. The city taxpayers are to be given the exclusive enjoyment of the interest and penalties collected at the expense of the county from city taxpayers, but the county taxpayers must share the interest and penalties on taxes in the rural district with the city taxpayers. This is manifestly an unjust and unreasonable discrimination in favor of city property owners, and against those who own property outside the city limits. The act clearly contravenes section 11 of the Constitution, which declares that all laws of a general nature shall have a uniform operation, and is likewise an infringement of that part of section 20 which forbids the granting of any privilege or immunity to one citizen or class of citizens which is not granted on the same terms to all. It is no answer to this constitutional objection to urge that the sums contributed by city taxpayers for interest and penalties ought to belong to the city. If this is true as to a city, it is also true of every other body politic in the county. If the legislature had seen fit to direct the interest and penalty to be paid over to the respective taxing districts on account of whose taxes it had been collected, such a disposition would, no doubt, have been proper. But that policy has not been adopted, and, so long as the interest and penalties collected from taxes on nonurban property go into the county general fund, like collections from city taxpayers must be disposed of in the same way. The act of 1905 does not repeal section 1260 and extend to the nonurban taxing districts the same privilege it purports to grant to cities. The court clearly has no power to repeal or revise this provision of the general revenue law so

as to give rural communities the same rights as those which section 124 has attempted to give to cities.

There is no doubt that for many purposes cities, or the inhabitants thereof, or the property therein, may be properly placed in a distinct class for the purpose of legislation with respect to such class, without infringing the constitutional prohibitions against "class legislation." But the fact that such a classification would be eminently proper for some purpose is no reason for upholding it in this case. Chief Justice Corliss, speaking for the court on this subject, in Edmonds v. Herbrandson, 2 N. D. 270, 274, 50 N. W. 970, 14 L. R. A. 725, said: "The classification must be natural, not artificial. It must stand upon some reason, having regard to the character of the legislation." See, also, Vermont Loan & Trust Co. v. Whithed, 2 N. D. 82, 49 N. W. 318; Angell v. Cass Co., 11 N. D. 265, 91 N. W. 72; Beleal v. Railroad Co. (decided at this term), 108 N. W. 33. Applying this test, we can conceive of no reason which would warrant this manifestly unjust discrimination in favor of city taxpayers as against other taxpayers in the county. We must therefore hold that section 124 of chapter 62, p. 122, Laws 1905, is invalid, to the extent that it requires the county treasurer to pay the interest and penalties on city and city school taxes to the city. Special assessments for local improvements are obviously in a class clearly distinguishable from ordinary taxes, and this distinction is properly recognized by section 1260, Rev. Codes 1899.

The judgment appealed from is reversed. All concur.

(108 N. W. 36.)

B. S. BRYNJOLFSON, RESPONDENT, v. CHRSITINA DAGNER ET AL., APPELLANTS, AND MORTGAGE BANK & INVESTMENT CO., THE GUARANTY CO. OF NORTH DAKOTA AND A. B. GUPTIL AS RECEIVER OF MORTGAGE BANK & INVESTMENT CO., NON-APPEALING DEFENDANTS.

Opinion filed February 3, 1906. Rehearing denied September 5, 1906.

Adverse Possession — Purchaser at Void Foreclosure Sale.

1. The possession of land by one who claims title under a warranty deed from the purchaser at a foreclosure sale is adverse, even though the foreclosure sale may be void.

Same.

2. The fact that the grantee of the purchaser at a void foreclosure sale may be deemed in equity to be a mortgagee in possession does not make him such in fact, so that his possession under his supposed valid claim of title is not to be regarded as adverse to the mortgagor.

Estoppel by Deed.

3. The grantor in a warranty deed who holds a previously existing mortgage on the granted premises cannot assert any rights as a mortgagee against his grantee; and one who subsequently acquires the mortgage from such grantor is in no better position unless he shows himself entitled to the protection accorded to innocent purchasers.

Evidence — Best and Secondary.

4. Parol evidence that a given note was secured by a real estate mortgage is incompetent, where no reason appears for the nonproduction of the instrument, or an authenticated copy thereof.

Champerty and Maintenance.

5. Evidence examined, and *held,* that the deed upon which plaintiff bases his claim of title is void because given and received in violation of section 7002, Rev. Codes 1899.

Appeal from District Court, Bottineau county; *Palda,* J.

Action by B. S. Brynjolfson against Christina Dagner and others. Judgment for plaintiff, and defendants appeal.

Reversed and remanded.

A. Besancon and *Newman, Holt & Frame,* for appellants.

Deed from one, while others are in adverse possession which they have asserted, and received rents and profits for over a year ,is void. Rev. Codes 1899, section 7002, and section 3920; Galbraith v. Paine, 12 N. D. 164, 96 N. W. 258; Schneller v. Plankinton, 12 N. D. 561, 98 N. W. 77.

Failure to make inquiry of one in possession of land, charges one with knowledge of all that such inquiry would reveal. Thompson v .Pioche, 44 Cal. 508; Fair v. Stevenot, 29 Cal. 486; Davis v. Baugh, 59 Cal. 569; Lestrade v. Barth, 19 Cal. 66; Metropolitan Bank v. Godfrey, 23 Ill. 531; Williams v. Brown, 14 Ill. 205.

Where a party's conduct has induced action by another, he is precluded from asserting to the prejudice of that other, that which is contrary to what his conduct has induced the belief. Hill v. Epley, 31 Pa. St. 331; Coogler v. Rogers, 7 So. 391; Wise v. Newat-

ney, 42 N. W. 339; Birch v. Steppler, 18 Pac. 530; Ratcliff v. Belford, I. W. Co., 10 S. W. 365; Gruber v. Baker, 23 Pac. 858.

One in priority with one so inducing is likewise estopped. Snodgrass v. Ricketts, 13 Cal. 360; Coogler v. Rogers, supra; Ions v. Harrison, 44 Pac. 572; Mull v. Orme, 67 Ind. 95; Stinchfield v. Emerson, 52 Me. 465; S. C., 83 Am. Dec. 524.

Tracy R. Bangs and *Chas. M. Cooley,* for respondents.

Purchaser at a void foreclosure sale under a power is an assignee of the mortgage sought to be foreclosed. Finlayson v. Peterson, 89 N. W. 855, 11 N. D. 45; Brynjolfson v. Osthus, 12 N. D. 42, 96 N. W. 261; Anderson v. Minn. L. & T. Co., 71 N. W. 665; Johnson v. Sandhoff, 14 N. W. 889; Rogers v. Benton, 38 N. W. 765; Smithson, etc., Land Co. v. Brantigan, 47 Pac. 434; Stillman v. Rosenberg, 78 N. W. 913; Taylor v. Agr'l & Mechanical Ass'n, 68 Ala. 229; Sawyer v. Barker, 77 Ala. 461; Stallings v. Thomas, 18 S. W. 184; Robinson v. Ryan, 25 N. Y. 320; Miner v. Beckman, 50 N. Y. 337; Investment Securities Co. v. Adams, 79 Pac. 625; Eq. Mtge. Co. v. Gray, 74 Pac. 614; Stauffer v. Harlan, 74 Pac. 610.

A deed on such purchase constitutes the purchaser equitable assignee of the mortgage. Finlayson v. Peterson, supra; Cooke v. Cooper, 22 Pac. 945; Jackson v. Bowen, 7 Cow. 13; Olmsted v. Elder, 4 N. W. Super. Ct. (2d Sanf.) 325; Holton v. Boweman, 19 N. W. 734; Rogers v. Benton, supra; Brynjolfson v. Osthus, supra.

A conveyance of land held in adverse possession to a creditor having a lien thereon is not void under the statutes against maintenance. Tutwiler v. Atkins, 17 So. Rep. 394.

The possession of a mortgagee is never adverse to the owner of the legal title, unless he has repudiated the relation and asserted absolute title in himself. 2 Jones on Mort., section 1152; Chalmers v. Wright, 28 N. Y. Sup. Ct. 713; Finn v. Laley, 37 N. Y. S. 437; Borst v. Boyd, 3 Sandf. Ch. 501; Gordon v. Lewis, Fed. Cas. 5613 (2 Sumn. 143) 1835; Waggner v. Dyer, 11 Leigh, 384; Steed v. Baker, 13 Gratt. 378.

To effect an estoppel in pais the same facts must co-exist as would be necessary to constitute a cause of action for deceit. Brigham Young Trust Co. v. Wagner, 40 Pac. 764; Roberts v. Trammel, 40 N. E. 162; 11 Am. & Eng. Enc. Law, 431; Blodgett

v. Perry, 10 Am. St. 307; Roberts v. Trammel, supra; Bynum v. Preston, 5 Am. St. 49; Martin v. Zellerbeck, 99 Am. Dec. 35, 38 Cal. 300; Newman v. Hook, 90 Am. Dec. 378; Ross v. Banta, 34 N. E. 865; Underwood v. Deckard, 70 N. E. 383; Sup. Tent v. Stensland, 68 N. E. 1098; 99 Am. St. 137; Fredenburg v. Lyon Lake M. E. Church, 37 Mich. 476, 11 Am. & Eng. Enc. Law, page 424, note 2.

Knowledge is essential on the part of the person to be estopped. Anderson v. Hubbell, 93 Ind. 570.

An estoppel does not occur where both parties have equal knowledge. McPherson v. Rollins, 1 Am. St. 826; Morrill v. St. Anthony Falls W. P. Co., 26 Miss. 222; Tinsley v. Fruits, 51 N. E. 111; Blodgett v. Perry, 10 Am. St. 307; Brant v. Virginia C. & I. Co., 93 U. S. 326, 23 L. Ed. 927.

To work an estoppel representation must be with intent to deceive. Griffith v. Brown, 18 Pac. 372; Brant v. Virginia C. & I. Co., supra.

Party must have relied on the representations. Halcomb v. Boynton, 37 N. E. 1030; Lincoln v. Gay, 42 N. E. 95; Jewell v. Miller, 61 Am. Dec. 751; Colo. Fuel & Iron Co. v. Lenhart, 41 Pac. 834; O'Mulchay v. Knapp, 28 Minn. 31; Dean v. Crall, 57 N .W. 813; Coffelt v. First Natl. Bank, 35 Pac. 289; Priewe v. Wis. State L. & I. Co., 89 N. W. 780; Lingonner v. Ambler, 62 N. W. 486; Mullaney v. Duffy, 33 N. E. 750; Gillespie v. Gillespie, 42 N. E. 305.

ENGERUD, J. This is an appeal from a final judgment in plaintiff's favor, and is before us for review on all the issues, under section 5630, Rev. Codes 1899.

The plaintiff alleges that he is the owner in fee of the quarter section of land in question, and the action was brought for the threefold purpose of quieting his title, recovering possession and redeeming the land from a mortgage. The defendants, who have appealed, are the heirs at law and the administrators of the estate of one Gottlieb Dagner, deceased, who, in his lifetime was in the exclusive possession of the land, claiming title thereto under a warranty deed from the Mortgage Bank & Investment Company, executed and delivered to him in January, 1893. Gottlieb Dagner died in February, 1896, intestate, and his heirs or the administrator of his estate, who is also an heir, have remained in possession of the premises since that time, claiming title under

the deed aforesaid. Among other defenses pleaded, these defendants deny the plaintiffs' alleged title on the ground that the deed under which he claims is void because executed and accepted in violation of section 7002, Rev. Codes 1899. We think this defense must be sustained, and it is therefore unnecessary to discuss the other questions in the case.

The common source of title is one Hans K. Libak, who, it is conceded, still owns the land, unless his title has been acquired by one or the other of the contestants in this litigation. In 1889 Libak mortgaged the land to the Mortgage Bank & Investment Company to secure a debt of $550. This mortgage and debt was assigned by the mortgagee to Asa W. Kennedy, and the assignment was recorded, as also was the mortgage. In 1891 the original mortgagee, notwithstanding the assignment, undertook to foreclose the mortgage by advertisement, and at the pretended sale bid in the land, and subsequently in October, 1892, received a deed purporting to convey to it the land in question pursuant to the foreclosure sale after the time for redemption had expired. The Mortgage Bank & Investment Company, claiming title under this pretended foreclosure, sold and conveyed the land by warranty deed with full covenants to said Gottlieb Dagner, since deceased. The deed was delivered in January, 1893. Dagner bought in good faith, believing the title good, and paid full value. It is, of course, conceded that Dagners' grantor had no title to convey, but the appellants claim that by reason of certain alleged written statements made by Libak the latter is estopped to question Dagner's title. Libak, apparently intending to abandon the land to his creditors, left the land in 1890 or 1891, and went to Oregon, where he has since resided. The respondent subsequently discovered the defect in Dagner's title, and in 1899 induced Libak to execute and deliver the deed of the land under which he now claims title, and the right to the relief sought in this action, which was not commenced until 1903. The consideration for the deed in question was $35 in cash and the surrender of certain notes, which will be referred to later. It is conceded that Libak had not asserted any right to the land since he abandoned it until he gave the deed in question, and the proof is conclusive that he never intended to assert any right to the land until he was solicited to execute that instrument. The plaintiff had not only constructive but actual notice of Dagner's adverse claim before he

took the Libak deed. That the transaction by which the deed was obtained, and which ultimately gave birth to this lawsuit, was necessarily productive of the very evil which the rule of law embodied in section 7002 was designed to prevent, is too plain for question. Galbraith v. Payne, 12 N. D. 164, 96 N. W. 258; Schneller v. Plankinton, 12 N. D. 561, 98 N. W. 77.

Respondent, however, contends that he is not within the law against maintenance for two reasons: First, because Dagner in his lifetime, and after his death the present appellants, were merely mortgagees in possession, and hence could not claim adversely to Libak; and, second, because the respondent was the owner of certain notes secured by mortgage of the land, and could lawfully extinguish the owners' right of redemption by surrendering his lien in exchange for an estate in fee simple.

The proposition that Dagner and his heirs held as mortgagees in possession is based on the fact that after Dagner had accepted the deed from the Mortgage Bank & Investment Company the latter purchased and procured a reassignment to itself of the mortgage previously assigned to Kennedy. This mortgage, which was the same one which the investment company had pretended to foreclose, contained a clause authorizing the mortgagee or its assigns to take possession of the premises in case of default. It appears that the investment company took the reassignment on the theory that such reassignment would cure the foreclosure and validate the title of the company's grantee. It may be true that Dagner was in a position to claim the rights of a mortgagee in possession by reason of the facts just mentioned, and that a court of equity would, if the circumstances required it, sustain that claim, in order to protect and adjust the rights of the parties with respect to the land. Counsel, however, falls into the error of assuming that Dagner was in fact a mortgagee in possession, because a court of equity might treat him as such under certain circumstances. There is a wide distinction between an actual mortgagee in possession and one who in equity may be dealt with as such in order to afford equitable relief. The fiction by which an adverse claimant is deemed a mortgagee in possession is resorted to and applied after the adverse claim is found to be invalid, but the defeated claimant is nevertheless entitled to equitable relief. In short, in order to place appellants in the position of mortgagees in possession, we must first decide that their adverse

claim is invalid. It will be seen, then, that respondent's argument is utterly illogical. It not only virtually admits the adverse possession, which is the very fact which it seeks to disprove, but also assumes that plaintiff can question the validity of the adverse claim, which is the very thing which section 7002 forbids one in his position to do.

We think the second proposition is equally untenable. It appears that the respondent had obtained possession of two notes executed by Libak. When he got them and how much he paid for them was not disclosed by the evidence. One of these notes was for $200, due in 1890, and made payable to the order of Libak, the maker. There had been paid on this note in 1890 $186.75. The other note was for $140, signed by Libak, and payable to the Mortgage Bank & Investment Company, and was due in 1890. The $140 note was secured by a mortgage of the land in question. Respondent testified that the $200 note was secured in like manner, but Libak testified to the contrary. Respondent did not produce the alleged mortgage or a record copy of it, or account for its nonproduction. His testimony that the note was secured by mortgage of the land in question was duly objected to as incompetent, and must be disregarded for that reason. In addition to these notes, the respondent also had several of the coupon notes representing the interest on the $550 mortgage debt hereinbefore mentioned. All these notes were surrendered to Libak in part consideration for the deed. Respondent contends that by virtue of his ownership of these notes he was the owner of the mortgage securing them, and that section 7002 does not apply to a mortgagee who takes a deed from the mortgagor in satisfaction of the debt. Whether this is true or not we need not decide, because, as we view the facts, the respondent is not in a position to avail himself of that rule, even if it were good law. The only notes proven to be secured by mortgage on the land were the $140 note and the coupons. All these notes so secured were payable to the Mortgage Bank & Investment Company, who executed and delivered to Dagner the warranty deed for the land upon which it held these mortgages. It is obvious that the warranty deed estopped this company to make any claim under these mortgages as against its grantee or his representatives, and it is also equally clear that its assignee is in no better position unless he is a bona fide purchaser for value without actual or constructive notice of the

equities existing in Dagner's favor. There is no evidence whatsoever to show that the respondent is in that position. We hold, therefore, that the respondent is within both the spirit and letter of the statute against maintenance, and acquired no title by the deed, and cannot maintain this action.

The judgment is reversed, and the cause will be remanded, with directions to render judgment dismissing the action, with costs of both courts. All concur.

(109 N. W. 320.)

WILLIAM E. HIGBEE v. RICHARD DAELEY ET AL.

Opinion filed February 9, 1906. Rehearing denied October 4, 1906.

Foreclosure of Mortgage by Assignee—Unrecorded Assignment.

1. A foreclosure by advertisement made in the name of the mortgagee by the assignee, whose assignment is unrecorded, is voidable, but is not a nullity.

Same.

2. One who seeks to have a voidable sale adjudged void, must show affirmatively that he asserted his rights promptly after discovering the facts.

Same — Diligence to Seek Relief.

3. Evidence examined and *held*, that the plaintiff failed to show proper diligence in seeking relief from the voidable sale.

Appeal from District Court, Ramsey county; *Fisk*, J.

Action by William E. Higbee against Richard Daeley and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Siver Serumgard and *Newman, Frame & Holt*, for appellant.

Foreclosure must be by a legal owner of the mortgage, and if he is the assignee, his assignment must be recorded.

Section 3419, R. C. 1899; Pardee v. Lindley, 31 Ill. 174; Strother v. Law, 54 Ill. 413; Niles v. Ransford, 1 Mich. 338; Dunning v. McDonald, 55 N. W. 864; Hathorn v. Butler, 75 N. W. 743; Clark v. Mitchell, 84 N. W. 327.

If not so done the foreclosure is void. Section 3419, Rev. Codes 1899; Niles v. Ransford, supra; Bauseman v. Kelly, 36 N. W. 333; Burke v. Backus, 53 N. W. 458; Backus v. Burke, 51 N. W. 284; Backus v. Burke, 65 N. W. 459.

Foreclosure being void, title to the note and mortgage passed to the purchaser. Brynjolfson v. Osthus, 12 N. D. 42, 96 N. W. 261.

They were transferred by such subsequent conveyance of the premises. Finlayson v. Peterson, 11 N. D. 45; Johnson v. Sandhoff, 14 N. W. 889; Stillman v. Rosenberg, 78 N. W. 913.

Doctrine of bona fide purchaser cannot be invoked against a prior innocent legal holder. 2 Pom. Eq. Jur., sections 735 and 739; Williams v. Rand, 30 S. W. 509.

Good faith cannot create a title where none existed. Story Eq. Jur., Vol. 1, section 64c; Dodge v. Briggs, 27 Fed. 166; Vattier v. Hinde, 32 U. S. 269, 8 L. Ed. 249; Boon v. Chiles, 35 U. S. 209, 9 L. Ed. 176; Steffian v. Milmo National Bank, 6 S. W. 823; Oakley v. Ballard, Federal Cases, 10, 393; Evarts v. Agnes, 4 Wis. 343; Tisher v. Beckwith, 30 Wis. 55; Henry v. Carson, 96 Ind. 422; Fitzgerald v. Goff, 99 Ind. 28; Fallon v. Chidester, 46 Iowa, 588.

A grantee can convey no more than he acquires. Sampeyriac v. U. S., 32 U. S. 222, 8 L. Ed. 220; Polks, Lessees, v. Wendell, 5 Wheaton, 308; Sumner v. Seaton, 19 Atl. 884; Dimond v. Manheim, 63 N. W. 495.

The appellant seeking to redeem from the mortgage, offers to pay it, asks for an accounting and that respondent be allowed his just claim against the premises. This is all that equity can require and no laches can be imputed to the appellant. Lasher v. McCreary, 66 Fed. 834.

McClory & Barnett, for respondent.

There was no name of a grantee in the assignment and it was void. Druary v. Foster, 69 U. S. (2 Wall.) 24, 33; Swartz v. Ballou, 47 Iowa, 188; Burns v. Lynde, 6 Allen, 305; 1 Devlin on Deeds, section 456.

Where the debt is assigned and the mortgagee retains title to the mortgage, he is an indispensable party to a foreclosure by advertisement, and a foreclosure by him is valid, if made with the consent of the owner of the debt. Burke v. Backus, 51 Minn. 174, 53 N. W. 458; Backus v. Burke, 48 Minn. 260, 51 N. W. 284; Bausman v. Faue, 45 Minn. 412, 48 N. W. 13.

A foreclosure by advertisement in the name of the mortgagee on a mortgage assigned in blank is regular where the assignee's name is not inserted until after service. Curtis v. Cutler, 37 L. R. A. 737.

Respondent is an innocent purchaser for value without notice of defect in the proceedings and should be protected. See Vol. 3, Ballard on Real Property, section 461; 65 N. H. 646; Marrill v. Luce, et al., 61 N. W. 43; 2 Story Eq. Jur., section 1502.

ENGERUD, J. Plaintiff, claiming to be the owner in fee of the quarter section of land in question, brought this action to enforce his alleged right to redeem said premises from a mortgage lien thereon, and to require the defendants to account for the rents and profits of the land as mortgagees in possession. The defendants deny the plaintiff's title and right to redeem, and assert that, if plaintiff ever had any title, it was extinguished by a valid foreclosure by advertisement of the mortgage from which the redemption is sought. The case is before us for trial de novo on all the evidence.

The pivotal question is whether or not title has been acquired by the foreclosure of the mortgage in question. One Mary Fagnant owned the land in fee from 1888 until May 2, 1892, when she conveyed the same by quitclaim deed to this plaintiff. When this conveyance was made the premises had been unoccupied about two years, and remained vacant until 1895. On April 1, 1889, said Mary Fagnant, the then owner, mortgaged the land to the Western Farm Mortgage Trust Company of Kansas, to secure a debt of $700, and interest, which debt was evidenced by a promissory note upon which the interest was payable annually, and it was due April 1, 1894. The mortgage contained the usual power of sale in case of default, and provided further, that, if the mortgagor failed to pay any interest when due, the mortgage could be foreclosed for the entire debt. The mortgage was duly recorded. Shortly after its execution, this mortgage, with the debt secured thereby, was assigned by the mortgagee to Charles E. Vedder, one of the defendants. The assignment was in writing, but was never recorded. In April, 1892, the interest being in default, Vedder sent the mortgage, notes, and assignment to Moen & Connelly, a firm of real estate dealers at Devils Lake, and directed them to have the mortgage foreclosed and authorized them to bid in the premises at the sale in Vedder's name. This firm employed an attorney of that city, to conduct the foreclosure. Proceedings to foreclose by advertisement were commenced in July, 1892, and culminated in a sale of the premises to Vedder on September 3, 1892. The foreclosure was made in the name of the Western

Farm Mortgage Trust Company. It is conceded that there is no other defect in the proceedings. After the time for redemption had expired the sheriff's deed, in proper form, was executed to Vedder, and recorded. Thereafter in May, 1895, Vedder conveyed the land by warranty deed for a valuable consideration, to defendant, Richard Daeley, who took actual possession of the land, and prepared it for cultivation by breaking and otherwise improved the same. Daeley farmed the land either in person or by tenants until he conveyed it by deed to defendant Brown. The latter contracted to sell the land to defendant Hurst, and placed him in possession. Brown subsequently conveyed the land to defendant Agnes Whitford, subject to the Hurst contract.

It is conceded that the record disclosed an apparently perfect title in Vedder, based on a foreclosure which appeared to be regular. It is also conceded that Daeley and those claiming under him purchased in good faith, and had no notice of the concealed defect in the foreclosure proceedings. It is also apparent that the defect is not one which could, under the circumstances of the case, cause any actual loss or prejudice to the plaintiff or any one else. There was a default which authorized a foreclosure, and the actual owner of the debt caused the apparent foreclosure to be made and reaped the fruits thereof. The owner of the fee, or any other person entitled to redeem, were given the same notice of sale, and had the same right to redeem as they would have had if the foreclosure had been made in the name of the assignee of the mortgage. The foreclosure, however, was not properly made in accordance with the terms of the statute, and it is, doubtless, true that it would be voidable if attacked in due season by the mortgagor or any one claiming under him, even though no actual detriment or prejudice did or could result from the irregularity. Hathorn v. Butler, 73 Minn. 15, 75 N. W. 743. The proceeding, although irregular and voidable, is not, in our opinion, an utter nullity as claimed by appellant. If this plaintiff or any other person entitled to redeem, had seen fit to exercise that right within the year after sale, such redemption would have effectually freed the land from any claims on the part of Vedder as assignee of the mortgage. It is self-evident that he would be estopped to allege his actual but undisclosed ownership as a ground for invalidating the apparently good foreclosure which he had brought about. Curtis v. Cutler, 76 Fed. 16, 22 C. C. A. 16, 37 L. R. A.

737; Bottineau v. Insurance Co., 31 Minn. 125, 16 N. W. 849; Merrill v. Luce, 6 S. D. 354, 61 N. W. 43, 55 Am. St. Rep. 844. So also, if Vedder, ignoring the foreclosure, had afterwards brought an action against the mortgagor to obtain a personal judgment for the debt, and the latter had pleaded payment, or partial payment by the foreclosure, Vedder would not be permitted to avoid the plea on the ground the foreclosure was void because the ostensible owner of the debt and mortgage in whose name he had foreclosed, was not the true owner. He would be estopped to do so, because the debtor, if the truth had been known to him, might have paid the debt, and enjoyed the use of the land, thus avoiding the liability for accumulated interest as well as deriving a profit from the land. It is manifest that if this foreclosure proceeding can be the basis of a title or right by estoppel, then, although it may be voidable, it is not a nullity. It is an interesting question, as to which we deem it unnecessary to express an opinion, whether this sale by the actual owner of the mortgage in the name of the ostensible owner was anything more than a mere irregularity, like that invloved in Powers v. Larabee, 3 N. D. 502, 57 N. W. 789, 44 Am. St. Rep. 577. It is unnecessary to discuss that question because, even if we assume that the sale could be avoided as against innocent purchasers, we are satisfied that the judgment must be affirmed for the reason that the plaintiff has failed to prove that he acted with reasonable diligence to avoid the sale after discovering its invalidity.

The right to disaffirm a voidable act, is, in all instances, in the nature of an equitable right; that is to say, the right must be exexcised in accordance with equitable principles. Even in cases of fraud, duress and similar positively wrongful acts which render voidable a transaction tainted thereby, the injured party must act promptly and any acquiescence evidenced either by delay in disaffirming or by retention of benefits, or by permitting the other party to change his position to his detriment, after knowledge of the right to disaffirm, is fatal to the exercise of the right. Although transactions tainted by the wrongs mentioned are voidable in law as well as in equity, and the right to disaffirm is a legal right as well as an equitable one, it is familiar law that, in whatever form the right of disaffirmance is asserted, the same principles apply. The same principles it seems to us, ought to be applied, when it is sought to annul a voidable sale. "In the

case of such voidable sales there should not be afforded the opportunity of speculation on chances. It is not permissible for a party to lie by and await events, and have power at any time in the future to let the sale stand, or avoid it, according as it may be found then to his interest to do." Hoyt v. Inst. for Savings, 110 Ill. 390, 399. Such seems to be the law recognized by the courts, and it has accordingly been held that he who attacks an apparently valid sale, and seeks to avoid it for hidden defects, must show affirmatively that he acted with reasonable promptness after discovering the facts. Cornell v. Newkirk, 144 Ill. 241, 33 N. E. 37; Fowler v. Lewis' Adm'r (W. Va.) 14 S. E. 447, 454, 455; Hamilton v. Lu Bukee (Ill.) 99 Am. Dec. 562, and notes; Jones on Mtges., section 1922. Applying these principles to this case, it is clear that the plaintiff must fail, because there is neither allegation nor proof showing when he discovered the facts which he now alleges invalidated the sale. This action was not commenced until 1904, more than 12 years after the sale and more than 10 years after the entire debt was due according to the terms of the note. He had never paid or offered to pay $1 of the mortgage debt before this action was commenced. He had never, from the time he received the deed in 1892 until he commenced this action, made any claim to the land or paid or offered to pay any taxes thereon. In the meantime, third persons have in good faith bought and paid for what appeared to be a good title to the land, and have ever since occupied and improved it.

Under such circumstances it was clearly incumbent on the plaintiff to offer some explanation of his long delay in asserting his alleged right. The court cannot assume that he was kept in ignorance of his legal rights so long a time. It is one of the essential elements of his cause of action, if he had any, to show that he promptly availed himself of his right to avoid the sale after discovering the facts which entitled him to do so. In the absence of any proof as to when he discovered the defect, it is plain that the court has no evidence on which to base a finding in his favor on this essential element of his cause of action. The plaintiff's neglect to pay the debt secured by the mortgage, subject to which he bought the land, and the subsequent continued open and adverse possession of the land by the grantees of the purchaser at the sale, made the plaintiff chargeable with at least constructive notice of the fact that the sale had been made. His long-continued

neglect of the mortgage obligation, his apparent abandonment of the land, and his failure to pay or offer to pay taxes, and the fact that at the time of the foreclosure he lived at Devils Lake where the sale was made after being publicly advertised, all tend strongly to show that he had actual knowledge of the sale as well as constructive notice thereof. If he had ever intended to pay the mortgage debt or had attempted to do so, he could hardly fail to discover the fact that Vedder was the assignee. There was apparently no intentional concealment of the true ownership of the debt, and it is quite evident that the least inquiry would have disclosed the facts in that respect. So far as the circumstances show anything on the subject, they indicate that the facts as to the ownership were known to the plaintiff long before this action was commenced, if not at the time the sale was made. If plaintiff knew the facts as to the real ownership of the mortgage before third parties acquired rights, but nevertheless permitted this apparently valid sale to stand unchallenged, he is manifestly in no position to invoke the aid of a court of equity. His continued silence, under such circumstances, would be equivalent to a fraudulent concealment which would estop him to deny the rights of innocent purchasers. Johnson v. Erlandson (recently decided) 105 N. W. 722; Bausman v. Faue, 45 Minn. 412, 48 N. W. 13. The Minnesota case above cited is one very similar to this. It was held in that case, not only that the plaintiff was estopped by his long delay to attack an apparently valid foreclosure after the land had passed to innocent purchasers, but it was further held that he could not excuse his delay on the ground that he was ignorant of the hidden defect, where his ignorance of it was due to his neglect to make diligent and prompt inquiry.

We think the judgment is in accordance with the rights of the parties, as disclosed by the evidence, and it is accordingly affirmed. All concur.

(109 N. W. 318.)

A. Y. MORE AND JOHN L. MORE, CO-PARTNERS AS MORE BROTHERS, v. R. B. BURGER AND L. W. MOVIUS.

Opinion filed February 14, 1906. Rehearing denied March 15, 1906.

Appeal — Review — Jury Case — Jury Waived — Remand.

1. Where an action is properly triable to a jury, but a jury is expressly waived, and it is tried under section 5630, Rev. Codes 1899,

and all the evidence that is offered is received, although some of it is objected to, this court will not remand the cause for another trial under said section, which authorizes this court to grant another trial where necessary to the accomplishment of justice.

Same — Reception of Evidence — Review.

2. The reception of such evidence under such circumstances, although it may be error, does not authorize a new trial under said section, but is an error of law occurring at the trial, which must be objected to, excepted to, specified as error in the statement of the case, and assigned as error before the same will be reviewed in this court.

Amendment of Complaint — Statement of Different Facts.

3. An amendment of a complaint after notice and about sixty days before the trial, which does not substantially state different facts, is permissible, although the prayer of the original complaint is one applicable to claim and delivery proceedings and that of the amended complaint pertains solely to a demand for damages for the conversion of the property.

Trover and Conversion — Demand Obviously Unavailing.

4. A demand followed by a refusal to deliver property is only evidence of a conversion and needs not be made before the commencement of the action in case a demand would be obviously unavailing, as when, by pleading and proof, the property is shown to be detained under a claim of absolute right.

Appeal from District Court, Ward county; *Palda, Jr.*, J.

Action by A. Y. More and John L. More against R. B. Burger and L. W. Movius. Judgment for plaintiffs, and defendants appeal.

Affirmed.

George H. Gjertson and *Newton & Dullam,* for appellants.

A new cause of action must not be set up by amendment. Mares v. Wormington, 8 N. D. 329, 79 N. W. 441.

Judgment cannot be had for property not in defendant's possession. Heidman-Benoist Saddlery Co. v. Schott, 80 N. W. 47; Gardner v. Brown, 37 Pac. 240.

Market value must be proved. Towne v. St. Anthony & D. Elevator Co., 8 N. D. 200, 77 N. W. 608.

Demand must be first made before action for conversion will lie. Sanford v. Duluth & Dak. El. Co., 2 N. D. 6, 48 N. W. 434;

Towne v. St. Anthony & Dak. El. Co., supra; Dowd v. Wadsworth, 18 Am. Dec. 567.

Jerome Parks, for respondent.

So long as the identity of action is preserved, the form is immaterial. 1 Enc. Pl. & Pr. 575; Chapman v. Barney, 129 U. S. 677, 9 L. Ed. 426; Keighan v. Hopkins, 19 Neb. 33; Lyon v. Tolmage, 1 Johns. Ch. 184, 188.

MORGAN. C. J. The original complaint stated facts that would constitute a cause of action in claim and delivery, and the relief asked for was the delivery to the plaintiffs of the property described in the complaint, or for its value, with damages for its detention in case a delivery of the possession of the property could not be had. Nearly sixty days before the trial came on, and after the defendants had answered the complaint, plaintiffs gave notice of an application for leave to amend the complaint, and the amendment was allowed after a hearing on the motion. The facts alleged in the amended complaint are substantially the same as those of the original complaint. In each the plaintiffs claimed a lien upon the property by virtue of a chattel mortgage on the growing crop, which the defendants are alleged to have taken into their possession and converted after the same had been harvested and threshed. The prayer of the amended complaint, however, does not ask for the delivery of the possession of the grain to the plaintiffs, but simply asks for damages equal to the value of the property. There was a trial of the issues to the court without a jury, a jury having been expressly waived by a written stipulation filed with the clerk. On the trial there were numerous objections to the admission of testimony, but no rulings on such objections except in one instance, and that objection was overruled and the testimony received. No evidence was excluded at the trial. The parties evidently understood that they were trying the case under section 5630, Rev. Codes 1899, although it was tried after chapter 201, page 277, Laws of 1903, amending said section 5630 went into effect. This amendment excepts from the operation of said section all actions properly triable with a jury. The trial court made findings of fact and conclusions of law in plaintiffs' favor and judgment was entered thereon. The defendants appeal from the judgment and ask for a review of the entire case under section 5630, Revised Codes 1899.

A statement of the case was settled in which are found specifications of errors which relate mostly to alleged error by the trial court in not making findings as to specified facts in defendants' favor. The statement of the case contains no specifications of the particulars in which the evidence fails to sustain the findings generally, hence the statement is not prepared in accordance with the statute, and must be disregarded when the failure of the evidence to sustain the findings is not particularly pointed out. Section 5467, Rev. Codes 1899. Nor can the evidence be reviewed in its entirety to determine whether the findings are sustained or not, as the case was not properly tried under section 5630, Revised Codes 1899.

It is claimed that there was a mistrial and that the cause should be remanded for a new trial in order that justice may be done between the parties. The amendment of section 5630 by the 1903 law does authorize a new trial to be granted if the court deem such course necessary "to the accomplishment of justice." But the admission of incompetent or irrelevant testimony has never been construed to authorize a new trial under said section. The evidence was all received without objection or exception. Receiving such evidence was an error of law occurring at the trial, and has never been treated as authorizing this court to pronounce the trial a mistrial. Where mistrials have been found to require the remanding of the case for a new trial under section 5630, Revised Codes 1899, the cases were properly triable under that section and for some reason there had been a mistrial. In this case the appeal must be determined on errors properly specified and assigned. The errors claimed in trying the case under section 5630 and in receiving improper evidence, are nowhere specified or assigned, hence they cannot be considered as grounds for declaring that there was a mistrial, or that the court committed error in receiving such evidence.

It is claimed that the amendment of the complaint was unauthorized. The alleged error is specified properly in the statement of the case, and the order allowing it is therefore reviewable as appearing on the face of the judgment roll, and it is assigned as error in the brief. The claim is made that the cause of action was entirely changed by the amendment and a new one substituted. The original complaint stated facts which would authorize a judgment for the return of the property to the plaintiffs based on the

fact that they held a chattel mortgage lien thereon under which they were entitled to the possession of the property, and that the defendants unlawfully took possession thereof, and converted the same to their own use. The amended complaint stated the same facts pertaining to the mortgage lien and their right to the possession of the property; and also that the defendants unlawfully took possession of the property and converted the same to their own use. In strictness the original complaint stated a cause of action to recover possession of personal property, and the amended complaint one in conversion. Substantially the same facts are stated as constituting these technically different causes of action. Under our Code system in an action to obtain possession of property unjustly detained, there is also granted the right to recover damages for the failure to return the property, if a return thereof be adjudged. Section 5447, Rev. Codes 1899. Trover or conversion is an action for damages for property unjustly detained or appropriated by a person. If the plaintiffs were entitled to the possession of the property when the action was commenced, and possession thereof could not be had, they would have been entitled to damages to the extent of its value, up to the amount of their lien, and the same would have been awarded them in their replevin action. This is all that the amended complaint demanded. Under the Code a remedy is provided for the delivery of the property involved in actions for the recovery of personal property and for damages if delivery cannot be had. When there can be no delivery of the property pursuant to the judgment or by means of the ancillary remedy of claim and delivery, the action is in effect and in its results the same as one for conversion. Whereas, the causes of action are not strictly the same, the same results may be obtained in one as in the other. The causes of action in these two complaints were not so entirely different as to bring them within the principle that an amendment will not be permitted when an entirely different cause of action is pleaded by the amendment.

The only allegation that is dropped out of the original complaint is the one that the property is unjustly and unlawfully detained by the defendants. Both complaints state that the property was converted by the defendants. The change in the complaint, therefore, relates almost exclusively to the relief asked and there is not a substantial change in the facts on which the cause of action is

based. There are cases holding such amendments as the one under consideration not permissible, but they are based upon and follow the common-law idea of a replevin action, one to obtain possession of personal property simply. We have recently decided that amendments are permissible in furtherance of justice when the causes of action, though technically different, are based on the same facts substantially. We think this case comes within the spirit of these cases. Rae v. Railway Co., 105 N. W. 721, and Kerr v. City of Grand Forks, 107 N. W. 197. Under the common law the action of trover and replevin were deemed essentially the same although differing in methods of procedure and the character of the judgment obtained. Cobbey on Replevin, section 18, and cases cited. The test generally adopted to determine whether an amendment is permissible is whether a recovery upon the cause of action set up by the amendment would be a bar to a suit on the other. But one answer could be given on that test in this case. Such amendments are permissible in California under certain conditions at the trial. Henderson v. Hart, 122 Cal. 332, 54 Pac. 1110; Cobbey on Replevin, section 585, and cases cited.

The court found expressly that the plaintiffs made no demand upon the defendants for delivery to them of the property involved before the action was commenced. It is claimed as a matter of law that demand is essentially a prerequisite to the bringing of a claim and delivery action or one for conversion. Under the pleadings in this case, this is not true. The controversy over the property was based on rights claimed under different chattel mortgages. It is not reasonable to presume that defendants would have surrenered the property if demand had been made when they have constantly urged by pleading and proof that they had a right to take the property and retain it. Demand was unnecessary under the well-established principle that it would have been unavailing. The claim by defendants that they rightfully held possession of the property is inconsistent with the theory that they would have surrendered possession had demand been made. Cobbey on Replevin, 449, and cases cited; Myrick v. Bill, 3 Dak. 284, 17 N. W. 268; Raper v. Harrison, 37 Kan. 243, 15 Pac. 219; Byrne v. Byrne, 89 Wis. 659, 62 N. W. 413.

What has been already said on the subject of the amendment to the complaint disposes of appellants' contention that the amendment stated a cause of action for conversion of the crop of 1903, whereas

the original complaint stated a cause of action in claim and delivery for the crop of 1904. We are not satisfied that the construction placed upon the complaint by the appellant can be sustained. But conceding that it is correct, the right to the amendment is clear. The confusion arises because of an error or mistake as to one of the exhibits described in the abstract. An amendment of the abstract was allowed in this court which removed the objection. An amendment of the complaint would be permissible in the trial court so as to include the crop of a different year. Correcting a mistake as to the year for which the crop is claimed or was taken pertains only to one of the elements of the cause of action, and the complaint was subject to such amendment under the cases cited. Under some circumstances the amendment might be such a surprise as would authorize postponement or terms. In this case the amendment was allowed nearly 60 days before trial, which excludes any possibility of such surprise as could be prejudicial.

The objection that the value of the grain converted was not properly shown did not prejudice the defendant if admitted to be true. The answer shows and defendants' proofs showed that they sold the grain for the precise sum awarded to plaintiffs as damages for the conversion. It is thus shown and admitted that the defendants received a certain sum on the sale of the grain. They have, therefore, dealt with the grain as of a certain value and received a sum of money for it and cannot complain because the judgment is for that sum, although the market value was not technically proved. Keystone Implement Co. v. Welsheimer (Kan. App.) 55 Pac. 348.

No error, therefore, appears on the face of the judgment roll. The findings, so far as reviewable, sustain the judgment.

It therefore follows that the judgment must be affirmed. All concur.

(107 N. W. 200.)

JAMES ROBERTSON v. WILLIAM MOSES AND JAMES WYLIE.

Opinion filed February 24, 1906. Rehearing denied July 30, 1906.

Sales — Warranty — Fidings Sustained by Evidence.

1. In an action to recover damages upon an alleged warranty of the value of certain bank stock, which was tried to the court without a jury, it is *held,* that the findings for plaintiff are sustained by the evidence.

Same — Damages — Prima Facie Value of a Note Is Its Face and Accrued Interest.

2. The face or prima facie value of a promissory note at any point of time is the principal with the interest then accrued; and this is true, even though the unearned interest has in form been added to the face of the note.

Same.

3. The defendants, in the sale of certain bank stock to plaintiff, guaranteed that it was, when estimated by the assets and liabilities of the bank as disclosed by its books, of a certain value. In making the computation they included the unearned interest upon the bills receivable as an asset. *Held,* that the recovery awarded plaintiff by the trial court for the difference in value resulting from the erroneous computation was proper and correct in amount.

Pleading — Variance in Civil Action — Prejudice.

4. Under our statute (section 5293, Rev. Codes 1899) a variance in a civil action is not material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense.

Same.

5. Upon the facts stated in the opinion it is ***held*** that there was no material variance between the pleadings and proof, and, further, that the trial court was not guilty of an irregularity in its proceedings.

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

Action by James Robertson against William Moses and another. From a judgment in favor of plaintiff, and an order denying a new trial, defendants appeal.

Affirmed.

Guy C. H. Corliss, for appellants.
Charles F. Templeton, for respondent.

YOUNG, J. The plaintiff brought this action to recover damages for the breach of an alleged guaranty of the value of 80 shares of stock in the Citizens' State Bank of Drayton, which were sold to the plaintiff by the defendants in February, 1903. The complaint alleges that the defendants sold the stock at $112.50 per share and as an inducement to the purchase represented "that said stock was then worth the sum of $112.50 per share and promised and agreed that if said stock was not then actually worth the sum of $112.50 per share the defendants would thereafter, upon the plaintiff's request, pay to him in cash a sum of money equivalent to the differ-

ence between the actual cash value of said stock and the price paid therefor;" that the plaintiff relied upon said promise; that the stock was actually only worth $90 per share; that plaintiff has demanded the payment of the difference, which demand has been refused—and prays for judgment for $1,800, which is the amount of the alleged difference in value. The defendants in answer to the complaint admit the sale of the stock and at the price alleged in the complaint, but deny making any guaranty whatever in connection with the sale and allege that the plaintiff made a full and personal examination of the bills receivable, assets, liabilities and affairs of said bank, and relied upon said investigation in purchasing said stock; that the only representations made by defendants "was to present for the inspection of said plaintiff, previous to said sale, the books, papers and assets of said bank, to be examined by plaintiff before purchasing said stock." The case was, by stipulation of counsel, tried to the court without a jury. The findings were in favor of plaintiff. The court found that the stock was actually worth $92.65 per share at the date of the transfer. Otherwise the findings follow substantially the language of the complaint. In addition the court made the following finding: "The court of its own motion finds that at the time of the sale of the said stock it was agreed between the parties that in estimating the value thereof, only such assets and liabilities of the bank should be considered as the books and papers of the bank then disclosed. And the actual value of said stock as hereinbefore found is based upon the then actual value of such assets and the amount of the then existing liabilities as the books and papers of the bank then disclosed." The amount of the recovery awarded was $1,588, being the difference between $92.65 per share and $112.50 per share, which was the amount paid for the stock. Defendants moved for a new trial upon a statement of case, alleging as grounds therefor. (1) "Irregularity in the proceedings of the court and abuse of discretion by which the defendants were prevented from having a fair trial. (2) Surprise which ordinary prudence could not have guarded against, in that the court unexpectedly decided the case upon a ground not set forth in the complaint, and not litigated on the trial." The motion was denied, and defendants have appealed from the order denying the same and from the judgment.

The grounds urged for reversal upon this appeal are those presented upon the motion for new trial: i. e., (1) insufficiency of the

evidence to justify the findings, and (2) irregularity in the proceedings of the court and surprise and prejudice resulting therefrom. Are the findings justified by the evidence? This question must receive an affirmative answer. The court found in substance (construing the preceding finding as modified, as we must, by the finding made by the court on its own motion and above set out), that the parties to the sale agreed that the value of the stock should be determined from such assets and liabilities of the bank as were then disclosed by its books and paper; that the defendants represented that the actual value of the stock figured upon this basis was $112.50 per share, and agreed that if it was not of that value to make good the difference upon demand; and that the actual value of the stock computed upon the basis thus agreed upon was only $92.65 per share. Eight witnesses testified relative to the transaction. These include the plaintiff and the two defendants, two clerks who were then employed in the bank, a director who heard the matter discussed between the plaintiff and defendants at numerous meetings of the directors and two cashiers of other banks who were chosen as arbiters, and went to Drayton for the purpose of adjusting the controversy. The statements of the several witnesses differ in language and in some respects in substance so that it may be said there are as many versions of the transaction as there are witnesses, but as to the vital and controlling facts found by the trial court there is, as we view it, no substantial conflict.

The capital stock of the bank was $15,000 which was divided into 150 shares. The defendant Moses was president. He was also connected with two other banks. The defendant Wylie had been one of its directors from its organization in 1898, and for about a month preceding the sale to the plaintiff had been acting as cashier. On or about the 3d day of February, 1903, the defendants sold and transferred the 80 shares of stock in question, which was the controlling interest, to the plaintiff and the latter took possession. Previous to that time the plaintiff had had no experience in banking, and was ignorant of banking terms and methods, and was not competent to compute the value of bank stock from an examination of the books. He had known Mr. Wylie for many years, and had confidence in his integrity. His proposition was to buy the stock for what it was worth, and he left it with the defendants to compute its value, and relied upon their

assurance that the amount they stated to him, $112.50 per share, was correct, and their further assurance that if it was not correct they would make the difference good. The assets of the bank, including its loans, were exhibited to the plaintiff for his inspection. He was acquainted in a general way with the financial standing of the makers of the bills receivable. During the negotiations he objected to a certain note for $1,000 which it was agreed was of little or no value, also to a $980 note and certain other small notes of doubtful value, and stated that if they were taken out in fixing the value he would purchase the stock. This the defendants declined to do. After some delay he concluded to make the purchase on the basis of the assets as they were taking them all at their face value. His testimony on this point is as follows: "I concluded to take the notes as affecting the value of the stock at full value. I took the loans and discounts at face value. They said they were not going to dispose of their interest in the bank they had established there for two or three years, and cut out that paper. I said I will take that paper for your good will. You can figure that poor paper right into the value of your stock. And the reason for it was in figuring up the stock nothing was put in for the good will. That is why I agreed to accept the paper. I told Wylie to go and figure up the stock what it is worth, and I will pay you. He figured it up at $112.50 per share, and I paid him. Early in the negotiations I told defendants that I had been advised to get an expert to go through the books. They replied that it would not be necessary to go to that expense. Wylie said: 'I will figure up what the stock is worth. * * * If any figures on this stock ain't what I say they are, we are perfectly able and perfectly willing to make them what they are. * * * He said he would make it worth $112.50. * * * Mr. Wylie and Mr. Moses both stated that they would do so.' They guaranteed the stock was worth so much, or if it was not they would make it worth it. They said 'you can go through those books after you buy this stock, and if you can find anything wrong we will make it all right, we are willing and able to do it.'" Wylie testified that plaintiff offered "to take the stock at what it was worth." In looking over the papers he objected to a $1,000 note and certain other notes and urged that they be thrown out, but finally consented to take the stock having them included in the valuation. "I made the statement that if they discovered any mistake in the books or any discrepancy in

any way that we stood ready to make it good. * * * The statement we made was that if you find that we misrepresented anything we stand ready to make it good." Moses testified: "We figured from the books to arrive at what we would take. * * * The book value of that stock was taken as a basis in fixing the value of it for the purpose of this transaction. In arriving at the value of the stock we figured up what we claimed were the assets and liabilities. That is the way we arrived at what I call the book value." J. D. Wallace, called by the plaintiff, testified that he had been one of the directors of the bank since its organization; that he had attended at least a dozen meetings of the board which were called to consider the controversy as to the sale of the stock. He testified that at these meetings the plaintiff stated his version of the transaction, which is substantially as above set out, and that the defendants stated that they were still willing to make the stock worth $112.50 if it was not worth that amount. Upon cross-examination by defendants, he testified as follows: "There was a discussion as to the process by which they fixed the value of this stock when it was sold. They differed on the proper way of reckoning interest; that seemed to be the difference of opinions. The word "book value" was mentioned frequently by Mr. Wylie and Mr. Robertson agreed to it if it showed without a mistake or some error in computing. * * * The books were to be the authority unless there could be shown to be a wrong computing. Q. In other words, then, they were to test the value of the stock by what the books showed if the books were straight? A. That is the way I understood it. Q. So the sale was on the basis of the book value if the books were correct? A. Yes, sir. Q. And that seemed in that conversation to be agreed to by all parties? A. They didn't differ on this at all."

It is not necessary to refer to the testimony of the other witnesses. It sufficiently appears from the testimony of this witness, and the testimony of the parties to the contract, that the sale was made upon the basis of the assets and liabilities of the bank as then disclosed by its books and paper as found by the trial court, and, further, that the plaintiff agreed to accept such assets at par or face value, and that the defendants agreed to make good their representation that the stock when figured upon the basis thus agreed upon was worth $112.50 in case it was found that their computation was erroneous. Was the value of this stock correctly com-

puted by the defendants? This has been at all times and still is the point and only point of difference. This question turns upon the answer to another question, and that is whether the unearned interest upon its bills receivable was an asset proper to be taken into account in fixing the value of the stock? The major part of the bank's assets consisted of its bills receivable. The custom followed by it in making and renewing loans was to have the borrower execute a note bearing interest only after maturity, and to add to the face of the note the amount of interest to be earned to its maturity. In other words, the unearned interest was added to the face of the bills receivable, and the notes were carried upon the books at the amount stated upon their face and were counted at this increased amount by the defendants in figuring the value of the stock; that is, the unearned interest was added to the principal and the total amount was counted as an asset. The inclusion of this unearned interest represents the only difference between the parties as to the correct basis for finding the value of the stock. The defendants counted the unearned interest as an asset in their computation, and claim that this was proper. The plaintiff contends that it was in no sense an asset and that he is entitled to reimbursement for the difference in the valuation of the stock which resulted from including it. If it was properly included, the computation of the defendants was correct, and plaintiff cannot recover. If, on the other hand, it was not properly reckoned as an asset, the plaintiff is entitled to recover. The value of the stock as found by the trial court is based upon the testimony of one Arthur L. Harris, an experienced banker. This witness took the liabilities and assets of the bank as shown by the books of the bank on the day of the sale, and computed the values of the different items which went to make up its assets, each being stated separately. The only item upon which he placed a valuation different from that used by the defendants in their computation was the bills receivable. Aside from this difference the correctness of his computation and valuations was not disputed, and unless the defendants are correct in their contention the amount of recovery awarded by the trial court is correct. They undertook to correctly figure the value of the stock from the assets and liabilities disclosed by the bankbooks. They included unearned interest as an asset in fixing the value of the bills receivable. This was unwarranted. It cannot be said that unearned interest is an asset. Clearly, the mere adding of un-

earned interest to the face of a note does not increase its value. The face value or prima facie value of a promissory note at any point of time is the principal and interest then accrued. Holt v. Van Eps, 1 Dak. 209, 46 N. W. 689; Anderson v. Bank, 6 N. D. 498, 72 N. W. 916; Bank v. Bank, 28 N. Y. 654, 86 Am. Dec. 273; Booth v. Powers, 56 N. Y. 22; Atkinson v. R. P. Co., 43 Hun. (N. Y.) 173. Interest until earned has no existence. To illustrate, suppose a person makes two separate loans on the same day of $1,000 each and for one year at an agreed rate of 10 per cent, and in one case the year's interest which is payable at maturity is added to the face of the note, and the other is not, can it be said that one note is of face or nominal value of $1,100 and the other $1,000? Clearly not. Both notes call for the same amount at maturity, and the unearned interest is no more an asset in one case than the other. The addition of the unearned interest to the face of the note is merely a different and perhaps more convenient way of evidencing the maker's promise but the change in the form of the promise does not change the fact that it is unearned interest, and is not an asset. The witness Harris estimated the actual value of the bills receivable at the date of the sale at their face value with accrued interest. This was also the prima facie value, and was in fact the basis of value agreed upon between the parties. The defendants guaranteed that they had correctly computed the value of the stock from the banks' assets and liabilities as disclosed by its books. They did not do so, and the attack upon the findings for the alleged insufficiency of the evidence must, therefore, fail.

The contention that the court was guilty of an irregularity in its proceedings and of an abuse of discretion whereby the defendants were surprised and prejudiced is, in our opinion, without merit. The grounds of this contention were presented to the trial court in the form of an objection at the hearing upon the settlement of the findings. The record shows that when the court had orally announced its findings, including the findings made upon its own motion and previously quoted, counsel for defendant objected to the decision of the case upon the grounds announced by the court, alleging that the complaint was framed upon the theory that defendants had represented that the stock was actually worth $112.50 per share, and not that the defendants' guaranty was "a guaranty as to what the books showed it to be actually worth on the

theory of figuring the present value of the bills receivable;" that defendants had not consciously litigated the case upon the theory upon which it was decided; that had they been apprised of this theory they would have gone into the question of the accuracy of the computation of the value of the bills receivable; that the change of theory eliminates good will as an element of value; and that the effect of the decision is to deprive the defendants of a full and fair trial upon the merits upon which the case is decided. At this juncture the court informed counsel that he could have further time and opportunity to show that the computation upon which its decisions as to the value of the bank was based was not correct. The offer was not accepted, but counsel demanded a right to further investigate and litigate the contract found by the court. That request was denied "for the reason that the contract between the parties was fully litigated and adjusted."

Counsel for defendants subsequently embodied the substance of the foregoing objection in an affidavit, and this, together with the supplementary affidavits of the two defendants were used upon the motion for new trial. We have examined the record with care, are unable to find that the defendants were in any respect prejudiced by the court's action. True, the complaint alleges that the defendants guaranteed the actual value of the stock, and the court found that they guaranteed its value when estimated in a particular way, but in a manner upon which the parties had agreed, i. e., from the assets and liabilities disclosed by the bank's books at the time of the sale. The finding is according to the fact as testified to by the parties themselves. It is based upon evidence received without objection. In fact, the objectionable finding has its strongest support in the testimony of the witness Wallace elicited upon examination by defendant's counsel. We think the trial court was correct in its reason for overruling the defendants' objection, i. e., because the question as to what the contract was, had been fully litigated. If the finding as to value can be said to present a variance from the allegation of "actual value," in the complaint, it is clearly not a material one. Our Code (section 5293, Rev. Codes 1899) provides that "no variance between the allegations of a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." As illustrating the application of the rule declared in the above section,

see Halloran v. Holmes, 13 N. D. 411, 101 N. W. 310. It may be conceded, as stated in the defendant's affidavits that the good will of the bank had a considerable value; also that other elements of value existed which were not shown as assets upon the books It is patent, however, that they have no just claim of prejudice through the fact that, for any cause, excusable or otherwise, they failed to offer evidence as to their value. The parties by their contract had limited the determination of value to the assets and liabilities as disclosed by the books. None of the several elements referred to appeared upon the books. Had the evidence been offered and received, it could in no way have affected the finding.

Finding no error in the record, the order and judgment will be affirmed. All concur.

(108 N. W. 788.)

Leu v. Commercial Mutual Fire Insurance Company.

Opinion filed February 26, 1906.

Insurance Policy — Stipulation for Appraisal — Ousting Jurisdiction of Courts.

1. A stipulation in a fire insurance policy to the effect that in case of loss the insurer should be liable only for such an amount as should be determined by agreement of the parties or by appraisers to be selected in a specified manner, and making such determination a condition precedent to an action by the insured to recover, is a valid agreement, and does not violate the rule expressed by section 3925, Rev. Codes 1899.

Same — Pleading — Must Allege Appraisal Specifically.

2. In an action to recover on a policy containing the stipulation set forth in the foregoing syllabus, the complaint is insufficient if it does not allege that the amount of loss has been determined by agreement or appraisement or show that these provisions had been waived, or otherwise rendered inoperative.

Same.

3. Although the determination of the amount of loss by agreement or arbitration is a condition precedent to the plaintiff's right of action it is not such a condition precedent as may be sufficiently alleged in the general form provided in section 5286, Rev. Codes 1899.

Appeal from District Court, Wells county; *Glaspell*, J.

Action by L. A. Leu against the Commercial Mutual Fire Insurance Company of North Dakota. Judgment for plaintiff, and de- defendant appeals.

Reversed.

Geo. A. Bangs, for appellant.

A contract that does not exclude wholly the determination of disputes by the ordinary legal tribunals but merely qualifies it by reasonable modes of arbitration is not invalid under section 3925, Rev. Codes 1899. Butler v. Tucker, 24 Wend. 447; Smith v. Brady, 17 N. Y. 173; Delaware & Hudson Canal Co. v. Pennsylvania Coal Co., 50 N. Y. 250; Holmes v. Richet, 56 Cal. 307; Denver & New Orleans Const. Co. v. Stout, 5 Pac. 627; Haley v. Bellamy, 137 Mass. 357; Thorndyke v. Wells Memorial Ass'n, 16 N. E. 747; Weggner v. Greenstine, 72 N. W. 170; Hudson et al. v. McCartney, 33 Wis. 331; Hood v. Hartshorn, 100 Mass. 117; Old Saucelito Land & Dry Dock Co. v. Commercial Union Assur. Co., 5 Pac. 232; Chippewa Lumber Co. v. Phenix Ins. Co., 44 N. W. 1055; Gasser v. Sun Fire Office, 44 N. W. 252; Adams v. South British and Nat. F .& M. Ins. Co., 11 Pac. 627; Cal. Ann. Con. of M. E. Church v. Seitz, 15 Pac. 839.

Ascertainment of loss by agreement, or the stipulated mode of appraisal, is such a condition precedent as must be alleged. Myers v. Pac. Const. Co., 27 Pac. 584; Weeks v. O'Brien, 36 N. E. 185; Company v. Company, 57 S. W. 506; Barney v. Giles, 11 N. E. 206; Michaelis v. Wolff, 26 N. E. 384; Cox v. McLaughlin, 63 Cal. 196; Tally v. Parsons, 63 Pac. 833; Gray v. La Societe, F. De B. M., 63 Pac. 848; New Tel. Co. v. Foley, 53 N. E. 56; Smith v. Company, 36 N. H. 458; Dinsmore v. Livingston County, 60 Mo. 241; approved in Williams v. Co., 20 S. W. 631; Boden v. Maher, 69 N. W. 980; Holmes v. Richet, 56 Cal. 307; Loup v. California Southern R. R. Co., 63 Cal. 97.

The rule of section 5286, Rev. Codes 1899, as to pleading conditions precedent, does not relieve from pleading such conditions required of a third person, of which performance is not required of plaintiff alone. Butler v. Tucker, supra; Johnson v. Howard, 20 Minn. 370; New. Tel. Co. v. Foley, supra; Rhoda v. Alameda County, 52 Cal. 350; People ex rel Hastings v. Jackson et al., 24 Cal. 623; Redington v. Chase, 34 Cal. 666; Kinkead v. Schreve, 17 Cal. 275; Doyle v. Phoenix Ins. Co., 44 Cal. 264.

J. J. Youngblood, for respondent.

A policy prepared and signed by the insurer and not by the insured is strictly construed against the former and liberally as

against the insured. Robson et al. v. United Order of Foresters, 100 N. W. 381; Queen Ins. Co. of America v. Excelsior Milling Co., 76 Pac. 423; Traders Mut. Life Ins. Co. v. Humphery, 69 N. E. 875.

The complaint is sufficient under code pleading. Kahnweiler et al. v. Phoenix Ins. Co. of Brooklyn, 67 Fed. 483; Sun Mutual Ins. Co. v. Chrest, 39 S. W. 837; Grand Rapids Fire Ins. Co. v. Flin, 54 N. E. 545; Davis v. Atlas Assurance Co., 47 Pac. 437.

ENGERUD, J. Action to recover $500 on a fire insurance policy upon a stock of merchandise. Defendant demurred to the complaint on the ground that it did not state facts sufficient to disclose a cause of action. The demurrer was overruled, and defendant appealed from the order.

The complaint alleges the execution and delivery of the policy, a copy of which is made part of the pleading; and after averring that the property insured was destroyed by fire and that the loss exceeded $500, the pleader alleges: "(6) That on or about Nov. 19, 1904, plaintiff gave defendant notice of loss, and also furnished and gave defendant due proof of said loss and otherwise performed all duties and conditions upon plaintiff's part as contained in said policy and as provided in said policy and by law provided; (7) That defendant has not paid said loss, nor any part thereof, but that the same is still due and owing from defendant to plaintiff according to the provisions of said policy hereto attached, and by reason of the loss by fire as herein shown, and the nonpayment of the loss by defendant. Wherefore plaintiff prays for judgment for the sum of $500," etc. The provisions of the policy so far as material to the issues now involved are as follows: The defendant insured the property described against loss or damage by fire, subject to the conditions stated in the policy to the extent of $500; and further stipulated that: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall, in no event, exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for

which this company is liable pursuant to this policy shall be payable 60 days after due notice, ascertainment, estimate, and satisfactory proof of loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild or replace the property lost or damaged with other of like kind and quality within a reasonable time, on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described. * * * In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire. This company shall not be held to have waived any provision of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until 60 days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by the committee. Certain proceedings are provided to obtain the decision of arbitrators, and there is this express stipulation, that 'the obtaining the decision of such arbitrators on the matters and claims in dispute, is hereby declared to be a condition precedent to the right of any members to maintain any such action or suit.' That the meaning of the parties therefore was, that the sum to be recovered should be only such a sum as. if not agreed upon in the first instance between the committee and the suffering member should be decided by arbitration, and that the sum so ascertained by arbitration, and no other, should be the sum to be recovered, appears to me to be clear beyond all possibility of controversy. * * * It appears to me perfectly clear, that the language used indicates this to have been their intention, that, supposing there

was a difference between the person who had suffered loss or damage and the committee as to what amount he should recover, that was to be ascertained in a particular mode, and until that mode had been adopted, and the amount ascertained according to that mode, no right of action should exist. In other words, that the right of action should be, not for what a jury should say was the amount of the loss, but for what the persons designated in that particular form of agreement should so say."

The defendant's obligation under the contract set forth in the complaint was to pay the agreed or appraised amount of loss within 60 days after it had been ascertained in the manner specified in the policy. It does not appear that the loss has been ascertained or that the defendant has failed or refused to comply with the contract in any respect, or denies liability for the loss. Although the determination of the amount of loss in the specified manner is in one sense a condition precedent to the right to sue on the policy, yet it is clearly not such a condition precedent as section 5286 has reference to. Whatever may be the effect of section 5286 it does not abrogate that elementary rule of pleading which requires the plaintiff to show prima facie that the defendant not only owes an obligation, but also that he had defaulted in its performance. Johnson v. Howard, 20 Minn. 370 (Gil. 322); New Telephone Co. v. Foley, 28 Ind. App. 418, 63 N. E. 56; Doyle v. Insurance Co., 44 Cal. 264; Mosness v. Insurance Co., 50 Minn. 341, 52 N. W. 932; Carroll v. Insurance Co., 72 Cal. 297, 13 Pac. 863; Carberry v. Insurance Co., 51 Wis. 605, 8 N. W. 406. As stated in Carroll v. Insurance Co., which was an action on a policy like the one before us: "The award is a necessary element of the plaintiff's cause of action. In contemplation of law the promise is not to pay such damage as the insured should suffer, but to pay such sum as the arbitrators should fix as the amount of damage sustained. It follows that the action should have been for the amount of the award, and that the award should have been set forth in the complaint. See Morse, Arb. 95. The allegation that 'all the conditions of said policy of insurance were duly performed and kept by this plaintiff' is not equivalent to setting forth the award, because, as has been stated, the award is a necessary element of the cause of action, and it is not the action of plaintiff but of third persons. If a fair award was prevented by the fraudulent conduct of defendant, the complaint should have set forth the acts

constituting the fraud. But the complaint, although it set out the policy, thereby disclosing the provisions as to the award, made no mention of any award having been made, or of any reason why not. Hence it did not state a cause of action, and the demurrer should have been sustained." The case of Kahnweiler v. Insurance Co., 67 Fed. 483, 14 C. C. A. 485, cited by respondent, is clearly distinguishable from the case at bar. The arbitration clause involved in that case differed radically from the stipulations for appraisement in the case at bar. The same is true of the other cases cited by respondent.

The order appealed from is reversed, and the district court will be directed to enter an order sustaining the demurrer. All concur.

(107 N. W. 59.)

LIZZIE FENTON AND DAVID ALLEN MURRAY, BY A. G. WHITTEMORE, HIS GENERAL GUARDIAN AND BY W. A. SCOTT, HIS GUARDIAN AD LITEM, AND HENRY O. WHEELER v. THE MINNESOTA TITLE INSURANCE & TRUST COMPANY, TRUSTEES FOR THE FIDELITY INVESTMENT UNION AND THE NORTHERN TRUST COMPANY ET AL.

Opinion filed May 14, 1906.

Constitutional Law — Due Process of Law — Publication of Summons.

1. The publication of summons, as prescribed by chapter 5, page 9, Laws 1901, in actions to quiet title, there being no description of the land in such publication, is not a sufficient notice to adverse claimants, not specifically named in the summons, to constitute "due process of law."

Judgment — Validity — Collateral Attack.

2. A judgment so obtained, whether attacked directly or collaterally, is void as to an adverse claimant not named in the summons, and who did not appear in the action.

Taxation — Removing Cloud — Tender.

3. One who sues in equity to remove a cloud on his title caused by a void tax sale will be required to pay the amount justly due for the taxes included in the void sale.

Appeal from District Court, Ransom county; *Allen*, J.

Action by Lizzie Fenton and others against the Minnesota Title Insurance & Trust Company and others. Judgment for defendants, and plaintiffs appeal.

Reversed and remanded.

J. E. Robinson, for appellants.

The statute, chapter 5, Laws of 1901, for the determination of adverse claims to real property does not secure to an unknown owner of real estate due process of law, and is unconstitutional, the notice not being reasonable and adequate for the purpose. Roller v. Holley, 176 U. S. 398; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565.

Pierce & Tenneson, for respondent.

In actions *in rem* courts may prescribe the form of bringing in parties by publication. Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. Rep. 557; Wahrman v. Conklin, 155 U. S. 314; Roller v. Holley, 176 U. S. 398; Shepherd v. Ware, 46 Minn. 174, 24 Am. St. Rep. 212; State v. Westfall, 89 N. W. 175.

Constitutionality of statutes like chapter 5, Laws of 1901, is held in Scudder v. Sargent, 17 N. W. 369; Coyd v. Trotter, 9 N. E. 507; Adams v. Cowes, 95 Mo. 501; Wunkel v. Landry, 39 La. Ann. 312; Essig v. Lower, 21 N. E. 1090; Gillespie v. Thomas, 23 Kan. 138; Cooley Cons. Lim., page 505; Clark v. Smith, 13 Pet. 195, 10 L. Ed. 123.

Where there is service of process, although irregular, but adjudged by the court rendering judgment thereon regular, the judgment is not void; although vulnerable to a direct movement to avoid it, it will withstand collateral attack. Quarl v. Abbot, 1 N. E. 476; Field v. Malone, 1 N. E. 507; Pickering v. State, 6 N. E. 611; Essig v. Lower, supra; Goodell v. Starr, 26 N. E. 793; Newcomb v. Newcomb, 76 Ky. 544, 26 Am. Rep. 222; Ballinger v. Tarbell, 16 Iowa, 491; Hendrick v. Whittemore, 105 Mass. 23; Sheldon v. Wright, 5 N. Y. 497; People v. Hagar, 52 Cal. 171; 17 Am. & Eng. Enc. Law, 1068.

Finding by a court, in its judgment, that notice was given, is conclusive against collateral attack. Swift v. Yanaway, 38 N. E. 589; Van Matre v. Sankey, 36 N. E. 628; Cincinnati R. R. Co. v. Village, 27 N. E. 464; McCahill v. Equitable Life Assur. Soc., 26 N. J. Eq. 531; Hurlbert v. Thomas, 55 Conn. 181, 3 Am. St. Rep. 43.

ENGERUD, J. On February 3, 1902, the respondent, Minnesota Title Insurance & Trust Company, as trustee for Fidelity Investment Company, procured the entry by the district court of Ran-

som county of a judgment purporting to quiet its alleged title to the quarter section of land now in controversy. The action in which that judgment was entered was one to determine adverse claims under section 5904 et seq., Rev. Codes 1899, as amended by chapter 5, p. 9, Laws 1901, commenced by said respondent against 92 known defendants and "all other persons unknown, claiming any estate or interest in, or lien or incumbrance upon the property described in the complaint, and their unknown heirs." The plaintiff in that action claimed to have acquired title to the land in controversy by virtue of two tax deeds executed and delivered to it by the county auditor of Ransom county on April 12, 1901. The respondents Northern Trust Company, Douglas A. Fiske and Emma C. Simmons now claim to have an indefeasible title to said land as tenants in common by virtue of conveyances from said Minnesota Title Insurance & Trust Company, as trustee aforesaid, executed after the entry of said judgment. They assert that the judgment above mentioned is a conclusive adjudication against all the world that the tax deeds to their grantor were valid, and that the judgment bars the assertion of any right of redemption even on the part of the appellant David Allen Murray, who is an infant. The appellants Lizzie Fenton and David Allen Murray are, respectively, the widow and only son of Warham N. Murray, deceased, who died long before the commencement of the former action, and they are the owners of the land unless their rights are barred by the judgment above mentioned. David Allen Murray was at the time of the commencement of this action about 17 years of age, and appears by guardian. He and his mother have never been residents of this state, but reside in New Hampshire, of which state Warham N. Murray, deceased, was also a resident during his lifetime. The appellant Henry O. Wheeler has no estate or interest in the property, and was improperly joined as plaintiff. The action should be dismissed as to him.

This action was commenced in November, 1903. The issues are presented by the allegations composing what the pleader styles the "second cause of action" in the complaint, as amended, and the pleading interposed by the Northern Trust Company, Douglas A. Fiske and Emma C. Simmons, who were joined as additional defendants after the action had been commenced against the first-named defendant. The complaint alleges plaintiffs' ownership

of the premises, and alleges that the Minnesota Title Insurance & Trust Company, as trustee aforesaid, claimed to have acquired title thereto by virtue of two pretended tax deeds; that said company had procured the rendition and entry of the judgment above mentioned, and by reason thereof denied plaintiffs' title. The complaint alleges in detail facts showing that the tax deeds, as well as the taxes upon which they were based, were invalid, and also avers that the judgment purporting to quiet title was void, because, among other reasons, the proceedings culminating in the judgment in that action did not constitute "due process of law," and hence the court was without jurisdiction to render the decree complained of. The facts upon which the plaintiffs relied to sustain their attack upon the judgment were specifically alleged. They will appear in the course of this opinion.

The prayer for judgment is: "First, That the said tax deeds and the judgment purporting to confirm the same, and all taxes charged against said land for the years 1895 and 1899, inclusive, be canceled, annulled and declared and adjudged to be void, and that the defendant corporation, and all persons claiming under it, may be forever barred and precluded from any title or interest in or to said land. Second. That in case it appears that any of said taxes are valid, then that the court ascertain and determine the amount of the same, and the amount which the plaintiffs should pay to redeem said land from such taxes and tax sales, and that they be permitted to redeem from the same, and that they have such other and further relief as may be just, together with the costs and disbursements of this suit." The answer of the impleaded defendants set forth that their grantor, the Minnesota Title Insurance & Trust Company, acquired title by virtue of the tax deeds referred to in the complaint, which deeds, it is averred, were valid conveyances, and they plead the judgment above mentioned, obtained by their grantor, as a bar to the assertion of any claim by plaintiffs. The trial court sustained the defendants' plea of res adjudicata. The plaintiffs thereupon appealed from the judgment and demanded a trial de novo, under section 5630, Rev. Codes 1899.

The first question for determination is as to the validity of the prior judgment. If the judgment is valid, it precludes all further inquiry. The entire judgment roll in that former action was introduced in evidence. The facts disclosed by that record are as

follows: On September 3, 1901, a verified complaint, in the form prescribed by section 5907, Rev. Codes 1899, as amended by chapter 5, p. 9, Laws 1901, was filed in the office of the clerk of the district court of Ransom county, and a summons issued to the sheriff of that county. Said summons and complaint named the Minnesota Title Insurance & Trust Company, trustee for the Fidelity Investment Company, as plaintiff, and named as defendants 92 different persons or corporations "and all other persons unknown, claiming any estate in, or lien or incumbrance upon, the property described in the complaint, and their unknown heirs." Neither Mrs. Fenton nor David Allen Murray were named as defendants, but the name of Warham N. Murray appeared among the 92 defendants named. The complaint alleged that the plaintiff was the owner in fee simple of the property therein described. The lands described in the complaint consisted of 15 distinct tracts of land, situated in various parts of Ransom county. On September 12, 1901, the sheriff's return on the summons was filed, showing that after diligent search and inquiry he was unable to make service upon about 70 of the defendants named. On the same day an affidavit for publication of the summons was filed, which we shall assume was in proper form. It shows that the places of residence of about 60 of the nonresident defendants named were unknown, and sets forth the addresses of the remaining nonresident defendants. The summons was thereupon published, in accordance with the provisions of section 5254, Rev. Codes 1899. On January 18, 1902, after the time for answering had expired, an affidavit in the usual form was filed, showing that most of the defendants had made default. On January 25, 1902, the court heard and granted the plaintiffs' applications for judgment by default against the defendants who had not appeared, and made and filed formal findings of fact, conconclusions of law, and an order for judgment. On February 3, 1902, judgment was entered in accordance with the court's order, and is to the effect that the plaintiff therein is the owner in fee of each of the 15 tracts of land described, which included the quarter section involved in the present action; and further decrees that the claims or pretended claims of all of the defaulted defendants are null and void and without right, and that said defendants, and each of them, and all persons claiming under them or either of them, be forever barred from asserting any claim thereto. Subsequently two other judgments were entered in the same action, disposing of

the rights of those defendants who had appeared and answered. It appears from the findings and judgments in the former action, as well as from the other evidence offered in the present suit, that neither Lizzie Fenton, David Allen Murray, nor Warham N. Murray ever had or claimed to have any interest in the 14 other tracts involved in the action to quiet title. The same is true with respect to the adverse claims against each of the other tracts. The adverse claims against each tract were wholly distinct and independent from the claims against every other tract. Neither did the plaintiff in that action acquire its alleged title by a single instrument or transaction, but it based its claim upon separate tax sales and tax deeds, one or more for each tract; in other words, although the complaint on its face purported to set forth a single cause of action, the proceeding was in fact a combination of 15 wholly distinct causes of action, having no connection, the one with the other. It is argued by respondent that this omnibus or "log-rolling" proceeding is warranted by the statute (chapter 5, p. 9, Laws 1901) relating to actions to quiet title, and constitutes "due process of law." This act of 1901 is a remarkable piece of legislation in form, phraseology and substance. It purports to amend sections 5904-5913, Rev. Codes 1899, but comparison of the act with the sections of the Revised Codes which it purports to amend will disclose that it is a misnomer to term the act an amendatory one. It is virtually a total repeal of the former provisions, and the substitution of wholly different ones. Its evident purpose was to do away with all of the most important safeguards which the act of 1899 (chapter 157, p. 228, Laws 1899) had provided in order to minimize the likelihood of obtaining judgment in such an action without adequate notice to adverse claimants, whether known or unknown. The act of 1899, which was incorporated in the Revision of 1899 as sections 5907 and 5907a, provided a procedure whereby all unknown adverse claimants could be cited to appear by publication of the summons, and make known their claims, to the end that the nature and validity thereof might be determined. That act provided for the filing of a notice of lis pendens in the office of the register of deeds, and the publication of that notice with the summons. Rev. Codes 1899, section 5907. In this way notice was published to the world, disclosing the nature of the action and the property affected. The plaintiff was required to specify by name all known adverse claimants, whether their claims appeared of record or not.

There were also other safeguards for the protection of the rights of unknown claimants. Section 5907, Rev. Codes 1899, is substantially, and to a great extent, a literal copy of section 5818, Gen. St. Minn. 1894. The constitutionality of the Minnesota statute was sustained in Shepherd v. Ware, 46 Minn. 174, 48 N. W. 773, 24 Am. St. Rep. 212. The act of 1901 (chapter 5, p. 9, Laws 1901) declares that it shall be sufficient to specifically name as parties defendant those who are in possession, or whose adverse claims appear of record. All other adverse claimants, resident or nonresident, however well known they may be to the plaintiff, may be proceeded against as "unknown" without specifically naming them. In the recent case of Gilbreath v. Teufel (N. D.) 106 N. W. 49, we held that it was a gross abuse of judicial process to designate as "unknown" certain adverse claimants whose names and whereabouts were known or ought to have been known to the plaintiff, and we held that a judgment so obtained ought to be vacated, although there had been a literal compliance with the language of the statute. In that case the adverse claimants voluntarily appeared in the action after judgment, and asked leave to defend. We did not, therefore, express any opinion as to the constitutionality of the law. In this case it is a disputed question as to whether the plaintiff was chargeable with knowledge of the claims of Warham N. Murray's heirs, and it may be conceded, arguendo, that these heirs were in fact and law unknown adverse claimants. In this case, as in Gilbreath v. Teufel, the proceedings are in strict accord with the letter of the law. The two cases well illustrate the gross abuse of process which the act has undertaken to devise as a substitute for "due process." It will be readily seen that, if such a proceeding could be sustained as "due process," it would easily be possible for one having a pretended claim to land to obtain a judgment by default, barring the true owner without his knowledge, even though the latter were the plaintiff's next door neighbor, and the plaintiff knew that his neighbor was the owner of the land in fee simple under an unrecorded deed; and this could be done without violating a single provision of the statute. As if to still further reduce the chances that the summons would convey any notice to adverse claimants, this act repealed the provision of the former act requiring a notice of lis pendens to be recorded in the registry of deeds, and a copy thereof to be published with the summons. The result was that the plaintiff was required to name

in the summons only such adverse claimants as were in possession, or whose adverse claim appeared of record. All others, although actually known to the plaintiff, could be described as unknown claimants to the land involved, and this without describing the land in the summons. No service of summons upon such claimants was required, except by publication, and the publication disclosed neither the names of the claimants nor the land affected.

In a case of this kind there is no actual seizure of the property of which the adverse claimants may be deemed to have any sort of constructive notice. It is manifest, therefore, that the jurisdiction of the court to determine the rights of claimants to the property must be acquired by the service upon the adverse claimants of an appropriate notice. The form of the notice and the mode of service to be required are matters resting in the legislative discretion. This legislative discretion is not however, unlimited, but is controlled and restricted by that provision of the Fourteenth Amendment of the federal Constitution, which declares that no state shall deprive any person of life, liberty or property without due process of law. The state Constitution contains the same prohibition. Const., article 1, section 13. The fact, therefore, that the notice by which the court's jurisdiction to hear and determine must be acquired is in the form and has been served as prescribed by the statute is not a conclusive test of its sufficiency. Roller v. Holly, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520; Bardwell v. Collins, 44 Minn. 97, 46 N. W. 315, 9 L. R. A. 152, 20 Am. St. Rep. 547.

There can be no doubt as to the right of the legislature to provide for some other method of giving notice to interested parties of the pendency of an action than by personal service of the summons where the action involves property within the territorial jurisdiction of the court, and where personal service of the summons is for any reason impracticable. Notice by publication in such cases has always been held sufficient. There must, however, be notice of some kind, and it must be a notice of such a character that it will have a tendency, in a reasonable degree, to convey information to interested parties that the action affects their rights. A notice such as the published summons in this case, which neither names the adverse claimants to the land in controversy nor describes the land itself, is clearly neither appropriate nor reasonable. It conveys no information whatsoever that the action in-

volved the title to the land of these appellants, or that these appellants were in any way interested in the action. The publication of such a summons, containing no description of the property or persons affected, is, so far as the adverse claimants not named are concerned, no notice at all. As to such persons it possesses none of the essential attributes of a notice such as is required by "due process."

The legislature of 1905 has recognized the inadequacy of the proceedings prescribed by the act of 1901 to acquire jurisdiction in this form of action by an amendatory act, which restores substantially the proceedings required by the act of 1899. See chapter 4, p. 8, Laws 1905. We hold, therefore, that the judgment in the former action does not conclude these appellants, because the proceedings, although in statutory form, did not constitute "due process of law" against adverse claimants who were not named and who did not appear. As to such persons the judgment was wholly void, whether directly or collaterally attacked. Its invalidity affirmatively appears on the face of the judgment roll. Under such circumstances, the former recitals in the findings and judgment, to the effect that process had been duly served and jurisdiction duly obtained, are obviously of no avail. Adams v. Cowles, 95 Mo. 501, 8 S. W. 711, 6 Am. St. Rep. 74.

The evidence shows that the tax sales upon which the tax deeds were issued were void. The respondents virtually concede this by their silence on this point. Appellants, however, contend that all the taxes for which these void tax sales were made are wholly void, and should be canceled. This contention is not sustained by the evidence. The defects relied upon, even if the competency of the evidence to prove them were conceded, are mere irregularities of a trifling nature, which do not afford any ground for equitable relief from the tax. If any of the taxes were excessive (and the proof on that point is not clear), the excess is so slight that it is not worth mentioning in the computation of the amount required to redeem in equity. We think the case is one where the maxim "de minimis non curat lex" may be justly applied. This is not a case where the validity of the title depends upon the correctness of the amount charged.

Following the case of State Finance Co. v. Beck, 109 N. W. 357, and Powers v. Bank, 109 N. W. 361, recently decided, but not as yet reported, we hold that the plaintiffs, as a condition prece-

dent to equitable relief, should be required to pay to defendants, or into court for them, the total amount of taxes paid by the purchaser of the tax title, being the taxes for the years 1895, 1896, 1897 and 1898, all of which were paid by the Minnesota Title Insurance & Trust Company when the rights of the county were assigned to it on July 7, 1899. The amount so paid was $76.63, to which should be added the sum of $15.26, paid by said assignee on February 1, 1900, for the taxes of 1899. The defendants are entitled to interest on these sums from the respective dates of payment at the rate of 7 per centum per annum. A provisional decree or order may be entered, requiring such payment within 30 days after notice of the entry thereof, and upon compliance with its conditions a final judgment may be entered for the relief prayed for in the complaint, including taxable costs. If the plaintiffs fail to comply with the conditions imposed, judgment should be entered to the effect that the plaintiffs are entitled to no equitable relief, and that defendants recover the taxable costs and disbursements.

This case is distinguishable from Powers v. Bank, where we ordered a dismissal of the action, in this: That the complaint shows on its face and the evidence discloses that the plaintiffs were ready and willing and offered to redeem by paying what was justly due, but the defendants declined the offer, and their answer shows that a formal tender would have been unavailing.

The judgment is reversed and the cause remanded for further proceedings in accordance with this opinion. The appellants will recover the taxable costs and disbursements of this appeal. All concur.

(109 N. W. 363.)

STATE FINANCE COMPANY, A CORPORATION, v. WILLIAM H. BECK, VALERIA R. MEYERS ET AL., DEFENDANTS, AND WILLIAM H. BECK AND VALERIA R. MEYERS, APPELLANTS.

Opinion filed May 15, 1906. Rehearing denied October 16, 1906.

Champerty and Maintenance—Occasional Cutting of Hay Not Adverse Possession.

1. The occasional cutting and removal of hay from unoccupied lands, under a permit from one claiming title adverse to the plaintiff's grantor, is not sufficient to constitute adverse possession so as to avoid plaintiff's deed for maintenance.

Taxation — Two Tracts Assessed as One.

2. Where two tracts of land are assessed and taxed as a single tract the entire tax proceeding is a nullity.

Same — Woods Law.

3. Where the same irregularity appears on the face of all the proceedings under the "Woods Law" (chapter 67, page 76, Laws 1897), the judgment in that proceeding is void.

Same — Payment Is a Condition of Equitable Relief.

4. Where there is an utter absence of those things which are inherently essential to a valid tax, equity cannot require payment as a condition to relief from the proceedings.

Same — Certificate of Sale.

5. A certificate issued in evidence of a sale under the "Woods Law" is, if valid on its face, prima facie evidence of a valid judgment and sale. Young, J., dissenting.

Same — Certificate as Evidence.

6. The certificate becomes conclusive evidence of a valid sale if not attacked in an action commenced within three years after the sale, unless the judgment was paid before sale or a redemption effected after sale. Young, J., dissenting.

Same — Void Judgment — Limitations.

7. Even if the judgment was void the sale becomes valid if not attacked within three years, unless a jurisdictional defect in the antecedent proceedings can be shown. Nind v. Myers, 109 N. W. 335, followed. Young, J., dissenting.

Same — Jurisdictional Defects.

8. The fact that instead of furnishing the sheriff with a certified copy of the judgment upon which to make the sale, the original judgment was used for that purpose, is not a jurisdictional defect in the proceedings. Young, J., dissenting.

Same — Redemption — Notice of Expiration.

9. Service of the notice of expiration of time to redeem from such a sale upon the grantees named in certain recorded tax deeds which were void on their face is not a service upon the owner required by section 1344, Rev. Codes 1899.

Same — Tax Deed as Evidence.

10. A tax deed void on its face is not evidence of a tax sale or of the existence of a tax.

New Trial — Newly Discovered Evidence.

11. Where the defect in the deed was properly pointed out by an objection at the trial, but the party offering it neglected to offer

other evidence of his alleged right as a tax-sale purchaser he cannot have a new trial to supply the absence of proof. Beggs v. Paine, 109 N. W. 322, distinguished.

Taxation — Failure of Proof.

12. In case of such failure of proof the alleged tax title purchaser must be held to have no claim either on the land or for reimbursement from the county as on a void sale.

Payment of Just Taxes Before Relief — Cases Overruled.

13. In an action to determine adverse claims the plaintiff will not be relieved from an alleged invalid tax sale unless he pays the face amount of all just taxes with interest from the day of sale. Previous cases on this point overruled.

Notice of Redmption Must State Time of Expiration.

14. A notice of the expiration of the time to redeem from a tax sale under the revenue law of 1897 is fatally defective if it incorrectly states the time when the redemption right will expire.

Same — Objection to Sale.

15. All objections to a tax sale under the revenue law of 1897 are barred unless the defect is one of those mentioned in section 1263, Rev. Codes 1899, or some other jurisdictional defect. Beggs v. Paine, 109 N. W. 322, followed.

Appeal from District Court, Stutsman county; *Glaspell,* J.

Action by the State Finance Company against William H. Beck and Valeria R. Myers. Judgment for plaintiff, and defendants appeal.

Reversed and remanded.

Marion Conklin and *James B. Kerr,* for appellants.

Paying taxes, leasing and the cutting and removal of hay constitute disseisin. Torey v. Bigelow, 9 N. W. 313; Booth v. Small, 25 Iowa, 177; Clement v. Perry, 34 Iowa, 564; Finn v. Wisconsin River Land Co., 40 N. W. 209; Knox v. Cleveland, 13 Wis. 245.

All defects in the sheriff's certificate are cured by the statute of limitations. Section 15, chapter 67, Laws of 1897; Henningsen v. City of Stillwater, 83 N. W. 983; Whitney v. Marshall, 17 Wis. 174; Oconto Company v. Jerrard, 46 Wis. 317.

John Knauf, Seth Newman and *Wicks, Paige & Lamb,* for respondents.

The possessory act must be of such a nature as to leave some enduring traces, such as cultivation, improvement, substantial en-

closure, removal of fuel, fencing of timber for the purposes of husbandry, etc. Section 5193, Rev. Codes 1899. Washburn v. Cutter, 17 Minn. 631; Bazille v. Murray, 40 Minn. 48; Lambert v. Stees, 47 Minn. 141; 1 Am. & Eng. Enc. Law (2d Ed.) 827.

ENGERUD, J. This case is here for trial de novo of all the issues pursuant to an appeal by defendants. Plaintiff, claiming to be the owner in fee, brought this action in statutory form to determine adverse claims. Defendants, Valeria R. Myers and William H. Beck, answered separately, each claiming title under certain tax deeds and liens under tax-sale certificates. Plaintiff claims title through a deed executed and delivered to it by one Kindred shortly before this action was commenced; and it is admitted that Kindred was, when he executed it, the owner of the land unless his title had been divested by certain tax sales hereinafter mentioned. Counsel for defendants contend that the deed under which the plaintiff claims title is void under Galbraith v. Payne, 12 N. D. 164, 96 N. W. 258. It is asserted that the plaintiff's grantor had not taken rents for one year prior to the execution of the deed, and that the land was in the adverse possession of the defendant Beck. The facts do not sustain this contention. The land was wild, uncultivated prairie, without improvement of any kind whatever. Plaintiff's grantor was a nonresident. In 1901, 1902 and 1903 his local agent at Jamestown sold to one Jennings the privilege of cutting the hay, and the latter, under this privilege, went upon the land and cut the hay in the seasons of 1901, 1902 and 1903, and removed it to his own farm. The hay was not stacked upon the premises, and he made no improvements of any kind. It took about 10 days to cut and remove the hay. Plaintiff's agent went over the land before completing the purchase. He saw no evidence of possession, and testified that he did not know that the hay had been cut by Jennings until he heard the latter's testimony to that fact. To constitute a disseisin of the owner of uncultivated or wild land by entry and occupation, the occupation must be of that nature and notoriety that the owner might be presumed to know that there was a possession of the land. A mere occasional entry to cut grass is not of that nature, and so it has been held. Washburn v. Cutter, 17 Minn. 361 (Gil. 335); Bazille v. Murray, 40 Minn. 48, 51, 41 N. W. 238; Lambert v. Stees, 47 Minn. 141, 49 N. W. 662. See, also, Bump v. Butler County (C. C.) 93 Fed. 290, 300; Buswell on Limitations & Adverse Posses-

sion, section 253; 1 Enc. of Evidence, 654, and cases cited. There was in this case but an occasional entry and for a temporary purpose. It was not such an occupation as is required to constitute adverse possession. The deed was not, therefore, within the prohibition of the statute against maintenance.

The action involves the title to three distinct tracts of land: The N. E. ¼ of the N. W. ¼ of section 13, township 139, range 63; the W. ½ of the S. E. ¼ of the same section; and the W. ½ of the E. ½ of section 25 in the same township. The first two tracts above described were assessed and taxed as a single tract although they were 80 rods apart. There was consequently no assessment of either tract, and hence there is nothing which can be held to be a tax either in law or equity. The invalidity of the proceedings as to these two tracts was apparent on the face of the certificates and deeds. The irregularity is fatal not only to the tax sales, but also to the tax itself. Roberts v. Bank, 8 N. D. 504, 79 N. W. 1049. The judgment and sale under the "Woods Law" (chapter 67, p. 76, Laws 1897), does not avail anything because the same irregularity exists in that proceeding. The citation, judgment and certificate all included the two distinct tracts under a single description. That law required each distinct tract to be separately described. Section 1331, Rev. Codes 1899. Although, under section 1339 the list of delinquent taxes filed with the clerk of court is prima facie evidence of the validity of the taxes listed, yet it is obvious it could not have that effect where the list disclosed the incurable illegality of the charge. A court of equity cannot impose as a condition of relief in this form of action the payment of the amount justly due when, as in this case, the inherent essentials to the existence of an assessment and tax are lacking. With respect to the W. ½ of the E. ½ of section 25 defendant Beck claims title by virtue of a sale on November 21, 1898, pursuant to the "Woods Law." The certificate is in the same form as that considered in Nind v. Myers (just decided) 109 N. W. 335; and is valid on its face for the reasons there stated. Following the decision in that case we hold that, by reason of the limition provisions of section 15 of that law (section 1345, Rev. Codes 1899), the validity of the sale cannot now be questioned, and the certificate has become conclusive evidence of a valid sale. In this case, however, the land was sufficiently described in the citation published by the clerk of court, and a judgment in proper form was duly rendered.

The fact that no certified copy of the judgment was handed to the sheriff, but instead thereof he used the original judgment, we do not consider of any importance. The same irregularity existed in the sale involved in Nind v. Myers. It is plain that the legislature could have authorized the sheriff to make the sale in the manner he did without a certified copy of the judgment. The requirement that a certified copy should be provided for the sheriff was for his convenience and that of the other officers. There was nothing in that requirement designed for the protection of the landowner; and its omission could not prejudice them. Be that as it may, it was only a legislative requirement, which the legislature could dispense with, and hence all objection because of that irregularity is barred by the limitation provisions of section 1345, Rev. Codes 1899. Nind v. Myers. We hold, however, that the plaintiff's redemption right has not been terminated by proper notice. The statute requires, among other things, that the notice must be served on the owner by mail if the owner is a nonresident. Section 1344, Rev. Codes 1899. The notice was not mailed to Kindred, the then owner. It was mailed to the persons whose names appeared of record as grantees in certain prior tax deeds. Each of these tax deeds were void on their face because they were not in statutory form; and were also void for other reasons. Without deciding whether a notice to the apparent record owner would be sufficient under this statute, we are agreed that the grantee named in a recorded tax deed void on its face cannot be held to be the owner within the meaning of this statute. It is unnecessary to notice other alleged defects in the notice. The certificate is valid, but the right of redemption has not been cut off.

The tax deed to Beck, dated December 17, 1898, based on a tax sale in 1895 for the taxes of 1894 is void on its face because it names the county of Stutsman as grantor instead of the State of North Dakota. Beggs v. Paine, 109 N. W. 322. The deed, therefore, proves nothing but its own execution, and its defects were specifically pointed out by proper objection. The defendant failed to offer any proof of a tax-sale certificate or tax sale, and he must bear the consequences of his own error. The reasons for ordering a new trial in Beggs v. Paine, in a case of absence of proof, do not exist in this case. It must be held that the defendant has no claim based on the tax sale of 1895 of the particular tract in question. In the absence of any evidence of a tax sale, we cannot

find that he is the holder of a void tax-sale certificate so as to entitle him to reimbursement from the county as provided by section 84, c. 132, p. 408, Laws 1890, under which the sale was made, or section 1270, Rev. Codes 1899, which corresponds to the provision on that subject in the former law.

The tax sale to Beck dated January 11, 1901, based on a tax sale in 1897, for the tax of 1895, is void on its face for the same reason that the preceding deed was void. It is conceded that the sale was void because the notice of sale was insufficient. There were certain irregularities in the antecedent tax proceedings, but all of them were merely irregularities in the performance of purely legislative requirements. Nothing was omitted that was inherently or constitutionally essential to the creation of a tax. In a court of equity such a tax is not wholly void even though the irregularity may be fatal to the sale. It is not shown that the tax was excessive or lacking in uniformity or otherwise unjust. No reason is assigned why the plaintiff should in equity be relieved from the payment of any portion of the tax. The plaintiff is not entitled to any equitable relief with respect to this sale until he does equity. Here is a tax which he ought to have paid. If he had done his duty by paying this just tax in proper season no sale would have been made. The county is a guarantor of the validity of the sale, and if the sale is held void, the public treasury must return the money received at the sale to the purchaser, with 7 per cent interest. If the land owner had made his objections to the sale promptly, several years of interest would have been saved to the county, and the tax could have been promptly collected. Shall the taxpaying members of the community be compelled by a court of equity to bear the burden of increased taxation due to this landowner's refusal or failure to pay a just tax? It is no answer to say that he had the legal right to refuse payment so long as the proceedings were not in accordance with the statute. The statutory regulations which have not been strictly observed in this case were designed to insure the taxpayer ample protection against injustice or infringement of his constitutional right; and to afford him ample remedies for prompt redress in case he was wronged. Whether the statutory regulations were observed or not, in this instance, no injustice has been done the plaintiff. The rights which the statute was designed to protect have not been violated. They were not intended to be used as a means of evading his duties to the government, and of doing injustice to his neighbors.

The county is virtually a party to this action because the judgment herein rendered is a conclusive adjudication of its liability as a guarantor of the tax sale. Section 1270, Rev. Codes 1899; Paine v. Dickey County, 8 N. D. 581, 80 N. W. 770. If the sale is set aside unconditionally, even though the tax is not canceled, the county is chargeable with the accrued interest, and plaintiff gets the benefit of the use of the money without interest which he ought to have paid years before, and his taxpaying neighbors must suffer for his laches. A court of equity will not tolerate such injustice. It will grant relief only on the condition that the party seeking it does equity. The burden of each taxpayer's neglect of his obligations should be borne by himself. Hence, we shall hold that as a condition to the vacation of the sale in question the plaintiff must pay to the defendant Beck, or into court for him, the amount for which the land was sold, with interest thereon at 7 per cent per annum from the day of sale. A provisional decree should be entered giving the plaintiff the privilege of making such payment to the certificate holder or into court for him within thirty days after notice of the entry of such decree. If the plaintiff shall fail to make such payment then the final decree shall adjudge that the plaintiff is entitled to no relief from such tax sale.

We recognize the fact that this decision is in conflict with the practice heretofore prevailing as established by the decisions of this court. Those decisions were cited in Douglas v. City of Fargo, 13 N. D. 467, 101 N. W. 919. It is true, as pointed out in that case, that there is a distinction between a suit for cancellation against the county, such as that, and an action to quiet title, such as this. The difference is only in form, however. Both invoke the equity jurisdiction of the court for the same purpose, namely, the cancellation of an adverse claim. The inherent powers of the court as an equity tribunal and the general principles governing the court in equity cases are precisely the same in whatever form the questions are presented. The legislature can devise remedies and rules of procedure, but it cannot deprive the court of its constitutional jurisdiction to grant equitable relief on equitable conditions. We do not think there is anything in the statute relating to this form of action which was intended to do so. It merely prescribes the manner in which the issues may be brought before the court. It does not restrict the exercise by

the court of any of its jurisdiction according to equitable principles. We do not question the well-established rule that a tax-title purchaser buys at his peril. The doctrine of caveat emptor applies to such a sale to its full extent. However circumscribed the rights of the tax-title purchaser may be as compared with those of the landowner, the latter is not entitled to more than his legal rights. The infirmities of the tax title do not absolve the taxpayer from his obligation to do equity when he seeks equity. We agree that the tax-title purchaser is entitled only to his pound of flesh in whatever form he demands it. But confining the tax-title purchaser to his strict legal rights is one thing, and relieving the tax debtor from his just share of taxes at the expense of his neighbors is quite another. This case is a fair illustration of the injustice resulting form adhering to the rule heretofore in force in this state of not requiring payment of just taxes as a condition precedent to relief in this class of cases. The owner of the land in this case has not paid a cent of tax on this property for more than 20 years. It is not claimed that any of the taxes were excessive or unfair, or that they otherwise infringed any of the landowners' constitutional rights. The technical requirements of the law as to the procedure have not been followed with precision; and the landowner not only asks to have the tax sales set aside, but declines to pay or offer to pay a cent of the taxes which are confessedly just. Under the rule heretofore in force he was sustained in that position. The public treasury was compelled to reimburse the tax-title purchaser. It could, of course, reimpose the taxes without interest, but took the risk of another law suit as to the validity of the subsequent proceedings. The delinquent taxpayer was permitted to profit at the expense of the community.

By overturning the precedents on this question established by former decisions, we do not in any way disturb the rules by which the validity of past or future tax sales are to be tested. We disturb no rights which are justly entitled to protection. It surely cannot be claimed that those who have neglected to pay their just taxes are in any position to invoke the doctrine of stare decisis to continued immunity from their obligation to do equity when they seek equitable relief. We are satisfied that public policy necessitates this modification of former decisions, and it is further justified by the fact that it restores in this state the rule recognized and applied in other jurisdictions. In addition to the cases cited in

Douglas v. City of Fargo, see Blackman v. Arnold (Wis.) 89 N. W. 513; Adams v. Castle, 30 Conn. 404; Knox v. Dunn, 22 Kan. 683. Chapter 166, p. 232, Laws 1903, is an express legislative establishment of the rule we have been discussing. As indicated above, the court has inherent power, independent of such a statute, to do what the statute requires. The second deed to Betts of the same date as the preceding one for the taxes of 1896 is likewise void for the same reasons. The taxes, however, are merely irregular, and all that was said with respect to the taxes and tax sales for the tax of 1895 applies to this tax and tax-sale certificate, and relief should be granted on the same terms. The tax deed to Beck dated June 25, 1903, based on the tax sale of 1898 for the taxes of 1897 is void because there was not proper notice of expiration of redemption. The notice was issued more than 90 days before the expiration of the 3 years for redemption. The time to redeem, if the notice was properly served, was December 6, 1901. The notice stated that the time to redeem would expire December 26, 1901. The notice was therefore ineffective, and the deed conveyed no title. State v. Nord, 73 Minn. 1, 75 N. W. 760, 72 Am. St. Rep. 594; Kipp v. Robinson, 75 Minn. 1, 77 N. W. 414. The irregularities relied upon to avoid the sale are none of those mentioned in section 1263 for which a sale may be avoided; and none of them were jurisdictional defects beyond the power of the legislature to cure or bar. State Finance Co. v. Mather, 109 N. W. 350, and Beggs v. Paine and Nind v. Myers, supra. The tax sale is therefore valid, but the redemption right is not cut off. The tax-sale certificate to Beck dated December 3, 1901, for the taxes of 1900 is conceded to be valid; and we think the judgment and findings sufficiently show that fact, though lacking somewhat in clearness. The tax sale to David Myers in 1892 for the taxes of 1891 was void because in the assessment roll the property is described as the "W. 2 E. 2" of the section. This must now be held to be no description, and vitiates the entire tax proceeding. The early decisions on this point have become a rule of property. Beggs v. Paine, supra.

The judgment will be reversed, and the cause remanded, with directions to enter judgment in accordance with this opinion. Appellant Beck will recover the taxable costs and disbursements of both courts from respondent.

YOUNG, J. (dissenting in part). The following conclusions announced in the above opinion do not meet my approval: (1) That

a sheriff's certificate issued under chapter 67, p. 76, Laws 1897, is prima facie evidence of a valid judgment, (2) that it becomes conclusive evidence of a valid sale unless attacked in three years, (3) that a sale under a void judgment becomes valid unless attacked in three years, and (4) that the sale by the sheriff without a certified copy of the judgment was a mere irregularity.

As to the remaining questions I agree with the conclusions stated in the syllabus. My views upon the first three questions are set forth in a dissenting opinion in Nind v. Myers, and in Beggs v. Paine (filed herewith), 109 N. W. 322, and need not be repeated

As to the fourth question, I am of opinion that the sale by the sheriff without the certified copy of the judgment was a sale without authority of law and was void, and was not a mere irregularity, as the majority hold. It cannot be said that a sale without authority of law is not a sale without jurisdiction. Section 1341, Rev. Codes 1899 (section 11, c. 67, p. 82, Laws 1897) required the clerk of the district court, after the entry of the judgment, to deliver to the sheriff "a certified copy of such judgment written on the left-hand page of a book to be prepared by the treasurer." This certified copy of the judgment is the sheriff's authority to sell. It is his precept, and performs the same office as an execution on an ordinary judgment. The subsequent proceedings are required to be recorded upon it, and the copy is returned to the clerk of the district court. Section 1346. In my opinion, the case is not different from that in which a sheriff seizes and sells property without an execution. There being no authority of law for him to proceed in that way, his act is void. The execution is the authority for his act and without it he is without authority. The same principle should be applied when an officer attempts to sell lands for taxes. If he does not have the precept, he is without authority,.and the sale is void. The following cases sustain this view: Atkins v. Hinman, 2 Gilman (Ill.) 437-448; Williams v. Underhill, 58 Ill. 137, 138; Eagan v. Connelly, 107 Ill. 458-465; Little v. Herndon, 10 Wall. (U. S.) 26, 19 L. Ed. 878; People v. Doe. 31 Cal. 220; Gilbreath v. Dilday, 152 Ill. 207, 38 N. E. 572. The sheriff's authority was special. It existed only to the extent and under the circumstances stated in the statutes. If he acted without the authority of the statute, his acts are not justified or sustained by it.

It is well settled that "the power to sell lands for taxes is a naked power, and the validity of a title derived from such a sale depends upon a strict compliance with the directions of the statute. The officer intrusted with the power of sale exercises a naked statutory and special authority, depending upon the letter of the law for its support. He must act in conformity with the law from which his power is derived; and a purchaser at such a sale is bound to know whether he has so acted. It is therefore a condition precedent to the passing of titles at such sales that all proceedings of the officers who have anything to do with the assessment and collection of the taxes or with the advertisement and sale of the property shall be in compliance with the statute authorizing the sale." Woodbridge v. State, 43 N. J. Law, 262, 270, and cases cited; also, Hopper v. Ex'rs, 16 N. J. Eq. 382; and the opinion of Chief Justice Marshall in the leading case of Williams v. Peyton, 4 Wheat. (U. S.) 77, 4 L. Ed. 518, and Early v. Doe, 16 How. (U. S.) 609, 14 L. Ed. 1079.

In my opinion there is shown an absence of authority in the sheriff to make the sale in question. And it is quite clear that authority to sell is not supplied by the curative or limitation provision of section 1345, to which the majority opinion refers. Such statutes, when applicable, cure irregularities and omissions in proceedings which are being taken by authority. But there is no ground for claiming that they give the officer authority in addition to that contained in the statute, under which he assumes to act. This must be so, for if the officer may choose his own method of procedure, or, as in this case, decide to sell without the certified copy, and thus without the authority of the statute, he is assuming to exercise legislative power which cannot be delegated. His authority to act is created by the legislature, and exists only upon the conditions named by the statute and he cannot create it himself. The fact that the legislature might have authorized him to sell upon different conditions proves nothing. It is a sufficient answer to this to say that it did not do so. The landowner can only be deprived of his property by due process of law, and he is not deprived of his property by any law, when it is not taken under the authority of a law in existence, but merely by a method of procedure which the legislature could have authorized if it had seen fit to do so.

For this reason I am of the opinion that the sale was made without jurisdiction, and should be held void.

(109 N. W. 357.)

STATE FINANCE COMPANY v. A. C. MATHER.

Opinion filed May 15, 1906.

Taxation — Assessment — Description of Property.

1. A sufficient description of the property intended to be assessed and taxed is inherently essential to a valid tax.

Same.

2. The term "East middle" of a given town lot is unintelligible.

Statutes — Title of Action — Constitutional Law.

3. Chapter 165, page 220, Laws 1901, amending section 1269, Rev. Codes of 1899, is constitutional. It is a valid limitation act, and its title is sufficient.

Verification of Assessment Roll.

4. The failure to attach to the assessment roll the prescribed assessor's affidavit does not invalidate a tax sale of real property made under the revenue law of 1897. (Young, J., dissenting.)

Same — Statutory Bar to Action.

5. The verification of the assessment roll by the assessor is merely a legislative requirement which is neither inherently or constitutionally essential to an assessment; and objection to a tax sale under the tax law of 1897 for such irregularity is barred by section 1263, Rev. Codes of 1899. Eaton v. Bennett, 10 N. D. 346, 87 N. W. 188, disapproved. (Young, J., dissenting.)

Appeal — Presumption as to Correctness of Abstract.

6. In the absence of proper objection this court will presume that the abstract on appeal is correct and was properly prepared.

Same.

7. This rule will be relaxed only in exceptional cases.

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

Action by the State Finance Company against A. C. Mather. Judgment for plaintiff and defendant appeals.

Modified.

J. B. Wineman and *B. G. Skulason*, for appellants.

A description is sufficient that is generally understood to refer to the land in question. Gilfillan v. Hobart, 24 N. W. 342; Power v. Bowdle, 3 N. D. 107, 64 N. W. 404; Doherty v. Real Estate Title Ins. & Trust Co., 89 N. W. 853; Kampfer v. East Side Syndicate 104 N. W. 290.

The purchase at a tax sale is a contract, and no subsequent statute can import new terms into it, or add to those before expressed. Morgan v. Commissioners, 27 Kan. 89; Forqueran v. Donnelly, 7 W. Va. 114; Merrill v. Dearing, 32 Minn. 479; Robinson v. Howe, 13 Wis. 341; Roberts v. First National Bank of Fargo, 8 N. D. 504, 79 N. W. 1049.

The law in force is a part of such contract. Hillebert v. Porter, 28 Minn. 496; Fisher v. Betts, 12 N. D. 197, 96 N. W. 132.

Charles M. Cooley and *Wicks, Paige & Lamb,* for respondent.

Where the statute has prescribed a form of verification, it must be followed in all essential particulars. Cooley on Taxation (3d Ed.) 761; Shattuck v. Bascom, 105 N. Y. 39; State v. Seahorn, 139 Mo. 582; Steffens v. King, 123 N. Y. 31; Van Rensseler v. Whitberk, 7 N. Y. 517; Gilchrist v. Dean, 29 N. W. 330; Daniels v. Watertown Twp., 28 N. W. 673; Eaton v. Bennett, 10 N. D. 346, 87 N. W. 188; Lee v. Crawford, 10 N. D. 482, 88 N. W. 97; Poldi v. Poldi, 47 N. W. 510.

ENGERUD, J. This is an action in statutory form to determine adverse claims to two tracts of city property. The defendant, Mather, sets up in his answer numerous tax sale certificates under which he claims to have valid liens upon each of the tracts described in the complaint. The trial court held all the tax sale certificates invalid, and judgment was entered to that effect. The defendant appealed from the judgment, and demands a trial de novo.

One of the tracts involved is a piece of ground 22 feet wide extending across two platted lots. In the several tax sale certificates which defendant asserts cover the above-mentioned tract the description of the land sold is as follows: "Grand Forks City, O. T., East middle 22 feet, lot 9, block 21." Even if we could assume that "O. T." means original townsite, we are at a loss to know what is meant by the "East middle" of a tract of land, and counsel have not enlightened us. The assessments upon which these certificates are based used the same terms in describing the land assessed. The description is meaningless, and, if the tract described in the complaint was in fact the land intended to be taxed, it is plain that the entire tax proceeding was utterly void. The other parcel involved is a strip 47 feet wide extending across both the same lots above mentioned and lies next to the alley

which runs back of said lots. That is the sum and substance of the very lengthy description set forth in the complaint. It may be sufficiently designated as the rear 47 feet of each of said lots. Throughout the tax proceedings hereafter referred to, the rear 47 feet of each lot was dealt with as a separate piece of land. They were assessed, taxed, and sold for taxes separately, so that for each sale there were two certificates, one for each lot.

Defendant holds two certifiates issued December 7, 1897, for the taxes of 1896. These certificates are barred by the provisions of chapter 165, p. 220, Laws 1901. That enactment amended section 1269, Rev. Codes 1899, by adding thereto the following proviso: "Provided, however, that all rights of such purchaser and his assigns to possession, title or lien of any kind of, to or upon such piece or parcel of land, shall cease absolutely and be deemed forfeited and extinguished, unless possession thereof be taken by him or them, or proceedings for such possession be by him or them instituted, or deed therefor be executed and delivered to him or them by the proper officer, prior to the expiration of six years from and after the date of such certificate, or in case of sales heretofore made and where five years or more have already elapsed since the date of such certificate, then prior to the expiration of one year after the taking effect of this section." This action was commenced in January, 1904, and the certificate became barred December 7, 1903. It is conceded that the defendant has taken no steps to avoid the effect of this law. The power of the legislature is beyond question to limit the time within which a certificate holder shall assert his rights, as such, to the land and to a deed after his right to do so accrues. Such a statute differs in no respect from any other limitation statute. It does not affect the right itself but affects only the remedy. The certificate gives the purchaser a right to take possession of the land after three years, and entitles him to a deed after the termination of the redemption right by the required notice. This act deprives him of none of these rights, but merely requires him to exercise them within a reasonable time after the right shall have accrued. The statute amply protects the rights of the holders of certificates issued before the law took effect by allowing a year for them to enforce their rights after the law took effect. Bank v. Braithwaite, 7 N. D. 358, 75 N. W. 244, 66 Am. St. Rep. 653; Osborne v. Lindstrom, 9 N. D. 1, 81 N. W. 72, 46 L. R. A. 715, 81 Am. St. Rep. 516. The title of

the act was clearly sufficient. It is stated in the title that the act was an amendment of section 1269, Rev. Codes of 1899, relating to the rights of purchasers at tax sales. It was not necessary to state in the title the precise point in which such purchasers would be affected. Power v. Kitching, 10 N. D. 254, 86 N. W. 737, 88 Am. St. Rep. 691; State v. Society, 10 N. D. 493, 88 N. W. 273; Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841.

The defendant holds certificates, however, for tax sales in 1898, 1899, 1900 and 1902. The plaintiff claims that the several assessment rolls upon which these respective sales are based were not properly verified by the assessor's affidavit, required by section 1219, Rev. Codes 1899. It has been held by this court that the failure of the assessor to verify the assessment roll by attaching the prescribed affidavit, is fatal to a tax sale based on such assessment. Eaton v. Bennett, 10 N. D. 346, 87 N. W. 188. Neither that case nor those it cites involved tax sales governed by the revenue law of 1897 which is the one now in force. Chapter 126, p. 256, Laws 1897; section 1176 et seq., Rev. Codes 1899. In that case the court said in effect that the act of verifying the assessment roll by the prescribed affidavit was a part of the act of assessing, and that a valuation by the assessor, although sufficient in all other respects, was no assessment if the assessor's affidavit was not attached to the roll. This unqualified language was in effect disapproved by the decision in Douglas v. City of Fargo, 13 N. D. 467, 101 N. W. 919. In that case the assessment rolls were not verified by the assessor's oath. The plaintiff in that case, relying on Eaton v. Bennett, asserted that there was no assessment, and hence no tax. The court held that, although the defect might be fatal at law, it was not fatal in equity. It is manifest that if there was no assessment there could be no tax either in law or equity. We hold that the verification of the assessment roll by the assessor is not any inherently necessary part of the act of assessment proper, but is merely a legislative requirement. The act of assessment is performed as to the land when the assessor determines its value. That is all that is inherently necessary, and it is clear that, under our system of real estate taxation, no less will suffiice. The assessment must of course be evidenced by some authentic record. It is self-evident that the assessor's affidavit is not inherently essential either to the assessment or as an authentication thereof. The constitution does not expressly or impliedly require it. The pro-

vision for the affidavit is a purely legislative requirement. That being so it is plain that the legislature has the power to either dispense with it altogether or to declare that the nonobservance of this requirement shall not be held to be a valid objection to the tax or a tax sale. Beggs v. Paine, 109 N. W. 322, and Nind v. Myers (just decided) 109 N. W. 335. In the absence of a curative statute such a defect would, in an action at law, be fatal to the tax, in the sense that it would not support the sale, although not fatal in a court of equity. Douglas v. City of Fargo, 13 N. D. 467, 101 N. W. 919. But the defect is not such a jurisdictional defect as that it cannot be remedied by a limitation act or declared immaterial by the same statute which requires it. Beggs v. Paine and Nind v. Myers. See, also, Williams v. Supervisors, 122 U. S. 154, 7 Sup. Ct. 1244, 30 L. Ed. 1088. With respect to a tax sale the legislative power to cure or bar objections grounded on the nonobservance of such defects would necessarily be circumscribed by certain constitutional limitations. But this defect is not of that character. In the revenue law of 1897 the legislature exercised this power to its full extent. By section 78 of that law (chapter 126, p. 286, Laws 1897; section 1263, Rev. Codes 1899) the legislature declared that no sale should be invalidated "unless the party objecting to the same shall prove either that the property upon which the tax was levied was not subject to taxation, or that the taxes were paid prior to such sale, or that notice of such sale as required by law was not given; or that the piece or parcel of land was not offered at said sale to the bidder who would pay the amount for which the piece or parcel was to be sold, in which case, but in no other, the court may set aside the sale." No language could more plainly and emphatically express the legislative intent that no omission or defect in the proceedings before the sale should be ground for invalidating the sale unless the omission or defect was one or more of those mentioned in that section. The section does not declare what shall be the effect of any omission or defect if objection is made before the sale. It purports to bar all objections except those mentioned if not made before sale. There can be no doubt that the section cures or bars every defect which is within the power of the legislature to declare nonessential. The language of the section taken literally goes farther than this and it is clear that, to the extent that it purports to declare nonessential those acts which are inherently necessary or which are necessary by rea-

son of constitutional provisions, it cannot be enforced literally. Beggs v. Paine and Nind v. Myers.

The tax sale involved in Eaton v. Bennett was made under the territorial revenue law. The deed was issued in 1893, and it was claimed that the limitation provision in the revenue law of 1897 barred all objections to its validity. Section 1264, Rev. Codes of 1899. The territorial revenue law contained no provision similar to section 78 of the revenue law of 1897. Section 1263, Rev. Codes 1897. That decision therefore does not govern this case. We think the decision is erroneous in holding that the want of an assessor's affidavit was a defect which could not be cured by a limitation act. Such a holding is in direct conflict with the rulings of all other courts that have had occasion to pass upon the question. Many of the decisions cited from other states in that case use language similar to that in Eaton v. Bennett. On examination it will be found that the tax laws involved in them had no curative or remedial provisions like section 1263, and no limitation act was involved. Most of the cases are actions at law to try the title. In the cases cited from 6 and 9 Nebraska that court used language very similar to that in Eaton v. Bennett, but that court very soon after qualified it, and has ever since adhered to the rule announced in Douglas v. City of Fargo, 13 N. D. 467, 101 N. W. 919; Wood v. Helmer, 10 Neb. 66, 4 N. W. 968; Twinting v. Finlay, 55 Neb. 152, 75 N. W. 548, and cases cited.

The same is true of the Michigan cases cited. Such a defect was held to be within the reach of a curative statute. Auditor General v. Sparrow, 116 Mich. 574, 74 N. W. 881. The statute involved in that case was similar to the one now before us.

The Missouri cases were ejectment actions. The tax law there involved was wholly different from our present law, though similar to the Dakota territorial revenue law. Under those systems, as said in Abbott v. Lindenbower, 42 Mo. 162, at page 167: "It is the owner who is taxed and not the land. He is taxed in respect to his title or ownership in the land, and taxation is to be in proportion to the value of the property. It is the owner who is to pay the tax, and it is his title or interest in the land which is to be transferred by a sale, if any title pass." Under such systems the land is only secondarily liable and it is self-evident that a proceeding directed against one not the owner would not be of any effect against the owner unless the land itself was seized, and, in

the absence of such seizure, it is manifest that the deed could not be made conclusive evidence. It was not "due process" because it lacked the element of notice. In State ex rel. v. Schooley, 84 Mo. 447, that court declared: "Beyond doubt it is competent for the legislature to dispense with the affidavit of the assessor, or, if not wholly dispensed with, to provide that a failure to attack such oath shall not render invalid the assessment, but, in the absence of any such legislative declaration, the courts ought not so to hold."

Martin v. Barbour, 140 U. S. 634, 11 Sup. Ct. 944, 35 L. Ed. 546, is not in point. Under the statutes involved in that case the limitation did not take effect unless the notice required by the statute was given. There was no competent evidence of such a notice, and hence the irregularities were not cured or barred. The taxes were not held void, but were tendered by the plaintiff. Marx v. Hanthorn, 148 U. S. 172, 13 Sup. Ct. 508, 37 L. Ed. 410, does not involve the question in support of which it was cited. The Oregon law purported to make the deed as soon as issued conclusive evidence unless impeached for stated reasons. The Oregon tax law is similar to that of Missouri, mentioned above. The tax is imposed, not directly on the specific land which has been assessed but against the owner personally the same as personal property taxes in this state. The land is not seized for the tax until the sheriff has exhausted the tax debtor's personal property subject to levy or has made return that none can be found. Then he is authorized to seize real property and sell it the same as he would under an execution on a judgment. He may seize and sell any tract of land owned by the debtor whether it is the tract described in the assessment roll or not, and there is no fixed time for the seizure and sale. Hill's Ann. Laws 1892 of Oregon, c. 17, tit. 6. The only notice the owner of the land receives as to whether his land, or what part of his land, will be sold is the published notice corresponding to the notice of an execution sale in our state. Such a proceeding has no analogy to the present tax laws of this state as to real property. The various essential acts preceding the sale and even the sale itself do not take place at stated times fixed by the statute, and hence the statute is neither actual or constructive notice of the sale as under our real property tax law. We called attention to this difference in Beggs v. Paine and Nind v. Myers. The name of the owner and the service of notice in some appropriate form is constitutionally essential to

the validity of such a sale and the legislature cannot cure or bar such a jurisdictional defect except by a statute requiring adverse possession.

This precise point, based on the same irregularity, has been bebefore the courts of New York. They held, as shown by the cases cited in Eaton v. Bennett, that in the absence of a limitation or a prior curative act, the defect was fatal to the sale. But the same court also decided that the defect was not fatal to the tax in equity, and that the want of an assessor's affidavit was not one of those jurisdictional defects which was beyond the reach of a curative act validating the tax, or a limitation act, even though subsequently enacted barring objection to the sale by reason of the defect. These cases were reviewed and approved by the United States Supreme Court. These cases are cited in Beggs v. Paine and Nind v. Myers. As we there said, the question is a federal one under the Fourteenth amendment of the national constitution and the federal decisions are controlling except so far as the construction of the law is concerned.

But there is no room for construction of so unambiguous a statute as the one in question. The only question is, does it, as applied to the facts of this case, violate the constitutional rights of this plaintiff? We think the decision in Eaton v. Bennett is in conflict with the views unanimously expressed in Roberts v. Bank, 8 N. D. 504, 79 N. W. 1049. In that case there was clearly no assessment of the tract of land sold and it was rightly held that the defect was a jurisdictional one which could not be barred by such a limitation act. It was there said (page 512) that these jurisdictional defects which could not be barred by such an act where the "nontaxability of the property, the absence of any assessment, the absence of any levy, the fact of payment, the absence of a tax sale, and the fact of lawful redemption." Substantially the same rule was announced in Wells County v. McHenry, 7 N. D. 246, 74 N. W. 241. See, also, Dever v. Cornwell, 10 N. D. 123, 86 N. W. 227. The fallacy of the opinion in Eaton v. Bennett lies in its failure to distinguish between those things which are mandatory solely because the legislature has seen fit to make them so, and those things which are inherently or by reason of constitutional provisions essential to the jurisdiction of the taxing power. This distinction has been pointed out in Beggs v. Paine and Nind v. Myers. Being convinced that the reasoning

in Eaton v. Bennett is erroneous we hold that it should not be followed as a precedent in any case not involving the territorial revenue law. As to whether the decision has become a rule of property which must be adhered to in future cases involving the same law, we do not now decide. It will be time enough to decide that question when such a case arises.

Respondent in his brief asserts that the abstract does not correctly represent the description of the land as shown by the certificates offered in evidence. It is claimed that the certificates are in fact void on their face because of the use of an unintelligible abbreviation in describing the land sold. No timely motion was made to strike out or correct the abstract. The case was tried and is here for review under section 5630, Rev. Codes 1899. There being no timely objection, we must presume that the abstract was prepared in accordance with the rules and truly shows everything essential to the questions for review, and therefore we decline to explore the record to look for defects in the certificate not disclosed by the abstract. The respondent's title is not in jeopardy. If the certificates are in fact invalid, as claimed by respondent, the tax itself is not invalid, because all the defects upon which respondent relies are cured by chapter 168, p. 234, Laws 1903. The only question, therefore, is whether the plaintiff shall redeem from the county or redeem from the certificate holder. Redemption from the latter will cost more, but one who has so long shirked his just share of the public burden is not in a position to ask for the relaxation of the rules in his favor. All the tax sale certificates for the rear 47 feet of lots 9 and 11 issued after the year 1897 should be held valid. The certificates covering the same property issued in 1897, and prior thereto, are barred by chapter 165, p. 220, Laws 1901. All the other certificates, as well as the taxes upon which they are based, are void. Neither party should recover costs in district court, but the appellant is entitled to the taxable costs of this appeal.

The district court will modify the judgment appealed from to conform to this opinion.

MORGAN, C. J., concurs.

YOUNG, J. (dissenting in part). I concur in the foregoing opinion, except in the conclusion that the failure of the assessor to verify the assessment roll does not render a tax sale based

thereon invalid, and that the assessment is a mere irregularity and is cured by section 1263, Rev. Codes of 1899.

The verification required by section 1219 of that Code (section 42, c. 126, p. 271, Laws 1897) and under which the alleged tax was laid, is identical with that required in the 1890 revenue law (section 41, c. 132, p. 391, Laws 1890), and is in no material respect different from section 1551, Comp. Laws 1887, which was construed and applied in Eaton v. Bennett, 10 N. D. 346, 87 N. W. 188. There has been no change in the statute since the decision in Eaton v. Bennett, which indicates an intention on the part of the legislature that this provision should be given a different construction. In construing this provision in that case, this court held, upon mature deliberation, that it is mandatory; that the verification is an essential part of the assessment, and that the assessment is not complete without it; that it is required for the benefit of the taxpayer; that its omission renders the tax void; and that it cannot be cured or barred by a statute of limitations. The court, speaking through Chief Justice Wallin, said: "This section of the statute is mandatory in its terms, and was obviously designed to safeguard the interests of the taxpayer. This is its sole design and purpose. It has no bearing whatever upon the matter of expediting or facilitating the dispatch of public business. Under the law the taxpayer is entitled to have his own property and all other property in his taxing district officially valued by an assessor, who acts under the sanction of an oath, and the legislature has carefully framed a form of oath which the assessors are required to attach to their work when the same is completed and returned. There are many cases holding that the omission to annex to the roll the prescribed affidavit and certificate is a fatal omission, which goes to the groundwork of the tax, and hence one which defeats the jurisdiction to lay the tax; and cases are not wanting which hold that where the assessor, in annexing the affidavit to the roll, has omitted therefrom some material averment prescribed by sovereign authority, such omission is fatal to the tax. Mandatory provisions—and those intended solely for the benefit of the taxpayer are manadtory—must be substantially complied with by the officials who attempt to impose the tax burden upon the citizen; and the omission to do so, under the decided weight of authority, is fatal to all proceedings based upon such attempted taxation, including tax certificates and deeds issued thereon pursu-

ant to a sale for such pretended taxes. Nor will the statute of limitations begin to run in favor of a tax deed based upon such attempted taxation. The rule that mandatory provisions of the statute must be substantially observed by taxing officers, and that the disregard or violation of such provisions is fatal to the tax and defeats the jurisdiction of the taxing officers is well settled in this state, and has become, therefore, practically a rule of property, and hence a rule which this court is bound to uphold until the same has been modified by constitutional legislation. The authorities cited will fully sustain the following propositions: First. That a valid assessment evidenced by an official return is essential to a valid tax, and that fatal defects in the record of an assessment cannot be aided by evidence aliunde. Second. A tax deed based on a void assessment is itself void, and does not operate to start running the statute of limitations. Third. Where the statutes require an assessor to authenticate his assessment roll by annexing thereto an affidavit in prescribed form, it will be fatal to omit such affidavit of authentication.

I am satisfied from an examination of the cases cited in the opinion, and of many others, that the construction announced in the above case represents the better view and the prevailing and almost universal construction given to similar statutes. The question was directly involved in Martin v. Barbour (C. C.) 34 Fed. 701, a case arising in Arkansas, and the United States Circuit Court held that the failure to verify was fatal to the tax and was not cured by the statute of limitations. The decision upon these points was expressly affirmed by the Supreme Court in Martin v. Barbour, 140 U. S. 634, 11 Sup. Ct. 944, 35 L. Ed. 546. The case, although persuasive and supporting our conclusion in Eaton v. Bennet, is not necessarily controlling, for the question as to what method shall be pursued in assessing property, and when and how it shall be laid, is essentially a state question, which is settled by state legislation, and the federal courts, as a rule, merely follow the construction placed thereon by the state courts. Castillo v. McConnico, 168 U. S. 674, 18 Sup. Ct. 229, 42 L. Ed. 622. The question, in my opinion, is purely one as to the construction of the statute. There is no constitutional provision, state or federal, which declares what shall constitute an assessment. Our constitution makes it the duty of the legislature to enact laws for raising revenue. The matter of providing for the assessment is left to the

legislature. This includes, among other things, the power of designating an officer to make it, the time when it shall be made, and the manner in which it shall be made—subject, of course, to the underlying prohibition that it could not provide for an assessment which, in its very nature, lacks the fundamental elements of an assessment.

I agree with the majority that the legislature had the power to provide a different mode for assessing property: It could have provided a different method of authenticating the roll, and I think that it could also have provided that the assessment should not be made under oath, and that it should not be authenticated, although such a course would deprive the taxpayer of an important safeguard. Still, this does not meet the question at issue, for the question is not whether the legislature could have passed a law omitting the verification, for it has not done so, but it is whether a statute which requires a verification is mandatory or directory; whether this provision is for the benefit of the taxpayer, or is merely a provision for the guidance of the taxing officers. If it is mandatory, as this court has heretofore held, an assessment made in disregard of it is void, and the command of the legislature contained in section 1263, that sales shall not be set aside on any other grounds than those therein stated is utterly unavailing as to a sale made upon such an assessment. To sanction the application of the section to such sales is to approve an attempted usurpation of judicial power by the legislature, and to deprive the landowner of his property without due process of law, for I assume that it will be admitted that he has a right to the protection of all laws enacted for his benefit. That the provision requiring the assessment to be made and returned under the sanction of an oath is for his benefit, has been authoritatively settled in this state, if it is possible for a court of last resort to settle anything. So far as any opinions were expressed prior to the decision in Eaton v. Bennett, they were in harmony with the construction contained in the language I have quoted from the opinion in that case. The subsequent case of Douglas v. City of Fargo, 13 N. D. 467, 101 N. W. 919, assumed the correctness of the decision in Eaton v. Bennett. In that case certain tax certificates were attacked upon the ground that the assessment roll was not verified. This court assumed that both the tax and sale were illegal for that reason, and that the plaintiff would have been entitled to the relief he

sought, but for his failure to do equity. The case did not turn upon the question as to whether the tax was legal or illegal. The court assumed that, as a basis for acquiring time, it was illegal, but held that that fact alone did not relieve the tax debtor from making tender of the amount justly due, adopting the Wisconsin rule that in such cases, "unless it is clearly shown that the illegal tax is also unequal, inequitable and unjust, relief will only be granted upon the condition that the irregular and illegal tax should be first paid." Fifield v. Marinette, 62 Wis. 532, 22 N. W. 705. It is clear that in determining whether payment or tender shall be required as a condition for relief, the controlling question is not whether the tax is legal, but whether it is just and equitable, and in determining this, the court is governed by equitable rules and is not bound by the requirements of the law under which the tax is laid. The rule is entirely different in determining the question of title, for in all such cases, the rights of the purchaser rest solely upon the statute and the proper observance of its provisions by the officers charged with its execution. He buys under the rule caveat emptor. No equitable considerations operate in his favor. He must look to the law as the sole source of his title. If there is a failure to comply with a provision enacted for the benefit of the taxpayer, he is entitled to its protection. I find no sufficient reason for overruling Eaton v. Bennett. It affords a measure of protection to taxpayers. It gives him the assurance that his property has been valued for the purpose of taxation under the sanction of an oath, and it enables him to know with certainty that the document purporting to contain the description and valuation of his property is the official assessment, a condition which would not exist if the assessment rests in an unauthenticated and fugitive written statement.

The interests of property owners are entitled to consideration and to accord it to them does no injustice either to the public or tax purchaser. This court has established the rule that in all cases where it is attempted to set aside tax sales and tax deeds, relief will not be granted until the tax justly due shall first be paid or tendered. Douglas v. City, 13 N. D. 467, 101 N. W. 919, and Powers v. Bank, and State Finance Co. v. Beck, in which the opinions have just been handed down. The rule established in these cases affords ample protection to the public and to tax purchasers as well. Property owners are not only required to pay legal

taxes, but also illegal taxes, unless they are also inequitable and unjust. I am not in favor of going further and withdrawing from property owners, when the question of title is involved and by a change of construction, the protection of a provision of the statute enacted for their benefit. But aside from the correctness of the construction announced in Eaton v. Bennett, it should be adhered to under the rule of stare decisis. It has been accepted and acted upon as settled law by taxing officers, by taxpayers, by tax purchasers, and the public generally and the magnitude and multiplicity of the interests involved forbid an unsettling of the law by announcing a different construction. If there is one rule of construction which more than another is binding upon the courts it is that a deliberate construction of a statute and particularly one relating to taxation, should be followed. "The judicial interpretation of a statute becomes a part of the statute law, and a change of it is in practical effect the same as a change of the statute. Where, therefore a decision or series of decisions has become a rule of property, it is evident that justice and reason require it to be adhered to so long as the statute upon which it is based remains unchanged." Endlich on Interpretation of Statutes, 363, and cases. Sutherland on Statutory Const. section 310. See, for further statements of this rule, Bellows v. Parsons, 13 N. H. 256; Lessee of Hannel v. Smith, 15 Ohio, 134-139; Kneeland v. City, 15 Wis. 454, 691. A mere change of opinion is not a sufficient ground for overturning a previous construction. This was well stated by Judge Paine in the case last cited, in speaking of the binding force of a former construction of a revenue law : "It is no justification to demonstrate that the first decision was incorrect. If it were, I think we should have such justification here. For, that a rule taxing different kinds of property at different rates is not a uniform rule, has always seemed to me a proposition too plain for argument. But a proposition appears plain to one mind and its converse equally plain to another. Experience teaches the necessity of recognizing this fact, and the philosophy of the law, which requires that rules of property, once settled by judicial decision shall not be disturbed, is founded upon it. The question in such cases is not whether the first decision was correct, but whether a decision has been made, and business conducted on the faith of it. When this has been done, it would be difficult to imagine a case where a court would be justified in reopening the question

that had been decided. There must be an end somewhere. 'The world waits and listens for the judicial determination, and then acts accordingly.' Men have the right to rely with certainty upon the decision of the highest tribunal in the state, in matters where their business is to be regulated by such decision. * * *"

The power of the legislature to provide a different mode of assessment is conceded. But until it is so changed, the provision in question which has been construed as one for the benefit of the taxpayer, should be given effect according to its settled construction, and should not be changed by judicial construction. A change by the legislature operates prospectively and without injury, but not so as to a change by judicial construction.

In my opinion, and for the reasons stated, the case of Eaton v. Bennett should not be overruled.

(109 N. W. 350.)

LOUISA M. NIND v. VALERIA R. MYERS AND WILLIAM H. BECK.

Opinion filed May 15, 1906. Rehearing denied October 16, 1906.

Taxation — Certificate of Sale — Erasure of Surplus Portion of Blank.

1. A certificate of sale for taxes, under chapter 67, page 76, Laws 1897 (section 1331 et seq., Rev. Codes 1899), is not void on its face because of the failure to erase those parts of the blank form which were designed for use in case of a sale on different terms, where the certificate was otherwise in proper form, and the unerased parts could not mislead.

Same — Validity of Sale — Precedent Judgment.

2. Under section 15, chapter 67, page 85, Laws 1897 (section 1345, Rev. Codes 1899), such a certificate is prima facie evidence of a valid sale without proof of a precedent judgment. (Young, J., dissenting.)

Same — Burden of Proof.

3. The party attacking such a certificate has the burden of showing that there was no valid judgment. (Young, J., dissenting.)

Same — Sale — Legislative Requirement.

4. The provision, in the "Woods Law" (chapter 67, page 76, Laws 1897), for a judgment before a sale for taxes, was merely a legislative requirement and was not inherently or constitutionally necessary as a condition precedent to the right of the legislature to authorize a sale of the property for unpaid taxes.

Sale—Setting Aside Tax Sale—Statute of Limitations.

5. A sale under the "Woods Law," pursuant to a judgment apparently valid, but in fact invalid for want of jurisdiction in the court to render it, cannot be avoided in an action commenced more than three years after the sale, where part of the taxes for which the sale was made were paid, and though the land had never been occupied. (Young, J., dissenting.)

Same — Redemption Notice — Service on Non-Resident.

6. The notice of the time when the right to redeem from a tax sale under the "Woods Law" will expire may be mailed at the residence of the certificate holder, even though that residence is not within the state.

Same — Sale — Affidavit of Mailing.

7. The affidavit of mailing such notice, filed with the clerk of court pursuant to section 1344, Rev. Codes 1899, is competent evidence of such mailing.

Same — Notice of Expiration of Redemption.

8. When the land is in fact unoccupied, it is not necessary to state that fact in the affidavits filed pursuant to section 1344, Rev. Codes 1899, in proof of service of the notice of expiration of the time to redeem.

Same — Sale Certificate — Redemption.

9. The party claiming title under a tax sale certificate issued pursuant to the "Woods Law" need not prove that no redemption has been made.

Appeal from District Court, Stutsman county; *Glaspell,* J.

Action by Louisa M. Nind against Valeria R. Myers and William H. Beck. Judgment for plaintiff, and defendants appeal.

Reversed, and judgment ordered.

Marion Conklin, for appellants.

Failure to furnish copy of judgment to sheriff upon which to sell is not fatal. Kipp v. Collins, 33 Minn. 394.

The description NE4 NW4SW4 S2NW4 taken with owner's name and the quantity of land embraced, viz., 280 acres, is definite. Stoddard v. Lyon, 89 N. W. 1116.

The title under sheriff's certificate is cured by the statute of limitations. Whitney v. Marshall, 17 Wis. 174; Stoddard v. Lyon, supra.

If defendant's tax deeds are set aside they are entitled to judgment for the amount of the valid tax. O'Neill v. Tyler, 3 N. D.

47, 53 N. W. 434; Douglas v. Fargo, 13 N. D. 467, 101 N. W. 919; McHenry v. Brett, 9 N. D. 68, 81 N. W. 65.

John Knauf, Wicks, Paige & Lamb, for respondent.

The description NE4 NW4SW4 S2NW4 is void. Kent v. Hayden, 2 N. W. 495; Knight v. Alexander, 37 N. W. 799; Power v. Bowdle, 3 N. D. 107, 54 N. W. 404, 21 L. R. A. 328, 44 Am. St. Rep. 511.

To render tax certificates evidence, precedent judgment must be proven. Sanborn v. Cooper, 17 N. W. 856; Russell v. Gilson, 31 N. W. 692.

The certified copy of the tax judgment is the sheriff's warrant for sale, and without it his act is void. Cooley on Taxation (3d Ed.) 927. Bell v. Johnson, 111 Ill. 374; Ransom v. Henderson, 2 N. E. 667.

Mailing of notice of redemption to one outside of the state is void. Laner v. Webster, 52 N. E. 489.

Where there is no judgment or there is a want of jurisdiction to enter it, statute of limitations does not apply. Sanborn v. Cooper, supra; Knight v. Alexander, supra.

ENGERUD, J. Plaintiff, claiming to be the owner in fee of a tract of and in Stutsman county comprising 280 acres, and described as the S. W. ¼ and the S. ½ of the N. W. ¼ and the N. E. ¼ of the N. W. ¼ of section 35, in township 137, range 64, brought this action in statutory form to quiet her title against Valeria R. Myers, William H. Beck, and all other persons unknown, etc. Valeria R. Myers and William H. Beck appeared and filed separate answers, each of which were subsequently amended. Each of said defendants claim title in themselves by virtue of numerous tax sales. The trial resulted in a judgment declaring all the tax sales void and quieting the title in plaintiff. Both defendants join in an appeal from the judgment and demand a new trial of the entire case.

It is conceded that the tax deeds under which Valeria R. Myers alleged title are void, because they name as grantee one David Myers, the original tax-sale purchaser, who had died before the execution of the deeds. This appellant, however, claims a lien upon the land by virtue of the tax sale certificates upon which the void deeds were issued; she having succeeded to the rights of the tax sale purchaser. The record discloses that, in attempting

to describe the land in the assessment roll upon which her tax sales are based, the assessor made use of the abbreviations: "N. E. 4 of N. W. 4., S. 2 of N. W. 2 and S. W. 4." Upon authority of Power v. Bowdle, 3 N. D. 107, 54 N. W. 404, 21 L. R. A. 328, 44 Am. St. Rep. 511, and Power v. Larabee, 2 N. D. 141, 49 N. W. 724, which have established a rule of property in this state, we are constrained to hold that there was no assessment, and hence no valid tax or tax sale, because there was no property described. Beggs v. Paine (just decided) 109 N. W. 322. The appellant Beck claims title under several successive tax sales upon which deeds have been issued. He also claims title by virtue of a sale of the land to him on November 21, 1897, by the sheriff of Stutsman county, pursuant to a judgment rendered against the land for taxes delinquent prior to 1895, in proceedings under the so-called "Woods Law" (chapter 67, p. 76, Laws 1897). In support of his claim of title under this sale, the defendant introduced in evidence the certificate of sale and the affidavits on file with the clerk of court in the proceedings, showing service of the notice of expiration of the time for redemption. The sufficiency of these docucents as evidence of the facts sought to be established thereby were duly challenged by plaintiff at the trial for reasons which will appear in the subsequent discussion of the case. For the purpose of showing that the proceedings were void, the plaintiff offered in evidence the newspapers attached to the affidavit of publication of the notice and delinquent list on file with the clerk of court in the proceedings. It appears therefrom that the land was not clearly described in such published list. The section, township, range, and number of acres were properly stated, as well as the name of the owner, and the S. ½ of the N. W. ¼ was sufficiently identified. The abbreviations referring to the remainder of the land were: "N. E. ¼ N. W. ¼ S. W. ¼." Assuming that the fact that the number of acres was stated sufficiently shows that these abbreviations were intended to describe 200 acres, instead of only ten acres, we are still confronted with the difficulty that, by reason of the absence of punctuation marks, it is not certain whether the entire series of abbreviations refer to the N. E. ¼ of N. W. ¼ and S. ½ of N. W. ¼ and S. W. ¼, or whether it refers to the N. W. ¼ of S. W. ¼ and S. ½ of N. W. ¼ and N. E. ¼. The entire description could be read either way, and yet describe a single tract consisting of 280 acres. We are not prepared

to say, however, that the description would necessarily be bad, if it were shown that the tract in question was the only land owned by Louisa Nind in that section. The delinquent list describes part of the land in question. The original list in the judgment book is not in evidence. We must assume that the land was therein properly described, because the sheriff was guided by the description in the original judgment in making the sale, and the certificate of sale gives a correct description of the land. The judgment was therefore on its face apparently valid; but, without expressing any opinion on the point, we shall assume, for the purposes of this case, that the judgment was in fact void for want of a clear description in the delinquent list or citation. The plaintiff also proved that no certified copy of the judgment was delivered to the sheriff before sale, but that the sheriff in making the sale used the original judgment book. This irregularity was not fatal. State Finance Co. v. Beck (just decided) 109 N. W. 357.

The respondent contends that the certificate of sale is void on its face. The certificate was made out on a blank form designed so as to be used in case of a sale either for a term of years, or to a fee-simple purchaser, or to the county; it being intended that the sheriff should fill up the proper blanks to suit the facts and strike out the inapplicable paragraphs. In this case all the blank spaces were properly filled out, but the officer neglected to draw a line through, or otherwise strike out, the paragraphs to be used in case of a sale for a term of years or to the county. This certificate is in the following form:

"Document No. 3210.

"Sheriff's Certificate of Sale of Real Estate Tax Judgment. State of North Dakota, County of Stutsman—ss.: No. 36.

"I, John H. Severn, the sheriff of said county, do hereby certify that at the sale of lands pursuant to the real estate tax judgment entered in the district court of the county of Stutsman, on the 7th day of Ocober, A. D. 1898, in proceedings to enforce the payment of taxes delinquent upon real estate for said county, which sale was held at Jamestown, in said county, on the 21st day of November, A. D. 1898, the following described piece— or parcel— of land situated in said county and state, to wit:

SUBDIVISION	Section	Township	R'nge	Am't Sold For
Northeast quarter of Northwest quaater and Southwest quarter and South half of Northwest quarter.....	35	137	64	$68.63

—was offered to the bidder who would pay the amount for which the same was subject to be sold, for the shortest term of years in said piece—or parcel—.

" * (And ———— having offered to pay and having paid such an amount, to wit: The sum of ———— dollars for the term of ———— years, that being the shortest term for which any person offered to take said piece— or parcel— and pay said amount: I do therefore, in consideration of the amount so paid, and pursuant to the statutes in such cases made and provided, let the said piece— or parcel— of land to the said ———— for the term of ——— years from the date hereof, subject to any redemption provided by law.)

" ! (And no person having offered to pay such amount for a term of years, I did sell the fee of said piece— or parcel— of land to William H. Beck for the sum of sixty-eight 63-100 dollars, that being the highest sum bid therefor; and he having paid such sum, I do, therefore, in consideration thereof and pursuant to the statutes in such cases made and provided, convey the said piece— or parcel— of land in fee simple to the said William H. Beck, his heirs and assigns, forever, subject to any redemption provided by law.)

" || (And there being no bidder upon that offer, I offered the fee of the same to the highest bidder, and no one bidding upon such an offer an amount equal to that for which said piece—or parcel—w——— subject to be sold, the county treasurer of Stutsman county bid in the same for the county at such amount, being the sum of ——— dollars. In consideration whereof and pursuant to the statutes in such cases made and provided, I do hereby convey said piece— or parcel— of land in fee simple to the county of Stutsman, state of North Dakota, and its assigns, forever, subject to any redemption provided by law.)

"Witness my hand this 21 day of November, 1898.

"John H. Severn.

"Sheriff of Stutsman County, N. D.

"[U. S. Revenue Stamp, 10c.]"

Upon the margin the following notations appeared:

" * Use this form when let for a term of years.

" ! Use this form when sold in fee simple to actual purchaser.

" || Use this form when bid in for the county."

The statute requires only substantial compliance with the prescribed form. The fact that the two paragraphs designed for use in case of a sale for a term of years or a sale to the county were not stricken out could not possibly mislead or render the certificate uncertain in meaning, especially in view of the marginal notes. The certificate sets forth all the facts required by the statutory form.

Respondent maintains that the certificate of sale is of no avail as evidence unless it is shown that there was a valid judgment authorizing the sale. In other words, it is claimed that the certificate is not prima facie evidence of a valid sale pursuant to a valid judgment. This question was decided in Cruser v. Williams, 13 N. D. 284, 100 N. W. 721, and we are satisfied that the views there expressed were correct. Whatever evidentiary force is possessed by the certificate is derived from section 1345, Rev. Codes 1899. The first sentence of that section declares: "The certificate shall in all cases be prima facie evidence that all the requirements of law with respect to the sale have been complied with." If this were all of the section, there would be much force in respondent's contention that the certificate is merely evidence of the regularity of those proceedings after judgment which the law requires to be observed in connection with the sale. The section must be read as a whole, and all its parts construed together. So read, the intent of the legislature is unmistakable. The remainder of the section is as follows: "And no sale shall be set aside or held invalid unless the party objecting to the same shall prove either that the court rendering the judgment, pursuant to which the sale was made, had no jurisdiction to render judgment, or that after the judgment and before the sale such judgment had been satisfied; and such certificate shall be conclusive evidence that due notice of sale as required by this article was given, and that the piece or parcel of land was first offered at such sale to the bidder who would pay the amount for which the piece or parcel was to be sold for the shortest term of years; and the validity of any sale shall not be called into question unless the action in which the validity of the sale shall be called in question shall be brought or the defense alleging its invalidity be interposed within three years

from the date of sale." The fact that the certificate is made conclusive evidence that due notice of sale was given, and that the land was first offered for sale for a term of years, indicates strongly that the first sentence, in which it is declared to be prima facie evidence, was not intended to apply solely to proceedings directly connected with the notice and manner of conducting the sale. The second sentence, however, removes all uncertainty in this respect, because it expressly puts the burden of showing want of jurisdiction upon the party attacking the sale. It would be absurd to hold that the purchaser must support his certificate by proof of a valid judgment, and at the same time assert that the sale must be presumed to be valid, unless the objecting party proves absence of jurisdiction. Furthermore, even want of jurisdiction is not available as an objection to the sale, unless urged in an action brought before the expiration of three years. We think the section plainly means that the certificate shall be taken as prima facie evidence of a valid sale based on a valid judgment; that it may be attacked for invalidity only for want of jurisdiction in the court to render the judgment, or on the ground that the judgment had been paid before sale; provided one or the other of those grounds for avoiding it are established by the objecting party in an action brought within three years after the judgment; and, if not so attacked, the certificate becomes conclusive evidence of a valid sale.

This action was not commenced until nearly five years after the sale. It follows that the objections urged against the sale by respondent, even if we assume that they would have been fatal to the sale, if urged in time, are now barred by lapse of time, unless the limitation feature of section 1345, Rev. Codes 1899, is violative of some constitutional provision so as to render the statute wholly void or inoperative as a bar to the objections now urged by respondent. The constitutional power of the legislature to limit the time within which the regularity of tax sales or tax proceedings may be attacked is beyond question. As we said, in the case of Beggs v. Paine (decided at this term) 109 N. W. 322: "The primary requisites to the validity of such a law are that some right of the person sought to be barred by it has been invaded or denied, for which he has a remedy, and that a reasonable opportunity to avail himself of the remedy is afforded. These conditions existing, it is competent for the legislature to impose upon

such person the duty to avail himself of his remedies within the given time, and to declare that his failure to do so shall operate as a bar to any relief." It is obvious that this power may be exercised in either of two ways; either by an ordinary limitation act barring all remedies after a given period, or by declaring that after a stated time a conclusive presumption of regularity shall arise in favor of the proceeding in question. Beggs v. Paine, 109 N. W. 322, and cases cited.

Section 1345 is an example of the last-mentioned method of exercising the power. It purports to create a conclusive presumption that the sale was in all respects valid, unless attacked within a given period of time, and does not require adverse possession to set the limitation period in motion. Did the legislature violate any constitutional limitation of its powers in declaring that the sale should be conclusvely presumed to be valid after three years, even though the court had no jurisdiction to render judgment pursuant to which the sale was held, and even though there had been no adverse possession of the land by any one claiming under the sale? The taxes for which the sales under the "Woods Law" were made were those which had been imposed prior to 1895 and which had never been paid or collected by sales of the land to actual purchasers. The taxes were presumptively valid. By this act, the state, in effect, caused actions to be instituted in each county and required all persons interested in the lands to come forward and either pay the taxes or show cause why a judgment of the district court should not be rendered conclusively establishing the validity tnereof. It must be borne in mind that these taxes had been imposed in previous years, and the taxpayers had already had ample opportunity to contest the validity thereof. Under our system of taxation, real estate taxes are charged directly upon the land taxed. They are imposed each year at stated times and places fixed by general law. Every owner of land subject to taxation knows that, if the public officers do their duty according to law, his land will be assessed and taxed each year, and he knows when, where, and by whom each step in the tax proceedings is to be taken, and where the public record of each step in the proceeding can be found. In other words, inasmuch as he is chargeable with knowledge of the law, he is chargeable with knowledge that, presumptively at least, an attempt has been made each year to tax his land. The sale of the land for unpaid taxes is also made at

certain times and places fixed by general law. It will be seen, then, that, under our system of real estate taxation, a landowner is not dependent upon the service of actual notice for information that his land has been taxed, and when and where it will be sold for taxes, if he fails to pay. He has ample opportunity to appear before the officers and boards who have power to grant relief from grievances. He also has ample remedies under the Code of Civil Procedure to obtain relief from any prejudicial error or irregularity at almost any stage of the tax poceedings while it is in fieri. Under such circumstances, it is plain to be seen that the legislature has ample power, as we held in Beggs v. Paine, 100 N. W. 322, to fix a reasonable time within which a person, claiming to have been aggrieved by a tax or tax sale of real estate, should make his objection known under peril of being forever barred. A judgment of the court was not necessary, nor was it necessary that adverse possession under the tax sale should be required, or even constructive possession. Regardless of possession, actual or constructive, the person affected by the tax is chargeable with knowledge of the tax proceedings, and, if they were irregular, he had ample remedies and abundant opportunity to resort to them. If he fails to avail himself of his remedies in a reasonable time, he is in no position to complain because his laches are taken to be conclusive evidence that he has no grievance. Beggs v. Paine, 109 N. W. 322, and cases cited.

It follows from what has been said that the legislature could have dispensed with the requirement that there be a proceeding in court and a judgment before the sale, and instead thereof could have declared that, unless the validity of these old taxes was called in question in an action commenced before a given time after the passage of the act, the taxes appearing in the list should be conclusively presumed to be valid, and the lands should be sold therefor. It is self-evident that, if the legislature had power to dispense with the proceedings in court, it likewise had the power to declare that the absence of, or any irregularity in, such intermediate proceedings, should not be fatal to the sale. The act was approved and took effect in March, 1897. It required the proceedings to be instituted forthwith, but provided that no sale should be held thereunder until after November 1, 1897. As before stated, under our system of real estate taxation no owner of land affected by the act could be heard to say that he did not know

that the proceedings would be instituted against his land under this act, if he had failed to pay the taxes which the proceedings were designed to enforce. The county authorities were required to institute an action, and it was not only the privilege but the duty of any person interested to come forward and contest the validity of the taxes in that proceeding. The proceeding in court, however, was not so much for the benefit of the taxpayer as it was for the convenience of the county. The object of the single proceeding in court against all the delinquent land was evidently to secure a speedy determination of all controversies in one proceeding, instead of having a multiplicity of suits instituted against the county or state at different times and subject to the delay incident to the usual rules of procedure. To further safeguard the rights of taxpayers, however, the privilege was extended to them to contest the validity of the taxes or of the sale at any time within three years after a sale under the judgment, if they could show that any condition prerequisite to the court's jurisdiction to render judgment was wanting. In so far as the law extended this privilege it was an act of grace, and not the recognition of any absolute right of the persons adversely affected by the sale.

A sale under a judgment in these proceedings cannot be likened to the ordinary sale pursuant to judicial proceedings. In such sales the right to sell is based exclusively on the jurisdiction of the court to render the judgment or make the order by virtue of which the sale is made. If the judgment or order was made without jurisdiction, the sale is void, and no legislative fiat can make it valid. Neither can cases like Marx v. Hanthorn, 148 U. S. 172, 13 Sup. Ct. 508, 37 L. Ed. 410, involving tax laws like the Oregon statute involved in that case, have any application to a real estate tax proceeding in this state. That case is cited and distinguished in State Finance Co. v. Mather, 109 N. W. 350. The validity of a tax sale like that involved here does not depend upon the jurisdiction of the court to render judgment, except so far as the legislature has seen fit to so declare. The judgment was a mere intermediate step required by statute before the sale. The jurisdiction to sell is based on the fact that the land was liable to a tax that had been imposed. If the judgment was regularly obtained it would be conclusive evidence that there was a valid unpaid tax; but, if the judgment was rendered without jurisdiction, it would have no effect, and in that event the tax would stand or fall as it might prove to be good or bad. So far as any constitutional right

is concerned, it was imaterial whether the court had jurisdiction or not to render judgment. The land was sold for an unpaid tax which was presumptively valid. The law afforded the respondent ample remedies and abundant time to resort to them to attack the sale, if it was invalid. His failure to act within the time limited is a complete bar against the irregularities he now complains of. Had the claim been that there was no unpaid tax for which the legislature could have authorized the sale, or had it been shown that the alleged taxes for which the sale was made were utterly void, in the sense that they were beyond the reach of any curative or limitation act which the legislature had power to pass, then a different question would arise. It would then be a question not merely as to the jurisdiction of the court to render judgment, but of jurisdiction of the taxing power.

It is evident that, notwithstanding the sweeping language of the statute, there might be defects shown which could not be cured by a statute of limitations which does not require adverse possession. As to such defects, this section would be of no effect. No such defect, however, is shown in this case. It is not claimed that the land was exempt from taxation, or that there was no tax, or that the tax had been paid before the sale. The sale was made for the taxes of two different years. No question is made as to the validity of the taxes for one of these years. There was therefore jurisdiction in the legislature to authorize a sale. Hence, the fact that the taxes for one of the years were void would not vitiate the sale after the lapse of the time limited for questioning it. This is not in conflict with any of the several decisions of this court holding that a tax sale or tax deed, void by reason of some jurisdictional defect, cannot become valid by mere lapse of time. Roberts v. Bank, 8 N. D. 504, 79 N. W. 1049; Power v. Kitching, 10 N. D. 260, 86 N. W. 737, 88 Am. St. Rep. 691; Sweigle v. Gates, 9 N. D. 539, 84 N. W. 481, and others. The jurisdictional defects, which cannot be thus barred without adverse possession, consist of the nonperformance of some of those things which are inherently or constitutionally necessary to a tax sale. The nonperformance of some act which is not inherently or constitutionally necessary to the right to sell, but which the legislature in its discretion may or may not require, is not a "jurisdictional defect," as that term is used in construing and applying statutes of this character. Roberts v. Bank, 8 N. D. 504, 79 N. W. 1049. The language

used in Eaton v. Bennett, 10 N. D. 346, 87 N. W. 188, is inconsistent with this statement, but we expressly disapproved it in State Finance Co. v. Mather (just decided) 109 N. W. 350.

This distinction between incurable jurisdictional defects and those which are jurisdictional only to the extent that the legislature has made them so, is well stated by Judge Finch, in the opinion denying the petition for rehearing in Ensign v. Barse, 107 N. Y. 329, 346, 14 N. E. 400, 15 N. E. 401: "Our attention is called to the case of Shattuck v. Bascom, 105 N. Y. 39, 12 N. E. 283. We there held a defect in the assessor's affidavit fatal to the assessment. We did not speak of the defect as jurisdictional, though, if we had, no collision of authorities would have resulted. The opinion in the present case is careful not to deny a possible fatal result of the defect, although it is rather formal than substantial, but for the curative effect of the statute of 1882, which had no parallel in any form in the facts of the cited case. In the opinion then delivered, the defect was not deemed jurisdictional in any other sense than the modified one of an essential condition under the law as it stood. Whether it was so jurisdictional as that the legislature could not have dispensed with it, and therefore could not cure its omission, is a very different inquiry. A defect may be in one sense jurisdictional relatively to the authority of the assessors acting under an existing law, and yet not so as it respects the power of the legislature to pass a statute curing the defect; and it is only by confusing these two things, which the opinion separated, that a seeming contradiction can be reached."

In each of the several cases on this subject in this state, it will be found that the court held that there was no assessment, or that there was no levy. As stated above, neither of these essentials to the existence of a tax could be barred by a limitation act without adverse possession. Neither does this decision conflict with the views expressed in Emmons County v. Bank, 9 N. D., at page 595, 84 N. W. at page 383. That was an attack upon a sale under the "Woods Law" made within three years after the sale, and the section we are construing had no application. We fully agree with the views expressed in that case to the effect that, if the judgment was void, it concluded nothing and left the parties in the same position as if there had been no adjudication. The same is true in this action. We are assuming for the purposes of this opinion that the judgment is void and has no effect as an adjudication, and

hence that the plaintiff is free to attack the validity of the sale for any jurisdictional defect which this limitation act in question does not bar. We hold merely that the rendition of a valid judgment is not a jurisdictional act inherently necessary or required by the constitution as a condition precedent to the right of the legislature to authorize a sale or forfeiture; but is merely a legislative requirement having only such force and effect as the legislature has seen fit to give to it. It is manifest that if a valid judgment was an indispensable condition precedent to the right to sell, then this limitation feature of the "Woods Law" is meaningless. No sale would be affected by the limitation, unless it was preceded by a valid judgment. In other words, the section would bar attacks upon those sales only which do not require such protection. Had it been shown that the judgment was void on its face, and hence afforded no ostensible authority to sell, a different question would be presented.

It is urged that the legislature has no power to bar the rights of the owner of unoccupied land to question the validity of a tax sale without adverse possession on the part of the tax purchaser. There are two cases which have so held unqualifiedly. In Groesbeck v. Seeley, 13 Mich. 329, 343, it is said: "A person who has a lawful right, and is actually or constructively in possession, can never be required to take active steps against opposing claims. The law does not compel a man who is unassailed to pay any attention to unlawful pretenses which are not asserted by possession or suit. When such a title is set up, he has a right to defend himself, by jury, if the claim is one of common-law cognizance, or otherwise if of a different nature. But to hold that, under any circumstances, a man can be deprived of a legal title without a hearing, is impossible without destroying the entire foundations of constitutional protection to property. No one can be cut off by limitation until he has failed to prosecute the remedy limited, and no one can be compelled to prosecute when he is already in possession of all that he demands." In Baker v. Kelly, 11 Minn. 480 (Gil. 358), this doctrine is approved. It seems that both in Michigan and Minnesota, when these decisions were rendered, there was no action maintainable by which an adverse claim could be litigated, unless one party or the other was in possession of or trespassed upon the land. Ejectment would lie only in case of disseisin. A suit to quiet title could be maintained only

by one in possession. Hence, unless the original owner was in possession, or the tax-title purchaser either took possession or trespassed on the premises, there was no action maintainable by the original owner in which to test the adverse claim. If there was no remedy available to test the adverse claim, it is plain, as we have hereinbefore said, that the limitation law would not apply. To that extent we agree with these decisions. But we think the reasoning which we quoted above from the Michigan case is as unsound in principle as it is unsupported by authority. The power of the legislature is denied by those decisions to impose upon a claimant of unoccupied land the duty to seasonably challenge an adverse claim arising under a tax sale of which he has notice, unless the adverse claimant invades the premises; and it is further denied that the legislature can make such neglect to challenge the known adverse claim conclusive evidence that the tax sale was valid. The legislature has plenary power, and all its enactments are binding upon those affected by them, unless the act is in contravention of some state or federal constitutional limitation.

It is claimed that such an enactment violates the constitutional provisions with respect to due process. What element of due process is lacking in such an enactment in this state? As already shown, the landowner has at least constructive notice of the tax proceedings and the sale; and, as a matter of fact, we all know from experience that it would be a rare case indeed in which the landowner or his legal representative would not have actual knowledge that the sale had been made. Under our system of procedure, there are ample remedies by action to test the validity of the sale, whether the land is occupied or not. It cannot be denied that three years' time affords abundant opportunity to invoke them. The power of the legislature to require the original owner of unoccupied land to resort to an available action to challenge the validity of a tax sale of which he has notice is sustainable on precisely the same principles which support its authority to ripen an adverse possession into conclusive evidence of title. A tax sale is an official act which is presumptively valid, and hence prima facie divests the original owner's title and right to possession. So, also, adverse possession has the same effect. In either case the land owner is chargeable with notice of the adverse claim, and remedies are available to him to attack the validity of the presumptively law-

ful adverse title. In either case the original owner has the burden of showing that the adverse claim is invalid. It violates no essential of due process of law to declare that the presumptively valid adverse claim shall become conclusive, if the landowner neglects to challenge it within the prescribed time. Whether or not this would be true, if the original owner had retained actual possession, we do not decide. The land in question is unoccupied.

The weight of authority is opposed to the doctrine expressed in these cases just mentioned. In Pennsylvania, when there was no action maintainable under the procedure of that state, if the land was unoccupied it was held that such a limitation act could not apply to vacant lands. Waln v. Shearman, 8 Serg. & R. (Pa.) 357, 11 Am. Dec. 624. After the legislature had provided a remedy in such cases, the limitation was given full effect, whether the land was occupied or not. Robb v. Bowen, 9 Pa. 71; Stewart v. Trevor, 56 Pa. 374. See, also, cases in Black on Tax Titles, section 496, from Wisconsin, Iowa and Kansas. In these states it was held that the original owner of unoccupied land was barred because the grantee in the tax deed was in constructive possession; and because in those states an action was maintainable under such circumstances. See, especially, Hill v. Kricke, 11 Wis. 442, cited in Leffingwell v. Warren, 67 U. S. 599, 17 L. Ed. 261. In New York short statutes of limitation substantially the same as the one now in question have been before the courts of that state, and have been uniformly sustained. Ensign v. Barse, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401; People v. Turner, 117 N. Y. 227, 22 N. E. 1022, 15 Am. St. Rep. 498; Id., 145 N. Y. 451, 40 N. E. 400. The New York decisions on this question have been approved by the United States Supreme Court. Turner v. People, 168 U. S. 90, 18 Sup. Ct. 38, 42 L. Ed. 392; Saranac Land Co. v. Roberts, 177 U. S. 318, 20 Sup. Ct. 42, 44 L. Ed. 786. Inasmuch as this question is a federal one arising under the fourteenth amendment, these decisions must be followed, even if we had any doubt on the subject.

We have not overlooked the numerous Minnesota cases cited by counsel in support of the argument that a void judgment defeats the limitation. Sanborn v. Cooper, 31 Minn. 310, 17 N. W. 856; Knight v. Alexander, 38 Minn. 384, 37 N. W. 796, 8 Am. St. Rep. 675; and others. Although the limitation provisions of the several revenue laws of that state involved in those decisions were sub-

stantially the same as the section of the "Woods Law" in this state, we cannot follow the Minnesota cases on this question without doing violence to what we deem to be elementary principles. It is true that the "Woods Law" was patterned after similar laws in Minnesota. If the language of the section in question were at all doubtful in meaning, or if we had any doubt as to the principles applicable to such laws, we would feel constrained to follow these decisions to the extent that they purported to construe the law, even though they did not coincide with our views. The section in question, however, is plain and wholly free from ambiguity so far as the limitation feature of it is concerned. There is no room for interpretation. We must give effect to the law to the extent that it is not in conflict with any constitutional provisions. For the reasons hereinbefore stated, we find no constitutional objection to its application to the facts of this case. We think the fallacy of the Minnesota cases lies in the failure of that court to notice and give effect to the distinction between the judgment required by the legislature in the course of the tax proceedings and a judgment or decree in an ordinary civil action or proceeding.

It remains to consider whether the respondent's right of redemption has been terminated. The "Woods Law" did not provide for any tax deed. Section 14 of the act (section 1344. Rev. Codes 1899) provides that the certificate shall operate as a deed after the time for redemption has expired. Redemption was to be affected by payment to the county treasurer of the amount of the purchaser's bid with interest, together with subsequent taxes. Section 1350, Rev. Codes 1899. If redemption was made, the county treasurer was required to execute and deliver to the redemptioner a certificate showing the fact, which certificate could be recorded in the office of the register of deeds, and the original or the record thereof was evidence of the fact of redemption. Section 14 provides: "That the holder of any certificate * * * must, ninety days preceding the maturity of such certificate, give personal notice to the owner, if a resident of the state, of the expiration and maturity of such certificate, and if the owner is a nonresident of the state, such notice may be given by registered letter, addressed to such owner, at his last known post office address; and in case the property covered by such certificate is occupied, then service of such notice shall, in addition to the foregoing provisions, be made upon the person in possession thereof,

and by publication of notice of the maturity of such certificate in some newspaper published in the county where the land is situated, or otherwise as hereinbefore provided, for at least thirty days preceding the expiration and maturity of such certificate; and the owner may redeem such certificate by paying the amount named therein, together with accrued interest and costs. Proof of notice here provided for must be filed in the office of the clerk of the district court prior to the maturity of such certificate. The fee simple of any piece or parcel of land named in any certificate shall not vest in the holder thereof until the notice provided for herein is given and due proof thereof filed with the clerk of the district court." In this case it was admitted that the plaintiff was a nonresident of the state, and that the land was unoccupied. The affidavit of William H. Beck, which was filed with the clerk of court November 17, 1900, in proof of service of the notice of expiration of redemption, shows that the notice was sent to respondent by registered mail, addressed to her at Detroit, Mich., her last known post office address, on August 17, 1900. The letter was mailed at Boston, Mass., where Beck resides. The notice describes the land, gives the date of the sale, the amount bid, the number of the certificates, and states that the time to redeem will expire on November 21, 1900. The notice is clearly sufficient. There is nothing in the law which requires the notice to be mailed at a postoffice within this state. The affidavit of mailing was competent evidence to prove the service. The proof of service, required by section 1344 to be filed, clearly contempates the usual proof in such cases. Section 5669, Rev. Codes 1899, makes such an affidavit competent evidence to prove service of notice. It was not necessary to file with the clerk proof that the land was unoccupied. The law merely requires that proof of the service of the notice be filed. Whether the service as proved is sufficient or not depends upon the fact whether the land was occupied or not. It is admitted that it was unoccupied.

It is finally contended that the prof is insufficient to prove title because the defendant did not prove that there had been no redemption. If the sale had been canceled by redemption, it was incumbent on plaintiff to prove that fact by the production of the certificate of redemption, or other evidence. It is no more incumbent on the tax purchaser to prove nonredemption than it would be for a plaintiff in a foreclosure suit to prove that the mortgage had

not been paid. It is not pretended that there was in fact any redemption, and the attempt to show the invalidity of the sale is in effect an admission that no redemption had been made. The cases of Greve v. Coffin, 12 Minn. 345 (Gil. 263), 100 Am. Dec. 229, and Sheehy v. Hinds, 27 Minn. 259, 6 N. W. 781, are not in point, even if their soundness were conceded. Those cases hold that the proof of nonredemption was by the statute there involved made a condition precednt to the right to use a tax deed as prima facie evidence of title. See Stewart v. Colter, 31 Minn. 385, 18 N. W. 98.

The judgment is reversed, and the trial court will enter judgment in the usual form that the plaintiff, Nind, and defendant Myers have no estate or interest in the land, and that the title thereto be adjudged to be in defendant William H. Beck, and that his title be quieted; the appellant Beck to recover from respondent taxable costs and disbursements of both courts.

YOUNG, J., (dissenting). I am unable to agree with the conclusion of my associates that the defendant acquired title to the premises in question through the proceedings under the void tax judgment. It is conceded that the title to the premises is in the plaintiff, unless it was divested and transferred to the defendant Beck through his purchase at the tax judgment sale on November 21, 1897, and the plaintiff's failure to redeem therefrom. So, too, it is conceded that the tax judgment pursuant to which the sale was made was void for want of notice. The defendant, in support of his claim of title, offered only the sheriff's certificate and proof of service of notice of expiration of the redemption period. From these facts the conclusion is drawn in the majority opinion that the plaintiff has no estate in or title to the premises, and it is adjudged that the title is in the defendant. This conclusion rests entirely upon section 15 of chapter 67, p. 85, Laws 1897 (section 1345, Rev. Codes 1899). The opinion holds that a sheriff's certificate of sale, which is regular upon its face, is, when three years have elapsed from the date of the sale, conclusive evidence, both of a valid judgment and a valid sale, or, in other words, that after that time the original owner cannot defend his title by showing that the judgment and the sale pursuant to which the sheriff's certificate was issued were in fact void. I cannot assent to this conclusion. The sale in question was made to satisfy a tax judgment entered under chapter 67, p. 76, Laws 1897, commonly known

as the "Woods Law." It was a judicial sale, and not a sale under the general revenue law, and was made to satisfy the alleged tax judgment. The judgment was void. The property was not described in the published notice through which the court acquires jurisdiction in such cases. The judgment was therefore entered without jurisdiction, and was void. This is conceded. I take it that it must also be admitted that the sale was void for the same reason. The rule of law applicable to such judgments and sales is stated in Freeman on Void Judicial Sales, section 2, as follows: "A void judgment order or decree, in whatever tribunal it may be entered, is nothing. All acts performed under it, and all claims flowing out of it, are void. Hence a sale based on such a judgment has no foundation in law. It must certainly fall." See, to the same effect, Kleber's Void Judicial Sales, sections 194, 452; Rorer on Void Judicial Sales, section 488; Freeman on Judgments, section 117; 1 Black on Judgments (2d Ed.) section 170, and cases cited. The conclusion of my associates that the original owner cannot now defend his title by alleging the invalidity of the sale, and that the title is now in the purchaser under the void tax judgment, is based upon three propositions: (1) That section 1345 makes the sheriff's certificate of sale prima facie evidence, not only that the proceedings connected with the sale were regular, but also that the judgment was regularly rendered and entered; the certificate thus establishing prima facie a valid judgment and a valid sale. (2) That the latter part of the same section, which limits attacks upon and defenses against such sales to three years, applies to all sales, including sales made under void judgments, and that such a sale sets the statute running against the owner and bars his right to defend his title by alleging the invalidity of the sale after three years. And (3) that the statute as thus construed, and as applied to a sale like that here in question, is valid. I am unable to agree to either of these propositions, and will give my views as to each of them, in the order in which they have been stated.

First, as to the evidentiary force of the sheriff's certificate: The majority opinion holds that, for three years after its issuance, it is prima facie evidence, and after that time is conclusive evidence, both of the regularity of the proceedings connected with the sale, and of the regularity of the rendition and entry of the judgment. I do not find that the statute gives the certificate any evi-

dentiary force whatever as to the judgment. Section 1345 declares that "the certificate shall in all cases be prima facie evidence that all the requirements of law with respect to the sale have been duly complied with. * * *" It does not declare that it is prima facie evidence that all of the requirements of law with respect to the judgment have been complied with. The certificate has, of course, only such force as is given to it by the statute. The statute confines its evidentiary force to the requirements of law with respect to the sale, and we are not warranted in extending the statute by construction so as to make it cover the judgment. The judgment is no part of the sale proceedings. It is antecedent and independent; essential, it is true, to a valid sale, but is no part of the sale. As is well known, chapter 67, p. 76, Laws 1897, was adopted almost bodily from the state of Minnesota. Many of its provisions, including the successive provisions of the Minnesota statute, corresponding to those contained in our section 1345, had received a settled construction in that state long prior to their adoption here. In construing a corresponding section of the Minnesota statute, in Sanborn v. Cooper, 31 Minn. 307, 17 N. W. 856, the court, speaking through Judge Mitchell, said: "Defendant offered in evidence a certificate of sale purporting to have been made pursuant to a tax judgment by the county auditor * * * to the admission of which plaintiff objected on the ground that no evidence had been offered of any tax judgment or of any authority to the auditor to make the sale. The court overruled the objections and admitted the certificate. * * * On this state of facts, the court found as conclusions of law that defendant was the owner in fee simple of the premises, and that plaintiff had no interest or title therein, and ordered judgment accordingly. The ground upon which the decision was put is that, no action having been brought to set aside or test the validity of the tax sale within five years, the title of the purchaser at such sale became absolute and cannot now be questioned. The sale was made under the general tax law of 1874, as amended by Laws 1875, p. 36, c. 5, section 30, the important provision of which is as follows: 'Section 125. Such certificate, or the record thereof, shall in all cases be prima facie evidence that all the requirements of the law in respect to the sale have been complied with, and no sale shall be set aside or held invalid unless the party objecting to the same shall bring his action to set aside such certificate, or

to test the validity of such sale within five years from the date of the sale.' It is elementary that, according to the common-law rule, this certificate would be inadmissible without proof of the authority of the auditor to make the sale. To sustain a conveyance executed by an attorney under a power of attorney, by an executor under a will, by a sheriff under an execution, by a guardian or administrator under an order of court, by a commissioner under a decree of court, the power of attorney, the will, the judgment and execution, and the decree must be first produced and put in evidence. If this certificate is prima facie evidence of any of the precedent acts necessary to clothe the auditor with authority to sell, it is only so by force of the statute, and only to the extent it is expressly made so. But this statute only makes the certificate of sale prima facie evidence 'that all the requirements of the law in respect to the sale' have been complied with, but not of the precedent acts necessary to authorize the auditor to make the sale. It is not made prima facie evidence of the tax judgment, which is the source of his authority to sell. This would have to be first proved aliunde, as before. The extent of the effect of the statute is merely to make the certificate prima facie evidence of the regularity of the proceedings connected with the sale itself, such as the giving of notice of the time and place of sale, the fact of sale, and that it was conducted in the manner required by law, and the like. That this is the extent to which it goes is, we think, almost self-evident from the language of the statute itself. * * * The defendant insists, however, that this rule is somehow changed or inapplicable, from the fact that the so-called statute of limitations has run; the action not having been brought within five years after the sale. But this is not a question of the statute of limitations, but of the competency of evidence. How can the fact that the statute has run render that competent which before would have been incompetent? The trouble is the statute is not broad enough for defendant's purposes. It needs a tax judgment behind it to set it in motion. Until she proves a tax judgment authorizing a sale, she can never reach a point to invoke the application of the statute. See Dawson v. Helmes, 30 Minn. 107, 14 N. W. 462. Had she proved such a judgment, she might be in position to successfully insist that plaintiff was not entitled to have the sale or certificate set aside on account of an omission to comply with any of the requirements of

law respecting the sale. But the case now stands precisely as if she had introduced no evidence, because she has produced no competent evidence."

The above case was decided in 1883, and the construction there announced has been repeatedly reaffirmed. In my opinion no reason exists for not following it. The rule which governs the construction of a statute adopted from another state is familiar. It will be presumed that the legislature adopted it with the construction which had been given to it. 2 Lewis & Suth. Stat. Con. (2d Ed.) section 404, and cases cited. In adopting this construction we are giving effect to the intent of the legislature, and observing a well-settled rule of statutory construction. 26 Am. & Eng. Enc. Law, 100, and cases cited. This court has repeatedly applied this rule of construction to other provisions of this same act. Wells Co. v. McHenry, 7 N. D. 246-259, 74 N. W. 241; Cass Co. v. Security Imp. Co., 7 N. D. 528, 535-537, 75 N. W. 775; Emmons Co. v. Lands, 9 N. D. 583, 596, 84 N. W. 379. Our statute shows no such change of language as would suggest an intent that it should have a different meaning than had been given to the parent statute. It follows from this view that the defendant, by introducing in evidence only the certificate and proof of notice of expiration of redemption, did not establish, even prima facie, title in the defendant. Proof of a valid tax judgment was essential.

The majority opinion is in error in stating that "this question was decided in Cruser v. Williams, 13 N. D. 284, 100 N. W. 721." In that case the entry of the tax judgment was conceded upon the record. Having been entered by a court of general jurisdiction, the presumption of regularity arose from that fact. The question as to whether the certificate standing alone is proof of the entry was not involved, neither was it discussed or decided. The question we have been considering, however, in no event is decisive in favor of the majority conclusion in this case, for, as previously stated, it was affirmatively shown and is conceded that the judgment was in fact void. And this brings me to the second question, which relates to the latter part of section 1345, which reads as follows: "And no sale shall be set aside or held invalid, unless the party objecting to the same shall prove, either that the court rendering the judgment pursuant to which the sale was made, had not jurisdiction to render the judgment, or that after the judgment and before the sale such judgment had been satis-

fied, * * * and the validity of any sale shall not be called in question unless the action in which the validity of the sale shall be called in question shall be brought or the defense alleging the invalidity be interposed within three years from the date of sale. A sale shall be deemed completed within the provisions of the article when the certificate thereof has been issued by the sheriff." The majority opinion holds, directly, that the limitation feature just quoted is applicable to sales under void judgments, and that, pursuant to its provisions, the sheriff's certificate, coupled with a notice of expiration of the redemption period, becomes in three years an unassailable muniment of title, which is thereafter wholly impregnable to an attack by the true owner, and against which he cannot urge in defense of his possession and title that the judgment and sale were in fact void. In my opinion the limitation provision of the section, which is above quoted, and this seems to be the basis of the majority opinion, has no application to void sales such as this. A void judgment is no judgment, and a void sale is no sale. The statute does not apply to void sales. As to such sales the statute does not commence to run, for there is nothing for it to operate upon. Such, and for reasons which will hereafter appear, and I think there is no exception, is the construction given to similar statutes. This construction gives effect to the statute as an effective means of barring attacks for defects in the proceedings which are commonly classed as irregularities, and does not take away from the true owner the right to urge that the sale was void for jurisdictional reasons. And, by thus excepting void sales from its operation, is observed that ancient and familiar maxim of the law, which is reaffirmed in section 5101 of our Code, that "time does not confirm a void act." And the statute is saved from the condemnation of the further rule that even the legislature cannot infuse life into that which is dead.

In Sweigle v. Gates, 9 N. D. 543, 84 N. W. 482, this court said: "It is well settled that tax deeds which are upon their face void for jurisdictional reasons do not operate to start the statute of limitations running; and it is also well settled both upon principle and authority that, where an officer executing a tax deed was without jurisdiction so to do, such deed will not start the limitation running, even if the deed be entirely regular upon its face." The decisions of this court are in harmony upon this question. Roberts v. Bank, 8 N. D. 504, 79 N. W. 1049; Sheets v. Paine, 10 N. D. 106,

86 N. W. 117; Hegar v. DeGroat, 3 N. D. 354, 56 N. W. 150; Eaton v. Bennett, 10 N. D. 346, 87 N. W. 188; Power v. Kitching, 10 N. D. 254, 86 N. W. 737, 88 Am. St. Rep. 691. So, too, in Kansas a void deed does not set the statute in motion. Shoat v. Walker, 6 Kan. 65, 75; Sapp v. Morrill, 8 Kan. 677, 685; Taylor v. Miles, 5 Kan. 515, 516, 7 Am. Rep. 558; Bowman v. Cockrill, 6 Kan. 337; Hall's Heirs v. Dodge, 18 Kan. 277; Hubbard v. Johnson, 9 Kan. 632. See, also, Millar v. Babcock, 29 Mich. 525; Gomer v. Chaffee, 6 Colo. 317; Moore v. Brown, 11 How. (U. S.) 414, 13 L. Ed. 751; Redfield v. Parks, 132 U. S. 239, 10 Sup. Ct. 83, 33 L. Ed. 331; Walker v. Turner, 22 U. S. 541, 6 L. Ed. 155; Kelly v. Herrall (C. C.) 20 Fed. 364; Bannon v. Burnes (C. C.) 39 Fed. 895. This also was the holding of the United State Circuit Court of Appeals for the Eighth Circuit, in a case arising under the Arkansas statutes (Alexander v. Gordon, 41 C. C. A. 228), in which it was held that a sale for an excessive amount was open to attack after the statutory period, upon the ground that the sale was void. For substantially the same reasons as controlled in the cases above cited, it was held under an early statute in Pennsylvania, which in terms commenced to run from "the sale," did not attack and commence to run, even when the sale was not void, until the tax deed was issued, and possession taken under it by the purchaser. Waln v. Shearman, 8 Serg. & R. 357, 11 Am. Dec. 624. So, in Iowa, it was held that a statute which in terms commenced to run from "the sale" did not attach until the tax deed was executed and recorded, which was three years later, and this construction was adopted upon the ground that any other construction would make the statute "both unjust and unconstitutional." Eldridge v. Kuehl, 27 Iowa, 160; McCready v. Sexton, 29 Iowa, 356, 4 Am. Rep. 214. The decisions of the Supreme Court of Minnesota are directly in point, and, in my opinion, are controlling. That court has repeatedly held, in construing the statute from which ours was borrowed, that a sale under a void tax judgment does not set the statute of limitations in motion. Sanborn v. Cooper, 31 Minn. 307, 17 N. W. 856; Feller v. Clark, 36 Minn. 338, 31 N. W. 175; Kipp v. Fenhold, 37 Minn. 132, 33 N. W. 697; Knight v. Alexander, 38 Minn. 384-388, 37 N. W. 796, 8 Am. St. Rep. 675; Smith v. Kipp, 49 Minn. 119, 125, 51 N. W. 656; Whitney v. Wegler, 54 Minn. 235-238, 55 N. W. 927; Farnham v. Jones, 32 Minn. 7, 19 N. W. 83; Holmes v. Loughren (Minn.) 105 N. W. 558.

The recent case of Holmes v. Loughren, supra, involved substantially the same questions as are presented in this case. A sale had been made under a tax judgment, which, like the judgment in this case, was void because of the insufficiency of the description of the property in the notice. The proceedings were under the charter of the city of Duluth. The plaintiff, the tax purchaser, relied upon a three-year statute of limitations. The court held, in accordance with the general rule and its previous decisions, that "a statute of limitations is not put in operation in favor of a party claiming under a tax judgment sale, unless there is behind it a valid tax judgment." An accurate statement of the construction which has always prevailed in Minnesota will be found in the following quotation from the opinion in the above case: "The provisions of the charter of the city of Duluth provided that no tax sale shall be set aside or held invalid, unless the action in which the validity of the sale shall be called in question be brought within three years from the issuance of the deed. It is the contention of the plaintiff that this statute prevents the defendant from now questioning the validity of the tax judgment and sale, as this action was not brought within three years after the issuance of the deed. It is to be noted that this case is essentially one to determine the title to the lot in question, that the defendant is the absolute owner of it unless his title has been divested by the tax proceedings, that his fee title carries with it the constructive possession of the lot; and, further, that if the statute applies to an action of this kind, and judgment be given for the plaintiff that he and not the defendant is the owner of the lot, the defendant is absolutely deprived of his property because he did not bring an action to vindicate his right to the continuance of the uninterrupted enjoyment of his property against a void claim existing only on paper. If statutes of this kind are to be construed as applicable to any action, no matter what its form may be, in which the title to the property will be finally and conclusively determined by the judgment, would they be constitutional? Baker v. Kelley, 11 Minn 480 (Gil. 358); Feller v. Clark, 36 Minn. 338-340, 31 N. W. 175. This is a serious question which we do not decide, for the reason that, no matter whether the statute, if construed as applicable to actions of this kind would be valid or not, it cannot be invoked in this case. A statute of limitations is not put in operation in favor of a party

claiming under a tax sale, unless there is a valid tax judgment behind it. Where there are jurisdictional defects in tax proceedings, the recording of the tax deed will not set limitations running, and it is immaterial whether such defects appear on the face of the deed or aliunde. Jaggard on Taxation, 744; Sanborn v. Cooper, 31 Minn. 307, 17 N. W. 856; Feller v. Clark, 36 Minn. 338, 31 N. W. 175; Kipp v. Fernhold, 37 Minn. 132, 33 N. W. 697; Knight v. Alexander, 38 Minn. 384-388, 37 N. W. 796, 8 Am. St. Rep. 675; Smith v. Kipp, 49 Minn. 125, 51 N. W. 656; Whitney v. Wegler, 54 Minn. 235, 55 N. W. 927. The alleged tax judgment in this case was void. Hence the statute does not prevent the defendant from asserting the invalidity of the tax sale."

In my opinion, no reason exists for refusing to follow a construction so well settled, and this without regard to our individual views as to its correctness. In following that construction, as previously stated in reference to another part of the same section, we give effect to the intent of the legislature, and, as we have seen, it is in harmony with the construction which this court and the courts generally have placed upon similar statutes. An examination of the cases will disclose that the controlling reason for restricting the operation of such statutes to voidable sales and deeds, and exempting those which are void for jurisdictional reasons, is that, unless they are thus restricted, they could not be sustained. And this presents the third question: Can the latter part of the section, which limits attacks upon and defenses against sales to three years from the date of sale, be upheld, as applied to void sales, or, as in this case, to a sale under a void tax judgment? In the majority view there is no constitutional objection to this construction and application of the statute, and that, in depriving the true owner of the right to defend his possession and title as against the void judgment and sale, and confirming the title of the tax purchaser, as is done in this case, no right guaranteed to the owner by the constitution is violated. It is said in the opinion that, under section 1315, "want of jurisdiction is not available as an objection to the sale unless urged in an action brought before the expiration of three years, * * *" and that, if the sale is not attacked before that time, "the certificate becomes conclusive evidence of a valid sale," and the majority held that the legislature may constitutionally effect this result "by declaring that after a stated time a conclusive presumption of regularity

shall arise in favor of the proceeding." And the question is squarely presented: "Did the legislature violate any constitutional limitation upon its powers in declaring that the sale should be conclusively presumed to be valid after three years, even though the court had no jurisdiction to render judgment pursuant to which the sale was made, and even though there had been no adverse possession of the land by any one claiming under the sale?" This question my associates answer in the affirmative. It will be seen from the statement in the majority opinion, and it is not contended otherwise, that, if the plaintiff's title is divested, it is solely by virtue of the legislative declaration contained in section 1345. It is not pretended that it was divested by the proceedings taken under the "Woods Law," for they were void. This result is accomplished by the legislative fiat, "declaring that after a stated time a conclusive presumption of regularity shall arise in favor of the proceeding," thereby making the certificate "conclusive evidence of a valid sale."

That it is not within the power of the legislature to thus preemptorily close the doors of the court to suitors, urging in defense of their property the fact that the proceedings by which it is being taken are void for jurisdictional reasons, is, I think, well settled. This right to a hearing in the courts upon such a question is guaranteed to them by section 13 of the state constitution, which declares that: "No person shall * * * be deprived of life, liberty or property without due process of law"—and also by the corresponding provision of the federal constitution. This right the legislature cannot take away. It is sometimes a question of some difficulty to determine whether the particular procedure by which the property of a citizen is being taken is or is not "due process of law." But a discussion of that question is not necessary here, for, in this case, it stands confessed that the act which deprives the plaintiff of his title and transfers it to the defendant is the declaration of the legislature found in section 1345, as construed by the majority, that this shall be done. It is not claimed that the land was sold, or that it is being taken under the general revenue law. The only proceedings taken were under the "Woods Law," and they were wholly void. And it is conceded that the only efficient power divesting the plaintiff's title is the legislative declaration contained in section 1345. I take it to be well settled upon reason and authority that a legislative act

which in effect and of itself transfers the property of one person to another, is not "due process of law." The fact that a tax is involved does not alter the case. The guaranty to the citizen of the protection of due process, before his property shall be taken from him is not merely against a taking by another person. It applies to a taking by the state as well as by individuals. And it matters not that the purpose of the taking was to satisfy an alleged tax, for the taxing power itself must observe the rights of the citizen and accord to him "due process of law." If this were not so, the constitutional guaranty of due process would afford but scant protection, and all property would be held subject to the will of the legislature. But this is not the law in my judgment, and, in order that the answer to a question of such vital importance may not rest upon my bare statement, I will quote from the opinions of others:

Judge Story, in his commentaries on the constitution of the United States (section 1784), says: "It seems to be the general opinion, fortified by a strong current of judicial opinion, that, since the American Revolution, no state government can be presumed to possess the transcendental sovereignty to take away vested rights of property; to take the property of A. and transfer it to B. by mere legislative act. That government can scarcely be deemed to be free where the rights of property are left solely dependent upon a legislative body without any restraint." In People v. Supervisors, 4 Barb. (N. Y.) 75, it was said: "Upon principle, as well as upon authority, a legislative act which takes away the vested rights of property of an individual for any purpose * * * is to be adjudged invalid as being above the power and beyond the scope of legislative authority." And, in Lane v. Nelson, 79 Pa. 407: "It is settled by a current of authority that the legislature cannot by an arbitrary edict take the property of one man and give it to another, and that when it has attempted to be taken by a judicial proceeding as a sheriff's sale, which is void for want of jurisdiction, it is not in the power of the legislature to infuse life into that which is dead." Likewise, in McDaniels v. Correll, 19 Ill. 226, 68 Am. Dec. 587: "It is not within the power of the legislature to make a void foreclosure valid. * * * Upon this question we cannot for a moment doubt or hesitate They can no more impart a binding efficacy to a void proceeding than they can take one man's property from him and give it to

another. Indeed, to do one is to accomplish the other." See, also, in Conway v. Cable, 37 Ill. 82, 87 Am. Dec. 240, in construing a curative act and its effect upon a void tax sale, it was said: "To give it force, therefore, would be to transfer the property of the former owner, not by force of a valid and binding sale for taxes, but by the declared will of the legislature that his title should pass from him and vest in the purchaser at a tax sale which conferred no right. This the legislature has no power to do, whether by direct or positive action, or by rendering valid and binding acts which were nugatory."

It will be noted that section 135, as construed by the majority opinion, is not different from statutes which declare in terms that a tax sale shall be conclusive evidence that all steps prerequisite to its issuance have been taken. It is authoritatively settled that such statutes are unconstitutional as applied to jurisdictional steps, and they are sustained only to the extent of during "irregularities." This court so held in Dever v. Cornwall, 10 N. D. 123, 130, 86 N. W. 227, 231, in passing upon the evidentiary effect of a deed issued pursuant to a sale which was void for want of sufficient notice. The court said: "Where the notice of sale is substantially insufficient for any reason, it matters not that the statute declares that the tax deed shall be conclusive and shall convey title. Such statutes are unconstitutional, and, if upheld, would operate to transfer title to real estate without 'due process of law.'". The rule as laid down in Cooley, Const. Lim. 454, is that: "A statute which should make a tax deed conclusive evidence of a complete title, and preclude the owner of the original title from showing its invalidity, would be void, because being not a law regulating evidence, but an unconstitutional confiscation of property." And so the courts hold, and I believe, without exception. Roth v Gabbert, 123 Mo. 29, 27 S. W. 528; Baumgardner v. Fowler, 82 Md. 631, 34 Atl. 537; McCready v. Sexton, 29 Iowa, 356-385, 4 Am. Rep. 214; McNamara v. Estes, 22 Iowa, 246-258; Case v. Albee, 28 Iowa, 277; Groesbeck v. Seeley, 13 Mich. 329; Case v. Dean, 16 Mich. 12; White v. Flynn, 23 Ind. 46; Corbin v. Hill, 21 Iowa, 70; Abbott v. Lindenbower, 42 Mo. 162; Id., 46 Mo. 291; Little Rock R. R. Co. v. Payne, 33 Ark. 816, 34 Am. Rep. 55; Hand v. Ballou, 12 N. Y. 541; Joslyn v. Rockwell, 128 N. Y. 339, 28 N. E. 604.

The settled law upon this subject was stated by Justice Shiras, in Marx v. Hanthorn, 148 U. S. 172, 13 Sup. Ct. 508, 37 L. Ed. 410, in the following language: "It is competent for the legislature to declare that a tax deed shall be prima facie evidence, not only of the regularity of the sale, but of all principal proceedings and of title in the purchaser; but the legislature cannot deprive one of his property by making his adversary's claim to it, whatever that claim may be, conclusive of its own validity, and it cannot therefore make the tax deed conclusive evidence of the holder's title to the land." It is also well settled that statutes which attempt to accomplish this same result, by declaring that after a fixed time the title of the tax purchaser shall be unassailable, are void and inoperative, as against one whose possession and enjoyment has not been disturbed. Such an one is possessed of his rights, and the state cannot declare them forfeited to another whose claim is void, merely because he declines or is unable to bring suit against the holder of the claim within a fixed period. The rule upon this question is stated in Cooley on Const. Lim. (5th Ed.) 450, as follows: "One who is himself in the legal enjoyment of his property cannot have his rights thereon forfeited to another for failure to bring suit against that other within a time specified to test the validity of a claim, which the latter asserts, but takes no steps to enforce. It has consequently been held that a statute, which after a lapse of five years makes a recorded deed purporting to be executed under a statutory power conclusive evidence of good title, could not be held valid as a limitation law against the original owner in possession of the land. Limitation laws cannot compel a resort to legal proceedings by one who is already in the full enjoyment of all he claims.

Perhaps the leading case in support of the rule just stated is Groesbeck v. Seeley, 13 Mich. 329, concurred in by Judges Campbell, Cooley and Christiancy, and cited in the majority opinion. In that case the court recognized the distinction in principle and effect between limitation laws which are such in fact and statutes like that now under consideration, the effect of which, if sustained, is to divest title solely by legislative action. In speaking of the latter class of laws, the court said: "There is no principle on which such legislation can be maintained. The only manner in which a party holding a lawful and vested right in property can be prevented from asserting it against one which was not lawful in its

inception is by the operation of limitation laws. These laws do not purport to take away existing rights, although their operation may often have substantially that result. But they are designed to compel parties whose rights are unjustly withheld from them to vindicate their claims within some reasonable time. If a person, who has been ousted out of his possession or diminion, desires to regain it, he knows that he must resort to those means which are furnished by the law, either by the peaceable act of a party himself, or by legal prosecution. A limitation law simply requires him to proceed and enforce these rights within some reasonable time on pain of being deemed to have abandoned them. Such laws can only operate on those who are not already in the enjoyment and dominion of their rights. A person who has a lawful right, and is actively or constructively in possession, can never be required to take active steps against opposing claims. The law does not compel any man who is unassailed to pay any attention to unlawful pretenses which are not asserted by possession or suit. When such a title is set up, he has a right to defend himself, by jury if the claim is one of common-law cognizance, or otherwise if of a different nature. But to hold that, under any circumstances, a man can be deprived of a legal title without a hearing, is impossible without destroying the entire foundations of constitutional protection to property. No one can be cut off by limitation, until he has failed to prosecute the remedy limited; and no one can be compelled to prosecute, when he is already in possession of all that he demands. This statute does not purport to be a limitation law. It is designed by its express terms to deprive persons of their titles, whether in possession or not, by mere lapse of time. If the proceedings to sell for taxes were illegal, no lapse of time can change their character, and they can never, therefore, become legal. If the tax purchaser obtains possession and holds it until protected by a limitation law, he then becomes safe, not because his tax title is any more regular, but because the holder of the better title has become incapable of asserting it. As an illegal tax title is a nullity, it cannot of itself divest or affect the true title in any way, and the true owner cannot be lawfully compelled to incur expense, or take active measures to get rid of it, unless he sees fit. But if he becomes ousted, whether by a pretended tax title holder, or by an adverse claimant, he can only secure the enjoyment of his rights by active measures, and the

party in possession may then rely on such possession until it is lawfully assailed, by suit or otherwise, within the period of limitation. In the present case, the party asserting a legal claim, against one which he claims to have been illegal, is in possession as a defendant. The other claimant is the actor and insists that, whether his tax title was legal or worthless originally, it has become good, although the defendant has not been previously ousted and guilty of delay in enforcing his title. If this tax title can be thus made indefeasible against a title in possession, by mere lapse of time, it might as well have been declared so originally. It would in either case be nothing more nor less than depriving one of his property without any legal process, and is simply confiscation by ministerial, and not judicial, action."

The doctrine laid down in the above case was approved and followed in Case v. Dean, 16 Mich. 12, and received the apparent approval of the New York Court of Appeals in Joslyn v. Rockwell, 128 N. Y. 339, 28 N. E. 604, and was expressly approved by the Supreme Court of Kansas in Taylor v. Miles, 5 Kan. 302-311, and by the Supreme Court of Minnesota in Baker v. Kelly, 11 Minn. 480 (Gil. 358), and in Feller v. Clark, 36 Minn. 338, 31 N. W. 175. In Baker v. Kelly, as in Groesbeck v. Seeley, the question was whether "the legislature can require a person who is in possession and uninterrupted enjoyment of his property to commence an action for the purpose of vindicating his rights or silencing adverse claims thereto." The existence of any such power was denied. The court said: "It is for him alone to determine whether it is proper or necessary to bring such suit, and his determination or action in the premises cannot prejudice his right of action for any subsequent injuries or wrongs. Nor can the legislature make his failure to do what they have no right to require a bar to a suit which he has a right to bring. * * * But suppose it is intended by this law to require the original owner to commence an action within the time fixed, or be forever barred from testing or questioning the validity of the assessment or sale. Is such a law sanctioned by the constitution? * * *It may be admitted that it is competent for the legislature to limit the time within which a party in possession may commence an action under our statutes to remove a cloud from his title or silence an adverse claim, but that it may require him to bring such action as a condition to the enjoyment of his property in the

enforcement or defense of his rights is quite a different thing. It is not necessary for a party in the enjoyment of his rights to institute any proceedings against an adverse claimant, and to require him to do so would be, in many cases, imposing a grievous and expensive burden. A law requiring a party to take such action is not, nor has it any analogy to a statute of limitations. Statutes of limitation only operate as an extinguishment of a remedy, and, of course, can have no application to a party who neither seeks nor needs a remedy. The Supreme Court of Michigan, in Groesbeck v. Seeley, 13 Mich. 329, says: " 'Limitation laws always must operate to compel a party to enforce or prosecute his claim within a reasonable time, but a party who is in the enjoyment of his rights cannot be compelled to take measures against an adverse claimant, and a law taking away the rights of a party in such cases is an unlawful confiscation, and in no sense a limitation law.' This position is, I think, tenable. Property in our state is not held subject to the will or permission of the legislature. The rights of property holders are fixed and guarded by the organic law. * * * 'Due process of law,' without which, the constitution declares, a person shall not be deprived of life, liberty or property, is not merely an act of the legislature. * * * That the plaintiff was the owner of the land, and authorized to prosecute and defend in the courts his rights thereto, is admitted. That he has been deprived of either his property or legal rights, by that due process of law which 'proceeds upon inquiry and renders judgment after trial,' cannot be pretended. If the statute should be sustained, it would effect this, for a person is deprived of his property and legal rights when he is forbidden to test or question the validity of the title of an adverse claimant. The statute would deprive a person of his property, if he fails to do an act which may be done or omitted without any violation of law, and which neither his duty nor interest requires him to do, and makes the performance of such act a condition to his right to sue for or defend his property in the courts; whereas the constitution declares that he shall not be deprived of his property by any mere legislative act, and that he shall be entitled to 'justice freely and without purchase, completely and without denial, promptly and without delay, conformably to the laws.' * * *"

Again, in Feller v. Clark, Judge Mitchell said: "The legislature cannot require a person in the uninterrupted enjoyment of his

own property to commence an action for the purpose of vindicating his right against some void claim existing merely on paper, and to declare that, by his failure to do so, the title of his property shall vest in the holder of that void claim who has never been in possession under it." For the same reason, the Supreme Court of Illinois declared a statute unconstitutional, which required that one not in possession, but who had paid taxes for seven years upon unoccupied land, under color of title, "shall be deemed and adjudged to be the owner." Harding v. Butts, 18 Ill. 503; Newland v. Marsh, 19 Ill. 376.

In Taylor v. Miles, 5 Kan. 302, 7 Am. Rep. 558, the court had under consideration a statute which prohibited actions to avoid tax sales or deeds, unless commenced "within two years from the time of recording of the tax deed or sale, and not thereafter." It was held that the statute did not apply to void sales and void deeds. The court said, in part: "Can it be claimed that a judgment void because the court had no jurisdiction, either of the person or of the subject-matter of the suit, can be made good by lapse of time, or by any statute of limitations? Would not such a claim be preposterous? And is a tax deed a subject of more solemnity, or a matter to be treated with greater respect, than a solemn judgment of a court of record? * * * A void tax deed, founded upon a void tax, can neither create title nor draw to its holder the constructive possession of the property. It is void for all purposes. The original owner still continues to hold the absolute and paramount title, both in law and equity, and to hold the constructive possession of the property. * * * It is conceded that statutes of limitations are now everywhere upheld, that they are considered favorably as statutes of repose; but it does not therefore follow that everything that may be called a statute of limitations, is a statute of limitations, nor that statutes of limitation shall be applied where they can have no possible application. * * * Up to the last moment before the statute had completely run, the plaintiff had no title, no possession, either actual or constructive, no property, no right of any kind to the land; and the next moment, when the two years had elapsed and the statute had completely run, the plaintiff was left in the same condition as he was before, with the same rights and the same property that he had before, and no more, and secure (as he was before) from any action to recover anything back from him. If it is intended

by the statute to compel a man to sue before he is injured, if it is intended to compel him to commence an action for the recovery of his land while he is in the full possession and enjoyment of the same, and, in default thereof, if it is intended to take his property from him, and during the same minute give it to another, it is a statute of confiscation, and not a statute of limitation. Groesbeck v. Seeley, 13 Mich. 329; Baker v. Kelly, 11 Minn. 480 (Gil. 358). Such a statute could not be upheld. The legislature cannot say that a man shall do a thing that they have no right to compel him to do do, and then say, if he does not do it, he shall forfeit his estate."

Up to the present time the principle announced in Groesbeck v. Seeley has been approved, I believe, wherever referred to. I know of no court, where the question has been presented, which has withheld its approval. It appeals to me as sound, and is founded on the plain principles of natural justice, and should be adhered to. I cannot assent to the view that the legislature has the power to forfeit one's property to a void claimant, because the owner, who is in possession of his rights, does not see fit to commence a lawsuit within a specified period, and yet that is what is done in this case. This is not taking property by due process of law, but by the fiat of the legislature. If the legislature has the power to effect this result in this case, it has in all cases, and all property is held subject to be forfeited to the holder of void claims without the judgment of a court and by legislative action alone. It is a misnomer to call such statutes statutes of limitation. If named from their purpose and effect, they should be called "statutes abolishing defenses and making valid void claims," or, as named by the Kansas court, "statutes of confiscation." It follows, in my opinion, at least, that section 1345 should be held to be inapplicable to void sales such as this, and for the two reasons already stated—(1) because that was the construction given to it before we adopted it, and is also the general construction given to such statutes, and (2) for this reason that, as applied to void sales, it cannot be upheld. The sale in this case was utterly void, and a sale is a jurisdictional prerequisite to the passing of title. The legislature cannot declare valid that which is void, and thus preclude judicial inquiry. The sale was void for want of a judgment, and the consequent want of authority in the officer who attempted to make in. It was also void for another

reason. The amount for which the sale was made included, besides the tax for one year, which the majority assume was valid, the costs of the void judgment and a tax for one year, which it is conceded was void. The legislature could not authorize a sale for these illegal items. Alexander v. Gordon, 41 C. C. A. 228, 238. See cases cited on the point in the dissenting opinion in Beggs v. Paine (filed herewith) 109 N. W. 322. It will hardly be claimed that the legislature has the power to declare a sale valid which it could not authorize, and such a sale is not cured by a statute of limitation. See cases cited.

The trial court held that the defendant acquired no right through the void sale of November 21, 1897, and upheld the plaintiff's title. For the reasons I have stated, I think the judgment was right and should be affirmed. Upon the questions considered in the majority opinion other than those I have referred to, I concur in the conclusion of my associates.

(109 N. W. 335.)

A. L. Beggs v. J. A. Paine.

Opinion filed May 15, 1906. Rehearing denied October 16, 1906.

Tax Deed — Taxation — Validity.

1. A tax deed issued pursuant to a tax sale under chapter 132, page 376, Laws 1890, is void if it fails to state any one or more of the facts which a deed in the form prescribed by section 7, chapter 100, page 271, Laws 1891, should show.

Same — Evidence of Valid Sale.

2. A tax deed which does not substantially comply with the form prescribed by law for such a deed is not prima facie evidence of a valid tax sale, and does not set in motion those statutes of limitation which bar actions to set aside tax sales without adverse possession.

Same — Purchaser at Tax Sale — Rights Acquired.

3. A purchaser at a valid tax sale pursuant to chapter 132, page 376, Laws of 1890, acquired actual ownership of the land sold as soon as the right of redemption had been terminated, even though a deed in proper form had not been delivered to him. (Young, J., dissenting.)

Appeal — Reversal — Objections Not Raised Below.

4. Where the record on appeal under section 5630, Rev. Codes 1899, shows that a tax deed was by both parties and the trial court

assumed to be sufficient in form and accordingly prima facie evidence of title and attention is not called to the formal insufficiency of the deed until the argument on appeal, this court will grant a new trial to afford the party claiming under the deed an opportunity to establish his right by other evidence. (Young, J., dissenting.)

Taxation — Tax Certificate — Invalidity.

5. Where a certificate holder has in proper time obtained a tax deed which is good on its face according to common law rules, but does not conform to the statutory form, and is therefore void on its face, the certificate is not barred by chapter 165, page 220, Laws 1901.

Same — Assessment Roll — Description of Property.

6. The abbreviation "N. W." in the column headed "Part of Section," was sufficient to identify the land as the northwest quarter of the section named in the assessment roll. Power v. Bowdle, 54 N. W. 404, 3 N. D. 107, 21 L. R. A. 328, 44 Am. St. Rep, and Power v. Larabee, 49 N. W. 724, 2 N. D. 141, distinguished.

Same — Assessment Roll — Failure to Verify.

7. A tax sale made in 1896 under the revenue law contained in the Revised Codes of 1895, was void if based on an assessment roll which was not verified by the required assessor's affidavit; but that defect did not invalidate the taxes for which the sale was made so as to warrant a cancellation of such taxes in the absence of any claim that same were unjust.

Same — Evidence.

8. The assessment roll was produced, and there was no assessor's affidavit attached to it, and there was no indication that any had ever been attached. The auditor testified that there was nothing to indicate that such affidavit had ever been in his office. *Held*, sufficient prima facie proof that the assessor had neglected to attach his affidavit to the assessment roll.

Constitutional Law — Vested Rights — Purchaser at Tax Sale.

9. The right of a tax sale purchaser at a sale in 1896 to a lien for taxes paid, guaranteed to him by section 1273, Rev. Codes 1895, was a right which could not be impaired by subsequent legislation (Young, J., dissenting.)

Highways — Road Taxes — Valid Levy

10. A percentage levy of road taxes by township authorities, based on the assessment roll of the previous year, was a valid levy.

Taxation — Certificate of Sale.

11. A certificate of sale issued on a tax sale in 1897, which shows that one acre was sold out of a quarter section, but does not identify the particular acre referred to, is void.

Same — Execution Under Seal.

12. A tax sale certificate for a sale under the present revenue law need not be executed under seal. The omission of a seal is not a substantial departure from the statutory form, because the county auditor has no official seal.

Same — Setting Aside Tax Sale.

13. Section 1263, Rev. Codes 1899, construed and *held,* under the provisions of this section, the failure of a person affected by the tax sale to seek relief from irregular tax proceedings before the tax sale operates as a complete bar to any relief unless the defect complained of is one or more of the objections specified in the section, or is some jurisdictional defect which it is beyond the power of the legislature to remedy by a curative act or bar by a limitation statute not requiring adverse possession. (Young, J., dissenting.)

Same — Notice of Sale.

14. In the notice of delinquent tax sale, which was otherwise sufficient, the words "Amount of Sale" appeared over the column in which were stated the sums for which each tract was to be sold. The notice clearly showed what was intended, and the words were not misleading. *Held,* the notice was good.

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

Action by A. L. Beggs against J. A. Paine. Judgment for plaintiff, and defendant appeals.

Reversed and remanded.

Newman, Spalding & Stambaugh, for appellant.
C. W. Davis and *W. F. Mason,* for respondent.

ENGERUD, J. This is an action in statutory form to quiet title to a quarter section of land in Dickey county, of which land the plaintiff claims to be the owner in fee. The defendant, in his answer, claims to have acquired title to the land by virtue of certain tax deeds; and also sets up certain tax sale certificates held by him thereon, upon which deeds have not yet been issued. The trial court found that each of the various tax sales upon which the defendant relied were invalid, and judgment was accordingly entered quieting the title of the land in plaintiff. The defendant has appealed to this court and demands a new trial of the entire case on a statement of the case duly settled for that purpose.

Each of the six tax sales upon which defendant relies is alleged as a separate defense, numbered in chronological order.

The first defense is a sale in 1890, for the taxes of 1889, upon which a tax deed was issued in 1894. The second is a sale in 1891, for the taxes of 1890, upon which a deed was received in 1895. The third alleges a sale in 1896, for the taxes of 1895, and a deed issued thereon in 1901. The fourth, fifth and sixth defenses are based, respectively, on sales in 1899, 1900 and 1901; each being for the tax of the preceding year, on none of which sales any deed has been issued. The appellant has abandoned all claims under the deed of 1895, for the taxes of 1890, because it is conceded that the assessment was void for want of any sufficient description of the property. The tax deed issued in 1894 on the sale of 1890 is void on its face because it does not conform in substance to the form prescribed by the statute for such a deed. It varies from the statutory form in several particulars, some of which are not material and need not be mentioned. The sale was made under the revenue law of 1890 (chapter 132, p. 376, Laws 1890). The form of deed is prescribed by section 7, c. 100, p. 271, Laws 1891, which was enacted to supply the omission in that respect in the law of 1890. That law required that the tax deed should "substantially" conform to the form therein prescribed. One of the recitals in the statutory form is a statement of the amount for which the premises were sold. This deed fails to state the amount for which the land was sold, and there is nothing on the face of the deed from which that amount can be ascertained. It is well-settled law that where the statute prescribes the form of a tax deed, even though it requires only a substantial conformity thereto, a deed which omits to show any one or more of the facts which the statutory form should disclose, is void. This is so, because the statute, by prescribing the form, has thereby made every fact recited in the form a matter of substance. It is only those deeds which conform in substance to the statutory form that are made evidence of anything; and it is only such a deed that can set in motion those statutes of limitation which bar actions to set aside tax sales without adverse possession. Blackwell on Tax Titles, section 773; Simmons v. McCarthy, 118 Cal. 622, 50 Pac. 961; Gilfillan v. Hobart, 35 Minn. 185, 28 N. W. 222; Vanderlinde v. Canfield, 40 Minn. 541, 42 N. W. 538; Lain v. Shepardson, 18 Wis. 59; Salmer v. Lathrop, 10 S. D. 216, 72 N. W. 570; Hegar v. De Groat, 3 N. D. 354, 56 N. W. 150. This deed was the only evidence offered by the defendant in support of his alleged

title under the sale of 1890. The deed being void on its face, proves nothing except its own execution. When the deed was offered in evidence, plaintiff's counsel objected to its admission on the ground that it was not in proper form. In answer to the trial court's request to specify the alleged defect in form, counsel stated that he was not certain that there was any defect, and that he would not put in any specific objection, as he was not then prepared to do so. It is needless to say that such an objection is of no avail. It is apparent that counsel did not notice the defect in form. We cannot believe that he was guilty of bad faith in the matter.

This objection to the deed seems to have been urged for the first time in this court. If it went merely to the technical sufficiency of the proof, we would hold that the objection was waived. It is not, however, a case where merely incompetent evidence has been admitted without objection to prove a given fact, but is rather a case where there is no evidence to prove the fact alleged. It is clear from the record, however, that counsel for both parties as well as the trial court, did not notice the defect in form, but assumed that the deed was sufficient in form to have the evidentiary force given to it by the statute; and the burden of proof was thereby cast upon the plaintiff to establish some irregularity in the proceedings sufficient to invalidate the same. It is fair to presume that if the point now raised with respect to the insufficiency of this deed had been raised at the trial, other evidence than the deed would have been offered in support of defendant's case. We think the record presents a case where, by reason of mutual misapprehension and mistake at the trial, the accomplishment of justice demands a new trial of the issues raised by that part of the answer which pleads title under this sale of 1890. Paine v Dodds, 14 N. D. 189, 103 N. W. 931.

This presents the question as to whether or not, in case the defendant shall be able to prove on the new trial a valid tax sale, and that the time for redemption has been terminated, he can thereby establish his title to the property, even though he has no valid deed. It is necessary to decide this question, because, if the invalidity of the deed precludes inquiry into the validity of the antecedent proceedings, there is no need for a new trial. We think the question should be answered in the affirmative. Under the statute by virtue of which the sale in question was made, the pur-

chaser at the sale was entitled to receive a deed conveying to him the title in fee of the premises sold after the expiration of three years and the termination of the redemption right by the service of a notice of the time when the right to redeem would expire. Section 103, c. 132, p. 414, Laws 1890. Unlike the revenue laws of 1896 (section 1264, Rev. Codes 1895), and the territorial revenue law (section 1635, Comp. Laws 1887) under which the right to redeem did not expire until the deed was actually issued, the law of 1890 provided that the right to redeem was terminated absolutely after the expiration of sixty days from the date of the service of the notice of the expiration of redemption, provided at least three years had expired from the day of sale. On and after the sixty-first day from the date of the completion of the service of the redemption notice, provided three years had expired since the sale, the former owner's rights were gone forever, whether the deed had yet been issued or not. The right to the possession and to the rents and profits passed to the purchaser at the expiration of three years from the sale, even though no deed had been issued, and even though the redemption right had not been terminated. Section 83, c. 132, p. 407, Laws 1890.

Assuming, then, that the proceedings were all regular and that more than sixty days had elapsed since the service of the notice of expiration of redemption, but no deed had issued, we would have a case presented where the former owner, although nominally holding the naked record title had lost all his proprietary rights, including the right to redeem, and the tax sale purchaser had become vested with all the rights of an owner and entitled to a deed transferring the record title. Unless we are to regard form as superior to substance, it is manifest that the purchaser must be held to be the owner. The conditions are analogous to those existing in the case of Smith v. Security Loan & Turst Co., 8 N. D. 451, 79 N. W. 981, where this court held that one who merely holds the nominal title without any proprietary rights has no real title or right. It is clear that it can make no difference in the application of the principle whether the conditions under which that doctrine applies are brought about by contract or by operation of law. It is true that the statute, in speaking of the deed, says that such deed shall vest the title in the grantee. Chapter 110, p. 283, Laws 1891. This must be taken to refer to the nominal or apparent record title, because it is clear, from the reading of the law as a whole,

that the actual substantial title or rights of ownership pass to the purchaser by operation of law as soon as the former owner's rights are terminated. The termination of those rights must necessarily, under the terms of the law, precede the execution and delivery of the deed. There must necessarily be a greater or less interval of time elapsing between the termination of the former owner's rights and the delivery of the deed. It is inconceivable that the actual ownership is vested in no one, even for an instant of time. If the proceedings were regular, the defendant was entitled to a deed, and could compel the delivery thereof by mandamus if the officer refused to execute it. Blackwell on Tax Titles, section 1073. The title evidenced by such a deed subsequently executed would relate back to the time when the grantee was entitled to receive the deed. Blackwell on Tax Titles, section 793 et seq. In Brigins v. Chandler, 60 Miss. 862, the grantee in such a case was permitted to show by parol that he was entitled to the deed, and hence had the title on a day earlier than the date of the execution of the deed. As said by the chancellor, in Bank v. Mersereau, 3 Barb. Ch. (N. Y.) 528, 578, 49 Am. Dec. 189: "If this * * * error in the form of the * * * deed was now material, it would not justify a court of equity in declaring that the purchaser had no right to the land by virtue of his purchase." In the case of Lockwood v. Gehlert, 127 N. Y. 241, 27 N. E. 812, it was held that the purchaser acquired no title until the execution and delivery of the deed; but that decision was based upon a statute similar to the tax laws of this state before 1890, and like the law of 1896, above mentioned, under which the rights of the former owner were not barred until the execution and delivery of the deed.

It is urged that if the deed is void, then the certificate is outlawed by chapter 165, p. 220, Laws 1901. This enactment amends section 1269, Rev. Codes 1899, relating to the rights of the holders of tax sale certificates, by adding thereto the following proviso: "Provided, however, that all rights of such purchaser and his assigns to possession, title, or lien of any kind of, to or upon such piece or parcel of land, shall cease absolutely and be deemed forfeited and extinguished, unless possession thereof be taken by him, or them, or proceedings for such possession be by him or them instituted, or deed therefor be executed and delivered to him or them by the proper officer prior to the expiration of six years from and after the date of such certificate, or in case of sales here-

tofore made, and where five years or more have already elapsed since the date of such certificate, then prior to the expiration of one year after the taking effect of this section." It is conceded that possession was not taken under the certificate. Respondent contends that, because the deed is void on its face, therefore it was "no deed," and hence the certificate is barred. This, we think, is too strict a construction. The effect of that law and its plain intent is to require certificate holders to actively assert their rights under the certificate within the given time by either taking or suing for possession, or by securing a deed. Failure to do so in the time required is in effect deemed conclusive evidence that the certificate holder has abandoned all his rights. The law is constitutional. State Finance Co. v. Mather (just decided) 109 N. W. 350. Does the term "deed," as used in this act, mean a deed conforming in all things with the statutory form? We think not. We think the word "deed" was used by the legislature in its ordinary, popular sense, namely, an instrument purporting to convey the land pursuant to a tax sale and which, when tested by the common-law requirements, would, on its face, be sufficient for that purpose, even though void either by reason of extrinsic facts, or by reason of nonconformity to the statutory form. This construction gives effect to the legislative intent. The expression often used that a void deed is "no deed" is merely one of those trite sayings which, although correctly expressing a rule applicable under some circumstances, may be entirely false under different conditions. It is not a maxim or rule of general application. The trial court held that this deed and the taxes upon which it was based were void, on the ground that there was no assessment upon which to base the taxes for 1899, for which the premises were sold, because, as it held, the premises were not sufficiently described in the assessment roll. The description of the land in question in the assessment roll was in the following form:

Owner's Name.	Part of Section	Sec.	Twp.	Range	Acres
Dawson Philip	N. W.	32	130	64	160

The propriety of using abbreviations in describing property for taxation is well settled, and is not now questioned. It is asserted, however, that the letter "N. W." in the column headed "Part of Section," are unintelligible, and cannot be said to mean

"northwest quarter." It is contended that the decisions in Power v. Bowdle, 3 N. D. 107, 54 N. W. 404, 21 L. R. A. 328, 44 Am. St. Rep. 511, and Power v. Larabee, 2 N. D. 141, 49 N. W. 724, are decisive of the case at bar. We do not think so. Those decisions have established a rule of property in this state from which we cannot now depart, but we are not disposed to extend the ruling in those cases to cases not within the express terms of those decisions. The point upon which those decisions held the abbreviations there involved, to be void, was the fact that the letters indicating the subdivisions of the section were followed by whole numbers instead of fractions. The court declined to assume, or permit proof to show, that the figures "2" or "4" used in that way were commonly understood to mean ½ or ¼, respectively. In other words, it was there held that it was the "combination of letters and figures" which was unintelligible. We have no hesitation in holding that the description in this assessment roll is as perfectly intelligible to any person of common understanding, as it would be if written out in full. "N. W." is the abbreviation which means "Northwest" wherever the English language is written. The northwest part of section 32, in the stated township and range, belonging to Philip Dawson, and containing 160 acres, specifically and clearly identifies the land in question, and could not reasonably be applied to any other tract than the northwest quarter of the section in question. The description was therefore sufficient.

The sale of 1896, which is the basis for the deed of 1901, set forth in the third defense, is also invalid. The assessor failed to attach to the assessment roll any sufficient affidavit as required by section 41, c. 132, p. 391, Laws 1890, under which law the assessment and levy were made. We think the evidence was sufficient to prove that the assessment roll had not been verified. The assessment book was identified by the officer in whose custody it was. There was no assessor's affidavit attached to it and no indication that any had ever been attached. It was also shown that there was nothing to show that such affidavit had ever been in the auditor's office. The law required the affidavit to be attached to the assessment book and when it was shown by the official custodian that no affidavit could be found, there was sufficient prima facie evidence that none ever was attached. Iverslie v. Spaulding, 32 Wis. 394; Hiles v. Cate, 75 Wis. 91, 43 N. W. 802. This defect is fatal to the sale. Eaton v. Bennett, 10 N. D. 346, 87 N. W. 188.

Section 72, c. 132, p. 404, Laws 1890, had been repealed by the Revised Codes of 1895, before the sale in question was made and there was no provision of law in force when the sale was made which rendered this defect immaterial. This defect, however, does not furnish any ground for canceling the tax itself. Douglas v. City of Fargo, 13 N. D. 467, 101 N. W. 919; Twinting v. Finley, 55 Neb. 152, 75 N. W. 548. Section 1261, Rev. Codes 1895, under which this sale was made, provides that the purchaser at the tax sale "acquires the lien of the tax on the land, and if he subsequently pays any taxes levied on the same, he shall have the same lien for them and may add them to the amount paid by him in the purchase." Section 1273 of the same Code provides: "Whenever any action or proceeding shall be commenced and maintained before any court or judge * * * to recover the possession or title of any property, real or personal, sold for taxes, or to invalidate or cancel any deed or grant thereof for taxes * * * the true and just amount of taxes due upon such property * * * must be ascertained and judgment rendered and given therefor against the taxpayer, and, if the tax is delinquent, execution must be issued forthwith for the same." These provisions of the law, then in force, entered into and formed part of the contract of sale. They provide the only remedy afforded to the purchaser at the tax sale to recover the money paid out by him in reliance upon a tax sale which might afterwards prove to be invalid, for any reason other than that specified in section 1272, Rev. Codes 1895. This was clearly a right which could not be impaired by subsequent legislation. These two sections must, therefore, be deemed to be still in force in favor of purchasers under the revenue law of 1896 Fisher v. Betts, 12 N. D. 197, 96 N. W. 132; Paine v. Dickey County, 8 N. D. 581, 80 N. W. 770; McHenry v. Brett, 9 N. D. 69, 81 N. W. 65.

The defendant's alleged title having failed, he was entitled to a judgment establishing and foreclosing his lien for the taxes paid by reason of this sale. It is true that the defendant did not specially pray for this relief. This is a suit in equity. Tracy v. Wheeler (just decided) 107 N. W. 68. The answer pleads a counterclaim, and, as is usual in equity cases, in addition to the prayer for specific relief which the pleader conceives himself entitled to, he prays for "such other general relief as shall be just." The defendant is entitled to the full measure of relief which the

law and the facts entitle him to. The fact that the proof defeats his claim to some of the specific relief prayed for is no reason for denying him such other relief as he is actually entitled to. When a court of equity obtains jurisdiction of a controversy, it proceeds to a final determination of all the matters involved in that controversy. 1 Pomeroy's Equity Jurisprudence, p. 181. Moreover, the object of this action is to determine the exact nature and extent of the defendant's adverse claims to the land; and liens and incumbrances are included in that category by the express language of the statute governing this form of action. Section 5904 et seq., Rev. Codes 1899, as amended by chapter 5, p. 9, Laws 1901. It is the duty of the court, therefore, in this form of action to determine the nature and extent of the tax purchaser's lien if his claim of title fails. Section 1273, Rev. Codes 1895, above referred to, goes further and makes it the duty of the court, not only to establish the lien in such a case, but also to render a judgment upon which an execution may issue to enforce the lien. Russell v. Hudson, 28 Kan. 99. Even if the statute did not require such a judgment, we can see no good reason for compelling the parties to resort to a separate suit to foreclose the lien when all the material issues in such a case have been determined in the present action.

Respondent contends that the township road taxes which were included in the amount for which the land was sold are void, because made by percentage, and not levied in a specific amount. This tax was levied by the board of town supervisors in 1895, and was based on the assessment roll of the previous year. Rev. Codes 1895, section 1122. Consequently there was a fixed and certain basis for determining the amount which the percentage levy would yield. It met all the substantial requirements of the law. Fisher v. Betts, 12 N. D. 197, 96 N. W. 132. It appears, however, that the amount properly chargeable against the land as certified to the county auditor by the town clerk was 46 cents too much. In fixing the amount of the lien, this excessive charge should be excluded. The record does not disclose the amount of taxes, exclusive of accrued interest, penalties, and costs for which the sale was made. We have only the amount for which it was offered for sale. We shall therefore include in the new trial to be had of this action, the issues arising on this third defense, involving the sale of 1896 for the taxes of 1895, to the end that the amount of defendant's lien by virtue of having paid the taxes at this abortive sale may be es-

tablished and judgment rendered therefor in case he shall fail to establish title under the sale of 1890 for the taxes of 1889. The amount of all valid taxes for the years 1896 and 1897, which were paid by the defendant subsequent to the sale of 1896, should be included in the lien and interest computed thereon at the rate fixed by the tax law of 1896. The township road taxes for 1896 appear to have been improperly levied in this: That a higher rate of taxation for this purpose was imposed on real estate than on personal property. It appears, however, that the premises were sold for the taxes of 1896 in 1897, and redeemed by the defendant after the sale. If this is the fact, then, for the reasons hereinafter stated in connection with the discussion of the subsequent tax sales, that objection was cured by the sale. In respect to the 1897 tax paid by defendant, if it shall appear that the township authorities illegally exempted the personal property from taxation for township purposes, then that part of the taxes for that year as to which that objection is available is void, unless the payment was by way of redemption from a sale.

The fourth defense is based on a certificate issued December 5th, 1899, on a sale on that date for the taxes of 1898. This certificate shows a sale of one acre of the tract in question. Under section 76, c. 126, p. 285, Laws 1897, the highest bidder for any tract of land was the person who would "pay the total amount of taxes, penalties and costs charged against it * * * for the smallest or least quantity thereof, which may be designated by any sufficient description." This certificate merely recites a sale of one acre, but does not give any description of it, so that the one acre sold can be distinguished and separated from the other 159 acres of the quarter section. For this reason the certificate is void on its face. We know of no way in which the land sold can be identified under the circumstances of this case except by means of the certificate. The sale itself must therefore be declared void.

The fifth defense is a certificate issued December 4, 1900, on a sale made that day for the taxes of 1899. This certificate is for the whole of the land in controversy, is signed by the county auditor, and is in the form prescribed by section 1262, Rev. Codes 1899, except that it bears no seal and omits the words "and seal" from the attestation clause, although the statutory form includes those words. A county auditor, as such, has no official seal. He has charge of the county seal, and is authorized to affix it in authenti-

cation of the corporate acts of the county where such authentication is required. Section 1897, Rev. Codes 1899. A tax sale and execution of a tax deed are not corporate acts of the county. It is clear that the mention of an auditor's seal was an inadvertence, because it is an impossibility to comply with that part of the form. The statute requires only "substantial" adherence to the prescribed form. We are satisfied that the disregard of this feature of the prescribed form is not a departure in matter of substance.

The objection that the township road tax included in this sale was levied by percentage, instead of specific amounts, is not well taken, for the reasons hereinbefore stated in discussing the tax of 1895. The record shows that the town board levied the road tax on real estate only. The town record in evidence is worded in somewhat obscure language. It might mean that no taxpayer in the town had any personal property above the amount exempted from taxation. Or it might be inferred therefrom that the town board was of the opinion that personal property was exempt from taxation for road purposes. We shall take the construction most favorable to the respondent, and assume that the road taxes were levied on real property only, and that personal property subject to taxation was improperly exempted therefrom. Although the objection on the ground of nonuniformity would be fatal to the tax if seasonably made, it is not available after a sale has taken place. Section 1263, Rev. Codes 1899, which section is part of the law under which the tax proceedings were had which culminated in the certificate in question, reads as follows: "Such certificates shall in all cases be prima facie evidence that all requirements of law with respect to the sale have been duly complied with, and that the grantee named therein is entitled to a deed therefor after the time of redemption has expired. And no sale shall be set aside or held invalid unless the party objecting to the same shall prove either that the property upon which the tax was levied was not subject to taxation, or that the taxes were paid prior to such sale, or that notice of such sale as required by law was not given; or that the piece or parcel of land was not offered at said sale to the bidder who would pay the amount for which the piece or parcel was to be sold, in which cases, but in no other, the court may set aside the sale or reduce the amount of taxes upon such land rendering judgment accordingly." This is the first time this court has been called upon to construe and apply this section of the

present revenue law. There was a similar provision in the revenue law of 1890 (section 72, c. 132, p. 404, Laws 1890). Some of the tax sales involved in Sweigle v. Gates, 9 N. D. 538, 84 N. W. 481, were governed by the 1890 law, but the provision now in question was evidently not called to the attention of the court. That provision is not mentioned in the opinion. In Mercantile Co. v. Nelson Co., 14 N. D. 407, 104 N. W. 528, the section in question was applied without discussion. The effect of this section is to cure any error or irregularity in the tax proceedings preceding the sale except those defects mentioned, if the validity of the taxes is not attacked before sale. It is therefore in the nature of a limitation statute as well as a curative law. It is well settled that the legislature has power by a subsequent statute to cure irregularities in a tax proceeding where the thing wanting or omitted is something the necessity for which might have been dispensed with or declared to be immaterial by prior statutes. Saranac Land Co. v. Roberts, 177 U. S. 330, 20 Sup. Ct. 642, 44 L. Ed. 786; Ensign v. Barse, 107 N. Y. 338, 14 N. E. 400, 15 N. E. 401; Shattuck v. Smith, 6 N. D. 56, 69 N. W. 5; Dever v. Cornwall, 10 N. D. 123, 86 N. W. 227; Wells Co. v. McHenry Co., 7 N. D. 256, 74 N. W. 241. Of course no curative statute passed after an attempted sale could render such sale effective as a transfer of any title. The legislature having the power by a subsequent statute to cure or declare immaterial any nonobservance of purely statutory requirements, it is self-evident that this power could be exercised by inserting the curative provisions in the same act which authorized and governed the proceedings. The section, however, goes further. It provides in effect that the sale shall exclude every objection to the proceedings except those irregularities specifically enumerated. Taken literally, it could not be sustained to its full extent, because there are objections not mentioned which the legislature could not bar, as for instance, the want of an assessment or the absence of any levy. The provisions of the section must be deemed to be predicated upon the hypothesis that the power and jurisdiction to sell for a tax the particular property affected, has been initiated by some proceeding which is inherently and, under the provisions of the constitution, sufficient to create a tax and fix it as a charge upon the land to be sold.

Speaking in general terms, there must be an assessment and a levy of a tax for which the property to be sold can be constitutional-

ly held liable. If these are wanting there is no power to sell, and neither the curative nor limitation provisions of the section could have anything upon which to operate. It is objected that the defect in the township tax complained of was beyond the curative power of the legislature, because the method of levying that tax violated that provision of the constitution which requires uniformity in taxation. We shall assume, without expressing any opinion on the point, that it is beyond the power of the legislature to cast the burden of taxation for the repair and improvement of the township roads upon real property alone. We are, nevertheless, of the opinion that under section 1263, the sale is not invalidated by this defect in the township tax. This presents what we have termed the limitation feature of section 1263. The legislature has undoubtedly power to enact limitation laws—to fix a time within which a person must avail himself of the remedies afforded him to protect or enforce his rights, under penalty of being forever barred from asserting them. The primary requisites to the validity of such a law are that some right of the person sought to be barred by it has been invaded or denied for which he has a remedy, and that a reasonable opportunity to avail himself of the remedy is afforded. These conditions existing, it is competent for the legislature to impose upon such person the duty to avail himself of his remedies within the given time and to declare that his failure to do so shall operate as a bar to any relief. People v. Turner, 117 N. Y. 227, 22 N. E. 1022, 15 Am. St. Rep. 498; Id., 145 N. Y. 451, 40 N. E. 400; Turner v. People, 168 U. S. 90, 18 Sup. Ct. 38, 42 L. Ed. 392; Saranac Land Co. v. Roberts, 177 U. S. 330, 20 Sup. Ct. 42, 44 L. Ed. 786; Ensign v. Barse, 107 N. Y. 338, 14 N. E. 400, 15 N. E. 401; Knox v. Cleveland, 13 Wis. 245.

The statute in question complies with all these requisites. The land in question was taxable, and the statute governing taxation, of which ignorance excuses no one, informed every person interested in the land that it would be taxed; and, if the taxes were not paid within a given period, the property would be sold. The statute further informed every interested person when and where every official act in the course of the proceeding from the assessment to the sale would take place, and the evidence of each of these acts was made a matter of public record open to the inspection of all persons at designated places. The propriety of the

assessment is subject to review before the town board of review, and again before the county board of equalization. The amount of taxes imposed on each tract and the various purposes for which the same were levied are spread out in detail upon the tax list which remains open to inspection at the county treasurer's office from the 1st of November succeeding the levy until November of the next year, and is then transferred to the county auditor's office a month before the sale takes place. During all this time the board of county commissioners are required to meet at designated times at the county seat, and are authorized to hear and allow petitions for abatement of taxes for any cause. The time and place of sale are fixed by law, and three weeks' public notice thereof is given by publication of the list of lands to be sold, and the taxes they will be sold for. Instead of, or in addition to, applying to the board of county commissioners for relief from any objectionable tax, the taxpayer has ample remedies under our liberal Code of Civil Procedure to obtain such relief by civil action or appropriate special proceedings; and he is allowed more than a year in which to avail himself of them. The legislature had the power, and we think it was clearly the intention to declare by this section of the law that the neglect of the taxpayer to resort to an appropriate remedy for relief from a prejudicial irregularity in the tax proceedings before the sale, should be a bar to any relief, unless the defect complained of consists of one or more of those objections specified in the section or is some other defect which it is beyond the power of the legislature to remedy by a curative statute or bar by a statute of limitations which is not based on adverse possession.

Under such a taxing system as ours there is no necessity for service of notice personally or by publication. The law itself is ample notice to comply with the requirements of due process. As said in People v. Turner, 117 N. Y. 227, 237, 22 N. E. 1022, 1025, 15 Am. St. Rep. 498: "A manifest difference exists between the modes of making assessments for local improvements and those providing for annual taxation, and much more reason exists why a formal notice should be given in one case than the other. In one case they are transitory and occasional; and in the other, regular, fixed, and of annual occurrence, known to all the people. In one case they become public only when proceedings are instituted and may escape the notice of the landowner; in the other they occur every

year and are as constant in their occurrence as the changes of the seasons. * * * The taxpayer must be presumed to have knowledge of the provisions of public statutes; and, as the time and place for the meetings of the board of supervisors are fixed by the statute, and occur at stated periods, we must presume that the legislature intended such notice of the time and place for hearing of dissatisfied taxpayers to be adequate notice of the opportunity to be heard." On the same point, see Hagar v. Reclamation District, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; Kentucky R. R. Tax Cases, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663. Also cases cited in 27 Am. & Eng. Enc. of Law (2d Ed.) p. 707. The law is valid, unless it violates the fourteenth amendment of the federal constitution, which prohibits any state from depriving a citizen of his life, liberty or property without "due process of law." The question is a federal one, because, although the same provision is in our state constitution, it is only copied from and repeats the guaranty found in the fourteenth amendment, and is no broader in its scope than the federal provision. The decisions of the United States Supreme Court are therefore controlling on this question. The point has been repeatedly raised and decided in that court. State R. R. Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Hagar v. Reclamation District, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; Kentucky R. R. Tax Cases, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414; Turner v. People, 168 U. S. 90, 18 Sup. Ct. 38, 42 L. Ed. 392; Saranac Land Co. v. Roberts, 177 U. S. 330, 20 Sup.Ct. 642, 44 L. Ed. 786. Further discussion of this subject will be found in Nind v. Myers, 109 N. W. 335, the decision in which is filed herewith. It is well known that our present law, regulating taxation of real property, was borrowed largely from Minnesota. In that state the delinquent tax list of real property was filed in the office of the clerk of the district court, and served the purpose of a complaint in an action against the respective lands listed. The list, with the accompanying citation, was published, requiring persons interested to file an answer, and litigate in court any alleged defense they might claim to have against the tax; and, in case of default of an answer, judgment was entered against the property for the tax listed. The property was subsequently sold pursuant to the judgment. This procedure was omitted from our tax law, apparently on the theory that, by the provisions of section

1263, the same result would be attained as was effected under the Minnesota law by means of the citation and judgment of the court. It is obvious that it is of no consequence whether the proceedings take the form of a judicial proceeding and judgment, or that the statute declares that certain extrajudicial proceedings shall have the same conclusive effect as a judgment, provided in either case there is notice and reasonable means and opportunity to obtain a judicial hearing and determination of any valid defense, before the defense is barred. Wells County v. McHenry, 7 N. D. 246, 74 N. W. 241, and cases cited supra. It must be borne in mind that these statutory provisions regulating the form and method of procedure in laying and collecting taxes are merely means to an end. The object in view is to insure a fair apportionment of the expenses of government, and to compel the payment of each individual's share. If that end has been accomplished, even though by irregular means, the taxpayer has no just cause for complaint, provided he is informed of what his tax is and has the opportunity of paying it before his property is taken from him. To illustrate: A fair assessment is essential to a uniform tax. To insure a just appraisement, the valuations fixed by the assessor must be reviewed by the town board of review and the county board of review, each of which meet at stated times and places, for the purpose of hearing and adjusting grievances. If these boards refuse to grant a hearing, or, having heard, refuse to do justice, an excessive tax will result which will appear as a charge on the tax lists which are made public the following November. The injured party can then demand an abatement of the excessive tax by the board of county commissioners; or, on payment or tender of the amount justly due, obtain by civil action, a cancellation of the excessive part of the tax, and an injunction against the sale. The mere payment or tender of the just amount of taxes due may be sufficient without a civil action to protect his rights. Wilson v. Reasoner, 37 Kan. 665, 16 Pac. 100. So, also, if any part of the aggregate levy is for an unlawful purpose, or in excess of the amount limited by the constitution, or is excessive for any other reason, the same remedies are available. Thirteen months must elapse from the time the tax list becomes public before the sale is made, and the taxpayer has all this time to protect himself by resorting to the court for redress if by reason of nonfeasance or misfeasance on the part of the officers in the tax proceed-

ings an unjust tax has resulted. In short, the entire proceeding is a standing order, of which every property owner has notice, to appear and show cause why the resulting tax is not or will not be fair and just. The taxpayer is not wholly dependent on his knowledge of the law for notice of the proceedings. To further insure that his attention shall be attracted to them, numerous notices are provided for. Notice of the completing of the assessment, and of the meeting of the town, village or city board of review, is given by posting a general notice. Rev. Codes 1899, section 1218. A statement showing the levy for state, county, school and township, village or city purposes, with the amount levied for each is published in each county, and notice of the completion of the tax list is published. Rev. Codes 1899, section 1233. Notice of the sale is also published. Rev. Codes 1899, section 1259.

Besides all these precautions, the proceedings are so familiar to all, and are given so much publicity, both officially and unofficially, and knowledge of their nature and of the time and place they occur, and of where the public record of them is kept, is so general and widespread that ignorance of them or of their effect is excusable only in very rare cases. Under such circumstances can the taxpayer be heard to say that he owes no obedience to so fair and liberal a law? What constitutional right does such a law invade or deny? In what respect is it arbitrary or unjust? This road tax was only a small fractional part of the aggregate taxes for which the sale was made. The other tax levies were valid. There was, therefore, jurisdiction to sell the land for taxes, and, if the road tax was void, it was merely an error in the exercise of jurisdiction, resulting in a sale for more than was legally due; but this error in the exercise of jurisdiction is a wholly different thing from an entire absence of jurisdiction. In the absence of legislation, such as is found in section 1263, the error would be fatal to the sale, as this court has repeatedly held. Sweigle v. Gates, 9 N. D. 538, 84 N. W. 481; Dever v. Cornwall, 10 N .D. 123, 86 N. W. 227, and other cases. If jurisdiction exists, but is erroneously exercised, the error may be remedied by a curative or limitation statute, subject to those restrictions hereinbefore referred to. See on this point the opinion in Nind v. Myers (filed herewith) 109 N. W. 335.

It is finally urged that the notice of this sale was insufficient, in substance, because it did not show, as the statute required (Rev.

Codes 1899, section 1259), the amount of taxes and penalties due for which the land would be sold. The statute does not prescribe any specific form for this notice. It merely requires a notice to be published which shall "contain a notice of all lands on which the taxes of the preceding year [mentioning it] remain unpaid, will be sold at the time and place of sale, shall be the first Tuesday in December, following, and said notice must contain a list of the lands to be sold and the amount of taxes and penalty due, to which amount the auditor shall add to each description of land so advertised the sum of 20 cents for each description of town lot, the sum of 10 cents, to defray the expenses of advertising," etc. The notice in question commenced with a general notice signed by the auditor, and stating, in substance, that "the taxes for the year 1899, on the following list of real property have become delinquent, and that the property will be sold to pay said taxes, together with interest and cost of advertising as provided by law," etc. Then follows the list of lands to be sold, arranged by townships. The land in question was listed in the same form as the other lands, in the following form:

Township 130, range 64.

In whose name assessed and description		Section	Amount of sale.
Philip Dawson	N. W. ¼	32	15 60

It is claimed that by reason of the words, "Amount of sale," over the right hand column, the list does not show the amount of taxes due. We think this is hypercritical. Any person of common understanding reading the list in connection with the general notice at the top could not fail to understand and know that the figures in the right hand column state the amount for which the land was to be offered for sale. No other meaning could be reasonably given to it, even if the person reading it were ignorant of the provisions of the statute which requires the publication. We have not overlooked the case of Mather v. Darst, 13 S. D. 75, 82 N. W. 407, where the Supreme Court of our sister state held insufficient a notice in somewhat similar language. The objections to the certificate set forth in the sixth defense issued on the sale of 1901 are of the same character as those urged against the certificate for the sale of 1900. We hold that both these certificates, and the sales evidenced by them, are valid. The case will be remanded

for a new trial on the issues presented by the first and third defenses, involving the sales of 1890 and 1896, respectively. In the event that the defendant shall establish that he is entitled to a deed under the sale of 1890 for the taxes of 1889, judgment will be entered awarding him the title and possession of the property. If the defendant shall not be able to establish title under said sale of 1890, then the trial court will render judgment, awarding the title to the plaintiff, subject to the rights of defendant under the certificates on the sales of 1900 and 1901, respectively, and his lien for taxes paid by reason of the sale of 1896. In the event of a judgment for plaintiff on the question of title such judgment should show the reasons why the tax sales or taxes, as the case may be, are void, in compliance with section 1270, Rev. Codes 1899.

The judgment is reversed and cause remanded for further proceedings in accordance with this opinion. The appellant will recover the taxable costs and disbursements of this appeal.

MORGAN, C. J., concurs.

YOUNG, J. (dissenting in part). As to the several questions considered and decided in this case I do not agree with my associates in their conclusions as to those numbered 3, 4, 9 and 13, in the syllabus, and will state my views in reference thereto as briefly as may be.

(4) I do not think that a new trial should be ordered as to the first defense to give the defendant another opportunity to establish, if he can, by common-law proof, an estate or interest in the premises under the 1890 sale, which he failed to establish by the void tax deed. In my opinion there is no just ground for this course. The defendant had the choice of introducing common-law proof or of relying upon the presumption of regularity which arises from the introduction of a tax deed, regular upon its fact. He chose to rely upon the deed. It is clear that any evidence which he can produce at the new trial was available when he made his election as to the kind of proof he would rest his case upon. If, therefore, we assume, and it is an unwarranted assumption, that he erred in electing to rely upon the deed, it was nothing more than an error of judgment which is a common incident of all trials, and is never held to present a ground for a new trial. Bacon v. Mitchell, 14 N. D. 454, 106 N. W. 129. If the rule were otherwise, there would be no end to lawsuits. I cannot see how the court or opposing coun-

sel were in any way chargeable with the error if it was one. The record shows that when the defendant offered the deed in evidence, the following proceedings occurred: "Plaintiff's counsel: 'Objected to as incompetent, not in the form required by law.' The Court: 'In what particular is it not in form? The objection is very general.' Plaintiff's counsel: 'I am not relying principally upon it. I am hardly ready to specify now.' The Court: 'If you expect to make a point on it, you must call the court's attention to the particular defect.' Plaintiff's counsel: 'I guess I won't put in any objection then. I am not certain that there is any defect in the form of the deed.' Defendant's counsel: 'You withdraw the objection?' Plaintiff's counsel: 'I prefer to let the objection stand as it is without withdrawing it.'" It is apparent that plaintiff's counsel had not discovered the defect in the deed when he made his objection. He did not consent to its introduction, however. On the contrary, he persisted in his objection that the deed was not in proper form. But that is not important for the burden was upon the defendant to know at his peril whether the deed had any evidentiary force, and his error in judgment is not ground for a new trial. The chief end in view in the enactment of section 5630, Rev. Codes 1899, which governs the proceedings in this case, was to secure a speedy and final determination of cases without the necessity of a new trial. True, the section contains a saving clause giving this court the power to grant a new trial when it deems that course necessary to the accomplishment of justice. This is a power which has been heretofore, and should be at all times, cautiously exercised. It is manifest that, upon a statutory motion for a new trial, the facts above stated would be insufficient, and in my view, an equally strong ground should be required to move the court to grant a new trial in actions tried under section 5630, in view of its manifest purpose. Any other course largely nullifies the chief purpose of this section. I am also of opinion that, if the case is to go back for a new trial, even-handed justice requires that the landowner be given the same consideration as the tax purchaser. He should be permitted to offer further evidence, if he so elects, to show that the sales which the trial court found were void, but which the majority hold upon the present record are valid, are in fact void, for reasons other than those presented at the former trial. But, as previously stated, the case is not one in which, in my opinion, a new trial can be ordered without doing violence to the spirit and purpose of the statute.

(3) As to the statement that a tax purchaser, who has terminated the right of redemption, has the same estate right and title as one who has completed his purchase by receiving a tax deed, I express no opinion. As I view it, the record contains no facts which present the question. There are no rights involved which depend upon this question. The defendant in his answer alleges a regular tax sale, the delivery of a tax certificate, the termination of redemption period by notice, and the issuance of the tax deed which we hold is void. If, upon the new trial, he shall prove a valid sale and notice of expiration of redemption, the trial court will so adjudge. Whether in that event, the defendant would have perfect title, and the same and all the rights of one who had taken out a tax deed is a question not in issue. The question is one of some importance, and should not be determined until it arises in a regular way.

(9) With the general statement that the rights acquired by a purchaser at a tax sale cannot be swept away by subsequent legislation, I fully agree. This court has repeatedly so held, and there is of necessity no division in the authorities upon that question. The point upon which I differ with the majority is in their construction of the statute in reference to which they invoke the prohibition against the impairment of contracts. The two sections of the Revised Codes of 1895, which my associates hold give the purchaser at a void tax sale the right to a judgment and a lien for the amount paid upon the purchase, and for all subsequent payments, and the right of foreclosure, are sections 1273 and 1261, Rev. Codes 1895. Section 1273 makes it the duty of the court to enter judgment against the taxpayer for "the true and just amount of taxes due upon the property," in actions to cancel tax sales and tax deeds, and authorizes the issuance of execution upon such judgments. It makes no reference to a lien in any way. Section 1261 provides for the issuance of certificates to purchasers at tax sales, prescribes the form of the certificate, and further provides that "the purchaser acquires the lien of the tax on the land, and if he subsequently pays the taxes levied on the same, he shall have the same lien for them, and may add them to the amount paid by him in the purchase. * * *" In my opinion these two sections relate to distinct matters: One to the remedy of a purchaser at a void sale; and the other to the rights of a purchaser at a valid sale, and under a valid certificate. Section 1273, which is a

part of article 12, relating to "Sales Wrongfully Made," contains the promise of the state to the purchaser at a void sale of a judgment for the taxes justly due, which is made enforceable by execution, as a measure of indemnity for the loss of his supposed purchase. Section 1261, which is found in article 9 of the same chapter, relates, not to void sales and the consquences thereof, but to valid sales, and the rights of purchasers at such sales. Under this section the lien of the tax at a valid sale, although the tax itself is discharged by the sale, follows the certificate, and to this lien is added a lien for taxes subsequently paid by the holder of the certificate. It is apparent that section 1261 refers to certificate issued upon valid sales. This view is reinforced by considering the rights and liabilities of the owner. If he does not redeem and the sale is valid, the purchaser will acquire title. If the sale is void and a nullity, title will not pass. He incurs no peril by disregarding a void sale, but not so as to a valid sale. He must redeem from a valid sale, and pay the amount stated in the certificate which includes the tax, interest, penalty and costs of sale, with 15 per cent interest, and all subsequent taxes paid by the purchaser with the same rate of interest. Section 1264.

Some states have statutes which provide that the purchaser acquires a lien when the sale is void, and provides means for its enforcement. Such statutes are necessary, for taxes are not matters of contract, and "only statutory means are to be resorted to for their collection." Croskery v. Busch (Mich.) 74 N. W. 464; Cooley on Taxation (1st Ed.) 300; Eyke v. Lange, 104 Mich. 26, 63 N. W. 535. So, in this state it has been held that a suit in equity in the nature of a suit to foreclose a mortgage will not lie to foreclose a tax lien, the statutory remedy being exclusive. McHenry v. Kidder County, 8 N. D. 413, 79 N. W. 875. See, also, Gage v. Eddy, 186 Ill. 432, 57 N. E. 1030. Such a provision is found in section 28, c. 67, p. 89, Laws 1897, which is a part of the original "Woods Law." That section declares that when a sale under a tax judgment is declared void, the purchaser, who had paid subsequent taxes, shall have a lien thereon for the same, and authorizes its enforcement by action. The statute under consideration contains no such provision. A purchaser at a tax sale buys under the rule caveat emptor. If the sale is valid he has under his certificate a lien for the amount of the tax, interest and penalty, and costs of sale, and also for amounts paid for subse-

quent taxes. Section 1261, supra. If the sale is void, he acquires nothing. A void sale is no sale, and he is, as to all payments subsequently under a mere volunteer. This court has so held in a number of cases where the sales were set aside for want of a valid assessment, and the same reasons apply to a sale which is set aside for want of a valid levy; for both are equally jurisdictional. Sheets v. Paine, 10 N. D. 107, 86 N. W. 117; Roberts v. Bank, 8 N. D. 504, 79 N. W. 1049; McHenry v. Britt, 9 N. D. 68, 81 N. W. 65. See, also, Barber v. Evans, 27 Minn. 92, 6 N. W. 445. When the sale is valid, the lien acquired by the purchaser may be ripened into title by statutory methods, unless redemption is made; and, in such cases, the statutory remedies are ample and exclusive. When the sale is void, the purchaser acquires no right. Whatever redress he may have for moneys paid out at the void sale, or subsequently, must be found in the statute, and the only remedy given is that contained in section 1273; that is, a judgment enforceable by execution. The question as to nature and extent of the lien of such a judgment need not be discussed. For the reasons stated, I cannot concur in the view, either that the defendant through the void sale acquired the lien of the tax, or that he is entitled to a judgment of foreclosure. The relief to which the defendant is entitled is, in my opinion, entirely different from that awarded him in the majority opinion. The record in this case shows that the defendant purchased the premises at several sales: First, under the 1890 revenue law, then under the 1895 law, and again under the 1897 law. The rights of the purchaser when the sale is set aside are different under each law. As to purchases under the 1890 law, he is entitled to be repaid by the county treasurer the amount paid at the sale and the amount paid as subsequent taxes and costs, with 10 per cent interest. See section 84, c. 132, p. 408, Laws 1890. As to sales under the 1897 law, he has the same redress, except that the interest rate is 7 per cent. See section 88, c. 126, p. 289, Laws 1897; section 1270, Rev. Codes 1899. The sole remedy given in case of void sales under the 1895 law is the judgment authorized by section 1273 of the 1895 Code.

(13) Neither am I able to agree to the construction given to section 1263, Rev. Codes 1899 (section 78, c. 126, p. 286, Laws 1897), or to its application. This section, which is quoted in the majority opinion, provides that no sale shall be set aside unless

the person objecting shall prove certain jurisdictional defects; for instance, that the property was not subject to taxation, or that the taxes were paid, or that notice of sale was not given, etc. It does not designate an illegal levy as one of the grounds upon which a sale may be set aside; but, on the contrary, to the extent of legislative power, it commands that a sale shall not be set aside upon that ground.

Statutes like this are quite common in revenue laws. The manifest purpose of such statutes is to dispense with strict obedience to the requirements of the law of which they are a part. This statute takes the form of a mandate to the courts commanding them to give effect to proceedings which have been taken under it, and to disregard all violations other than those enumerated. In this case the township tax, included in the consolidated tax for which the land was sold, was levied upon real estate alone. The levy had no warrant of law to support it, and could not have been authorized by the legislature. It was entirely void, and beyond the healing power of curative laws. Cooley on Constitutional Limitations, 747. The command of the legislature that a sale based upon such a levy shall not be set aside is therefore wholly ineffective. The will of the legislature should be given effect by the courts whenever it can be done constitutionally. But, when the legislature assumes power which it does not possess, as it frequently does, in these so-called "curative laws," the effect of its declaration must be measured, not by the language of the command, but by the limitations upon its power. In this case it is conceded in the majority opinion, as I understand it, that the levy in question was beyond the curative power of the legislature. Notwithstanding this, the conclusion is reached, and under the authority of the same section, that the sales which were based upon these void and incurable levies are valid, or at least are not open to question after the sale. This conclusion, as I understand the opinion, rests upon the assumption that section 1263 is also a statute of limitation, limiting the period of time in which the landowner may invoke the aid of the courts to protect his property against any and all unlawful invasion by the taxing power, and as against any and all defects in its exercise, jurisdictional, or otherwise, which occur prior to the sale, except those which are particularly enumerated in the section. It will be noted that this section does not except either a void levy or a void assessment, and both are jurisdictional and

fatal, and incurable defects. The theory of the majority opinion apparently is that while such defects are not curable, judicial relief against them may be and must be had before sale, and that relief is barred unless invoked before the sale. In other words, it is held that under section 1263, a limitation against the taxpayer's remedy in court begins to run when the illegal assessment or levy is made; and if not invoked before the sale, the bar is complete. In my judgment, the statute will not bear this construction. I find no language in the section which suggests that it is a statute of limitations. Its language is wholly curative. It contains no statement in reference to the time when actions shall be brought. It merely declares that when actions are brought to set aside sales, they shall not be set aside except upon the grounds enumerated. That it was not the legislative intent to impose a limitation upon actions by this section is also otherwise apparent; for a limitation is in fact placed upon actions by the landowner in the same act and in the succeeding section (section 1264) which provides that "any person having or claiming title * * * may commence and maintain an action either in law or in equity at any time before or after the issuing of a tax certificate, and within three years after the execution and delivery of a deed * * * to test the validity of the tax sale, tax certificate, or tax deed * * * and if no action is commenced within the time aforesaid, such tax deed shall vest in the grantee a fee-simple title to the land. * * *" This section fixed a three-year period, in which the landowner may apply to the courts for relief, and it fixes a definite time when the statute commences to run. It is well settled that, prior to the sale, or at least not until a sale is threatened, courts of equity will not interfere at the suit of an individual taxpayer to enjoin the acts of the taxing officers, even though they are illegal. He must wait until his property rights are invaded. A contemplated future injury will not be sufficient to sustain his action. Considerations of public policy compel an adherence to this rule. If this were not so, and every taxpayer could invoke the aid of the courts whenever the taxing officers act without or in excess of their authority, or commit an illegal act, the entire time of the courts would be consumed to the exclusion of other legitimate business, and the collection of revenues necessary to conduct village, city, township, county and state government would be seriously impeded. For these reasons, it has been held that the aid of the

courts will be denied to the taxpayer until his property rights are invaded, or are immediately threatened. See Miller v. Grandy, 13 Mich. 540; Youngblood v. Sexton, 32 Mich. 406, 20 Am. Rep. 654; Jull v. Town of Fox Lake, 28 Wis. 583; Mayor v. Meserole, 26 Wend. (N.Y.) 132. Also the recent case of Torgrinson v. School District, 14 N. D. 10, 103 N. W. 414, where we approved and applied this rule, and cases there cited.

It is not claimed by counsel for the original owner that the provisions of the revenue law, when observed by the officers charged with their execution do not accord to property owners due process of law. It is properly assumed that, if the taxing officers regularly pursue their authority, and the landowner fails to redeem. his title will be divested. When taxing officers act within their authority and jurisdiction, he is bound by their acts, and in such cases his remedies are those contained in the revenue law itself. But the case is entirely different when the taxing officers proceed in disregard of the statute, and without authority, for their illegal and unauthorized acts do not bind him; and, for the purpose of preventing the taking of his property through such unlawful methods, he is entitled to his day in court. But, as previously stated, his application for relief will not be entertained until his property rights are threatened or invaded by a sale. It is apparent, therefore, that to hold that the landowner must in every case bring his action before sale, is in effect to deny a remedy; for as already stated, the courts will not entertain his application for relief, at least until a sale is threatened. The present holding is at variance with the settled construction of such statutes. There is no distinction in legal effect between a void levy and a void assessment, and this court recently, in harmony with the views of other courts, in the case of Scott Barrett Merc. Co. v. Nelson County, 14 N. D. 407, 104 N. W. 528, said that "the want of an assessment could not be cured or barred by the sale." This is, I believe, a correct statement of the law.

The majority further contend that the officer making the sale had jurisdiction to sell the land that the inclusion of the illegal road tax with the legal taxes was merely an error in exercising his jurisdiction, and is therefore a mere irregularity. It is said: "The void road tax was only a small fractional part of the aggregate taxes for which the sale was made. The other tax levies were valid. There was, therefore, jurisdiction to sell the land for taxes, and if

the road tax was void, it was merely an error in the exercise of the jurisdiction, resulting in a sale for more than was legally due; but this error in the exercise of jurisdiction is a wholly different thing from an absence of jurisdiction." I cannot assent to this reasoning. It erroneously assumes that the officer who has authority to sell is clothed with general authority, and has a discretion, and that, whether he pursues his statutory authority or not, so long as he makes a sale, he is acting with authority. This is erroneous. His authority is special. He has only the authority given him by the statute. He can only sell at the time, place and manner provided in the statutes and after giving the notice required by the statute and for taxes legally due. Where he departs from his statutory authority, his acts are void; for, unless his acts are authorized, they have no more validity than the acts of a stranger. This has been the settled law of this country ever since the decision of Williams v. Peyton, 4 Wheat. (U. S.) 76, 4 L. Ed. 518, which involved a tax deed, and in which Chief Justice Marshall used this language: "As the collector has no general authority to sell the lands at his discretion for the nonpayment of the direct tax, but a special power to sell in the particular cases described in the act, those cases must exist, or his power does not arise. It is a naked power, not coupled with an interest, and, in all such cases, the law requires that every prerequisite to the exercise of that power must precede its exercise; that the agent must pursue the power or his act will not be sustained by it." No authority exists for selling land for taxes which are not legally due, and a sale for taxes, a part of which is illegal, is without authority of law, and is void. Such is the view of the text-writers (Blackwell on Tax Titles, 160; Cooley on Taxation, 296 (2d Ed.) 497; Burrough on Tax'n, 301; Desty, Taxation, 972), and this court has so held. (Lee v. Crawford, 10 N. D. 483, 88 N. W. 97). And our opinion in the case just cited is in harmony with the opinion of the courts generally. See People v. Hagadorn, 104 N. Y. 516, 10 N. E. 891; Poth v. Mayor, 151 N. Y. 16, 45 N. E. 372; Buell v. Irwin, 24 Mich. 145; Silsbee v. Stockle, 44 Mich. 561, 7 N. W. 160, 367; Hardenburgh v. Kidd, 10 Cal. 402; Treadwell v. Patterson, 51 Cal. 637; Drew v. Davis, 10 Vt. 506, 33 Am. Dec. 213; Gamble v. Witty, 55 Miss. 26-35; McLaughlin v. Thompson, 55 Ill. 249; Riverside Co. v. Howell, 113 Ill. 256, 262; Gage v. Pumpelly, 115 U. S. 454, 6 Sup. Ct. 136, 29 L. Ed. 449; Kemper v. McClelland's Est., 19 Ohio, 324; Elwell v.

Shaw, 1 Greenl. (Me.) 339; Huse v. Merriam, 2 Greenl. (Me.) 375; Wallingford v. Fiske, 24 Me. 386; Worthen v. Badgett, 32 Ark. 496; Parr v. Matthews, 50 Ark. 390, 8 S. W. 22; Kimball v. Ballard, 19 Wis. 601, 88 Am. Dec. 705; Barden v. Supervisors, 33 Wis. 447, 14 Am. Rep. 762; Baker v. Supervisors, 39 Wis. 444. See, also, the opinion of the Circuit Court of Appeals, Eighth Circuit, in Alexander v. Gordon, 101 Fed. 91, 41 C. C. A. 228, an Arkansas case, in which it was held that such a sale as the one under consideration was void; "that the sale itself was not only irregular, but void, because it was made for the collection of a tax in excess of the amount which the county court was authorized by the statutes to levy, and because the officer who made the sale was without jurisdiction or authority to effect it." And it was also held that the sale was not protected by the two-year statute of limitations. See, also, Cooley on Const. Lim. (5th Ed.) 645.

The foregoing cases fully sustain the doctrine laid down by Judge Cooley, that "A sale for anything more than is lawfully chargeable is a sale without jurisdiction, and therefore void." Under this rule, it must be held that the sale in question in this case was void for jurisdictional reasons, and, as such, the statute could have no curative effect. Neither could it bar the original owner from subsequently asserting in court the invalidity of the levy, when necessary to protect his property rights. In what I have said, I do not wish to be understood as assenting to the view that a statute of limitations will in any case validate a void paper claim like a void tax certificate, or that even a void tax deed will in any case bar the right of the true owner, who is in possession and in the enjoyment of all his rights, from urging the invalidity of a sale for jurisdictional reasons. I think the rule is quite well settled to the contrary. This question is involved in Nind v. Myers, 109 N. W. 335, now pending in this court, and I will present a statement of my views in that case.

The trial court held that the several tax sales and tax deeds set up in defendant's answer were void; and, in my opinion, the judgment in this respect should be affirmed, and relief should be granted to the defendant for payments made at the sale, and for taxes subsequently paid, according to the provisions of the law in force when the sales were made, as hereinbefore stated.

(109 N. W. 322.)

FREDERICK A. POWERS v. FIRST NATIONAL BANK OF BOTTINEAU, N. D., SUBSTITUTED IN PLACE OF WILLIAM H. McINTOSH.

Opinion filed May 15, 1906. Rehearing denied October 3, 1906.

Taxation — One Seeking Relief in Equity Must Pay or Tender Taxes Due.

1. In an action to determine adverse claims to real estate arising out of tax certificates on which taxes are shown to be justly due, a court of equity will not grant the plaintiff relief until he pays or offers to pay the taxes justly due.

Same.

2. The mere fact that the rule of caveat emptor applies to tax-sale purchasers is not ground for not exercising in behalf of such purchasers the usual principles in equity actions.

Same — Complaint in Statutory Form Need Not Allege Payment or Tender.

3. In an action to determine adverse claims simply in which the statute provides a form of complaint, the complaint need not allege a payment or offer of payment of the taxes justly due, but before granting any relief the court should require such payment as a condition of granting any relief.

Appeal from District Court, McHenry county; *Palda, Jr.*, J.

Action by Frederick A. Powers against the First National Bank of Bottineau and others. Judgment for plaintiff, and defendants appeal.

Reversed and dismissed.

Bosard & Bosard and *A. M. Christianson*, for appellants.

Where there is no levy there is no tax and neither the amount of purchase or subsequent tax is recoverable. Tyler v. Cass Co., 1 N. D. 369, 48 N. W. 232; Budge v. Grand Forks, 1 N. D. 309, 47 N. W. 390; McHenry v. Brett, 81 N. W. 65 (N. D.); Barke v. Early, 33 N. W. 677; Roberts v. Duds, 10 N. W. 740 (Iowa); Barber v. Evans, 27 Minn. 92, 6 N. W. 445; Crosby v. Busch, 74 N. W. 464 (Mich.); Broxson v. McDougall, 70 Tex. 64, 7 S. W. 591.

Plaintiff cannot maintain this action or seek relief in equity, unless he offers to do equity by paying or tendering the taxes against

the premises. Cooley on Taxation, 750; Farrington v. Investment Co., 1 N. D. 102, 45 N. W. 191; Black on Tax Titles, section 216-220.

M. H. Brennan and *Brennan & Gray,* for respondent.

The rule of caveat emptor applies, where the tax is void *ab initio,* there being no levy there is no lien, and neither the purchase money or tax is recoverable. Tyler v. Cass Co., 1 N. D. 369, 48 N. W. 232; Budge v. Grand Forks, 1 N. D. 309, 47 N. W. 390; McHenry v. Brett, 9 N. D. 68, 81 N. W. 65; Barke v. Early, 33 N. W. 677; Roberts v. Deeds, 10 N. W. 740; Barber v. Evans, 6 N. W. 445; Coskery v. Busch, 74 N. W. 464; Broxson v. McDougall, 7 S. W. 591.

A levy by percentages is no levy. Dever v. Cornwell, 86 N. W. 227, 10 N. D. 123; Wells Co. v. McHenry Co., 7 N. D. 246, 74 N. W. 241.

MORGAN, C. J. The plaintiff brings an action against McHenry county and one W. H. McIntosh, seeking to cancel and annul four tax certificates issued on a tax sale in 1900 for the delinquent taxes of 1899. The defendant bank is the holder of such certificates under an assignment thereof from said McIntosh. the purchaser at the sale, and was substituted as defendant in place of said McIntosh at the trial. The complaint alleges that plaintiff is the owner of the land, which was sold for such delinquent taxes in separate tracts, comprising in all 480 acres; that the defendants claim interests and liens in and against said real estate adverse to the plaintiff "under alleged tax sales, levies and assessments for the years 1895, 1896, 1897, 1898 and 1899, all of which are void;" that the claim of the defendants is without any right whatever, and that neither of said defendants has any interest, lien or right in or to any portion of said lands; "that the defendant McIntosh claims to be the holder and owner of alleged tax sale certificates for the tax sale of 1900 for alleged taxes of the year 1899 on said lands, being tax certificates numbered 41, 44, 46 and 47, and will apply for and obtain deeds from defendant county of McHenry under said certificates for said lands unless the said defendants and each of then be enjoined and restrained by this court from taking or issuing deeds thereunder, and that in case of the issue of any deed or deeds to any of said lands the title of plaintiff to said lands will be clouded, and he will be irreparably

damaged; that all of said alleged taxes and tax certificates are void." The prayer for relief asks that the defendants and each of them be required to set forth the nature of their claims, and that a decree be entered adjudging that the defendants have no interest or estate in said lands, and that plaintiff's title to said lands be declared valid, and that all of said tax certificates be declared null and void; "that said defendants, and each of them, be forever enjoined and debarred from asserting any claim whatever in or to said land by or under any of said alleged tax sale certificates and that plaintiff have such other and further relief as shall be agreeable to equity," etc. The defendant bank answered, and alleged that the taxes under which the lands were sold under a regular sale for valid taxes were duly levied in the year 1899, and that the plaintiff had never paid any of said taxes, or offered to pay any of them, as a condition precedent to setting aside said certificates.

The complaint is not strictly one for the determination of adverse claims only, as it asks for an injunction against the county officials and the owner of the certificates to prevent the county from issuing a deed on said certificates and the holder from accepting such deed. These certificates are pleaded, and the court is asked to cancel them on the ground that they are invalid. The precise ground of the alleged invalidity of the certificates is not set forth in the complaint, and need not be set forth in an action to determine adverse claims. The grounds claimed to have been shown by the evidence are: (1) That the county levy for 1899 was made by percentages and not in specific amounts. (2) That no proper designation of a newspaper in which the delinquent tax list was to be published was made by the county commissioners.

We do not deem it necessary to consider the question whether these alleged omissions rendered the subsequent tax proceedings void or not. It may be conceded for the purposes of this case that a levy by percentages or mills was a void levy but from that it will not follow that all the taxes levied for that year were void. The levy by percentages pertained to the county taxes only. The state and township levies were not affected thereby Hence it necessarily follows that some of the taxes under which the land was sold are not void, nor are they claimed to be void. In the absence of such showing, they are presumed to be valid,

and the plaintiff will not be relieved from the entire burden of taxation by a court of equity upon a showing that some of the taxes are so irregularly imposed as to render such portion void.

The complaint sets forth an equitable cause of action. It asks for an injunction against the county officials, forbidding them from proceedings to deliver to the bank a deed upon the tax sale. To that extent it is the same as the complaint in the case of Douglas v. City of Fargo, 14 N. D. 467, 101 N. W. 919. In that case it was determined that the rule laid down in Farrington v. N. E. Investment Co., 1 N. D. 102, 45 N. W. 191, should be adhered to, and that interference by a court of equity could not be justly invoked unless the plaintiff showed that he had offered to pay such taxes as were justly due in cases where no claim was made that the whole assessment was void for jurisdictional reasons particularly pointed out in the opinion in that case. Plaintiff contends, however, that an injunction was not necessary in this case, and that the action was dismissed at the trial on plaintiff's motion as to the county commissioners. Plaintiff therefore insists that the action must be determined as involving only the rights of private parties, entirely dissolved from the rights of the public. The argument is not convincing. In the ultimate results there is no difference in the two cases. In both cases the public is deprived in the end of the taxes. In this case, if the certificates be adjudged void, the county must refund the taxes paid by the bank. Section 88, c. 126, p. 256, Laws 1897. The fact that the action was finally resolved into a contest between private litigants in no way detracts from the statement that it interferes with the collection or use of the public revenues. It is not alleged or contended that the land was not taxable, nor that it was excessively taxed. No constitutional provision is claimed to have been violated. No prejudice is alleged, unless it can be claimed that the levy by percentages implies prejudice, and such contention could not be upheld. No equitable principle is involved as a ground from immunity from payment of the taxes assessed. Nothing affecting the fundamental groundwork of the taxes has been omitted or wrongfully performed. This is an equitable action, to be determined on equitable principles, although the county interests be eliminated from the issues. The plaintiff seeks the cancellation of certificates and the setting aside of levies and taxes. He seeks to set aside the lien created by a tax cer-

tificate. He asks for general equitable relief. Under the issues framed, it is an equitable action, and held to be such in this state. O'Neill v. Tyler, 3 N. D. 47, 53 N. W. 434; Tracy v. Wheeler (just decided) 107 N. W. 68. The relief sought is equitable, hence equitable principles must be applied in the determination of the issues. The mere fact that the action is between private parties only is not enough to take it out of the rules applicable to equity cases. It is not an answer to say that the doctrine of caveat emptor applies in suits to determine the validity of taxes, sales, or tax deeds. That rule does apply in such cases, but that does not justify a court of equity in holding that a tax sale purchaser shall be compelled to look elsewhere for his money, and the owner relieved from all payments and burdens imposed upon owners of property by the revenue laws. The owner comes into a court of equity, asking that he be relieved from tax proceedings which he claims to be illegal. Before his prayer should be granted, he should do equity himself, and reimburse the tax purchaser, and save the county from the burden of having to pay out the money received as taxes on plaintiff's land, which the latter does not claim not to owe.

A new rule is announced in this case, overruling previous cases, in this court, so far as the application of this equitable principle in actions between private parties to determine the validity of tax sales or certificates or deeds is concerned. Upon mature consideration we conclude that no sound distinction can be drawn, between such actions and those against public officers that will warrant the application of this equitable principle in the one case and withholding it in the other. In Douglas v. City of Fargo, supra, the cases in which this distinction is drawn in this state were cited, but the doctrine was not approved in that case. The cases were cited and reviewed in that case solely for the purpose of showing that the rule announced in Farrington v. N. E. Investment Co., had not been departed from by this court.

The question involved in this case, whether in an action between private parties affecting tax proceedings as liens on land an offer to pay the just tax should be made, was not there involved. The principle here involved is now a statutory enactment. Chapter 166, p. 232, Laws 1903. In addition to the cases cited in the Douglas case as sustaining the principle here announced, see State Finance Co. v. Beck (just decided), 109 N. W. 357, and the

cases there cited. Also, Cooley on Taxation (3d Ed.) p. 1458, and cases cited under note 2; Knox v. Dunn, 22 Kan. 683.

In this case the plaintiff did not allege in the complaint a payment or an offer of payment of the taxes justly due. If the action be considered one solely to determine adverse claims, such an allegation is not necessary, as the statute prescribes a form of complaint for such cases. In such actions if it develops on the trial that taxes are justly due, the plaintiff should offer to pay them before equitable relief will be granted. In this case that was not done, although but two years' taxes had been paid by the plaintiff during his ownership of some of the land for about ten years. Under each of the grounds claimed to entitle the plaintiff to equitable relief, it is not shown that there was not a valid tax due on the land. Until this is shown, it will be presumed to be valid. Hence, there is no ground for interference by a court of equity until the plaintiff himself shows a disposition to do equity. This involves no hardship to the plaintiff. No deeds have been issued, and the right of redemption from the certificate exists.

The judgment is reversed, and the action directed to be dismissed. All concur.

(109 N. W. 361.

MARTIN MARTINSON v. GEORGE MARZOLF, MILLIE MARZOLF AND J. F. HENRY.

Opinion filed May 16, 1906. Rehearing denied July 9, 1906.

Public Lands — Defeated Occupying Claimant May Assert Title as Against One Not Party to Contest — Cancellation.

1. A decision by the commissioner of the general land office, in a former contest between the occupying claimant of public land and a contestant, canceling the claimant's homestead entry for alleged abandonment, which decision became final by reason of the entryman's failure to appeal, is not a conclusive adjudication that the defeated occupying claimant had no right to the land as against a subsequent homestead applicant, who was not a party to the first contest or in privity with the successful contestant.

Same — Cancellation of Entry — Defeated Contestant's Priority Over Entry of Stranger to Contest — Failure of Successful Contestant to Exercise Preference Right of Entry.

2. It appearing that the decision canceling the occupying claimant's entry for alleged abandonment was erroneous, and that the en-

tryman had in fact in all things complied with the requirements of the law, and had not in fact abandoned his claim, and the successful contestant not having exercised his preference right, a stranger to that contest proceeding whose application to enter the land as a homestead had been accepted while the occupying claimant's entry appeared canceled of record, acquired no equitable right to the land by such entry.

Appeal from District Court, McLean county; *Winchester,* J.

Action by Martin Martinson against George Marzolf and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Hanchett & Wartner, for appellant.

Courts will review a decision of the land department in an action to establish a trust in land, where patent has issued from the United States, where there has been a cancellation of an entry without the entryman having an opportunity for a hearing, where such cancellation has been had through an erroneous or mistaken decision as to a matter of law. Parsons v. Venzke, 4 N. D. 452, 61 N. W. Rep. 1036; Johnson v. Lee, 47 Mich. 52, 10 N. W. Rep. 76; Marquez v. Frisbie, 101 U. S. 473, 25 L. Ed. 800; McCord v. Hill, 84 N. W. 27.

Also for fraud and imposition upon the department, by perjured testimony, where the other party has had no opportunity to meet it. Garland v. Wynne, 61 U. S. 6, 15 L. Ed. 601; Sanford v. Sanford, 13 Pac. 602; Wilson v. State, 1 S. W. 71.

Where the land department renders a decision upon a point not raised by the complaint before the register and receiver, a claimant ousted by such decision can file a bill in equity to compel a subsequent patentee to convey to him. Johnson v. Lee, 10 N. W. 76.

Gooler & Goer, for respondents.

A settlement, either by force or surreptitiously, cannot be made upon public land already occupied. Goodwin v. McCabe, 17 Pac. 705; Mower v. Fletcher, 116 U. S. 381, 6 Sup. Ct. Rep. 409; McBrown v. Morris, 59 Cal. 68; Belk v. Meagher, 104 U. S. 287; Bullock v. Rouse, 22 Pac. 919, 920; Atherton v. Fowler, 96 U. S. 513; Hosmer v. Wallace, 97 U. S. 575; Trenouth v. San Fran-

cisco, 100 U. S. 251; Davis v. Scott, 56 Cal. 165; Smer v. Duggan, Id. 257; McBrown v. Morris, 59 Cal. 64; Goodwin v. McCabe, 17 Pac. 705.

Fences and natural barriers constitute a sufficient enclosure to give actual possession. Brumagim v. Bradshaw, 39 Cal. 25; Southmayd v. Henly, 45 Cal. 101; Conroy v. Duane, Id. 603.

Where a claim is made that a department decision is based upon false and prejudiced testimony, it must be set out in the complaint with fullness and particularity. Thornton v. Peery, 54 Pac. 649; Ball v. Dilla, 114 U. S. 74, 5 Sup. Ct. 782.

A court will not set aside a judgment because it was founded upon perjured evidence, or other matter actually presented and considered in the proceeding in which the judgment assailed was rendered. U. S. v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93.

ENGERUD, J. The court below sustained a demurrer to the complaint on the ground that no cause of action was stated therein. The plaintiff declined to amend, and judgment was entered dismissing the action. This appeal is from that judgment.

The defendant Marzolf is in possession of the quarter section of land in suit, and has the legal title thereto by virtue of a patent issued to him by the United States. The plaintiff asserts that he was rightfully entitled to receive the title from the government, but that Marzolf wrongfully secured the patent through the erroneous rulings of the federal land office officials as to the relative rights of the parties. The relief prayed for is that plaintiff be adjudged to be the equitable owner of the land, and that the legal title acquired by Marzolf be conveyed to plaintiff. We think the complaint shows affirmatively that the plaintiff has no right to the land. The complaint is too long for repetition. We shall state only those facts alleged therein which, in our opinion, show that the plaintiff has no cause of action. On January 12, 1898, Marzolf filed a homestead entry for said land at the Devils Lake land office. In August, 1899, one Malinda Lind instituted a contest against Marzolf's entry, charging abandonment by the entryman. Marzolf appeared personally and by attorney in that contest, and evidence in his behalf was submitted. When the contest reached the Commissioner of the General Land Office, that official ordered that Marzolf's entry should be canceled, holding that the evidence showed abandonment. Marzolf's attorney was notified of the commissioner's decision. Marzolf did not ap-

peal from that decision, and the entry was canceled on October 29, 1901. On November 25, 1901, this plaintiff's application to enter the land as a homestead was accepted at the local land office. Marzolf was living on the land and cultivating it when Martinson filed his application therefor, and "had been residing thereon and cultivating the same continuously for a period of six months or more prior thereto." Marzolf continued his said residence and cultivation after defendant's entry, and on June 6, 1902, instituted a contest against Martinson, praying for the cancellation of the latter's entry, on the ground that he (Marzolf) had a prior right thereto by reason of his continuous residence upon the land for four years last past and his cultivation and improvement thereof during that time. Nothing was said in the contest affidavits as to the entry which had been previously canceled; and reinstatement of such entry was not prayed for. After the evidence had been taken in the local land office in that contest, the register and receiver held that the contest should be dismissed. Marzolf appealed to the Commissioner of the General Land Office. Then for the first time an application was made to the commissioner to reinstate Marzolf's former entry, notwithstanding the decision canceling it in the Malinda Lind contest. The grounds urged for such reinstatement were that Marzolf had never been informed by his attorney in that contest of the commissioner's decision therein; that the proceedings were irregular, and that Marzolf's testimony which had been given through an interpreter, had been incorrectly transcribed. Coupled with this motion for reinstatement was a request that the motion be considered in connection with the pending contest against Martinson's entry. On October 1, 1903, the Commissioner granted Marzolf's motion for reinstatement of his previous entry, and directed Martinson's entry to be canceled.

The complaint sets out in detail the reasons assigned by the Commissioner for this ruling, and asserts that it was contrary to law. Martinson appealed from this decision to the Secretary of the Interior, who affirmed the Commissioner's decision, and denied Martinson's prayer for a rehearing. Thereafter Marzolf made final proof in support of his homestead claim and a patent was issued to him. The sufficiency and truthfulness of the testimony submitted in the final proof is not questioned. It must be assumed, therefore, that Marzolf had in fact complied in all things with the homestead laws. The paintiff alleges, however, that

he was wrongfully deprived of some right because the land department reconsidered and reversed the Commissioner's decision in the Malinda Lind contest, without giving this plaintiff any opportunity to be heard or submit testimony in opposition to the motion to reinstate. He asserts that it was error to hold that notice to Marzolf's attorney in the Lind contest was not conclusive evidence of notice to Marzolf. He further contends that Marzolf's sworn statement in the application for reinstatement, that his attorney in the Lind contest never informed him of the Commissioner's decision canceling his entry was false. The plaintiff alleges that the Commissioner of the General Land Office and the Secretary of the Interior accepted Marzolf's ex parte denial of notice and denied Martinson any opportunity to show that Marzolf did in fact receive actual notice of the decision in the Lind contest. The fallacy of plaintiff's argument is the assumption that the decision in the Lind contest was, as between Marzolf and Martinson, a conclusive and irrevocable adjudication that Marzolf's entry had been abandoned and canceled for that reason. That decision was rendered in a case between Lind and Marzolf. Lind had asserted no rights by reason of the decision and Martinson was not in privity with Lind. The effect of that decision was to expunge Marzolf's entry from the land office records, so that as far as those records showed the land was unappropriated public lands. It may be that the government could avail itself of this decision as a conclusive estoppel against Marzolf. But as between the latter and Martinson, that decision was res inter alios acta and at most was merely prima facie evidence that Marzolf had lost his rights by abandonment.

The allegations of the complaint disclose and admit that Marzolf had not in fact abandoned his entry, but had resided upon, cultivated and improved the land in a very substantial manner, and that he had done so with intent to obtain title under the homestead laws pursuant to the entry filed in 1898. It is true that the complaint contains allegations to the effect that Marzolf was not occupying the land as a homestead claimant, and had abandoned his intention to claim it as a homestead and was a mere trespasser. These allegations, however, are mere argumentative assertions on the part of the pleader; as it is evident from a reading of the whole complaint that they merely state the conclusion which the plaintiff contends follows as a matter of law from the

fact, as he contends, that Marzolf's entry had been irrevocably canceled by the Commissioner's decision in the Lind case. The sum and substance of these argumentative assertions found in the complaint is that the decision in the Lind contest estopped Marzolf from showing that he had not abandoned his entry. The question in the Martinson contest was whether or not Marzolf had abandoned or lost his rights as a homestead claimant. If Marzolf had not forfeited his rights the land was not "unappropriated" public land; and if the land was not unappropriated, Martinson's entry was invalid. The plaintiff admits that the officers of the federal land department found that the evidence submitted in that contest showed that Marzolf had in all things complied with the homestead laws, and showed that the decision in the Lind contest was erroneous. He does not deny that this finding was in accordance with the real facts. His only point is that the land department had no right to question the propriety of the decision in the Lind contest, and he asserts that that decision is a bar to the disclosure of the truth. That proposition is, in our opinion, untenable. Martinson was not a party to the case in which that decision was rendered or in privity with any party therein. To what extent that decision should be given effect as between the United States and Marzolf was a question between the latter and the government. Martinson had no property right in that decision. The government officers, having become convinced that the decision was contrary to the facts, unquestionably had the right, as against a stranger to the decision, to set it aside and reinstate the entry which the decision had erroneously canceled. Martinson, being a stranger to that decision, had no right to be heard to question the propriety of vacating it. When Martinson made his entry, he knew that Marzolf was in possession, and he was chargeable with knowledge of the occupant's rights. The plaintiff is not, therefore, in the position of a bona fide purchaser. Neither can he claim the legal right of a successful contestant. He acquired no rights by his formal homestead entry unless the land was unappropriated. Although the erroneous decision in the Lind contest had caused the land office records to show that the land was open to entry, the real fact was, as Martinson knew, that Marzolf was in possession, asserting his rights as a homestead claimant. The plaintiff was also chargeable with knowledge that the officials of the land department had the power to

correct or disregard the erroneous decision canceling Marzolf's entry, if it were shown to be erroneous. We are therefore very clearly of opinion that the complaint shows that plaintiff is entitled to no equitable relief, and the demurrer was properly sustained.

Judgment affirmed. All concur.

(108 N. W. 801.)

THE HOOVEN & ALLISON COMPANY, A CORPORATION, v. A. J. WIRTZ AND C. H. WIRTZ, CO-PARTNERS AS WIRTZ BROS.

Opinion filed May 18, 1906.

Sales — Written Warranties — Oral Warranties.

1. A written contract for the sale of binder twine for use on harvesters, which in terms contains no warranties of quality, but contains a provision that no agreement, verbal or otherwise, not contained in the written contract, will be recognized unless approved by the vendor in writing, excludes oral warranties of quality made by the vendor's agent at the time of the sale and not thus approved, but does not exclude the warranties which arise upon such sales under sections 3976 and 3978, Rev. Codes 1899; the latter warranties resting not upon the contract of the parties, but arising solely by operation of law.

Same — Inability to Inspect.

2. Upon the facts of this case it is *held* that the twine purchased was not accessible to the examination of the buyer within the meaning of section 3978, Rev. Codes 1899, and that the vendee is not therefore precluded from relying upon the warranty given by that section.

Same — Oral Warranty.

3. Where a written order for twine, which thus excluded express warranties of quality, was given, but was countermanded before the delivery of the twine, and the sale was later effected by parol, and upon different terms, and upon the inducement of an oral warranty of quality by the vendor's agent, the oral warranty thus made is valid and may be urged in defense to an action on the note for the purchase price.

Appeal from District Court, Benson county; *Cowan*, J.

Action by the Hooven & Allison Company against A. J. Wirtz and C. H. Wirtz, partners as Wirtz Bros. Judgment for plaintiff. Defendants appeal.

Reversed.

Scott Rex, for appellant.

Mere written orders for goods which do not contain the terms of a complete contract will not exclude parol evidence of the contract actually made. Tufts v. Hunter, 65 N. W. 922; Aultman Miller & Co. v. Clifford, 56 N. W. 593; Head et al. v. Miller, 48 N. W. 195; Boynton Furnace Co. v. Clark et al., 44 N. W. 121; Palmer et al. v. Roath et al., 49 N. W. 590; Nat. Cash Register Co. v. Pfister et al., 58 N. W. 270; Arms v. Arms, 21 N. E. 147; Vaughn Co. v. Lighthouse, 71 N. Y. S. 799; Puget Sound Iron & Steel Works Co. v. Clemmons, 72 Pac. 465; 17 Cyc. 746, note 55.

The rule against parol evidence does not apply when the written instrument is only used collaterally for evidentiary purposes. 21 Am. & Eng. Enc. Law, 1085; 17 Cyc. 741; notes 6 and 9; Dean v. Nichols & Shepard Co., 63 N. W. 582; Pac. Coast Co. v. Dugger, 70 Pac. 523.

An implied warranty is not negatived by an express warranty on another subject, or by a provision that the writing contains the entire agreement. Blackmore v. Fairbanks, Morse & Co., 44 N. W. 548; Bucy v. Pitts Agrl. Works, 56 N. W. 541; Merriam v. Field, 24 Wis. 640; Giffert v. West, 37 Wis. 115; Alpha Check-Rower Co. v. Bradley et al., 75 N. W. 369; Houston Cotton Oil Co. v. Trammel, 72 S. W. 244; Carleton v. Lombard, Ayers & Co., 43 N. E. 422; Blackwood v. Cuttin Packing Co., 18 Pac. 248; Ideal Heating Co. v. Kramer, 102 N. W. 840.

Both express and implied warranties may exist. Standard Rope & Twine Co. v. Olmen et al., 83 N. W. 271; Gardner v. Winter et al., 78 S. W. 143; Fay Fruit Co. v. Talerico, 69 S. W. 196.

The same matter may constitute fraud if the representation is made either without knowledge or with knowledge of its falsity, or a breach of warranty if innocently made. Ross v. Mather, 51 N. Y. 108, 110; Hitchcock et al. v. Gothenberg Water Power & Irr. Co., 95 N. W. 638.

An action must be disposed of on appeal, upon the same theory as it was tried below. Evans v. Enloe et al., 26 N. W. 170; Perry et al. v. Beaupre, 50 N. W. 400; Bailey v. Scott, 47 N. W. 286; Noyes v. Brace, 70 N. W. 846; Hollister v. Donahoe, 92 N. W. 12; Moquist et al. v. Chapel, 64 N. W. 567; Perkins v. Fish et al.,

53 Pac. 901; Ryan v. Pac. Axle Co., 68 Pac. 498; Fifer v. Fifer, 30 N. D. 20, 99 N. W. 763, 766.

McClory & Barnett and *Turner & Wright,* for respondents.

The rule forbids to add by parol when the writing is silent as well as to vary where it speaks. Reeves & Co. v. Bruening, 13 N. D. 157, 100 N. W. 241.

YOUNG, J. The plaintiff brought this action to recover upon a promissory note for $9,850, executed by the defendants on July 20, 1904, and due 100 days thereafter. The defendants' answer admits the execution of the note and that it is not paid. The answer after alleging, "that the only consideration for the note sued on herein, was certain binding twine of plaintiff's manufacture, which was ordered and purchased of plaintiff by defendants," alleges by way of defense and counterclaim in substance (1) that the twine so ordered and purchased was manufactured by plaintiff and was sold by it as its own manufacture; that it was not accessible to the defendants for examination; that to induce the defendants to give the order and make the purchase, the plaintiff warranted the twine to be good merchantable binding twine, suitable for use in harvesters, warranting that the same was equal in quality to McCormick, Deering or Plymouth twine, and to the best in the market; that to plaintiff's knowledge, defendants relied upon said warranty, and upon the warranties implied by law; that said twine was found upon examination and use to be of inferior quality, knotty, lumpy, of uneven size, rotten, made of inferior and improper material, a large part not good merchantable twine, and not fit for use in harvesters; * * * that if it had been as represented, it would have been worth $9,850, the amount of the note. but as furnished, it was worth no more than $4,850, or $5,000 less than the agreed purchase price; (2) that after giving the order for the twine, defendants countermanded the order, and that thereafter in order to induce the defendants to purchase and accept the twine, plaintiff warranted the quality of the twine, the warranty being substantially that above alleged, and that defendant relied upon the warranty so made; (3) realleges the making of the foregoing warranties, and alleges "that the statements and representations aforesaid were untrue, and were known by plaintiff to be untrue when made, and that defendants have been damaged by the deceit in the sum of $5,000, the difference between the actual value of the twine and the contract price." At the close of the testi-

mony, a verdict was directed for plaintiff for $10,388, the full amount of the note and interest, less $50, which apparently was allowed as damages. Defendants have appealed from the judgment, and in a statement of case, specify a large number of errors of law occurring at the trial, as ground for reversal.

The errors assigned and argued in appellant's brief relate to the exclusion of testimony offered to sustain the allegations of their answer and to the direction of the verdict. Before considering these questions, it is necessary to state some preliminary facts.

The record shows that on July 8, 1904, the defendants, at the solicitation of one W. A. Mace, a traveling salesman for plaintiff, gave a written order for the twine in question, which, with the alleged approval of plaintiff endorsed thereon, is in words and figures as follows: "Order for Binder Twine, July 8th, 1904. The Hooven & Allison Co., Xenia, Ohio—Gentlemen: Please enter our order for binder twine as follows: 50,000 lbs. Standard, 9¾ cts. per lb.; 50,000 Standard Manila, 10¾ cts. per lb, f. o. b. Minneapolis. Shipment at your option any time between at once and 1904. Terms: Approved note to be given promptly on receipt of twine, due Nov. 1st, 1904. No agreement, condition, or stipulation, verbal or otherwise, save those mentioned in this order will be recognized unless approved or accepted in writing by the Hooven & Allison Co. Wirtz Bros., Leeds, N. D. W. A. Mace, Salesman. Approved: The Hooven & Allison Co., by S. C. Bennett. 7-11-04. * * * (This order subject to the approval of the Hooven & Allison Company and when accepted will be filled unless prevented by labor strikes, fire, unavoidable accident to mill machinery, or delays of transportation.)"

The note in suit was executed and delivered to W. A. Mace for plaintiff, at Leeds, on July 20, 1904. One carload of the twine was then standing on the track at Leeds, but no part of it had been unloaded or delivered; neither had it been examined by the defendants. At the trial, upon objection of plaintiff's counsel, all testimony offered by the defendant to prove that plaintiff's salesman, Mace, at the time he procured the order on July 8, 1904, orally warranted the quality of the twine as alleged in the answer, was excluded and the numerous rulings rejecting this testimony are assigned as error. In our opinion the court did not err in excluding this testimony. Its purpose was to show that the sale effected by the written order above set out, if it was in fact made under

that order, and this defendants deny, was accompanied by an oral warranty as to the quality of the twine, by Mace. To permit the defendants to prove and rely upon the alleged oral agreement, thus made, would violate the express condition in the written contract, that "no agreement, condition or stipulation, verbal or otherwise, * * * will be recognized unless approved or accepted in writing by the Hooven & Allison Company" and would impose upon the plaintiff an agreement, an express warranty made without authority and as to which the parties had stipulated the plaintiff should not be bound unless approved or accepted by it in writing. The language of the order is that "no agreement, condition or stipulation, verbal or otherwise, * * * will be recognized. * * *" That language is not ambiguous. It is an explicit affirmation that the plaintiff will not be bound either by verbal or written agreements and these include express warranties, unless they are approved in writing. It is not claimed that the alleged oral warranty of July 8, 1904, was approved. The excluded testimony contradicted the written order, and did not tend to establish a valid warranty and was, therefore, properly excluded.

Error is also assigned upon the court's rulings excluding the testimony offered to sustain the allegations of the answer, setting up an implied warranty, and the breach thereof. Counsel for defendants repeatedly offered to prove (1) that the twine for which the note was given was of plaintiff's manufacture; (2) that it had latent defects resulting from the process of manufacture, which were not disclosed to the defendants, and (3) that when it was sold to the defendants, it was not accessible for examination by defendants. We are agreed that the exclusion of this testimony was fatal error. The defendants' offers of proof brought the sale within the terms of sections 3976 and 3978, Rev. Codes 1899 which read as follows:

Sec. 3976. "One who sells or agrees to sell an article of his own manufacture, thereby warrants it to be free for any latent defect not disclosed to the buyer, arising from the process of manufacture, and also that neither he nor his agent in such manufacture has knowingly used improper materials therein."

Sec. 3978. "One who sells or agrees to sell merchandise inaccessible to the examination of the buyer, thereby warrants that it is sound and merchantable."

The testimony offered to establish the implied warranties which are declared in the above sections, was apparently excluded upon the ground that it contradicted the terms of the written order. This was error. There is no conflict between the order and the implied warranties. The order does not state that the sale is made without warranties, neither does it state that the vendor warrants only against certain defects, thus excluding all other warranties, whether express or implied, as was the case in Dowagiac Mfg. Co. v. Mahon & Robinson, 13 N. D. 516, 101 N. W. 903. The order is silent on the subject of warranties, save that it provides in effect that express warranties will not be recognized unless approved by the plaintiff in writing. The warranties which are thus prohibited by the written order, are warranties by agreement, by contract, verbal or written, or express warranties. The prohibition does not extend to implied warranties which are not matters of agreement, but arise by operation of law. "They are obligations which the law raises upon principles foreign to the actual contract. * * *" They are such as were implied at common law in case of sales under the circumstances stated in the statutes above quoted and do not depend upon the agreement of the seller. Hoe v. Sanborn, 21 N. Y. 563, 78 Am. Dec. 163; Kellogg Bridge Co. v. Hamilton, 110 U. S. 114, 3 Sup. Ct. 537, 28 L. Ed. 86. The order contains no provisions excluding such warranties, and the defendants were clearly entitled to rely upon them. In addition to the foregoing, the defendants offered to prove that the twine was of inferior quality, knotty, lumpy, of uneven size, rotten, made of inferior and improper material, and that a large part of it was not merchantable and not fit for use on harvesters, and that it was not worth to exceed the sum of $4,850. The evidence should have been received. There is no ground for claiming that the twine was, when sold, subject to inspection and that the defendants, therefore, assumed the risk of it being sound and merchantable. True, one car was on the track when the note was given, but an inspection even of this portion of the twine was not practicable. Had the defendants opened the car to inspect it, they would not have learned whether it was free from latent defects and was merchantable. The twine was put up in bales, each bale consisting of a number of balls. It would have been necessary to open each bale and unravel each ball. This was not only not feasible, but it would necessarily render the twine unfit for use. The law imposes no

such duty upon the purchaser of property of this character, and under the conditions which existed in this case. See 2 Story on Contracts, 834 and cases cited; also Merriam v. Field, 24 Wis. 640; Kellogg Bridge Co. v. Hamilton, 110 U. S. 114, 3 Sup. Ct. 537, 28 L. Ed. 86; and Jones v. Just, 27 L. J. Q. B. 89, L. B. 3 Q. B. 197. See, also, Cordage Co. v. Rice, 5 N. D. 432, 67 N. W. 298, 57 Am St. Rep. 563.

The error in excluding testimony to establish the warranties implied by sections 3976 and 3978, supra, requires a reversal of the judgment; but inasmuch as a new trial must be had, it will be necessary to refer to the second defense or counterclaim, in which defendants allege that the written order of July 8th was countermanded and in effect that the twine was purchased on July 20th, the day the note was given and that plaintiff's agent, Mace, at that time orally warranted the quality of the twine, substantially as he attempted to do on July 8th, when he secured the written order. The exclusion of testimony offered to show this warranty is assigned and urged as error. It is manifest that if the written order of July 8th was in fact canceled, and the sale was in fact made on July 20th and accompanied by an oral warranty of quality, as defendants claim, no reason exists for denying them the benefit of this warranty, for in that event there was no written contract in existence prohibiting the agent from making it.

Inasmuch as we hold that in any event the defendants may rely upon the implied warranties, arising under sections 3976 and 3978, supra, and recoup for the breach, it is unnecessary to refer to the third defense or counterclaim, in which the defendants allege damages for deceit, further than to say that the measure of damages for the breach of the implied warranties, and of damages for the deceit, if such a counterclaim is maintainable, is in this case the same, to wit, the difference between the actual value of the twine as it was delivered, and the contract price, and it is so alleged in the answer, and the damages can be recouped but once.

For the errors above pointed out, the judgment will be reversed, and a new trial ordered. All concur.

(107 N. W. 1078.)

GILBERT S. WALKER AND AART KORTHORF, CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF WALKER & KORTHORF, v. SMITH STIMMEL.

Opinion filed May 21, 1906.

Contract — Constructions — Performance — Conditions Precedent.

1. Whether stipulations in a contract are conditions precedent to a right to enforce performance is to be determined by the intention of the parties, derived from the contract itself, by application of common sense to each particular case rather than by technical rules of construction. Stipulations in a contract should not be construed as conditions precedent, unless that construction is necessary by the terms of the contract.

Partnership — Designation of Firm.

2. A firm name, showing the surnames only of the parties, is not "a fictitious name," nor "a designation not showing the names of the parties," within sections 4410, 4412, Rev. Codes 1899, requiring every firm doing business under such name or designation to file and publish a certificate showing the full names and residences of the members.

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

Action by Gilbert S. Walker and Aart Korthorf, partners, under the name of Walker & Korthorf, against Smith Stimmel. Judgment for plaintiff, and defendant appeals.

Affirmed.

Robt. M. Pollock and *Stimmel & Scott,* for appellant.

Failing to observe the condition precedent in a contract of sale, respondents have no right of action against appellant. Barnes v. Rawson et al., 82 N. W. 947; First State Bank v. Thuet, 93 N. W. 1; Withers v. Moore, 74 Pac. 159; 1 Cyc. 692.

Without complying with their undertakings in the contract, or pleading an excuse for the noncompliance, respondents cannot maintain this action. 9 Cyc. 722-3; Escott v. White, 10 Bush. 169.

J. F. Callahan, for respondents.

Where the performance of one party is to precede that of the other, then he, who was to do the first act, may be sued, although nothing has been done or offered by the other. Morris v. Slite, 1 Denio, 59; Meriden Britannia Co. v. Zingsen, 48 N. Y. 247, 8 Am. Rep. 549; Bailes' Code Pl. (2d Ed.) 187.

An action for money had and received may be maintained by one person against another, when the latter has money to which in equity and good conscience the latter is entitled. Gulbrath v. Gulbrath, 50 Am. Dec. 375; McCrea v. Purmont, 16 Wend. 460; Lime Rock Bank v. Plimpton, 17 Pick. 159, 28 Am. Dec. 286; O'Fallen v. Boismenu, 3 Mo. 405, 26 Am. Dec. 678; Glascock v. Lyons, 20 Ind. 1, 83 Am. Dec. 299, and note; Wells v. Brigham, 52 Am. Dec. 750.

Where the names of partners appear in the firm title, a filing and publication of the partnership is unnecessary. Pendleton et al. v. Cline, 24 Pac. 659; McLean et al. v. Crew, 26 Pac. 596; Carlock et al. v. Cagnacci, 26 Pac. 597.

FISK, District Judge. This action was brought to recover for money had and received. The facts, briefly stated, are as follows: In September, 1903, defendant sold and delivered to plaintiffs a car load of flax on board car at Fleming Siding, near Casselton, in this state. The price agreed upon between the parties was 91 cents per bushel, the plaintiffs advancing to defendant thereon the sum of $900, with the understanding that plaintiffs would cause the car to be shipped to Casselton, where it should be cleaned, weighed and tested, after giving defendant an opportunity to be present; and thereafter a final settlement was to be made. and any balance found due was to be paid to the party entitled thereto. Through a mistake of the railway company, and without fault on plaintiff's part, the car was shipped to Duluth, Minn., instead of Casselton. Upon discovering this fact plaintiffs informed defendant thereof, and, defendant refusing to accept Duluth weight and grades, the plaintiffs endeavored to have the car returned by the common carrier to Casselton, but without avail. Subsequently the flax was weighed and graded at Duluth, and, while there appears to be nothing in the abstract showing the number of bushels in the car according to Duluth weight, it seems to be taken as a conceded fact in the case that there was a shortage of flax in the car, which, according to the price of 91 cents per bushel, would amount, with interest, to the sum of $56.99, for which sum a verdict was returned in plaintiff's favor and a judgment entered thereon, from which judgment this appeal is prosecuted.

It is appellant's contention that, because by the terms of the contract the flax was to be weighed and tested at Casselton, where

he was to have an opportunity to witness the same, and because it was not so weighed and tested at that place, no recovery can be had; in other words, that performance on plaintiffs' part with this provision of the contract was and is a condition precedent to their right to recover for this overpayment. We are unable to agree with appellant's contention. The parties by their contract did not see fit to stipulate that any such results should follow a failure on plaintiffs' part to comply with this provision of the contract; nor by a fair construction of the contract can it be said that the parties contemplated or intended any such result. It is elementary that stipulations in a contract are not construed as conditions precedent unless the construction is made necessary by the terms of the contract. Deacon v. Blodget, 111 Cal. 416, 44 Pac. 159. The true doctrine, as we understand the authorities, is enunciated in the case of Leonard v. Dyer, 26 Conn. 172, 68 Am. Dec. 382, as follows: "Whether stipulations in a contract are conditions precedent to a right to enforce performance is to be determined by the intention of the parties, derived from the contract itself, by application of common sense to each particular case, rather than by technical rules of construction." As said by Judge Bennett in note to Benjamin on Sales, p. 595: "No other rule, worthy of the name of rule, can be laid down than that it is always a question of the intention of the parties, manifested by the expressions they have used as applied to the subject-matter of the contract and read in the light of surrounding circumstances. And previous cases are not of much value in deciding upon subsequent contracts of different phraseology. The question does not depend upon any particular form of words, or upon any particular collocation of the different stipulations; but the whole contract is to be taken together, and a careful consideration had of the various things to be done, to enable one to decide correctly the order in which they are to be done. With respect to such conditions, it is true that no technical words are requisite to render a condition precedent or subsequent; nor does it depend on the position of words, but it rests on the good sense and plain understanding of the contract, and the acts to be performed by the parties respectively." See Wiley v. Inhabitants of Athol, 150 Mass, 426, 23 N. E. 311, 6 L. R. A. 342. In Tipton v. Feitner, 20 N. Y. 423, Seldon, J., says: "As the effect of a condition precedent is to prevent the court from dealing out justice to the parties according to the equities of the case, it

is not surprising that we find it so frequently said that constructions productive of such conditions are not to be encouraged. Parties must be held strictly to their contracts, and where they have agreed in terms or by plain implication to a condition which is to bar them of a recovery according to what is equitable and just, they must abide by the consequences. But courts are to see that such was the intention of the parties before they are held up to so rigid a rule."

Applying the foregoing well-settled rule of construction to the contract in this case, it is clear that defendant's contention is unsound. The parties in making their contract never contemplated a state of acts such as are disclosed in this case, and hence they could not have intended to contract with reference to such state of facts. To uphold defendant's contention in this case would require us to give the contract a construction never intended by the parties, and most palpably unreasonable and inequitable, especially in view of the fact that defendant did not allege, or attempt to show, that the Duluth weights and grades were incorrect, or that he had been in any manner injured thereby. The authorities cited in appellant's brief in support of his contention are not in point under the facts of this case, as an examination thereof will disclose. These authorities are Barnes v. Rawson, et al. (Iowa) 82 N. W. 947; First Nat. Bank v. Thuet (Minn.) 93 N. W. 1; Withers v. Moore, 140 Cal. 591, 74 Pac. 159. These are cases where a recovery was sought for the purchase price of goods sold and for the contract value of services rendered, and it was shown at the trial that the goods offered and the services rendered were not of the kind and amount required by the contract, and the courts merely held that the delivery of the goods and the performance of the kind and amount of the services contracted for was a condition precedent to plaintiff's right to recover. It is apparent, therefore, that the cases cited are not analogous to the case at bar.

Appellant's only other point requires but brief notice. This point is embraced in appellant's first assignment of error, and is that the court erred in overruling appellant's motion to dismiss the action on the ground that respondents had not filed any certificate of copartnership under section 4410, Rev. Codes 1899, nor published the notice contemplated by section 4412, Rev. Codes 1899. The Supreme Court of California, under a statute identically the same as the foregoing sections of our Revised Codes, has repeated-

ly held that a partnership name, such as the plaintiffs in this case used, is not a fictitious name, and is not a designation failing to show the names of the persons interested as partners, and hence that said sections have no application. Pendleton v. Cline (Cal.) 24 Pac. 659; McLean v. Crow (Cal.) 26 Pac. 596; Carlock v. Cagnacci, Id. 597. We are entirely satisfied that these authorities correctly state the law, and we adopt the rule of construction therein enunciated.

Finding no error in the record, it follows that the judgment of the court below should be affirmed; and it is so ordered. All concur.

ENGERUD, J., being disqualified, took no part in the foregoing decision; Judge FISK, of the First Judicial District, sitting in his place by request.

(107 N. W. 1083.)

C. A. TAMLYN v. P. O. PETERSON AND KAREN O. PETERSON.

Opinion filed May 21, 1906.

Negotiable Instruments — Fraud — Bona Fide Purchaser.

When fraud in the inception of a negotiable instrument is alleged and proved, the burden is upon the indorsee to prove that he is a purchaser for value, before maturity without notice, and in good faith.

Appeal from District Court, Ransom county; *Allen,* J.

Action by E. A. Tamlyn against P. O. Peterson and Karen O Peterson. Judgment for defendants. Plaintiff appeals.

Affirmed.

Pierce & Tenneson, for appellant.

If the defendant desires to rely upon his alleged failure of consideration, or fraudulent representation as a defense to the note, his answer must allege that the plaintiff took the note with notice of the same. Bliss on Code Pleading, section 330; 8 Cyc. 170; Anderson v. Jacobson, 66 Ill. 522; Ither v. Rich, 10 Ad. & Ell. 784; 14 Enc. Pl. & Pr. 641; Sturdivant v. Bank, 60 Fed. 730; Daniel on Negotiable Instruments, section 770; Stein v. Keller, 4 Greene, 86; Clapp v. Cedar Co., 5 Iowa, 15; Billingsly v. Craddock, 47 N. W. 893; Lane v. Krekle, 22 Iowa, 399; Banks v. McCosker, 34 Atl. 539; Posey v. Denver Nat. Bank, 42 Pac. 684.

Chas. S. Ego and *T. A. Curtis,* for respondent.

In this case are decided symptoms of "graft," "false pretense," and the work of "imposters." Here is a Scandinavian farmer, not used to the oily-tongued grafter, submitting his child for treatment by one representing himself as a cat's paw under the name of an innocent purchaser. This court has expressed its opinion of such transactions in Knowlton v. Schultz et al., 6 N. D. 417, 71 N. W. 550; 2 Rand. Com. Paper, Par. 992; Jordon et al. v. Grover et al., 33 Pac. 889.

ENGERUD, J. Suit on a negotiable promissory note, the plaintiff claiming to be an indorsee for value in the ordinary course of business before maturity. The defendants admit the execution of the note, but allege that its execution was induced by the fraud of the original payee and that there was no consideration therefor, and they deny that the plaintiff is a bona fide purchaser. The trial resulted in a verdict for defendant, after plaintiff's motion for a directed verdict in his favor had been denied. The plaintiff thereupon made an alternative motion for judgment, notwithstanding the verdict, or for a new trial. The court denied both features of that motion. Plaintiff then appealed from that order. The motion was made upon a statement of the case duly settled. The plaintiff contends, first, that the defendant's evidence does not show fraud or want of consideration; and, second, even if the evidence is sufficient to prove these allegations, the evidence was inadmissible because defendant failed to plead or prove sufficient facts to show that plaintiff was not a bona fide purchaser without notice of the invalidity of the paper.

We shall dispose of the latter proposition first. Appellant relies upon those cases from other states, which held that the maker of negotiable paper, who, in an action by the indorsee, seeks to avail himself of defenses existing against the original payee, has the burden of pleading and proving that the indorsee took with notice. Such is not the law of this state. In the case of Vickory v. Burton, 6 N. D. 245, 69 N. W. 193, this court declined to follow that line of authorities and held that in such cases, when the defendant had shown fraud on the part of the original payee, "the plaintiff has the burden of showing a good faith purchase of such paper in due course and without notice." This view was reiterated and adhered to in Knowlton v. Schultz, 6 N. D. 417, 71 N. W.

550. We think that rule is a sound and salutary one and should be adhered to, even if it had not become the established law in this state. The answer alleges and the proof shows that a person styling himself, Dr. A. H. Shields, appeared at defendant's farmhouse and represented himself to be a skilled physician of the New York Hospital of St. Joe, Mo. He offered to treat the defendant's child and cure it of an ailment with which it was afflicted. He agreed to furnish the medicine once a month for six months, at the end of which time he agreed to call in person and collect the note. If a cure had not then been effected, he would continue further treatment. Under these circumstances the note was executed. It is needless to say that the "doctor" was never again heard of, and no medicines were furnished except those left behind him at the time. The medicines, of course, were worthless. The circumstances leave no room for doubt that the "doctor" was a confidence man, and that his representations and promises were made with intent to deceive and without any intention to fulfill them. A promise so made is a fraud. Rev. Codes, 1899, section 3848, subdivision 4. The defendant's testimony, if true, tended to show that the plaintiff was a confederate of the "doctor" in the perpetration of the fraud. The testimony of the plaintiff as to the indorsement to him of the note, is of the most formal character and there is little if anything in it upon which the jury could have based a finding of good faith on his part in the purchase.

The verdict is amply sustained by the proof, and we find no error in the record. The order appealed from is affirmed. All concur.

(107 N. W. 1081.)

J. J. HATCH & E. A. HEINSIUS, CO-PARTNERS AS HATCH & HEINSIUS, v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY.

Opinion filed May 22, 1906.

Carriers — Injury to Stock — Notice of Claims — Place of Destination.

1. The words "place of destination," as used in a stipulation in a shipping contract, requiring the giving of notice of injuries to stock before its removal from the place of destination, refer to the town, village or city to which the shipment is made.

Same — Notice of Injuries — Failure to Give Is Matter of Defense.

2. A stipulation requiring the giving of such notice of injuries is not strictly a condition precedent to the bringing of an action for damages for injuries, but is a limitation upon the right of recovery. A compliance with such stipulation need not be affirmatively shown by the complaint, but noncompliance is a matter of defense to be raised by answer.

Same — Requirement of Notice a Reasonable Stipulation.

3. A stipulation in a contract for the shipment of stock, requiring the shipper to give notice to the carrier, of injuries to the stock before it is removed from the place of destination, and before it is mingled with other stock is a reasonable stipulation, and binding upon the shipper when duly entered into.

Same — Consideration.

4. Such a stipulation is binding upon the shipper although not based on any consideration except that for the contract generally.

Appeal from District Court, Wells county; *Burke,* J.

Action by J. J. Hatch and another against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. From a judgment for plaintiff defendant appeals.

Affirmed.

George K. Shaw, Jr., and *Alfred H. Bright,* for appellant.

A provision in a contract with a carrier of goods, that the receiver of such goods shall give notice in writing before their removal from the place of destination, or they are mixed with other goods, as a condition precedent to the right of recovery for damages for their loss or injury, is not unreasonble. Express Co. v. Caldwell, 21 Wall. 264, 268, 22 L. Ed. 556, 88 U. S. 264; Queen of the Pacific, 180 U. S. 49; Phoenix Ins. Co. v. Erie & W. Trans. Co., 117 U. S. 312, 322, 29 L. Ed. 873; York Mfg. Co. v. Ill. Central R. R. Co., 3 Wall. 107, 114, 8 L. Ed. 170; Hart v. Penn. R. R. Co., 112 U. S. 331, 28 L. Ed. 717; Mobile & Montgomery Ry. Co. v. Jurey et al., 111 U. S. 584, 28 L. Ed. 527; Rice v. Kansas Pac. R. Co., 63 Mo. 314, 20 Am. Ry. Rep. 424; Id. 76 Mo. 514, 88 Mo. 239; Sprague v. Mo. Pac. Ry. Co., 23 Am. & Eng. R. Cases, 684, 8 Pac. 465; Goggin v. Kan. Pac. R. Co., 12 Kan. 416; Wichita & W. R. Co. v. Koch, 28 Pac. 1013.

Hanchett & Wartner, for respondents.

A common carrier may limit his common law liability by special contract, provided such limitation was not against public policy, was just and reasonable, and was honestly made and rested upon a proper consideration. O'Malley v. Great Northern Ry. Co., 90 N. W. 974; Express Co. v. Caldwell, supra; Sprague v. Missouri Pac. Ry. Co., supra.

MORGAN, C. J. The plaintiffs entered into a written contract with the defendant under which a carload of horses was to be carried from the Minnesota Transfer to Harvey, N. D. The plaintiffs claim that the horses were injured through the defendant's negligence, and that they were damaged thereby in the sum of $504. The written contract is attached to the complaint and made a part thereof. The defendant demurred to the complaint upon the ground that it appears upon the fact thereof that it does not state a cause of action. The demurrer was overruled. Defendant appeals from the order overruling it.

The contract of shipment contained the following condition or stipulation: "The said shipper further agrees that as a condition precedent to his right to recover any damages for loss of or injury to any of said stock, he will give notice in writing of his claim therefor to some officer of said railroad company or its nearest station agent before said stock has been removed from said place of destination, and before said stock has been mingled with other stock." It is claimed that the complaint states no cause of action because it fails to state that the notice provided for in said contract was given. The plaintiff contends that the condition above set forth is an unreasonable condition, and therefore void. This contention is based upon other portions of the contract, wherein it is stated that the horses are to be "transported from Minnesota Transfer station to Harvey, N. D. station." This statement in no way affects the agreement concerning giving of notice. The contract as to shipment was complied with when the horses were delivered at the station. That was the place where the horses were to be unloaded. But the stipulation or agreement as to notice refers to the place of destination. The word "place" in that connection refers to the village of Harvey, and not to the station at Harvey. This is the construction given to the same language used in the contract involved in Welch v. N. P. Ry. Co., 14 N. D. 19, 103 N. W. 396.

These conditions or stipulations in shipping contracts are for the benefit of the carrier. Their object is to prevent false claims as to injuries received by stock during shipment. If the stock is mingled with other stock before notice of injuries is communicated to the carrier, he is placed at a serious disadvantage in determining the facts as to the injuries claimed. The time during which notice must be given is not limited. Unlimited opportunity is given to ascertain if the stock is injured. The stipulation does not limit the carrier's liability. It simply requires notice to be given that injuries have occurred, before the stock is moved away or mingled with other stock. The shipper is deprived of no right. We are unable to say that the stipulation is an unreasonable one as a matter of law. The following authorities held that similar conditions or stipulations are not unreasonable as a matter of law: Rice v. K. P. Ry., 63 Mo. 314; Express Co. v. Caldwell, 21 Wall, (U. S.) 264, 22 L. Ed. 556; Goggin v. K. P. Ry. Co., 12 Kan. 416; Sprague v. Mo. Pac. Ry. Co., 34 Kan. 347, 8 Pac. 465; Hutchinson on Carriers, section 259, and cases cited; Southern Railway Co. v. Adams, 115 Ga. 705, 42 S. E. 35; Glenn v. Express Co., 86 Tenn. 594, 8 S. W. 152; Louisville & N. Ry. Co. v. Landers, 135 Ala. 504, 33 South. 482; Wichita & W. Ry. Co. v. Koch, 47 Kan. 753, 28 Pac. 1013. The plaintiff further contends that the stipulation is invalid and unenforceable because the complaint shows that it was entered into without consideration. The contention is that some special consideration must have passed between the parties relating to this express stipulation before it becomes binding. This is not true. Conditions like the one in suit become binding and effectual by virtue of the general consideration, for the contract generally, if assented to. It is not a contract limiting defendant's liability. Am. & Eng. Enc. Law (2d Ed.) p. 300; Crow v. Chi., etc., Ry. Co., 57 Mo. App. 135. It therefore follows that the plaintiff's contentions in favor of the complaint are not tenable. The defendant contends that the complaint must state that the notice of injuries was given before the stock was removed from the place of destination, and before it was mingled with other stock. It is further contended in favor of the demurrer that the general allegation of the complaint that all conditions precedent to the right to maintain an action which were imposed by the contract had been fully performed by the plaintiff is not equivalent to an allegation that the notice was given as provided by the contract and

that said allegation is simply a statement of a conclusion and not one of fact. Section 5286, Rev. Codes 1899, is relied upon by the plaintiffs in support of the sufficiency of the complaint. That section was construed in Leu v. Ins. Co., 15 N. D. 360, 107 N. W. 59, and it was there held that said section does not authorize a general statement of compliance with condition imposed by contracts in cases in which such conditions are part of the cause of action as distinguished from conditions precedent. It is not necessary to determine whether that section is applicable to this case or not, as the demurrer was properly overruled upon another ground.

The condition or stipulation referred to is not strictly a condition precedent, and it is not part of the cause of action. The cause of action is complete before this condition becomes operative. The cause of action is not created by the contract of the parties. The law controls what facts shall constitute the cause of action. If the law should provide for the notice in the same statute, defining what the cause of action should be, a different question would be presented. But the condition in this case is made by the contract of the parties and the cause of action is defined by the common law. Hence the condition cannot operate as a part of the cause of action. It was therefore an unnecessary allegation of the complaint. A cause of action was completely stated without it. The condition was a limitation upon the right of the plaintiff to maintain the action and pertained to the remedy. It was therefore a matter of defense to be raised by answer, if at all. This court has recently so held in a case involving a similar condition, Kinney v. Brotherhood, etc., 15 N. D. 21, 106 N. W. 44. See, also, Kahnweiler v. Ins. Co., 67 Fed. 483; 14 C. C. A. 485; Maloy v. Chi. & N. W. Ry. Co., 109 Wis. 29, 85 N. W. 130; Gatzow v. Buening, 106 Wis. 1, 81 N. W. 1003, 49 L. R. A. 475, 80 Am. St. Rep. 1; Meisenheimer v. Kellogg, 106 Wis. 30, 81 N. W. 1033; Westcott v. Fargo, 61 N. Y. 542, 19 Am. Rep. 300.

The order overruling demurred is affirmed. All concur.

(107 N. W. 1087.)

MITCHELL v. MONARCH ELEVATOR COMPANY.

Opinion filed May 22, 1906.

Thresher's Lien — Sufficiency of Statement.

1. A statement for a thresher's lien pursuant to chapter 83 of the Revised Civil Code of 1899, which requires the statement to show the amount and quantity of grain threshed, need not state the number of bushels of each kind of grain threshed, when the total amount of the lien appears from the statement.

Same — Lien Upon All Grain Threshed Under the Contract.

2. A thresher is entitled to a lien on all the grain threshed for threshing any particular kind of grain, when done under the same contract, and such lien is enforceable between the parties.

Appeal — Objections Not Raised Below.

3. An indefinite allegation of a fact in a complaint cannot be first attacked on appeal, where the record shows that the evidence is positive as to the fact, and such evidence was not objected to.

Same — Statement.

4. A statement for a thresher's lien must contain everything required by the statute to be stated therein, and nothing more.

Same — Lien Relates Back to Commencement of Threshing.

5. Chapter 83 of the Revised Civil Code of 1899 gives to threshers of grain an enforceable lien thereon upon filing a statement therefor within thirty days from the threshing and such lien exists from the commencement of the threshing.

Same — Purchase Subject to Lien.

6. A person purchasing grain during thirty days after its threshing in the regular course of business is not an innocent purchaser thereof, although the statement was not filed when the purchase was made.

Same — Description.

7. Statement for a lien considered, and *held* to give a description of the land on which the grain was grown.

Appeal from District Court, Griggs county; *Burke*, J.

Action by Stephens Mitchell against the Monarch Elevator Company. Judgment for plaintiff. Defendant appeals.

Affirmed.

Lee & Fowler, for appellants.

Perfect compliance with statute essential to lien. Parker v. First National Bank, 3 N. D. 87, 54 N. W. 313; Anderson v. Alseth, 62 N. W. 435; Moher v. Rasmusson, 95 N. W. 152, 12 N. D. 71.

The lien affidavit must contain all the facts required by statute or the lien is of no effect. Moher v. Rasmusson, supra.

It must be shown in statement, averred in complaint, and established in the proof, that the grain to which lien attached was grown on the land described in the complaint. Martin v. Hawthorne et al., 5 N. D. 66, 63 N. W. 895, 3 N. D. 412, 57 N. W. 87.

A lien statement need not pray for lien. Smith v. Headley, 23 N. W. 550.

An averment in such a prayer is a mere recital, not an allegation of a fact. Rugg v. Hoover et al., 10 N. W. 473; Staples v. Fairchild, 3 N. Y. 41; Payne v. Young et al., 8 N. Y. 158; Feucht v. Dessar, 5 N. Y. Supp. 129; Powell v. Caine, 5 Paige, 265; Lavin v. Bradley et al., 1 N. D. 291, 47 N. W. 384.

Although a lien accrues at time of the commencement of the work it has no priority over a bona fide purchaser. Smith v. Shell Lake Lumber Co., 31 N. W. 694; Andrews, Executrix, v. Jenkins et al., 39 Wis. 476; Boom Com. v. Sanborn, 36 Mich. 358; Haifley v. Haynes, 37 Mich. 535; Finney v. Harding, 27 N. E. 289.

Before any conclusive statutory liability can be imposed to divest a man's title to property, he must be guilty of some tort, consent, be in default, or have notice to enable him to protect himself. John Spry Lumber Co. v. Sault Sav. Bank, Loan & Trust Co., 43 N. W. 778; Meyer v. Berlandi et al., 40 N. W. 513; Mallory v. La Crosse Abattoir Co., 49 N. W. 1074.

The case is distinguished from a building lien, where the building process is notice of the accrual of liens. Glass et al. v. Greeberg et al., 52 N. W. 900; Bastien v. Barras et al., 10 N. D. 29, 84 N. W. 559; Haxter Steam Heater Co. v. Gordon et al., 2 N. D. 246, 50 N. W. 708; Turner v. St. Johns et al., 8 N. D. 245, 262, 78 N. W. 340.

Bartlett & Gladstone, for respondents.

A thresher has a lien from the date of the commencement of threshing. Rev. Codes 1899, section 4823.

It is prior to all other liens. Rev. Codes 1899, section 4825.

A purchaser takes subject to the right of such lien. Rev. Codes 1899, section 4824.

Parties are presumed to contract with reference to existing law, affecting their contract. O'Neil v. Anderson et al., 4 N. W. 47; Bohn et al. v. McCarthy et al., 11 N. W. 127; Douchy v. Clapp, 12 Cush. 440; Phil. Mech. Liens, section 65; Laird et al. v. Moonan et al., 20 N. W. 354; Smith et al. v. Stevens, 31 N. W. 55; Bardwell et al. v. Mann et al., 48 N. W. 1120; Haxter Steam Heater Co. v. Gordon, supra; Turner v. St. Johns, supra.

The constitutionality of similar statutes is implied. Lampson v. Bowen, 41 Wis. 484; Vilas v. McDonough Mfg. Co., 65 N. W. 488; Alfree Mfg. Co. v. Henry, 71 N. W. 370; Fitzgerald v. Walsh, 82 N. W. 717.

Sale or transfer of product during the period for filing the statement in no way affects the lien. Federspiel v. Johnstone et al., 49 N. W. 581; Saxton et al. v. Krein, 64 N. W. 868.

MORGAN, C. J. This action was brought to recover damages against the defendant for the conversion of grain on which the plaintiff claimed a thresher's lien. The case was submitted to the court for decision upon stipulated facts. No objections were taken at the trial except that the complaint did not state facts sufficient to constitute a cause of action, and that it appears upon the face of the complaint that the plaintiff is not entitled to maintain the action. The trial court made findings of fact and conclusions of law in plaintiff's favor and judgment was duly entered thereon. The defendant has appealed from the judgment. The specifications of error are directed against the sufficiency of the complaint and the sufficiency of the statement for a lien to sustain the judgment as a matter of law. The principal objection to the complaint is to the following allegation thereof: "That heretofore and in the fall of 1904, said plaintiff did thresh for S. Almklov and Cryst Steinborn, 495 bushels of wheat and 918 bushels of oats and barley at the reasonable value and agreed price of 12 cents for wheat and 7 cents for oats and barley for threshing the same. That although said threshing was done on or about the 3d, 4th and 5th days of October, and frequent demands have been made for said threshing amounting to $123.66, it is entirely due and wholly unpaid, except the sum of $56.00, leaving a balance due said plaintiff of $67.66." It is claimed that the complaint fails to state a cause of action for two reasons: (1) That it and the statement for a lien fail to state the number of bushels of oats and the number of bush-

els of barley that were threshed; (2) that the time when the threshing was done is indefinitely stated, so that it cannot be determined from the complaint whether a lien was filed within time or not. It is also contended that the defendant is not liable under the facts as it was an innocent purchaser of the grain.

We will dispose of these objections in the order above given. The statute providing for a thresher's lien, is chapter 83 of the Revised Civil Code of 1899. Section 4823 of that chapter is as follows: "Any owner or lessee of a threshing machine who threshes grain for another therewith, shall, upon filing the statement provided for in the next section, have a lien upon such grain for the value of his services in threshing the same from the date of the commencement of the threshing." Section 4824: "Any person entitled to a lien under this chapter, shall within thirty days after the threshing is completed, file * * * a statement in writing * * * showing the amount and quantity of grain threshed * * * and a description of the land upon which the grain was grown. Unless the person entitled to the lien shall file such statement within the time aforesaid, he shall be deemed to have waived his right thereto." Section 4825: "Such lien shall have priority over all other liens and incumbrances upon such grain." It is claimed that the statement for a lien is fatally defective for the reason that it fails to state the exact number of bushels of oats and the exact number of bushels of barley. The statute does not require the number of bushels of each kind of grain threshed to be stated. It only requires the amount and quantity of the grain threshed to be stated. In showing only the aggregate number of bushels of oats and barley threshed, we think the statute was complied with. The amount of the lien is definitely stated, and can be computed from the facts stated in the affidavit for a lien. In view of the broad language of the statute, we cannot assume that it was the intention of the legislature that the statement should necessarily specify the amount of each kind of grain threshed, when the amount of the lien claimed appears definitely by computation from the facts given in the statement. The statement must contain everything required by the statute before the lien becomes enforceable, but no more particularity than is necessary Under the language of the statute, a lien is given upon all the grain threshed, for threshing any part of it. In this case the question as to the enforcement of the lien for threshing any particular kind of grain

upon other kinds of grain threshed at the same time and under the same contract, as against other lien, prior in point of time, is not material The lien is to be construed in this case the same as though the question were between the owner of the grain and the thresher. In case of other existing liens upon the grain, the mode of enforcing the lien so as to protect the interests of all concerned need not be considered or decided.

The next objection is that the complaint does not definitely set forth when the threshing was done. It states that the threshing was done on or about 3d, 4th or 5th of October, and that the statement was filed on October 15th. The claim is that the complaint does not show that the statement was filed within 30 days after the threshing was done. The testimony submitted in the stipulation of facts is that the threshing was done on the 3d, 4th and 5th days of October. This testimony was not objected to. Hence the indefinite allegation of the complaint becomes immaterial even if it be conceded that the objection made to the complaint would cover the objection now made and that such objection was good.

It is also urged that the statement for a lien does not contain a description of the land on which the grain was grown. The statement specifically sets forth that the grain was threshed on land specifically described therein, and gives the number of bushels threshed and the sum paid on the bill. The statement then contains the following language: "for which this affiant claims a lien upon said grain grown upon the above land." This was a definite statement that the grain was grown upon the land that had been previously described. The statement for a lien contained everything set forth in the statute as necessary to be stated, and was in compliance therewith in every respect.

A more difficult question is next presented. It is stipulated that the grain was purchased and paid for at the regular market price and mingled with other grain and shipped out of the state before the claim for a lien was filed and without any knowledge of plaintiff's claim, and without any knowledge that plaintiff had threshed the grain. These facts are set forth as a basis for the contention that the defendant was an innocent purchaser of the grain. The language of section 4823, supra, does not warrant the conclusion from such facts that the defendant was an innocent purchaser. That section gives owners or lessees of threshing

machines a lien for threshing done. It gives them 30 days in which to file a claim for such lien after the threshing is done. After the filing of the claim for a lien, the lien relates back to the commencement of the threshing. The right to file a lien exists during the whole of the 30 days. It is the doing of the work that constitutes the right to a lien by virtue of the statute. The filing of a claim for a lien makes the lien enforceable from the commencement of the threshing. During the 30 days a lien exists by virtue of the statute and without filing and the filing makes it enforceable from the commencement of the threshing. The law gave the defendant notice that a statement for a lien might be filed for the threshing of the grain during 30 days after the work was done. The grain itself was evidence that it might be subject to a lien for threshing it. The object of the statute is to give security for threshing grain. The statute is remedial in its nature. It should be construed liberally to carry out its object, if that can be done by a reasonable construction of its language.

To construe this statute so that purchasers of the grain during the 30 days could purchase it without liability, would defeat the purpose of it to a great extent. The intention of the legislature clearly was to subject the grain to a lien for the threshing during the 30 days and this lien became enforceable upon the filing of the claim during the 30 days. The following cases sustain this construction of similar statutes concerning liens. Matthews v. Burke, 32 Tex. 420; Kennard v. Harvey, 80 Ind. 37; Campbell v. Bowen (Ind. App.) 53 N. E. 656; Richardson Bros. v. Peterson, 58 Iowa, 724, 13 N. W. 63; Doolittle et al. v. Plenz, 16 Neb. 153, 20 N. W. 116; Holden v. Cox, 60 Iowa, 449, 15 N. W. 269; McCoy v. Cook (Wash.) 42 Pac. 546. This decision is not in conflict with Richmire v. Elevator Co., 11 N. D. 453, 92 N. W. 819. The statute authorizing the lien in that case did not give the filing of the statement for a lien the effect of relating back to the doing of the work.

There is no question involved as to the constitutionality of the statute. The question is whether the plaintiff had a lien on the grain from the time of the threshing, after he had filed a claim therefor. The owner of the grain could not transfer any better title to it than he himself had, and defendant purchased the grain knowing that the statute gave the thresher a lien thereon from the commencement of the threshing. Section 4825 gives threshers'

liens priority over all prior claims and incumbrances. From this appellant argues that innocent purchasers take the property exempt from the lien. As we construe the statute, there can be no innocent purchasers of the grain during the 30 days following the completion of the threshing. It was necessary to define the relative rights of existing lien holders on the crop with respect to the thresher's lien created by this law. After the filing of claim for a lien, the lien exists as a matter of law against all liens or claims. The statute deprives the purchaser of nothing. He gets all that the owner had a right to sell to him. He knows as a matter of law that the owner cannot lawfully sell, except subject to the lien of the thresher, if it develops that he has any. The statute is notice to the purchaser of the right to a thresher's lien on the grain, up to 30 days from the threshing. McCoy v. Cook, supra. The defendant bought the grain with notice which was as effectual as though the statement for a lien was on file. He acted at his peril, and the statute deprives him of no constitutional or vested right of property.

The judgment is affirmed. All concur.

(107 N. W. 1085.)

S. J. VIDGER COMPANY v. GREAT NORTHERN RAILWAY COMPANY.

Opinion filed May 22, 1906.

Error Without Prejudice Does Not Warrant Reversal.

Error in the admission of testimony which the record shows was not attended by prejudice, affords no ground for reversal.

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

Action by the S. J. Vidger Company against the Great Northern Railway Company. Judgment for plaintiff and defendant appeals.

Affirmed.

Murphy & Duggan, for appellant.

Party offering secondary evidence must show that better cannot be produced. McManus v. Commow et al., 10 N. D. 340, 344, 87 N. W. 8; Wigmore on Evidence, sections 1201, 1202; Bell v. Chandler, 23 Ga. 356; McCollister v. Yard et al., 57 N. W. 447; Darrow v. Pierce, 51 N. W. 813; Dade v. Aetna Ins. Co., 56 N. W. 48; Tanner v. Page, 63 N. W. 993.

Notice to produce must be definite, and leave no doubt as to the instrument sought. France v. Lucy, Ryan & M., 341; Parish et al. v. Weed Sewing M. Co., 7 S. E. 138; Field v. Zemansky, 9 Ill. App. 479; Forsyth Comm'rs v. Lemly, 85 N. C. 341; Julius King Optical Co. v. Treat, 40 N. W. 912; Armstine et al. v. Treat, 39 N. W. 749; Rose v. King, 5 S. & R. 241; Greenleaf on Ev., section 563.

A witness who attempts to authenticate a copy must have read the original. Edistos Phos. Co. v. Stanford, 20 So. 613; Hooper v. Chism, 13 Ark. 496, 501; Edwards v. Noyes et al., 65 N. Y. 126; Nichols v. Kingdom Iron Ore Co., 56 N. Y. 618; Propst v. Mathis, 20 S. E. 710; Coxe v. England, 65 Pa. 212, 222; Johnson v. Bolton, 43 Vt. 303; Nostrum v. Halliday, 58 N. W. 429; McGinness v. Sawyer, 63 Pa. 266.

That a notation is similar to the one on the original is insufficient. Keyser v. K. C. St. J. & C. B. R. Co., 9 N. W. 133, Id. 338; Pevcke et al. v. Shinn, 94 N. W. 135; In re Gazett, 29 N. W. 347.

H. F. Miller, for respondent.

In shipping freight it will be presumed that the custom of proving loss has been followed. 1 Elliott on Ev., section 64.

The sufficiency of preliminary proof to admit secondary evidence rests largely in the discretion of the court. Cooley v. Collins, 71 N. E. 979; Elliott on Ev., 689; State v. Salverson, 91 N. W. 1; 2 Elliott on Ev., section 1456. Where a document is essential as a link in the opponent's case, notice to him to produce is not a necessary preliminary to offer of secondary evidence. Nichols & Shepard v. Charlebois et al., 10 N. D. 446, 88 N. W. 80, 84.

Entries in books of bank are competent evidence, though persons making them are dead, out of the state or have no recollection. 1 Elliott on Evidence, section 465.

YOUNG, J. The plaintiff brought this action to recover $187 for damages alleged to have been caused by defendant's negligence in transporting 139 barrels of apples from Osnabrock to Hannah, in December, 1902. The complaint alleges in substance that the apples were sound and in good condition when shipped, and were of the value of $443; that in consequence of the defendant's negligence they were frozen and 11 barrels of them were broken open and the apples scattered over the car floor, by reason of which they were so injured that they were of no greater value than

$256, and prayed judgment for $187. The jury returned a verdict for $86.15. Defendant moved for a new trial upon a statement of case, which motion was denied, and judgment was entered upon the verdict. This appeal is from the judgment

The assignment of error chiefly relied upon relates to the admission in evidence over defendant's objection of Exhibit C, which is a page from what the plaintiff calls its "claimbook." The evidence shows that this book was kept by one Charles Barton. The page in question contains a statement of plaintiff's claim against the defendant, showing the number of barrels shipped to Hannah, the alleged value of the same, date of shipment, and a statement of their value when they arrived, or rather the amount for which they were sold, and the amount of the loss, $187, all as alleged in the complaint. It also contains the following memorandum: "Shpd by McAllen Bros. Osnabrock to W. J. Farris, Hannah, for our ac. E-B attached. Agents notation. Frozen. About 10 bbls. all over the floor. We received 2.00 per bbl. for 128 bbls. and 11 bbls. crushed and worthless." The defendant's objection goes to that part of the exhibit which relates to the condition of the apples, viz: the so-called agent's notation: "Frozen. About 10 bbls. all over the floor." Counsel for the appellant contend that this is purely a self-serving statement, and was therefore inadmissible. We fully agree with this contention. The plaintiff's theory is that the language above quoted is a copy of an entry made by the defendant's agent at Hannah upon the freight receipt, and that for reasons we need not consider, secondary evidence of the agent's admission was admissible. An insuperable objection to this theory is that there is no evidence to identify it as a copy. Barton who made the entry in the claimbook was not called as a witness, and the witness who produced the book testified that she knew there was a notation on the freight bill, but could not state from her own knowledge that the alleged copy in Exhibit C was a true copy. She testified that she did not remember seeing what was written on it, referring to the freight receipt. Under these circumstances, if it be conceded that a sufficient foundation was laid for the introduction of secondary evidence of the agent's admission still this alleged copy was not admissible, for there was a total failure to identify it as a true copy. We are of opinion, however, that the error was not material for the record shows that the facts stated in this exhibit and purporting to be the agent's statement in reference to the con-

dition of the apples, and to which objection is made, was established at the trial by undisputed evidence. It appears that the car was billed to McAllen Bros. at Osnabrock, from Dundee, N. Y. Upon its arrival, W. J. McAllen, pursuant to a previous purchase, took 50 barrels from the car for his firm, and also, and at plaintiff's request, delivered 30 barrels more to other purchasers. He then under plaintiff's direction rebilled the car with the remaining 139 barrels to W. J. Farris at Hannah, who had agreed to take 80 barrels at $3.35 per barrel. On account of their condition Farris refused to accept them, and the defendant's agent stored them in the depot at Hannah. Plaintiff at once sent its agent, George Vidger, to Hannah, and the apples were examined by him, by Farris, and by Bolton, defendant's agent, and also by one Hart, a drayman, each of whom testified to the condition of the apples; the three last named as witnesses for defendant. McAllen in testifying to the condition of the applies at Osnabrock, stated that 10 or 11 of the barrels were broken, and the applies scattered over the car floor. Each of the witnesses previously named in testifying to the condition upon the arrival at Hannah, testified to the same fact, and also that the apples in the broken barrels and those scattered on the car floor were frozen. There is a difference in the testimony as to what extent the apples in the unbroken barrels were frozen. That the apples were frozen to a greater or less extent, and that 10 or 11 barrels were broken open and the apples scattered over the floor, is not disputed. There is then no conflict between the statement in Exhibit C and the facts as established by the undisputed evidence. There is no claim by plaintiff that all the apples were frozen or that the notation in the exhibit, "Frozen," had that meaning, and the small amount of the verdict shows that the jury did not so construe it.

Error is also assigned upon the admission of two other exhibits, A and B. Exhibit A is the plaintiff's book account of the sale of the damaged apples to Farris, showing the number of barrels, price $2 per barrel, and receipt of payment. Exhibit B is the account of the sale to McAllen Bros., showing the number of barrels sold to that firm at Osnabrock, the price, $3.25, and the fact of payment. The apparent purpose of introducing these exhibits was to show by specific sales the value of the apples at Osnabrock before they were frozen and their value at Hannah after they were frozen. Counsel for defendant contends that the admission of these exhibits

was error, and we agree with this contention. As to whether in any case evidence of the amount for which property in controversy was sold as in the case of the sale to Farris, and shown by Exhibit A, or evidence as to the amount similar property sold for, as in the case of the sale to McAllen Bros., and shown by Exhibit B, is competent upon the question of value, and upon this there is a conflict of authority (see 1 Wigmore on Ev., section 463, and cases cited), we express no opinion. It is sufficient for the purposes of this case to say that the above exhibits were at best but secondary evidence, and no foundation was laid for the introduction of evidence of that character.

We reach the conclusion, however, as in the case of Exhibit C, that the error was not material, and was without prejudice. Farris testified to buying the damaged apples at the price stated in Exhibit A, and that the price he paid "was the reasonable value of the apples at Hannah at that time," and this testimony is not disputed. W. J. McAllen testified to the purchase of the apples by his firm as shown by Exhibit B, and to his general knowledge of the value of applies and to the quality of those apples and their condition before they were frozen, and that they were worth $3.25 per barrel. True, he did not open the barrels which went on to Hannah, but he was familiar with the quality of those taken from the same car by his firm, and he examined those in the 10 or more broken barrels. Upon this showing, and in the absence of any claim that these not examined were of different quality, his testimony as to the value was competent. The value fixed by him corresponded to Exhibit B and is undisputed. There being no conflict between the undisputed evidence and the statement contained in the exhibits, no prejudice resulted from their erroneous admission. Error without prejudice does not constitute ground for reversal. Section 5300, Rev. Codes 1899; 1 Spelling on New Trial, section 689; Hayne on New Trial, section 286; Land Ass'n v Christy, 41 Cal. 501; Aultman Miller & Co. v. Jones, 15 N. D. 130, 106 N. W. 688.

The assignments we have considered are the ones chiefly relied upon. The question raised by the remaining assignments and not covered by those we have considered are not of sufficient merit to require consideration. Finding no prejudicial error in the record, the judgment will be affirmed. All concur.

(107 N. W. 1083.)

J. H. SCHOMBERG v. C. A. LONG.

Opinion filed May 22, 1906.

Appeal—Record.

1. One alleging error has the burden of presenting a record upon which it may be reviewed.

Same — Statement of the Case.

2. Upon an appeal from the judgment, an order of the district court taxing costs can only be reviewed upon a statement of case containing the record upon which the court acted in making the order.

Appeal from District Court, Ransom county; *Allen*, J.

Action by J. H. Schomberg against C. A. Long. Action dismissed on appeal on motion of plaintiff. From an order taxing costs, plaintiff appeals.

Affirmed.

O. S. Sem, for appellant.

Rourke, Kvello & Adams and *Henry B. Thompson*, for respondent.

YOUNG, J. This case is brought here upon plaintiff's appeal from a part of the judgment, and for the sole purpose of reviewing the order of the district court taxing the costs. It appears from the abstract that the case was commenced in justice court. Upon plaintiff's application, a change of venue was taken to another justice, before whom the case was tried. The defendant then appealed to the district court. The plaintiff moved to continue the case over the term for which it was set for trial. The motion having been denied, plaintiff moved to dismiss the case without prejudice. The motion was granted, with costs and disbursements of both courts to the defendant, and judgment was entered accordingly. The clerk taxed the costs at $77.65. Upon plaintiff's application to the district court to review the taxation, the court made its order, upon notice and after a hearing, allowing the same. The order, so far as material, is as follows: "Said appeal of plaintiff was heard upon the affidavit of Alfred W. Kvello and O. S. Sem, * * * and upon all the files and records in this case. * * * The court having read the record, and having heard counsel, and being fully advised in the premises, * * * it is ordered that the defendant have costs of justice and district court in the sum of $77.05."

Appellant's brief contains 13 assignments of error directed to various items which he claims should not have been allowed. These include the fees of certain witnesses and portions of the clerk's, sheriff's and justice's fees. We have reached the conclusion that the order cannot be reviewed for want of a sufficient record. No statement of case was settled. The appeal, which is from the judgment, brings up only the judgment roll, as defined by section 5489, Rev. Codes 1899. The order which appellant seeks to review recites that it was heard upon two certain affidavits "and upon all the records and files in the case." What these records and files are we can only conjecture. The abstract contains copies of a number of miscellaneous papers, including copies of the justice dockets, of subpoenas, a motion for continuance, and also two affidavits supporting it, and a memorandum of costs. None of these papers is a part of the judgment roll, and could only be made so by a statement of case. These documents and papers, which in part, at least, furnished the record upon which the order was made, are not therefore before us. There being no statement containing the grounds upon which the trial court acted, the order cannot be reviewed. It is elementary that one alleging error has the burden of showing it, and where the appeal is from the judgment, and the error does not appear upon the judgment roll proper, he must settle a statement; otherwise, it cannot be reviewed. That an order taxing costs cannot be reviewed upon an appeal from the judgment, in the absence of a bill of exceptions or statement, is well settled. Elliott, App. Pro. 818; 2 Spelling, New Trial & App. 519; Hayne, New Trial and Appeal, section 197; Gates v. Buckingham, 4 Cal. 286; Levy v. Getleson, 27 Cal. 686; Dooly v. Norton, 41 Cal. 439; Kelley v. McKibben, 54 Cal. 192; Williams v. Holmes, 7 Wis. 168; Cord v. Southwell, 15 Wis. 211; Ernst v. The Brooklyn, 24 Wis. 616; Howard v. Richards, 2 Nev. 128, 90 Am. Dec. 520; Urton v. Lucky, 17 Jud. 213; State v. Saxon, 42 Ind. 485.

The presumption is in favor of the correctness of the order. The appellant having failed to settle a statement, so as to authorize the review which he seeks, the order and judgment must be affirmed. All concur.

(108 N. W. 332.)

E. M. Larson v. Myron O. Walker.

Opinion filed May 26, 1906.

Appeal from District Court, Barnes county; *Burke*, J.

Judgment for defendant and plaintiff appeals.

Affirmed.

Parks & Olsberg, for appellant.
Herman Winterer, for respondent.

Per Curiam. The record shows that plaintiff's appeal is based upon a mistake. He has appealed from an order granting the defendant's motion for a new trial. No attack is made upon the merits of the order. The only question attempted to be raised is the jurisdiction of the district court to make it. His sole assignment is that "the court erred in making the order vacating the verdict and ordering a new trial, on the ground and for the reason that there was no settled statement of the case in said cause at the time said order was made and entered." The objection that a statement was not settled is not sustained by the record. The appellant's abstract shows that the attorneys stipulated the contents of the statement, and that it might be settled by the court in accordance therewith on August 10, 1905, and that the motion for a new trial might be heard at the same time. The appellant's abstract contains no order settling the statement, but the order granting the new trial, which was made after a hearing and is dated on August 10th, recites, among other things, that it is based on the statement of case. As to whether the plaintiff, upon his own showing, could now take advantage of the omission of the certificate, we express no opinion; for the defendant had presented an amended abstract, which contains the judge's order settling the statement, regular in all respects and bearing date August 10, 1905, the day motion was heard.

Order affirmed.

(107 N. W. 1135.)

J. F. GORTHY, v. NOAH JARVIS.

Opinion filed May 31, 1906.

Jury Trial.

1. Where the complaint prays for both legal and equitable relief, but the former alone is warranted by the facts pleaded, it is error to deny defendant's demand for a jury trial.

Thresher's Lien — Statement When Grain Grown in Two Counties.

2. Where grain upon which a thresher's lien, under chapter 83 of the Civil Code (Rev. Codes 1899, sections 4823-4825), is claimed, was grown on land situated in two counties, the lien statement should be executed in duplicate and filed in both counties.

Same — Pleading Must Show Kind and Quantity of Grain.

3. Where the plaintiff acquired a lien upon part only of a large quantity of grain, consisting of wheat, oats and barley, for threshing same, and seeks a foreclosure of such lien by action, the complaint must show the kind and quantity of grain upon which the lien exists.

Appeal from District Court, Barnes county; *Burke,* J.

Action by J. F. Gorthy against Noah Jarvis.

Judgment for plaintiff, and defendant appeals.

Reversed.

Turner & Wright, for appellant.

Plaintiff cannot deprive defendant of a jury trial of legal issues by advancing fictitious claims for equitable relief. Davison v. Associates of the Jersey Co. 71 N. Y. 333; Wheelock v. Lee, 74 N. Y. 495; Bradley v. Aldrich, 40 N. Y. 504; People v. A. J. S. R. Co 57 N. Y. 163.

Parks & Olsberg, for respondent.

Failure to file statement in each county will not prevent enforcement for the proportionate part in the county in which it was filed. Richmond & Irvine C. C. v. Richmond et al. 34 L. R. A. 625.

ENGERUD, J. This is an appeal by the defendant from a judgment entered after a trial of the issues by the court without a jury. The only question presented by the assignments of error is whether or not the defendant was erroneously deprived of trial of the issues

by a jury. The complaint sets forth, in substance, that the plaintiff who was the owner and operator of a threshing machine threshed out a crop of wheat, oats and barley for the defendant, the owner of the grain, pursuant to a contract. The number of bushels of each kind of grain threshed and the agreed price for threshing the same is set forth, together with the description of the land upon which the crop was grown. Three-fourths of the land is in Barnes county, and the remaining fourth in Stutsman county. The complaint further sets forth that the plaintiff, for the purpose of availing himself of the right to a lien for such threshing, pursuant to chapter 83 of the Civil Code (Rev. Codes 1899, sections 4823-4825), filed in the office of the register of deeds of Barnes county, within 30 days after completing the threshing, the verified statement required by law. The statement is attached to and made part of the complaint. The allegations of the complaint, as well as the lien statement, show that the grain threshed was grown on the land situated in both counties, but the quantity of each kind of grain grown in each county is not shown. It is alleged, however, that all the grain threshed was stored on the defendant's premises in Barnes county. Judgment was demanded for $262.99 and interest, the alleged balance due for the threshing, and for a foreclosure of the threshing lien. The answer, besides disputing the number of bushels threshed and the price for threshing alleged in the complaint, pleads payment in full, and also sets up a legal counterclaim for the recovery of money only. When the case came on for trial, defendant demanded a jury trial, upon the ground that the complaint disclosed on its face that the plaintiff had no right to a foreclosure, and the remaining issues of fact were properly triable by a jury. The trial court denied the motion and proceeded to try the case without a jury. It found the facts to be substantially as alleged in the complaint, and ordered judgment in plaintiff's favor for the recovery of $170.30 with interest and costs, but did not grant a foreclosure, thus, in effect, though not in express terms, holding that there was no right to that relief.

The appellant concedes that, had the plaintiff alleged and proved an equitable cause of action for the foreclosure of a thresher's lien, then all the issues in the case were properly triable by the court without a jury. Appellant contends, however, that the complaint does not state the facts sufficient to entitle the plaintiff to a foreclosure or any other equitable relief, and hence the

action is one at law for the recovery of money only. The defendant has a constitutional as well as statutory right to have a jury decide disputed questions of fact in cases properly triable by a jury, unless he waives the right. "The defendant cannot be deprived of a jury trial in a proper case because the plaintiff has demanded equitable instead of legal relief." Davison v. Associates of the Jersey Co. 71 N. Y. 333. The prayer for relief, therefore, is not the sole test for determining the nature of the action and the mode of trial. The allegations of the complaint and the prayer for relief must be taken together. If the facts alleged do not warrant the equitable relief prayed for, the prayer is of no avail. People v. Railroad Co. 57 N. Y. 161. Applying these principles to this case, it is plain that the action was properly triable to a jury, unless the allegations of the complaint showed that the plaintiff was entitled to a foreclosure of a thresher's lien. Section 4824, Rev. Codes 1899, provides, among other things, that the person claiming such a lien must, within 30 days after completing the threshing, file the specified statement or claim of lien in the office of the register of deeds "of the county in which the grain was grown;" and further provides that, "unless the person entitled to the lien shall file such statement within the time aforesaid, he shall be deemed to have waived his right thereto." This lien is a purely statutory one and can be obtained only by compliance with the terms of the statute. Martin v. Hawthorn, 3 N. D. 412, 57 N. W. 87. It is clear that a lien cannot be asserted in this case against the grain grown in Stutsman county, because as to that part of the grain threshed the lien statement was not filed in the county "in which the grain was grown." In such a case as this we think the lien statement should be made in duplicate, and one statement filed in each county. As applied to a case like this, the words of the statute with respect to the place of filing should be read in the plural. "Words used in the singular number include the plural, and the plural the singular, except when a contrary intention plainly appears." Rev. Codes 1899, section 5134.

In this case the complaint as well as the findings show that the lien statement was filed in Barnes county only. It is true that the grain was all stored there after it had been threshed, but the statute requires the statement to be filed in the county or counties where the grain was grown, not where it was stored. We shall

assume for the purpose of this case that the filing of the statement in Barnes county was sufficient to perfect the lien on the grain grown in that county, even though no statement was filed in the other county. Counsel has not argued this question, and we therefore express no opinion on it. If the assumption is true, plaintiff acquired a lien on the Barnes county grain, but that fact does not obviate the objections to the plaintiff's alleged cause of action for a foreclosure. It simply leaves this plaintiff in a position similar to that of the plaintiff in the case of Martin v. Hawthorn, 3 N. D. 412, 57 N. W. 87, and 5 N. D. 66, 63 N. W. 895. In this case, as in that, the plaintiff has failed to allege the kind and quantity of grain upon which he acquired a lien. In this case, as in that, he may have a lien upon a part of a large quantity of grain, but he has not shown what part is covered by his lien. The grain may not, as in that case, have been mixed with other grain, but he has not shown how much of each of the three kinds of grain threshed was grown in Barnes county. In short, he has not identified the grain upon which he claims to have a lien, by showing its kind or quantity, or by showing what proportionate part of each kind of grain is subject to his lien. His lien may cover all the wheat, and none or only part of either the oats or barley; or it may cover all the oats and barley, and none or only a part of the wheat.

It is plain that the court could not decree a foreclosure, unless the property to be sold was described and identified. The complaint contains no allegations on that subject and it is apparent from findings that the defect was not cured by the proof, even if the proof had been admissible without the necessary allegations. We, therefore, hold that the complaint did not state facts sufficient to entitle the plaintiff to the equitable relief demanded, and hence the action was one at law for trial by jury.

The judgment is reversed, and a new trial granted. All concur. (108 N. W. 39.)

H. E. Hunt v. O. M. Swenson and Minnie Swenson.

Opinion filed May 31, 1906.

Judgment — Setting Aside Default — Grounds.

Evidence examined, and *held* insufficient to warrant relief from a default judgment.

Appeal from District Court, Barnes county; *Burke,* J.

Action by H. E. Hunt against O. M. Swenson and Minnie Swenson.

From an order vacating a default judgment, plaintiff appeals.

Reversed.

Turner & Wright, for appellant.
Lee Combs, for respondents.

ENGERUD, J. Plaintiff has appealed from an order vacating a default judgment and permitting the defendant to answer. The action was brought to recover $747 and interest, the balance of an account alleged to be due to plaintiff from defendant for plaintiff's services as a physician. The summons was served on the defendants personally in September, 1905. Judgment by default was entered November 28, 1905, more than 60 days after the service of the summons. The proceedings were regular in all respects. On December 6, 1905, an execution was issued on the judgment, and levied on defendants' property. A month after the execution levy, defendants served notice that they would apply to the court to vacate the judgment and for leave to answer the complaint. The application was made under section 5298, Rev. Codes 1899, which provides, among other things, that the court may, "in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment order or other proceedings taken against him through his mistake, inadvertance, surprise, or excusable neglect." The application is supported by the joint affidavit of the two defendants who are husband and wife. They depose that on the day the summons was served, they handed the same to one I. J. Moe of Valley City, who, they aver, represented himself to them to be a lawyer, and whom they believed to be such; "that said Moe promised and agreed to give the matter attention and do what was necessary to either settle the matter or prepare and serve an answer in the cause." They paid him at the time $10 as a retainer. Said Moe was not, and never has been, an attorney. Moe made no appearance or answer for them. They aver that they relied upon this promise to appear and answer for them in the cause and believed that he had done all things necessary to protect their interests in said action, and they depose that

Moe subsequently told them that he had done so, and they did not know that judgment had been taken against them until they received the notice of levy. In short, they aver that their failure to answer was caused by Moe's deceit without fault on their part. Their proposed answer was served with the notice and an affidavit of merits in due form was included in the affidavit excusing their default.

It will be noticed that the defendants delayed 30 days after receiving notice of the execution levy before seeking relief and they offer no explanation of this delay. The regular term of court at which this action should have been tried had there been an answer in proper time, commenced December 11, 1905, five days after they admit that they knew of the judgment. In opposition to defendants' motion, the plaintiff presented the affidavits of I. J. Moe, A. P. Paulson and E. H. Wright, respectively. Moe's affidavit admits that the defendant, Mr. Swenson, handed him the summons and complained about the time it was served, and paid him $10. He denies that he represented himself to be an attorney or that he agreed to prepare and serve an answer. He alleges that Mr. Swenson desired him to try to effect a settlement and failing in that, to get a lawyer to interpose a defense; that Swenson said he did not know any lawyers. Moe swears that he tried to effect a settlement with plaintiff's attorney, Mr. Wright, but the latter declined to accept the proposed settlement. Moe further swears that he then handed the papers to Mr. Paulson, a practicing attorney in Valley City, and the latter agreed to correspond with Mr. Swenson in regard to the matter; that Paulson subsequently told him that he had obtained an extension of time to answer and had written to Swenson but had received no reply. Moe deposes that Swenson afterwards stated to him that he had heard from Paulson, and that if it was going to cost as much as Mr. Paulson wanted for attorney's fees, he might as well let the plaintiff have his judgment. Mr. Paulson, in his affidavit, states that he received the papers from Moe, as stated by the latter; that he secured from Mr. Wright a promise of an extension of time to answer so as to give him time to communicate with defendants; that he wrote and mailed a letter to Swenson, stating that he would appear as requested by Mr. Moe, provided Swenson paid him a certain sum as a retainer; that he waited several weeks, but received no answer to his letter, and finally told Mr. Wright that he would not appear

in the case. Mr. Wright's affidavit corroborates Moe's and Paulson's statements as to their respective transactions with him. He says he agreed to Mr. Paulson's request for an extension of time to answer on the condition that if an answer was interposed, it should be done early enough so the case could be tried at the December, 1905, term. After waiting until November 28, 1905, he caused the judgment to be entered.

The defendants did not present any affidavit explaining or denying either of these affidavits. As to Moe's affidavit, it may not, perhaps, have been necessary as Moe's statements were in effect denied by defendants' original affidavit. But Mr. Paulson's affidavit was left undisputed and unexplained. If that affidavit is true, it convicts the defendants of willful abandonment of their right to defend. There is no reason for questioning the truth of that affidavit. If defendants had not received Mr. Paulson's letter, it was their duty to come forward, and say so under oath. The burden was on them to excuse their failure to answer in time, and although the affidavit of Mr. Paulson may be open to the technical objection that it does not state specifically the address written on the envelope, the defendants are not in a position to urge such a technicality under the circumstances of this case. If they had denied the receipt of the letter, the objection could have been made with good grace. In view of the strong showing made by the opposing affidavits, it was certainly incumbent on the defendants to offer some explanation or denial. The absence of any such denial or explanation and the unexplained delay from December 6, 1905, until January 6, 1906, constrains us to hold that the defendants have failed to make a showing sufficient to warrant the trial court in holding that the defendants were excusably negligent.

The order appealed from will be reversed. All concur.

(108 N. W. 41.)

E. C. DEDRICK v. CATHERINE CHARRIER, NAPOLEON CHARRIER AND NICHOLAS D. O'SHAUGHNESSY.

Opinion filed May 31, 1906.

Judgment May Be Set Aside to Bring in New Parties.

1. A party in whose favor a judgment is rendered may have the same set aside for the purpose of bringing in additional defendants who are necessary parties to a complete determination of the plaintiff's rights in the action.

Same — Bringing in After Judgment — Inherent Powers.

2. The right to bring in proper parties, even after judgment, exists under the statutes, and is also one of the inherent powers of court to control their own judgments.

Same — Term Time.

3. The power to set aside or amend judgments in this state is not limited to the term at which they are rendered.

Appeal — Additional Parties.

4. The power to bring in additional parties defendant is discretionary with trial courts, and its exercise will not be interefered with by appellate courts, unless shown to be an abuse of discretion.

Appeal from District Court, Cavalier county; *Kneeshaw,* J.

Action by E. C. Dedrick against Catherine Charrier and others. Judgment for plaintiff. Defendants appeal.

Affirmed.

Cleary & McLean, for appellants.

Judgment *cannot* be amended after term time. Grant v. Schmidt, 22 Minn. 1; Weld v. Weld, 8 N. W. 900; Becket v. N. W. Masonic Association, 69 N. W. 923; Gallagher v. Irish Am. Bank, 89 N. W. 1057; Fairbarn v. Dana Bros. et al. 26 N. W. 90; Brett v. Myers, 21 N. W. 604; Cent. P. R. R. Co. v. Creed, 11 Pac. 772.

Gordon & Wheeler, for respondent.

Under Rev. Codes 1899, section 5298, court may reverse and set aside a judgment as was done in this action. Minn. Thresher Co. v. Holtz, 84 N. W. 581; Sargent v. Kindred, 5 N. D. 472, 67 N. W. 826; Freeman v. Wood, 11 N. D. 1, 88 N. W. 721.

MORGAN, C. J. On December 14, 1903, a judgment of foreclosure of a mechanic's lien was rendered in favor of the plaintiff and against the defendants. The plaintiff furnished the materials and labor for the erection of a hotel building for two of said defendants upon their lots in the village of Langdon. This judgment was rendered on the default of said defendants. The premises described in the judgment were regularly sold under execution to the plaintiff for the full amount of the judgment and costs, and the execution returned with the sheriff's indorsements thereon showing these facts. On June 25, 1904, the plaintiff on notice duly served on the

defendants, moved to set aside the judgment of December 14, 1903, and the subsequent sale based thereon, on the ground that the judgment was entered through plaintiff's mistake and excusable neglect. The motion was based upon affidavits setting forth the facts concerning the entry of the judgment and the failure to ascertain the facts concerning the rights of certain mortgagees to the premises is suit, as against plaintiff's lien. The relief asked is that these mortgagees be brought in as parties defendant. The affidavits show that the plaintiff was mistaken as to the relative rights of these mortgagees to his mechanic's lien, and that he was unable, after due diligence, to ascertain the exact date when the work on the building on which his lien was secured, was commenced; that in consequence thereof he commenced the action to foreclose on the theory that such mortgages were prior incumbrances to his lien and that the mortgagees were not necessary parties to a full determination of his rights; that after the sale under the foreclosure judgment, he discovered that such mortgages are inferior liens to his mechanic's lien. The district court entered an order setting aside the judgment and the sale, and granted the plaintiff leave to make these mortgagees defendants, and provided that they should be brought in by service of summons on them, and permitted the summons and complaint to be amended by inserting their names as defendants, and the complaint to contain proper allegations as to their claims. The original defendants appeal from this order.

We think that the action of the district court was proper. The showing made on the hearing of the motion was sufficient to warrant the action taken and was in furtherance of justice. Plaintiff's showing as to the effort made to ascertain just when the work on the building was commenced, was uncontradicted and we cannot say, as a matter of law, that it was not excusable neglect in not ascertaining that the mortgages were subsequent to his lien as he now claims them to be, before the action was commenced. Courts are vested with discretion on such applications, and this discretion will not be disturbed except in clear cases of the abuse thereof. Several objections are interposed by the defendants to the action of the court in permitting additional defendants to be brought in and the pleadings to be amended accordingly.

It is first contended that the court had no power to set aside the judgment after the term at which it was rendered had passed. The common law practice that judgments could not generally be set

aside or amended after the term at which rendered is not in vogue in this state. The right to apply for the amendment or opening up of a judgment exists after term time in this state, subject to limitation as to time on some applications, the same as it existed at common law during the term. This court has recently held that there are no terms of court in this state in the common-law sense. Martinson v. Marzolf, 14 N. D. 301, 103 N. W. 937.

It is also claimed by the appellants that a party in whose favor a judgment is entered has no right to apply to have it set aside or modified. No reason is apparent why excusable mistakes should not be remedied on behalf of successful litigants as in case of those not successful. The object to be attained is to do complete justice to all the parties. The right to remedy mistakes is an inherent power with courts and this power extends to all parties to actions. Black on Judgments, section 314, and cases cited; volume 15, Enc. Pl. & Pr. 252, and cases cited. This power to amend process and to bring in additional parties in proper case, also exists under the statute. The statute permits such procedure even after judgment. Section 5297, Rev. Codes 1899. Under the statute the power is to be exercised only in furtherance of justice and is therefore discretionary. In this case there was no abuse of discretion. The action of the court in no way prejudices defendants' rights.

The order is affirmed. All concur.

(108 N. W. 38.)

Jonas Shoemaker v. Andrew Sonju.

Opinion filed June 1, 1906.

Damages for Wrongful Act Embrace Those Suffered After as Well as Before Suit.

1. Both at common law and under our statute (sections 4973, 4997, Rev. Codes 1899), one who suffers an injury by the wrongful act of another may recover compensation for all detriment proximately caused thereby, and this includes compensation, not only for past detriment, but also for detriment resulting after the commencement of the action or certain to result in the future, and whether the damages alleged are general or special in character.

Assault and Battery — Exemplary Damages — Actual and Presumed Malice.

2. Exemplary damages may be awarded for an assault under section 4977, Rev. Codes 1899, where it is committed with malice either actual or presumed, and malice authorizing such a recovery may be presumed from the wanton and reckless manner in which the wrongful act was committed.

Same — Pleading.

3. When the complaint alleges, and the proof shows facts such as will warrant a recovery of exemplary damages, they need not be claimed by name and as such, but may be recovered under the claim for damages generally.

Appeal from District Court, Barnes county; *Burke,* J.

Action by Jonas Shoemaker against Andrew Sonju. There was a verdict for defendant and from an order denying motion for a new trial plaintiff appeals.

Reversed and remanded.

Parks & Olsberg, for appellant.

An act of wanton and reckless character, disregarding the safety and right of another, warrants punitive damages and the character of the act is for the jury to determine. Day v. Woodworth, 13 How. 361; Milwaukee Ry. Co. v. Arms, 91 U. S. 489, 23 L. Ed. 374; 13 Cyc. 106; Rev. Codes 1899, section 4977.

Exemplary damages were warranted although not specially claimed in the prayer for relief. Gustavsen v. Wind, 17 N. W. 523; Alabama G. S. R. Co. v. Arnold, 84 Ala. 159; Wilkinson v. Searcy, 76 Ala. 176; II Thompson on Negligence, section 1245.

Lee Combs, for respondent.

To recover special damages they must be pleaded. Comasky v. N. P. Ry. Co., 3 N. D. 276, 55 N. W. 732; Western Union Tel. Co. v. Morris, 83 Fed. 992.

To entitle one to exemplary damages, he must prove the element that entered in to make up his cause of action. Cannville v. Houston, etc., R. Co., 2 Tex. Unrep. Cases, 473; Samuels v. Richmond, etc., R. Co., 35 So. Car, 493, 52 Am. & Eng. Ry. Cases, 315; Kauffman v. Babcock, 67 Tex. 241.

YOUNG, J. The plaintiff has appealed from an order denying his motion for a new trial in an action for personal injuries. Plaintiff claimed damages in the sum of $3,050. The jury returned a verdict for $233.33. The motion for new trial was based upon a statement of case which specified as grounds of the motion errors in excluding evidence, and in the instructions. The injury occurred on March 31, 1905. The action was commenced on April 27, 1905, and was tried on June 29, 1905. The complaint alleges (1) "That on the 31st day of March, 1905, in the Waldorph Hotel in Dazey, North Dakota, this defendant did willfully, maliciously, negligently, and without any cause whatever, seize this plaintiff with his hands and throw him with great force and violence to the floor. That by reason of this willful, malicious and negligent act of the defendant, plaintiff sustained severe and permanent injuries to the extent of a dislocated shoulder and a fracture of the collar bone. (2) That by reason of the said injures this plaintiff was confined to his bed for a period of one week. That during all of that time and since he has been subjected to great pain and mental suffering. That he is 65 years of age and that the injuries he received will be permanent and a constant source of annoyance to him. That he has been damaged thereby in the sum of two thousand ($2,000) dollars. (3) That by reason of the said injuries he had been under the care of a physician for a period of four weeks, and it will be necessary for him to be under their care for at least four weeks longer. That he will be obliged to pay for such services the sum of two hundred and twenty-five ($225) dollars. (4) That by reason of the said injuries, this plaintiff has been obliged to hire a man to attend to his business, for a period of four months at forty ($40) dollars per month and board; that he will be damaged thereby in the sum of two hundred and twenty-five ($225) dollars. (5) That this plaintiff is capable of earning not less than seventy-five dollars per month; that he will be unable to perform any labor for a period of eight months and will be damaged thereby in the sum of six hundred dollars. * * *" Judgment was prayed for in the sum of $3,050, and for costs. The answer, in addition to a general denial, alleges that both plaintiff and defendant were intoxicated at the time the injury occurred and were engaged in wrestling; that plaintiff through his own negligence and without fault on the part of the plaintiff fell to the floor and received the injury of which he complains. The errors

assigned upon the exclusion of evidence and upon the instructions present the same questions and they will be considered together.

The portions of the instructions which were excepted to and assigned as error are as follows: You are instructed that, under the evidence in this case, plaintiff cannot recover any sum as special damages, that is, damages for either doctor bills incurred or for money paid or to be paid for the services of a man or men by him hired or employed to work in his place or stead since the commencement of his action. That is, after the action has commenced, anything that comes in there would be in the nature of permanent injury. You are to treat this action just the same as if it was tried the day the complaint was served. You are further instructed that plaintiff cannot recover any damages for either medical treatment or for services of a man or men to work in his place to be sustained or suffered in the future, because such alleged damages are too remote and speculative, and the law does not recognize such as an element of damages in this case. * * * And you are further instructed that there is no evidence of malice of defendant against plaintiff, either at the time of the alleged assault or thereafter, but on the contrary both plaintiff and defendant agree that such a factor was entirely absent in defendant's mind at the time plaintiff fell upon the floor. * * * You are further instructed that no exemplary damages as punishment can be allowed in this case, because the same are not pleaded or claimed. I instruct you, as a matter of law, that in considering and determining the damages, if any you find from the evidence that plaintiff has sustained, you may take into consideration all the damages resulting from the injury, including not only the actual damages, such as loss of time and pecuniary expenses for medical attendance up to the time of the commencement of this action, but also for bodily and mental suffering, if any, arising from the injury."

In reference to the several rulings upon the admission of evidence which are assigned as error, it is sufficient to say that the court followed the rules laid down in the foregoing instructions. In one instance, after sustaining an objection to a question put to plaintiff as to the value of his services from the date of the injury to the day of the trial, the court gave plaintiff's counsel this direction: "Confine yourself to the period between the time he was injured and the time of the bringing of this action." The plaintiff attempted to show the value of the attending physician's services

before and after the commencement of the action. This was excluded. So also plaintiff's testimony that he suffered pain when being examined by a physician on the day previous, at the request of defendant's counsel, and that he suffered pain in dressing himself, was stricken out. In one instance the ground of the objection was that it was "not within time," and in another that reason was stated as the ground for the ruling.

Counsel for appellant contend that the court erred "in excluding from the consideration of the jury all evidence of damages subsequent to the commencement of the action and in instructing them to that effect." This contention must be sustained. The plaintiff was entitled to recover compensation for all detriment proximately caused by the defendant's wrongful act. Section 4997, Rev. Codes 1899. This includes compensation for detriment resulting from the wrongful act whether past or prospective. 3 Sutherland on Damages (2d. Ed.) section 844; 1 Sedgwick on Damages (8th Ed.) section 86; Hicks v. Drew, 117 Cal. 305, 49 Pac. 189; Drew v. Ry. Co., 26 N. Y. 49. This well-settled rule of the common law is expressly affirmed in section 4973, Rev. Codes 1899, which reads as follows: "Damages may be awarded in a judicial proceeding for detriment resulting after the commencement thereof, or certain to result in the future." And as to this right to recover for future detriment, there is no distinction between general damages—i. e., those which naturally and necessarily result from the wrongful act or omission and need not therefore be pleaded—and special damages, which, because they do not necessarily follow, must be pleaded. It will be seen that the rulings upon the admission of evidence restricted the proof, and the instructions complained of, when read in connection with the rest of the charge, restricted the right of recovery to general and special damages which resulted before the commencement of the action. This deprived the plaintiff of his right to compensation for all detriment proximately resulting from the injury, and the error was highly prejudicial. This is shown by the small amount of the verdict, which but slightly exceeds the alleged value of the physician's services up to the time of the trial. The evidence shows that the injury was of a permanent character. The court excluded testimony offered to show that the value of the physician's services from the time of the injury to the trial was $200. This, for reasons above stated, was error. The services were alleged as special damages,

and the proof as to time of treatment was within the allegation of the complaint. There is high authority, however, for the rule that where the injury is serious, as in this case, the value of physician's services may be recovered under a general allegation of damages. 1 Sedgwick on Damages, section 483; Folsom v. Town, 36 Vt. 580-592; Huchinson v. Granger, 13 Vt. 386. The reason of this rule is that the description of such an injury apprizes the person liable of the necessity for such services.

The same error was repeated in reference to the other two items alleged as special damages. The plaintiff alleged that as a result of the injury (1) he was obliged to hire a man for four months to attend to his business, at an expense of $225; (2) that his earning capacity is $75 per month and that for eight months he will be unable to perform any labor. These are proper elements of damage. Wade v. LeRoy, 20 How. (U. S.) 34, 15 L. Ed. 813. They were specially alleged, and to the extent that they are sustained by the evidence the plaintiff is entitled to recover, subject, of course, to the limitation that there can be but one recovery for each element of damages, whether claimed as general or special damages.

We also agree with counsel's contention that the court erred in taking away from the jury the question of malice, and instructing them that exemplary damages could not be awarded. The record tends to show that the assault upon the plaintiff was unprovoked. The plaintiff is 64 years of age. While he was engaged in conversation with another person in the hotel, the defendant, without warning, grabbed him and threw him upon the floor, fracturing his upper forearm and the shoulder blade. This was in the presence of a number of persons whose testimony is in the record, and they do not differ materially as to the manner in which the assault was committed. It is true that there does not seem to have been any prior difficulty between the plaintiff and the defendant, and the evidence shows that both of them had been drinking intoxicating liquor to some extent. One witness said defendant was intoxicated and looked angry. Plaintiff testified: "I was friendly to all. I had no enemies. I don't think I had any malice or hate against Sonju. We never had any altercation or quarrel before that. I don't think he had any malice towards me." It was upon the foregoing and similar testimony given by defendant that the trial court took the question of malice from the jury. This

was error. The above testimony only goes to the question of actual malice. It does not show that the assault was not committed with implied malice. Malice which will authorize a recovery of exemplary damages may be actual or presumed. Section 4977, Rev. Codes 1899. Malice which is presumed or malice in law, as distinguished from malice in fact, "is not personal hate or ill will of one person toward another; it refers to that state of mind which is reckless of law and of the legal rights of the citizen in a person's conduct toward that citizen." 1 Suth. on Damages (2d Ed.) section 394; Willis v. Miller (C. C.) 29 Fed. 238; Fotheringham v. Adams Ex. Co. (C. C.) 36 Fed. 252, 1 L. R. A. 4774; White v. Spangler, 68 Iowa, 222, 26 N. W. 85; Voltz v. Blackmar, 64 N. Y. 440.

Upon the evidence in this case the awarding of exemplary damages was within the discretion of the jury. The complaint alleged that the injury was inflicted willfully, and maliciously, and the jury, had the question been left to them, could properly have presumed that the assault was with malice from the wanton and unprovoked manner in which it was committed. The plaintiff claimed a gross sum of $2,000 as general damages. It was unnecessary to itemize the elements of such damages, or to state separately the amounts claimed as actual damages and exemplary damages. 1 Sutherland on Damages, section 424; Shephard v. Pratt, 16 Kan. 209; Dooley v. M. P. Ry. Co., 36 Mo. App. 381. It is well settled that where the complaint alleges and the proof shows facts such as will warrant a recovery of exemplary damages, they need not be claimed by name and as such in the complaint but may be recovered under the claim for damages generally. Hoadley v. Watson, 45 Vt. 289, 12 Am. Rep. 197; Ala. G. S. Ry. Co. v. Arnold, 84 Ala. 159, 4 South. 359, 5 Am. St. Rep. 354; Savannah Ry. Co. v. Holland, 82 Ga. 257, 10 S. E. 200, 14 Am. St. Rep. 158; Southern Ex. Co. v. Brown, 67 Miss. 260, 7 South. 318, 19 Am. St. Rep. 306; Gustafson v. Wind, 62 Iowa, 281, 17 N. W. 523; Davis v. Seeley, 91 Iowa, 583, 60 N. W. 183, 51 Am. St. Rep. 356. Also, 13 Cyc. 177, and cases cited. The plaintiff's claim for damages was unliquidated. It was for the jury to say, under the evidence, what sum should be allowed as actual damages; also, whether exemplary damages should be awarded, and, if so, the amount.

The order appealed from will be reversed, and a new trial granted. All concur.

(108 N. W. 42.)

CHARLES N. JOHNSON v. CITY OF FARGO.

Opinion filed June 5, 1906.

Municipal Corporations — Defective Sidewalks — Notice of Injury.

1. The notice of injury on a street or sidewalk of a city, provided for by section 2172, Rev. Codes 1899, presented to the proper city officials in this case, is not insufficient or fatally misleading when it describes the place of injury as about thirty feet from a fixed point, when it is only twenty-four feet therefrom.

Same — Obstruction on Sidewalks — Question for Jury.

2. Whether a wire attached to a stringer at the outer edge of a sidewalk, or to stakes driven in the street very close to the sidewalk and extending along the sidewalk to the top of a fruit booth, six feet higher than the sidewalk, and eight feet from the place where the wire is attached to the stakes or sidewalk, is an obstruction on the sidewalk, is a question of fact for the jury.

Same — Negligence.

3. Whether a plaintiff is guilty of contributory negligence, and whether a city is guilty of negligence in permitting an obstruction to continue on a sidewalk, are ordinarily questions of fact for a jury.

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

Action by Charles N. Johnson against the city of Fargo. Judgment for plaintiff, and defendant appeals.

Affirmed.

Seth Newman, for appellant.

No proper claim was presented to the mayor and council. It alleged the locus in quo to be "about 30 feet" from a point, and testimony shows it was about 15 feet. The object of the notice is to protect the municipality, and enable it to make proper investigation. Trost v. The City of Casselton, 8 N. D. 534, 79 N. W. 1071.

Plaintiff was guilty of contributory negligence, and defendant's motion for a directed verdict should have been granted. Indianapolis Ry. Co. v. Zaring, 71 N. E. 270; Indianapolis Ry. Co. v. Marschke, 70 N. E. 494; Indianapolis Ry. Co. v. Tenner, 67 N. E. 1044; Patterson v. Hemenway et al., 19 N. E. 15; Pinnix v. Durham, 41 S. E. 932; Ill. Cen. R. R. Co. v. Dick, 15 S. W. 655; Massey v. Seller, 77 Pac. 397; Cook v. Atlanta, 19 S. E. 987: McLaury v. The City of McGregor, 7 N. W. 91; Alline v. City of LeMars, 33 N. W. 160; Tuffree v. State Center, 11 N. W. 1; Cres-

sey v. Town of Postville, 12 N. W. 757; Yahn v. City of Ottumwa, 15 N. W. 257; Hutchins v. Priestley Express Wagon Co., 28 N. W. 85; Bedell v. Berkey, 43 N. W. 308; Schofield v. Ch. M. & St. P. Ry. Co., 114 U. S. 615 S. C., 29 L. Ed. 224; C. R. I. & P. Ry. Co. v. Houston, 95 U. S. 697 (S. C.), 24 L. Ed. 542; Klutt v. Phil. R. Co., 133 Fed. 1003; Claus v. N. Steamship Co., 89 Fed. 646; Moore v. Richmond, 8 S. E. 387; Donaldson v. M. & St. P. Ry. Co., 21 Minn. 293; Brown v. M. & St. P. Ry. Co., 22 Minn. 165; Smith v. Minn. & St. L. Ry. Co., 26 Minn. 419; Johnson v. Ramberg, 51 N. W. 1043; Sparks v. Serbrecht, 45 N. Y. 993; O'Dwyer v. O'Brien, 43 N. Y. 815; Bauman v. Met. St. Ry., 47 N. Y. 1094; Fuller v. Dedrich, 54 N. Y. 593; Hilsenbeck v. Guhring, 131 N. Y. 674, 30 N. E. 580; Whalen v. Citizens' Gas. Co., 45 N. E. 363; Hausman v. City of Madison, 55 N. W. 167; Hutchins v. Priestley Express Wagon Co., 28 N. W. 86.

There is no proof of negligence on the part of the city. It exercises reasonable care when it repairs defects in its walks within a reasonable time after notice, actual or constructive. Plaintiff's conclusion that he caught his foot in the obstruction, from an examination the next day, does not carry the presumption that it was there the day before. A presumption is not retrospective. Jarvis v. Vanderford, 21 S. E. 302; Martin v. Curtis, 31 Atl. 296; Singler v. Murphy, 77 N. W. 577; Brentner v. Chicago, M. & St. P. Ry. Co., 12 N. W. 615; State v. Hubbard, 15 N. W. 287; Hoyt v. City of Des Moines, 41 N. W. 63; Blank v. Township of Lavonia, 44 N. W. 157.

The exceptions to the rule are cases where from the notice of the defect, it must have existed long previous. Miller v. N. P. R. Co., 30 N. W. 892; City of Bloomington v. Osterle, 28 N. E. 1068; Mixter v. Imp. Coal Co., 25 Atl. 587; Johnson v. City of St. Paul, 54 N. W. 735.

Barnett & Richardson, for respondents.

Notice to the mayor and council was sufficient. Robin v. Bartlett, 13 Atl. 645; Trost v. City of Casselton, 8 N. D. 534; Cowan v. Inhabitants, etc., 56 Atl. 901; Fopper v. Town of Wheatland, 18 N. W. 514; Coffin v. Town of Palmer, 38 N. E. 509; Weber v. Town of Screenfield, 42 N. W. 101; Citing White v. Stowe, 54 Vt. 510.

The city's negligence was a question for the jury. Baxter v. City of Cedar Rapids, 72 N. W. 720.

Neither abutting owners or others can obstruct sidewalks. Callahan et al. v. Gilman, 14 N. E. 64; Davis et al. v. Mayor of City of N. Y., 14 N. Y. 506; Com. v. King, 13 Metc. 115; Com. v. Blaisdell, 107 Mass. 234; Freeman's Note, 1 Am. State Rep. 840; State v. Edens, 84 N. C. 526; Com. V. Wentworth, 4 Clark, 324; Shopp v. City of St. Louis, 22 S. W. 898.

Towns must keep roads in repair, not only as to surface and margins, but as to muniments; Glidden v. Reading, 38 Vt. 52; Lindsey v. Densville, 45 Vt. 72; Elliott on Roads and Streets (2d Ed.) 621; Gallamore v. City, 75 Pac. 978; Stafford v. City of Oskaloosa, 11 N. W. 668; Coffey v. City, 85 S. W. 532.

Sidewalks are portions of the highway. City of Chicago v. O'Brien, 53 Am. Rep. 640; Johnson v. City, 57 Atl. 363; City of Macon v. Holcomb, 69 N. E. 79; Coffey v. City, supra.

Side of street or sidewalk is a material part of it, and must be kept clean as well as other portions of it. Bunch v. Edenton, 90 N. C. 431; Bacon v. Boston, 3 Cush, 174; Houfe v. Town of Fulton, 29 Wis. 296; Wheeler v. Town of Westport, 30 Wis. 392; Kelly v. Town of Fon Du Lac, 31 Wis. 179; Burnes Administratrix v. Town of Elba, 32 Wis. 605; Cremer v. The Town of Portland, 36 Wis. 92; Kenworthy v. The Town of Ironton, 41 Wis. 647; Cartwright v. Town, 58 Wis. 370; Fitzgerald v. City, 64 Wis. 207; Stricker v. Town 93 Wis. 460, 77 N. W. 897; Gorr v. Mattlesteadt, 96 Wis. 296; City v. Lowery, 74 Ind. 520.

Traveler may cross a street at any point without being liable to imputation of neglect. Brusso v. Buffalo, 90 N. Y. 679, citing Raymond v. Lowell, 60 Cush. 524, 530; Rea v. City of Sioux City, 103 N. W. 949; Pike v. City of Jamestown, 15 N. D. 157, 107 N. W. 359; Lincoln v. City of Detroit, 59 N. W. 617; Raymond v. Lowell, 6 Cush. 524; City of Louisville v. Johnson, 69 S. W. 803; Cotteril v. Starkey, 8 Car. & P. 691; Boss v. Litton, 5 Car. & P. 407; Griffin v. City of Boston, 65 N. E. 811; Miller v. Lewiston Co., 62 Atl. R. 32.

Suspension of a wire or other articles above the surface of a walk is an obstruction and is just as reprehensible as the obstruction of the surface itself by digging a ditch or otherwise. Larson v. Tobin, 44 N. W. 1078; Cremer v. The Town of Portland, 36 Wis. 92.

The jury could find from the length of time that the wire had been there that the city had notice. Hayes v. Town of Hyde Park, 27 N. E. 522; Pyke v. City of Jamestown, supra.

Negligence is always a question for the jury under proper instruction. 21 Am. & Eng. Enc. Law, 502, 503, 506, 507.

There was no negligence in going to the edge of the sidewalk, as respondent had a right to suppose that there were no impediments or pitfalls in any part of the street. Guffin v. City of Boston, 65 N. E. 811; Durant v. Palmer, 29 N. J. 544; City v. Augem, 48 N. E. 318; Griffin v. City, 65 N. E. 811; Monongahela City v. Fischer, 56 Am. Rep. 241; Gordon v. City of Richmond, 2 S. E. 727; Baker v. City of Grand Rapids, 69 N. W. 740, citing Thomp. Neg., section 387; Lincoln v. City, 101 Mich. 345; City Council v. Wright, 47 Am. Rep. 422; Barnes v. Town of Marcus, 65 N. W. 984; Heckman v. Evenson, 7 N. D. 173; Mathews v. City, 45 N. W. 894; Murphy v. Railway, 38 Iowa, 539; Messenger v. Plate, 42 Iowa, 443; Smith v. City, 74 Pac. 674.

Respondent was not guilty of contributory negligence in failing to observe the wire. Wall v. Town, 39 N. W. 560; Brush Electric Lighting Company v. Kelly, 25 N. E. 812; City of Louisville v. Keher, 79 S. W. 270; City v. Harris, 113 Ill. App. 633; City v. Trammel, 109 Ill. App. 524; Jennings v. Van Schaick, 15 N. E. 424; Bettingill v. City, 116 N. Y. 558; Turner v. Newburgh, 109 N. Y. 301; Jorgenson v. Squires, 144 N. Y. 281; Houghtaling v. Shally, 51 Hun. 599; Babbage v. Powers, 130 N. Y. 281; Harris v. Uebelhoer, 75 N. Y. 175; Chilsholm v. State, 36 N. E. 184, citing McQuire v. Spense, 91 N. Y. 303; Weed v. Village, 76 N. Y. 329; Brusso v. Buffalo, 90 N. Y. 679.

One running to a fire on the street in a dark night is not guilty of negligence. Jennings v. Van Schaick, 15 N. E. 242; Shook v. City of Cohoes, Id. 531; Stevens v. City of Logansport, 76 Ind. 498; Noblesville Gas & Imp. Co. v. Loehr, 24 N. E. 579; Barr v. Kansas City, 16 S. W. 483; Barry v. Ferkildsen, 13 Pac. 657; Cantwell v. City, 37 N. W. 813; West v. City, 61 N. W. 313; Mahnke v. R. R., 29 So. 52; LeBeau v. Telephone Co., 67 N. W. 339; City of Chicago v. Babcock, 32 N. E. 271; Fuller v. Hyde Park, 37 N. E. 782; Words v. City of Boston, 121 Mass. 337; Mayo v. R. R., 104 Mass. 137; France v. R. R., 116 Mass. 537; Hill v. Seekonk, 119 Mass. 85; Hunt v. Salem, 121 Mass. 294; Bruch v. City, 37 Atl. 818; Heckman v. Evenson, 7 N. D. 173.

MORGAN, C. J. Plaintiff brought this action to recover damages for a personal injury alleged to have been caused by an obstruction upon one of defendant's streets. The complaint alleges

the injury to have been caused in the following manner: "That on or about the 24th day of March, A. D. 1904. at about the hour of 10 o'clock p. m. of said day, said plaintiff was lawfully upon the sidewalk on the east side of Fifth Street South, in the city of Fargo, North Dakota, about 30 feet from the intersection of Fifth Street South and Front street in said city, and moving southward on said sidewalk, when said plaintiff was then and there tripped up by a wire guy rope attached to said sidewalk and the other end of said rope attached to a fruit or notion stand on wheels, which stood on the street with the hind wheels of said stand against the curbing." Other material facts are that said fruit stand was about 10 feet long and 6 feet wide and 7 feet high from the street, and about 6 feet above the sidewalk. The sidewalk was 10 feet wide at this point. The wire was attached to the top corners of the stand, and fastened either to a stringer of the sidewalk, or to posts driven into the street. The wire was attached to the posts, or to the stringer, about eight feet south of the fruit stand. Just how the wire was attached is a matter of some dispute, but we do not think that the discrepancy in the testimony of the witnesses can affect the result. The plaintiff testifies that the wire was fastened to the top of the corner of the fruit wagon, and therefrom ran down to and around a stringer of the sidewalk; that it reached the stringer, going between the planks of the walk, and, after being placed around the stringer, came out between the planks, and was then fastened to the wire and a loop was thus formed at a distance of 11 inches from the outer edge of the walk. Plaintiff is the only witness that testifies that a loop was formed on the sidewalk. Other witnesses testify that the wire was attached to a stringer of the walk, but they testify that it was so fastened that no loop was formed, and that the wire did not extend on and above the sidewalk at all, but at the outer edge thereof. Other witnesses testify that the wire was attached to posts in the street, and not attached to the walk at all, but within an inch or two of it. Under this evidence the manner in which the wire was attached was a question for the jury. The finding of the jury is not attacked, as no motion for a new trial was made.

The defendant contends that the evidence conclusively shows that the defendant was not guilty of any negligence, and that the motion for a directed verdict, seasonably made, should have been granted. If the evidence conclusively shows that the defendant

was not guilty of any actionable negligence, the action of the trial court in denying the motion was erroneous. If, however, the evidence does show negligence, or the evidence leaves the question of negligence in doubt, so that reasonable men might arrive at different conclusions, then it was not error to deny the motion, and the question of negligence was a proper one for the jury. The evidence is such that we cannot say as a matter of law that there was no negligence.

The contention is that the wire was not an obstruction on the sidewalk, but was an obstruction in the street, if an obstruction at all. Whether the wire was over the walk, or at the end thereof, and attached to a stringer, or attached to posts in the street so close to the walk as to be practically a part of the walk, is not material upon the phase of the case now under consideration. The question is, Was the wire as attached an obstruction on the sidewalk? We think that it was a question for the jury to determine. In effect, and when considered in connection with the right of a pedestrian to walk at the outer edge of a walk, or to leave the sidewalk to go upon the street, it was an obstruction. It was attached to the sidewalk, or so close thereto as to render it impossible to leave the sidewalk at that point without being obstructed by it. Pedestrians are not, as a matter of law, compelled to keep upon the walk or cross-walks at all times. They may leave the walk and go upon the street as convenience demands or seems to demand, without having negligence imputed to them as a matter of law. When occasion demands their leaving the sidewalk, or seems necessary, or is convenient, they have a right to presume that the street and sidewalk are free from dangerous obstructions. As stated in the syllabus in Heckman v. Evenson, 7 N. D. 173, 73 N. W. 427: "A foot passenger in a city is not limited to traveling on the sidewalks or cross-walks. He may, while exercising due care in so doing, walk along or across a street, and may leave the sidewalk at such points as suits his convenience, and he has a right to presume and act upon the presumption that the street is reasonably safe and free from dangers to travelers for its entire width." In Wheeler v. Westport, 30 Wis. 392, it was said: "It has been laid down as a correct rule in such cases that, even though there be a defect or obstruction in the limits of the highway as located, if it is not in the traveled part of the road, nor so connected with it as to affect the safety or convenience of those using the traveled

path, the town is not responsible for any injury sustained in consequence of it. * * * It cannot be said that the boulders here were unconnected with the traveled path. They were so connected with it, and so closely as to make it almost true that they formed a part of it." See, also, Morgan v. City of Hallowell, 57 Me. 376; Bunch v. Edenton, 90 N. C. 431; Slivitski v. Town of Wein, 93 Wis. 460, 67 N. W. 730; Johnson v. City of Louisville (Ky.) 69 S. W. 803; Brusso v. City of Buffalo, 90 N. Y. 679.

It is claimed that the defendant city had neither actual nor constructive notice of the obstruction complained of. The evidence is uncontradicted that the booth was blown down in September, 1903, and that it was guyed up by wires immediately thereafter. The injury occurred on March 24th following. The obstruction had therefore existed for nearly seven months. It is not shown that the city had actual notice of the obstruction. Some of the city officials had seen it, but it is not shown that such officers had any duty to perform to the city in respect to the condition of the street or sidewalk. Actual notice is not necessary before a liability is incurred. If the obstruction had been there so long that the city officers having a duty in regard to the condition of the streets were presumed to have seen it, notice is imputed to the municipality. We are satisfied as a matter of law that the city authorities should be presumed to have had notice of the obstruction. It is, however, a proper question to be submitted to the jury in case of doubt. It certainly cannot be said that the evidence shows conclusively as a matter of law that the city had no constructive notice. Beach on Munic. Corporations, section 1521, and cases cited; Baxter v. Cedar Rapids (Iowa) 72 N. W. 790; Elliot on Roads, p. 461; Hayes v. Town (Mass.) 27 N. E. 522, 12 L. R. A. 249.

It is contended that the plaintiff was guilty of contributory negligence, and cannot, therefore, recover. The injury occurred at about 10 o'clock at night. The plaintiff was on his way home, when he saw a building on fire not far from where he was then standing, on Front street near Fifth Street South. He turned around and walked on the sidewalk a short distance, and was tripped up by the wire and fell off the sidewalk into the street. The street was about one foot below the sidewalk. He was walking fast and looking at the fire when he was tripped up. An effort is made to show that he was running when he struck the wire. We do not think the evidence supports that contention. We cannot say that

contributory negligence is shown as a matter of law. The jury expressly found that he was not guilty of such negligence. We think it was peculiarly a proper case to be submitted to them on that question. Contributory negligence is generally a question for a jury. Unless the facts are such that but one conclusion can be arrived at, it is a question for the jury. If the question is doubtful, and different persons might reasonably arrive at opposite conclusions, it is always to be submitted to a jury. In Heckman v. Evenson, 7 N. D. 173, 73 N. W. 427, it was said: "But, not knowing of their presence and not seeing them [stones], was he negligent in stepping down without ascertaining the condition of the street? We cannot say as a matter of law that he was, unless we disregard that other principle which declares that he may rightfully presume that the street is reasonably safe and free from dangers, and act upon that presumption. If a party must be charged with negligence in making a step in advance when he does not clearly see where he is stepping, then, of course, all presumptions that the street is safe are swept away." The plaintiff, in speaking of his not having seen the wire, says, "It was dark in there," evidently meaning in the shadow of the booth. It is urgently insisted that the place of the injury was well lighted at that time, and that he could, if he had exercised ordinary care, have seen the wires. We cannot so hold as a matter of law. It was properly submitted to the jury. Under the evidence we cannot say that contributory negligence was conclusively shown. It is not always incumbent on a person while on the sidewalk to keep constant watch on the walk ahead of him. Heckman v. Evenson, supra; Pyke v. Jamestown, 14 N. D. 157, 107 N. W. 359; T. Thomp. Neg. 1197. See, also, A. & E. Enc. L. 506, and cases cited; Barnes v. Town (Iowa), 65 N. W. 984; Wall v. Town (Wis.), 39 N. W. 560; Penrose v. Fehr (Mich.),, 71 N. W. 862, 67 Am. St. Rep. 479; Baxter v. City, supra; Draper v. Town of Ironton, 42 Wis. 699.

When the motion to direct a verdict was made, the evidence would not justify a direction to the jury that the evidence conclusively showed as a matter of law that the plaintiff was guilty of contributory negligence. It is claimed that no sufficient notice of the injury was presented to the mayor and city council. It is claimed that the location of the place on the walk when the injury occurred was not correctly given. In the notice it was stated that the injury occurred 30 feet south of the intersection of the Front street side-

walk with the Fifth street sidewalk. The evidence shows that the north end of the booth was 10 feet from Front street. The booth was 6 feet wide. The place of injury was about 8 feet south of the booth. This would make the actual distance from the intersection of the Front street sidewalk with that of Fifth Street South to be about 24 feet. We do not think that a variance of 6 feet necessarily renders the notice insufficient or misleading. This is especially true in view of the fact that the notice stated that the wire was attached to the booth, which would aid the city in locating the place of injury. Absolute certainty is not necessary as to the place. Reasonable certainty is all that is required. "The notice should point out as directly and plainly to the place of the injury as is reasonably practicable, having regard to its character and surroundings." White v. Stowe, 54 Vt. 510. See, also, Beach on Pub. Cor, section 1527. The statute requires that notice shall be given "describing the time, place, cause and extent of the damage or injury." Section 2172, Rev. Codes 1899. The notice was sufficiently accurate and definite, and not misleading. The object to be attained by the notice is to give the city an opportunity to investigate as to its liability and as to plaintiff's injury. Plum v. Fond du Lac, 51 Wis. 393, 8 N. W. 283.

This disposes of all the assignments of error. It follows that the judgment must be affirmed. All concur.

(108 N. W. 243.)

CLAUS JACKSON v. ISAAC ELLERSON, DEFENDANT, AND ANNA ELLERSON, INTERVENER.

Opinion filed June 5, 1906.

Appeal — Review — Specification of Error of Law.

1. Section 5467, Rev. Codes 1899 (section 7058, Rev. Codes 1905), makes it essential to a review of errors of law occurring at the trial of a law action that they shall be specified in the statement of case.

Same.

2. The same section requires, as a prerequisite to a review of a specification that the evidence is insufficient to justify the verdict or other decision, that it shall point out the particulars in which it is claimed to be insufficient.

Appeal from District Court, Griggs county; *Winchester*, J

Action by Claus Jackson against Isaac Ellerson, Anna Ellerson intervened. Judgment for defendants, and plaintiff appeals.

Affirmed.

M. C. Spicer and *Jerome Parks,* for appellant.
Lee Combs, for respondents.

YOUNG, J. This is an action in claim and delivery, brought by plaintiff against the defendant, Isaac Ellerson, to recover certain grain grown in 1904. The plaintiff's right to possession is based upon a certain chattel mortgage executed by the defendant. The plaintiff executed an affidavit and undertaking and a requisition to the sheriff, pursuant to which the latter seized 1,230 bushels of wheat, which was subsequently delivered to the plaintiff and sold by him. Anna Ellerson, the wife of the defendant, intervened in the action, alleging that she has been the owner of the land upon which the grain was grown ever since November 19, 1903; that she was the sole owner of the crop grown in 1904, being the grain in controversy, and that the wheat seized by the plaintiff was of the total value of $1,200. By stipulation the case was tried to the court without a jury. The court found for the intervener—that she was the owner of the grain and that it was of the value of $1,148.16—and judgment was entered against the plaintiff and in her favor for that sum. The plaintiff caused a statement of case to be settled, and appealed from the judgment.

We find upon turning to the record that we are unable to review any of the seven assignments of error in appellant's brief. Six of them are directed to the findings of fact, and are in form and substance like the first one, which is as follows: "The court erred in making the fourth finding of fact, and each and every fact, and the whole thereof, for the reason that the same is not sustained by the evidence." The specifications of error in the statement of case are in the same form. No attempt was made in any of them to point out the particulars in which it is claimed the evidence is insufficient to sustain the finding. The remaining assignment is "that the court erred in not granting plaintiff's motion at the close of the trial. * * *" This alleged error is not specified in the statement of case, at all. Under these circumstances it is apparent that the record does not authorize a review of the questions attempted to be raised by the assignments. Section 5467, Rev. Codes 1899 (section 7058, Rev. Codes 1905), which governs the

settlement of statements in law actions, provides, among other things, that "there shall be incorporated in every such statement a specification of the particulars in which the evidence is alleged to be insufficient to justify the verdict or other decision, and of the errors of law upon which the party settling the same intends to rely. If no such specification is made the statement shall be disregarded on motion for a new trial and on appeal. * * *" The requirement that errors shall be assigned in the appellant's brief rests upon the rules of court, but the requirement that they shall be specified in the statement of case is statutory; and this is true as to the requirement that, when the verdict or decision is challenged because of the insufficiency of the evidence, the particulars in which it is claimed to be insufficient must be pointed out. The failure of the appellant to comply with these plain provisions of the statute is fatal to the review which he seeks. The findings of fact fully sustain the conclusions of law and judgment.

It follows that the judgment must be affirmed. All concur.

(108 N. W. 241.)

DEAN & CO. v. D. B. COLLINS AND J. A. MAHOOD, CO-PARTNERS, DOING BUSINESS AS COLLINS & MAHOOD, D. B. COLLINS, APPELLANT.

Opinion filed June 5, 1906.

Partnership — Assumption of Debts — Retiring Partner Not a Surety as to Creditors.

An agreement upon a dissolution of a partnership, by which the retiring partner transfers his interest in the partnership property to the remaining partner, and the latter agrees to pay the partnership debts, creates as between them the relation of surety and principal, but does not create that relation as to a creditor who has not assented to it, even though he had notice of it. As to him their obligation as joint debtors continues.

Appeal from District Court, Towner county; *Cowan,* J.

Action by Dean & Co. against D. B. Collins. Judgment for plaintiff. Defendant appeals.

Affirmed.

Brooks & Kehoe and *Burke & Middaugh,* for appellant.

Where a partnership is dissolved and one partner assumes the firm's debts, the retiring partner is a surety as to all its creditors who are cognizant of the agreement. Millard v. Thorne, 56 N. Y. 402; Colgrove v. Tallmann, 67 N. Y. 95, 23 Am. Rep. 90; Smith v. Sheldon, 24 Am. Rep. 529; Brandt on Suretyship (2d Ed.) section 36; Stearns on Suretyship, 24; Baylies on Suretyship, 481; Shumaker on Partnership, 341, 342.

Davis & Sennet and *F. N. Hedrix,* and *L. J. Van Fossen* of counsel, for respondents.

Mere neglect to sue or make active efforts to collect the note of the principal maker, at the request of the surety is insufficient to discharge the latter. Benedict v. Thoe et al. 35 N. W. 10; Dane v. Corduan, Admr. 24 Cal. 157; Page v. Webster, 15 Me. 249; Inkster v. Bank, 30 Mich. 142; Bank of Maywood v. McAllister, 76 N. W. 552; Davis v. Huggins, 3 N. H. 231; Pintard v. Davis, 21 N. J. L. 632; Findley v. Hill, 8 Ore. 247; Hogaboon v. Herrick, 4 Vt. 131; Hikcock v. Bank, 35 Vt. 476.

A surety is one who is such at the inception of the contract and not by a subsequent agreement or implication. Fensler v. Prother, 43 Ind. 119; Fish et al. v. Glover, 39 N. E. 1081.

YOUNG, J. This action was brought to recover a balance of $1,914.72 upon two promissory notes, executed by the defendants in 1901 and due, respectively, on November 1st and November 15th of that year. When the notes were given, and for two years prior thereto, the defendant, D. B. Collins, and J. A. Mahood, were engaged in the farm machinery business as a copartnership under the firm name of Collins & Mahood. The notes were given by the copartnership for goods purchased from the plaintiff. Mahood did not answer. Collins attempted to avoid personal liability by alleging and offering to prove certain facts which his counsel contend show that Mahood is the principal debtor, and that he (Collins) is a mere surety, and that he has been discharged from liability by reason of the plaintiff's failure to sue Mahood. The existence of the copartnership is admitted, and also the execution of the notes. He alleges that in December, 1901, the partnership was dissolved; that all of its property was transferred to Mahood; that as a part of the agreement for dissolution Mahood agreed to pay the firm debts including the notes in suit; that all firm creditors, including the plaintiff, were duly notified of the dissolution and

the terms upon which it was made; that on several occasions this defendant notified the plaintiff to proceed against Mahood; that Mahood was solvent when the partnership was dissolved, but has since become insolvent. The trial court rejected the testimony offered to sustain the above defense and directed a verdict for the amount due upon the notes. Defendant has appealed from the judgment entered upon the verdict.

The first question raised by the assignments of error (and it is the only one we need consider) is whether the allegations of the answer and the offers of proof constitute a defense. Counsel for defendant contend that they do. They contend that "where a partnership is dissolved, and one partner purchases the interest of the other in the partnership property, and assumes and agrees to pay the partnership debts, he becomes in equity the principal debtor as to such debts, and the other his surety, and a creditor having notice of such agreement is bound by such relationship; and (2) that where a creditor with such notice is requested by the surety to collect his claim from the partner who has assumed the debts, and he neglects or refuses to do so, the surety is discharged, provided the principal was at the time solvent." We shall have occasion to refer only to the first of the above propositions. That the relation of principal and surety is created as between the remaining and the retiring partner upon the facts stated is well settled. As between themselves the partner assuming the debts becomes the principal, and the retiring partner the surety. Pingrey's Suretyship and Guaranty, section 20; Moore v. Topliff, 107 Ill. 241; Wendlandt v. Sohre, 37 Minn. 162, 33 N. W. 700. As to this there is no dispute. The question in controversy (and upon this there is a conflict of judicial opinion) is whether a creditor who is not a party to the agreement between the partners creating this new relation between them, and does not assent to it, but merely has notice of it, is bound by it, and must after such notice treat the retiring partner, not as a joint debtor, but as a surety. We have no hesitation in holding that under such circumstances the partners continue to be bound as joint debtors to the creditor, pursuant to their original obligation. In our view there is no reasonable ground for a difference of opinion upon this. The obligation of the partners to their creditor was created by contract. They were joint obligors. By the contract they subjected themselves to all of the obligations of that relation, and conferred upon their

creditor all of the benefits arising from it. To sustain the doctrine that the partners can by their own act change the character of their obligation to their creditor, and without this assent, express or implied, violates the fundamental principles of the law of contract. It abrogates an express contract without the consent of the party beneficially interested, and forces upon him a new contract to which he has not given his assent. In Pingrey on Suretyship and Guaranty, section 21, it is said that "the great weight of authority is that two or more principal debtors cannot by agreement among themselves, without consent of the creditor, so change the character of the liability of one of them to such creditor from principal to surety, as to enable him to demand from the creditor the treatment of a surety for the debt; that is, a retiring partner or other principal debtor cannot become a surety as to the creditor by simply informing him that his co-debtors have agreed that he shall be held only as a surety."

The question has been carefully considered in a large number of cases, and the rule announced is in harmony with the foregoing text. From these we cite: Rawson v. Taylor, 30 Ohio St. 389, 27 Am. Rep. 464; Shapleigh Hdw. Co. v. Wells, 90 Tex. 110, 37 S. W. 411, 59 Am. St. Rep. 783; White v. Boone, 71 Tex. 712, 12 S. W. 51; Hall & Long v. Jones, 56 Ala. 493; Barnes v. Boyer, 34 W. Va. 303, 12 S. E. 708; Whittier v. Gould, 8 Watts (Pa.) 485; McAreavy v. Magirl (Iowa) 99 N. W. 193; Shepherd v. May, 115 U. S. 505, 6 Sup. Ct. 119, 29 L. Ed. 456; Conwell v. McCowan, 81 Ill. 285; Bank v. Finck, 100 Wis. 446, 76 N. W. 608; Keller v .Ashford, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667; Story on Partnership, section 158; Parsons on Partnership (4th Ed.) sections 296-324; Bates on Partnership, sections 533, 534. The leading cases upholding the doctrine that a creditor with notice of the agreement between the partners is bound by it are Colgrove v. Tallman, 67 N. Y. 95, 23 Am. Rep. 90, and Smith v. Sheldon, 35 Mich. 42, 24 Am. Rep. 529. Both cases rest upon what was supposed to be the rule of the English courts, laid down in Oakley v. Pasheller, 4 Clark & F. 207. It will appear from an examination of Shapleigh Hdw. Co. v. Wells, and other cases above cited, that the court's opinion in that case was misunderstood and that the creditor assented to the arrangement between the partners. The doctrine stated in the New York and Michigan cases does not represent the English rule; for in Swire v. Redmon, L. R. 1 Q. B. Div. 536, the Chief Justice said: "There is no

English case which holds the doctrine that is contended for by those who claim that the agreement between the partners themselves, without the consent of the creditor, could change their relation to the latter; and we have found no decision in the American courts which directly holds to that theory, except those we have herein cited, all of which rest upon the misinterpretation of Oakley v. Pasheller, 4 Clark & F. 207."

In our opinion, the rule announced in Colgrove v. Tallman is unsound in principle and is against the decided weight of authority. We conclude, therefore, that where the creditor has in no way assented to the new relation created by the parties, as between themselves, he is not bound by it, and as to him they continue as joint debtors. The trial court did not err in so holding.

Judgment affirmed. All concur.

(108 N. W. 242.)

A. C. SKJELBRED, PLAINTIFF AND APPELLANT, v. USHER D. SHAFER, SYLVESTER CONKLING, MARY E. CONKLING, MORTGAGE BANK AND INVESTMENT COMPANY, A CORPORATION; A. B. GUPTILL, AS RECEIVER OF THE MORTGAGE BANK AND INVESTMENT COMPANY, A CORPORATION; MARY F. HOWARD, AND ALL OTHER PERSONS UNKNOWN, CLAIMING ANY ESTATE OR INTEREST IN, OR LEIN OR INCUMBRANCE UPON THE PROPERTY DESCRIBED IN THE COMPLAINT, AND THEIR UNKNOWN HEIRS, DEFENDANTS. ETHEL MAY SOUTHARD, RESPONDENT.

Opinion filed June 5, 1906.

Quieting Title — Judgment Void for Want of Service.

1. A judgment rendered in an action to quiet title under chapter 5, page 9, Laws of 1901, is void as to those who are not named in the published summons, and who are not personally served and who do not appear in the action. Following Fenton v. Insurance Co. (opinion recently handed down) 109 N. W. 363.

Same — Relief from Void Judgment.

2. Relief from a judgment which is void for want of service may be had, without regard to the date of its entry and without the showing of merits and excuse required in cases where jurisdiction has attached.

Appeal from District court, McHenry county; *Palda*, J.

Action by A. C. Skjelbred against Ethel May Southard. Judgment for defendant, and plaintiff appeals.

Affirmed.

Christianson & Weber, for appellant.

Sufficient affidavit of merits is indispensable in all applications to vacate default judgments. Gauthier v. Rusicka, 3 N. D. 1, 53 N. W. 80; Sargent v. Kindred, 5 N. D. 8, 63 N. W. 151; Kirschner v. Kirschner, 7 N. D. 291, 75 N. W. 252.

Not only good defense but good excuse for default must be shown. Harlan v. Smith, 6 Cal. 173, 15 Enc. Pl. & Pr. 286; 2 Black on Judgments, 251.

A default judgment can be vacated only within the time permitted by law. Sargent v. Kindred, 5 N. D. 472; McKnight et al. v. Livingston et al., 1 N. W. 14.

Statutory action to quiet title is largely a proceeding in rem. Inglee v. Welles et al., 55 N. W. 117; Shepherd v. Ware et al., 48 N. W. 773.

LeSueur & Bradford, for respondent.

Where the affidavit of merits sets forth a good defense, the usual form of such affidavit is unnecessary and defects therein are immaterial. Wheeler v. Castor, 92 N. W. 381, 11 N. D. 347; 1 Enc. Pl. & Pr. 366; Bell v. Kelly, 17 N. J. Law, 270; Gulick v. Thompson, 4 N. J. Law, 294; 15 Enc. Pl. & Pr. 286; Joerns v. LaNicca, 38 N. W. 129.

The excuse for default is sufficient. Worth v. Wetmore et al., 54 N. W. 56.

Where an application is seasonably made, decision can be made after time. Minnesota Thresher Mfg. Co. v. Holtz, 10 N. D. 16, 84 N. W. 581; 6 Enc. Pl. & Pr. 198, 199; Wolff v. Can. Pac. Ry Co., 26 Pac. 825; Conkling v. Johnson, 34 Iowa, 286; Vandenberg v. New York, 5 N. Y. Sup. 664; Hatch v. Central National Bank, 78 N. Y. 487; Allen v. Ackley, 4 How. Pr. 5.

YOUNG, J. The plaintiff has appealed from an order vacating a judgment in an action to quiet title and permitting one Ethel May Southard to appear and defend. The action was brought under chapter 5, p. 9, Laws of 1901. The summons was served by publication and named as defendants, "Usher D. Shafer, Syl-

vester Conkling, Mary E. Conkling, Mortgage Bank & Investment Company, a corporation, A. B. Guptill, as receiver of the Mortgage Bank & Investment Company, a corporation, Mary F. Howard, and all other persons unknown, claiming any estate in or lien or incumbrance upon the property described in the complaint, and their unknown heirs." The moving papers show that the abovenamed Mary F. Howard died in Parksville, Mo., on April 20, 1890, and that the respondent, Ethel May Southard, is her sole heir. The action was commenced on February 28, 1903. Judgment was entered on September 29, 1903, quieting title in the plaintiff against all adverse claims of the defendants and all persons claiming through or under them. The respondent was not named in the summons and was not served, unless the description "unknown heirs" in the published summons was sufficient to give jurisdiction. On September 29, 1904, which was just one year from the date of entry of judgment, she procured an order to show cause why the judgment should not be set aside as to her and she be permitted to defend. The order was returnable on October 8, 1903. Her moving affidavit and proposed answer show that Mary F. Howard, who is named in the summons as one of the defendants, was the owner of the land in question at the time of her death; that the applicant is her sole heir, and is now the owner of the fee, and has a good defense to the action. On the return day, to wit, October 8, 1904, and more than one year after the entry of the judgment, of the trial court, after considering the affidavits submitted in support of and in opposition to the motion, made the order from which this appeal was taken.

The plaintiff urged (1) that the court had no power to open the judgment after one year; (2) that the applicant had not sufficiently excused her default; and (3) that her affidavit of merits was not sufficient. The same objections are urged in this court as grounds for reversal. None of these several questions need be considered. They are all based upon the assumption that chapter 5, p. 9, Laws of 1901, to the extent that it attempts to confer jurisdiction over "unknown heirs" by thus designating them in the published summons, is valid. Since this case was submitted the validity of that portion of the act was before us in Fenton v. M. T. & F. Co., 109 N. W. 363, and we held that as to persons not named in a summons published under the authority of that act the proceedings did not constitute "due process of law," and that a judgment so

rendered is void as to those who are not named or personally served and do not appear. The decision in that case is controlling. As to the applicant in this case, the judgment was void. Judgment having been entered without jurisdiction, the statutory limitation of one year for applying for relief has no application. She was in no respect in default, and was not subject to the statutes and rules which apply in such cases. Freeman v. Wood, 11 N. D. 1, 88 N. W. 721; Heffner v. Gunz, 29 Minn. 108, 12 N. W. 342; Magin v. Lamb, 43 Minn. 80, 44 N. W. 675, 19 Am. St. Rep. 216; Coughran v. Markley, 15 S. D. 37, 87 N. W. 2, Aetna Life Ins. Co. v. McCormick, 20 Wis. 265; Weatherbee v. Weatherbee, 20 Wis. 499. See, also, Yorke v. Yorke, 3 N. D. 343, 55 N. W. 1095, and Phelps v. McCollam, 10 N. D. 536, 88 N. W. 292.

The record in this case shows that as to the applicant for relief the judgment was void. The order vacating was therefore properly made and must be sustained. Such will be our order. All concur.

(108 N. W. 487.)

FREDERIK RASMUSSEN v. W. C. HAGLER.

Opinion filed June 20, 1906.

Confession of Judgment Under Warrant of Attorney.

1. A warrant of attorney to confess judgment without process must be clear and explicit, and must be strictly pursued.

Same — Term of the Warrant Must Be Strictly Followed.

2. A warrant of attorney to confess judgment in favor of a particular person, who is designated therein, gives no authority to confess judgment in favor of another person, and a judgment so rendered is without authority and jurisdiction, and is void.

Quieting Title — Execution Sale on Void Judgment.

3. It is *held*, in an action to determine adverse claims, that the trial court did not err in quieting plaintiff's title against the defendant, who purchased the premises at an execution sale on an alleged judgment by confession which was entered in favor of a person not within the terms of the confession.

Appeal from District Court, Wells county; *Burke*, J.

Action by Frederik Rasmussen against W. C. Hagler. Judgment for plaintiff, and defendant appeals.

Affirmed.

Scott Rex, for appellant.

The confession is good under statute and authorities. Kendig v. Marble, 12 N. W. 584; Brown v. Barngrover, 47 N. W. 1082; Dullard v. Phelan, 50 N. W. 204; Briggs v. Yetzer, 72 N. W. 647; Atwater v. Bank, 48 N. W. 187.

The attack upon the judgment is collateral, and nothing short of a fatal jurisdictional defect appearing on the face of the record will avail defendant. XVII Enc. Law, 1042, note 6; Morse v. Presby, 25 N. H. 299, 303; Purcell v. Farm Land Co., 100 N. W. 700; Mach v. Blanchard (S. D.) 90 N. W. 1042; Nichols & Shepard Co. v. Paulson, 10 N. D. 440; State v. Cloudt, 84 S. W. 415.

The court having power to render judgment in the matter submitted, it matters not how irregular or erroneous the judgment may be. Purcell v. Farm Land Co., 100 N. W. 700, 702.

The confession of judgment may have been duly assigned by express consent of Pifer and the court will assume that competent proof was present, if necessary to sustain the judgment. Joy v. Elton, 83 N. W. 875, 881; Sacramento Bank v. Montgomery, 81 Pac. 138; Bush v. Hanson, 70 Ill. 480.

S. E. Ellsworth, for respondent.

A confession of judgment given by warrant of attorney to confess judgment, must be clear and explicit, and strictly pursued. Gardner v. Bunn, 23 N. E. 1072; Utah Nat. Bank v. Sears, 44 Pac. 832; Spencer v. Emerine, 21 N. E. 866; Weber v. Powers, 72 N. E. 1070; Howell v. Gilt Edge Mfg. Co., 46 N. W. 704; National Exchange Bank v. Wiley, 92 N. W. 582.

Where a reasonable question arises as to whether a judgment by confession was entered strictly in accordance with the terms of the confession it will be held null and void. Howell v. Gilt Edge Mfg. Co., 49 N. W. 704; Gardner v. Bunn, 23 N. E. 1072; Reid v. Southworth, 36 N. W. 866; Sloan v. Anderson, 25 N. W. 21; First Natl. Bank v. Cunningham, 48 Fed. 510; Weber v. Powers, 72 N. E. 1070.

It may be collaterally attacked. Weber v. Powers, supra; Utah Nat'l Bank v. Sears, 24 Pac. 832; Howell v. Gilt Edge Mfg. Co., supra; Gardner v. Bunn, supra; Reid v. Southworth, supra; Weber v. Powers, supra; National Exchange Bank v. Wiley, supra.

The defects in question affect the jurisdiction both as to person and subject matter and may be collaterally attacked. Thornilly v.

Prentice, 96 N. W. 728; Banking House v. Dukes, 97 N. W. 805; Aldrich v. Steen, 100 N. W. 311, 17 Am. & Eng. Enc. Law (2d Ed.) 1046, and cases there cited under note 2.

YOUNG, J. This is an action to determine adverse claims to certain real estate situated in Wells county, of which the plaintiff alleges he is the owner. The land in controversy was owned by one John Pifer on April 20, 1901, and he is the common source of the title and interest claimed by the parties to this action. The plaintiff holds under a warranty deed executed on October 26, 1901, by Pifer and wife, and recorded on the 29th of that month. The defendant's claim rests upon a purchase of the premises on April 5, 1904, at an execution sale under an alleged judgment in his favor and against John Pifer and wife, plaintiff's grantors. The judgment against the Pifers was for $905.49, and was entered in McHenry county on July 26, 1900, upon their written confession dated September 30, 1890. On August 8, 1900, a transcript of the alleged judgment was filed in Wells county, where the land in question is situated. On February 20, 1904, an execution was issued from McHenry county, directed to the sheriff of Wells county, pursuant to which a levy was made and the premises were sold to the defendant as above stated. At the trial, counsel for plaintiff objected to the admission in evidence of all proof of the confession of judgment and judgment and all papers connected therewith, and to all subsequent proceedings, upon the ground that it appeared from the judgment roll that the court was without authority to enter judgment, and that it was entered without jurisdiction and is void upon its face. The case was tried under section 5630, Rev. Codes 1899 (section 7229, Rev. Codes 1905), and pursuant to the provisions of that section all evidence offered was received. The trial court found that the judgment was void, that defendant acquired no interest in the premises under his alleged purchase at the execution sale, and quieted title in the plaintiff. The defendant has appealed from the judgments, and demands a review of the entire case in this court.

The propriety of the judgment in this action depends upon the correctness of the conclusions of the trial court in reference to the defendant's judgment against the Pifers. His counsel contends that it is valid, or at least that it was rendered with jurisdiction, and is merely irregular, and is therefore not subject to collateral attack. Counsel for plaintiff contends, on the other hand, that

it is void for jurisdictional reasons. The solution of this question requires a reference to the statutory requirements relating to judgments by confession, and to the statement or confession upon which the judgment in question was entered. Section 6130, Rev. Codes 1899, authorizes the entry of a judgment by confession, for money due or to become due, in the manner provided in sections 6131 and 6132. Section 6131 provides that "a statement in writing must be made, signed by the defendant and verified by his oath, to the following effect: (1) It must state the amount for which judgment may be entered, and authorize the entry of judgment therefor. (2) * * * (3) * * *" Section 6132: "* * * The statement must be presented to the district court or a judge thereof, and if the same is found sufficient, the court or judge shall make an order that judgment be entered by the clerk, whereupon the statement and order may be filed in the office of the clerk who shall enter in the judgment book a judgment for the amount confessed, with costs. The statement and affidavit with the judgment shall thenceforth become the judgment roll. Execution may be issued and enforced in the same manner as upon judgments in other cases in such courts * * *" It will be noted that the judgment roll consists of the statement and affidavit and judgment. The statement and affidavit, which is a part of the judgment roll in the case, is as follows:

"State of North Dakota, County of McHenry—ss.:

"Know ye that John Pifer, of McHenry county, in the state of No. Dakota, being indebted to the Bank of Minot (a corporation under laws of Dakota) in the sum of five hundred ninety-eight and 50-100 dollars, for an actual loan of money, for which aforesaid note was given to said Bank of Minot, to be paid at the time and times specified aforesaid, I, John Pifer, do hereby waive the issuing and service of summons and hereby confess a judgment against me, John Pifer, * * * as defendant in favor of the Bank of Minot, of Minot, Dakota, as plaintiff, for the sum of five hundred ninety-eight and 50-100 dollars aforesaid, and do hereby authorize the clerk of the district court in and for the county of McHenry and state of No. Dakota to enter up judgment in due and legal form against me, * * * John Pifer, * * * for the aforesaid amount, with all costs incident and pertaining to this confession of judgment, including one hundred dollars as attorney's fees, in accordance with the terms of said mortgage, and interest

from date at twelve per cent per annum; and I, the said John Pifer, * * * do solemnly swear that the above statement is true and correct in every essential particular, and that the above stated and aforesaid amount is now or to be justly due said plaintiff for the cause aforesaid.

"Catherine Pifer,
"John Pifer.

"Sworn, subscribed to, and acknowledged before me this 30th day of September, A. D. 1890. James M. Pendroy, Notary Public. [Notary's Seal.]"

Certain other papers were introduced. One of them is an agreement signed by Pifer and wife, in which they acknowledge having executed a note to the Bank of Minot for $598.50, describing it, and secured by a mortgage, and bind themselves to certain collateral agreements in reference to the payment of interest, taxes and attorney's fees. This document precedes and is apparently attached to the "statement and affidavit" above quoted. Another paper is an affidavit of W. C. Hagler, dated July 25, 1900, in which he swears "that he is the owner and holder of a certain confession of judgment made by John Pifer and Catherine Pifer, on the 30th day of September, A. D. 1890, to the Bank of Minot; * * * that there is due and unpaid upon the notes * * * described in the said confessions of judgment the sum of $905.49; * * * that the annexed confession of judgment and notes were duly sold and assigned to the affiant who still holds the same. * * *" The order for judgment and alleged judgment is as follows: "The annexed statement and confession of judgment, together with the foregoing affidavit and notes, having been presented to me, and the said statement and confession of judgment having been found sufficient and satisfactory: Now, therefore, it is hereby ordered that said judgment be filed, entered and docketed by the clerk of the district court of the county of McHenry, state of North Dakota, for the sum of nine hundred and five and 49-100 dollars, the amount shown to be due at the date hereof, for which judgment is hereby rendered, together with clerk's fees for the entry thereof, and that said judgment be docketed in favor of W C. Hagler, to whom the same has been duly assigned. Dated July 27th, 1900. * * *" The defendant also offered the docket entries from the clerk of the court's office, in both McHenry and Wells counties.

Counsel for plaintiff contends that the alleged judgment is a nullity for the following reasons: (1) That the confession of judgment in favor of the Bank of Minot and above set out did not give jurisdiction or authority to enter judgment in favor of W. C. Hagler; (2) that "the statement and affidavit" was insufficient under the statute; and (3) there was no entry of a judgment, and that the entry of the above order does not constitute a final judgment. The first of the above contentions is the only one we need consider. It will be seen by referring to Pifer's written statement and affidavit that he confessed judgment "in favor of the Bank of Minot" and authorized the entry of judgment in favor of the Bank of Minot for the amount due upon the note therein referred to. Conceding the sufficiency of the statement in other respects, this gave the Bank of Minot authority to have judgment entered in its favor for the amount stated in the confession. But the question is, did it give authority for the entry of judgment in favor of Hagler? We are agreed that it did not. It is well settled that the authority to confess judgment without process must be clear and explicit, and must be strictly pursued. Under this rule it has been held that a warrant of attorney given by two persons and authorizing the entry of judgment against them will not authorize the confession and entry of judgment against one of them alone. Hunt v. Exec., 8 N. J. Law, 336; 14 Am. Dec. 427; The M. & M. Bank v. St. John, 5 Hill (N. Y.) 497. The judgment must be against the two jointly. The reason for this is that such only was the judgment authorized by the persons creating the power. For the same reason it has been held that a warrant of attorney by the maker of a promissory note which authorizes the confession of a judgment in favor of the payee, does not authorize the entry of judgment in favor of one to whom the note has been transferred. Osborn v. Hawley, 19 Ohio, 130; Spence v. Emerine, 46 Ohio St. 433, 21 N. E. 866, 15 Am. St. Rep. 634; Patterson v. Pyle (Pa.) 17 Atl. 6; Nat. Exch. Bank v. Wiley (Neb.) 92 N. W. 582. The statement of facts in Cross v. Moffat, 11 Col. 210, 17 Pac. 771, cited by counsel for appellant, is so meager that we are unable to determine to what extent, if at all, that case is an authority for a contrary rule.

Cases will be found where judgments by confession in favor of persons other than the payee have been sustained. In such cases it will be found that the warrant of attorney authorized the confession in favor of "the holder of the note" as in Richards v.

Barlow, 140 Mass. 218, 6 N. E. 68, or "their assigns" as in Holmes v. Bemis, 124 Ill. 453, 17 N. E. 42, but see Marsden v. Soper, 11 Ohio St. 503. The reason for sustaining such judgment is that they are within the terms of the power. In the case at bar no such general authority was given. The makers of the note delegated the power to cause a judgment to be entered in favor of the Bank of Minot. We cannot hold that it authorized the entry of judgment in favor of another without reading into the written statement and affidavit provisions which the party making it withheld. This we cannot do. The confession confers no further authority than is given in express language, and that is to confess judgment in favor of the Bank of Minot. It furnished no authority whatever for the entry of a judgment in favor of the defendant, Hagler. It was not a mere irregularity or error of law to enter judgment in favor of Hagler. The only authority given was to enter judgment in favor of the Bank of Minot. This want of authority appears affirmatively upon the judgment roll. The statement and affidavit upon which the judgment rests is a part of the judgment roll and shows that the judgmnet was entered without authority and without jurisdiction. The presumption of jurisdiction, which arose from the recitals in the judgment, is overcome by the statement and affidavit. Adams v. Cowles, 95 Mo. 501, 8 S. W. 711, 6 Am. St. Rep. 74. The want of jurisdiction thus appearing upon the judgment roll, the judgment was open to collateral attack. It follows from the views already expressed that the trial court did not err in holding the judgment void, and in quieting the plaintiff's title as against the defendant's purchase at the execution sale.

Judgment affirmed. All concur.

MORGAN, C. J., being disqualified to sit in this case, C. J. FISK, judge of the First judicial district, sat in his place.

(108 N. W. 541.)

PRESTON GARLAND v. F. B. KEELER.

Opinion filed June 21, 1906.

Directing Verdict — Renewal of Motion at Close of All Testimony.

1. Error in denying a motion to direct a verdict is waived, unless the motion is renewed after the taking of evidence is closed.

Sale — Article Satisfactory to Purchaser.

2. Where a machine is taken on trial, to be paid for if it does work satisfactory to the purchaser, there is no sale if the purchaser is in fact not satisfied with the work done by the machine, although it does work that other persons might deem satisfactory.

Same — Dissatisfied in Good Faith.

3. In such cases the purchaser must be dissatisfied in good faith, and not pretend to be so on selfish or dishonest grounds.

Appeal from District Court, Foster county; *Burke,* J.

Action by Preston Garland against F. B. Keeler. Judgment for plaintiff. Defendant appeals.

Reversed and remanded.

T. F. McCue, for appellant.

Where the agreement is that machine shall work to the purchaser's satisfaction, he is the sole judge and he need only show that his claim was made in good faith. Wood Machine Co. v. Smith, 15 N. W. 906; Piano Mfg. Co. v. Ellis, 35 N. W. 841; Silsby Mfg. Co. v. Chicago, 24 Fed. 893; Goodrich v. Van Nortwich, 43 Ill. 445.

J. W. White and *C. B. Craven,* for respondent.

Exceptions to charge must be specific. Hedlun v. Holy Terror Min. Co., 92 N. W. 31.

MORGAN, C. J. Plaintiff sues for the purchase price of a King harvesting machine, alleged to have been sold and delivered to the defendant. The machine was sold by the plaintiff as agent for the Acme Machine Company. The answer denies that the harvester was sold to him, and alleges that it was delivered to him for trial, and if it worked to his entire satisfaction that he was to pay $200 for it, and if it failed to work to his entire satisfaction that he was not to receive it, but was to return it. He alleges that it failed to work satisfactorily and that he returned it to plaintiff. A trial to a jury resulted in a verdict for the plaintiff for the full amount claimed. Defendant moved for a new trial upon a settled statement of the case, and the motion was denied. Judgment was entered on the verdict, and defendant has appealed from the same and from the order denying the motion for a new trial.

The specifications refer to alleged errors in the admission and exclusion of testimony and the instructions given to the jury. De-

fendant also made a motion for a directed verdict at the close of plaintiff's case, and the overruling of the same is assigned as error. The motion was not renewed when the taking of testimony closed. Hence the right to claim error in denying the motion was waived. The issues under the pleading are whether there was a sale of the machine, and whether the machine was taken on trial and failed to work satisfactorily to the defendant. There is no contention that there was an express warranty of the quality of the machine or that it would do good work. It is claimed in this court by the defendant that, if the evidence shows a sale, the law implies that there was a warranty that the machine was fit for the purposes for which it was intended, and that the defendant is not entitled to avail himself of the implied warranty. No such contention was brought to the attention of the trial court in any way whatever. It is too late to raise the question for the first time on appeal, even if conceded to have any merit. Whether the contract was one of sale or a contract for sale after trial with the privilege of returning the machine if it did not work satisfactorily, was a matter of dispute. The evidence is ample to sustain the plaintiff's contention that the machine was unconditionally sold to the defendant. Hence, the verdict cannot be disturbed on the ground that it is not sustained by the evidence on that issue.

The following instruction was excepted to: "If you find that he [defendant] made some agreement not amounting to a sale, and yet looked to a sale in the event that the machine should prove satisfactory to a reasonable man, then you will decide whether or not this machine from the evidence, was such a machine as would satisfy an ordinary man." As stated before, the defendant alleged that the machine was taken on trial, and if it did not work to his entire satisfaction, that no purchase was to be made, and the machine was to be returned. The defendant testified that: "I told him (the agent) that I knew nothing of this machine, and I would not buy one of them under any consideration, without taking them on trial and my approval. Mr. Roller then told me I could have one on trial any length of time I wished until I became satisfied that it did better work than any similar machine I could buy. I told him that was fair enough, and if the machine proved satisfactory to me I would come to town, and buy it and pay $200 cash. He told me I could take the machine." In view of this testimony, it is our opinion that the jury should have been in-

structed upon the defendant's theory of the agreement. Under the defendant's evidence, the machine was taken on trial and if it failed to work satisfactorily to him there was no sale. Parties have the undoubted right to make their own contracts, and their rights are to be determined under their contracts as actually made. Courts have no right to add conditions to the contracts made. Defendant had the right to return this machine if it did not work to his satisfaction. That does not mean that the defendant must be satisfied if an ordinary man would be satisfied with the machine. To so instruct the jury was erroneous and prejudicial, as they may have found for the plaintiff because they found that the machine did work that would have been satisfactory to a reasonable and ordinary man. The contract under defendant's theory was not that he would buy the machine if, after trial, it did work that would be satisfactory to a reasonable or ordinary person. The work was to be satisfactory to him. Meechem on Sales, section 665, lays down the rule as follows: "In such cases, if the vendee is, in fact, not satisfied, there is no sale. It is not enough that he ought to be satisfied, or that the article would be satisfactory to a reasonable man, or that the court or jury shall deem the article satisfactory. The contract is that the article shall be satisfactory to the vendee himself, and not to some one else." In Machine Co. v. Okerstrom, 114 Iowa, 260, 86 N. W. 284, it was said: "In such a case, he is the sole judge whether the article is satisfactory or not, and if he is not satisfied, he is not bound to accept the article, although as a matter of fact, he ought to have been satisfied therewith." See, also, Exhaust Ventilator Co. v. C., M. & St. P. Ry. Co., 66 Wis. 218, 28 N. W. 343, 57 Am. Rep. 257; Parr v. Northern El. Mfg. Co., 117 Wis. 278, 93 N. W. 1099; Haney-Campbell Co. v. Preston Creamery Ass'n, 119 Iowa, 188, 93 N. W. 297; Pierce v. Cooley, 56 Mich. 552, 23 N. W. 310; Howard v. Smedley, 140 Pa. 81, 21 Atl. 253; Silsby Mfg. Co. v. Town of Chico (C. C.) 24 Fed. 893; Mfg. Co. v. Brush, 43 Vt. 528; Baltimore & Ohio Ry. Co. v. Brydon, 65 Md. 198, 611 3 Atl. 306, 9 Atl. 126, 57 Am. Rep. 318; Brown v. Foster, 113 Mass. 136, 18 Am. Rep. 463. It is not to be understood that a person having an option under such a contract may pretend that he is not satisfied when in fact he is satisfied. In other words, the party must be actually and in good faith dissatisfied. It is the fact of actual dissatisfaction that relieves him from paying for the article, and not the fact that he says that he is dissatisfied. He must act

honestly, and not pretend to be dissatisfied from selfish or other unworthy motives.

The judgment is reversed, a new trial granted, and the cause remanded for further proceedings. All concur.

(108 N. W. 484.)

JOHN SILANDER v. A. J. GRONNA.

Opinion filed June 21, 1906.

Contracts — Consideration — Compromise Is Possible Only Where Dispute Exists.

1. Before a compromise between parties to a contract becomes a sufficient consideration for a promise, there must be a dispute between the parties as to some question.

Contracts — Validity.

2. A promise to pay money under a void contract is not enforceable.

Homestead — Wife's Concurrence in Contract of Sale.

3. A contract by a husband for the sale of the homestead of himself and wife is void, and an action against him for damages for its breach cannot be maintained.

Contracts — Mistake of Law.

4. A contract in form entered into by parties under a mutual mistake of law is not enforceable.

Evidence — Dispute.

5. A finding of the trial court examined, and *held* not to show a dispute arising between the parties as to their rights under a contract.

Appeal from District Court, Nelson county; *Fisk*, J.

Action by John Silander against A. J. Gronna. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Fred A. Kelley and *Scott Rex*, for appellant.
Frich & Kelley and *Tracy R. Bangs*, for respondent.

Failure of wife to join in contract for sale of homestead renders it unenforcible, and bars claim for damages. Weitzner v. Thingstad, 56 N. W. 817.

Where parties to a compromise suppose that they are settling a valid claim, this is sufficient. Hansen v. Gaar Scott & Co., 65 N. W.

254. Disputes based on questions of law are subjects of compromise. Pom. Eq. Jur. section 894; 1 A. and E. Enc. Law, 420.

The law favors a compromise and settlements. 8 Enc. 510; Am. & Eng. Enc. 711; McGlynn v. Scott, 4 N. D. 18, 58 N. W. 460; Daly v. Busk Tunnel Ry. 129 Fed. 513.

An agreement to settle and forbear a suit, where there is no legal cause of action is void. Melchoire v. McCarty, 31 Wis. 252; Everingham v. Meighan, 55 Wis. 354; Read v. Hitchings, 71 Me. 594; Bunnell v. Bunnell, 64 S. W. 425; Moon v. Martin, 23 N. E. 669.

MORGAN, C. J. Plaintiff brought this action for an accounting and for the release and cancellation of certain mortgages and liens held by the defendant upon his real estate. The defendant answered and set forth all his mortgages, liens, claims and promissory notes against the plaintiff. After a trial the district court made findings of fact and conclusions of law, in defendant's favor. The plaintiff did not perfect an appeal from such judgment. The trial court disallowed a certain claim of $75, which the defendant contended should have been allowed as a valid claim in his favor, and against the plaintiff. The facts in regard to that item are set forth in the following findings of fact made by the trial court on its own motion: "That there was included in the note last aforesaid the sum of $75, which sum plaintiff agreed to pay defendant Gronna in consideration of his releasing him from all liability under and the cancellation of a certain written contract, theretofore and in December, 1902, entered into between plaintiff and said defendant, whereby plaintiff had agreed to sell and convey to said defendant the real property described in finding 3, and which sum was accepted by the said defendant in full cancellation of said contract, and in full release of plaintiff from all liabiity thereunder; that at the time said contract was entered into, plaintiff was a married man and the head of a family, which fact was not known to said defendant, and that at said time said real property was the homestead of plaintiff; that the parties at the time it was agreed between them that plaintiff should be released from all liability under said contract and the said contract canceled in consideration of said $75 so to be paid and included in said note, did know that as matter of law, said contract was void; that both parties acted in said matter in good faith. Save only as hereinbefore found, the said note was given for a full and adequate valuable consideration."

The defendant appealed from the judgment and asks to have the judgment modified to the extent only of allowing that item in his favor. No statement of the case was settled. The facts stated in the finding must therefore be taken as true and proven. There is no dispute as to the facts, but it is defendant's contention that the conclusion of law that defendant is not entitled to have the item of $75 allowed in his favor is not sustained by the facts found. The pivotal question to be considered is whether there was a valid consideration between the parties for plaintiff's promise that he would pay defendant $75 for a release of the contract for the conveyance of plaintiff's land to the defendant. Plaintiff contends that the contract was void and made under a mutual mistake of law. Defendant contends that the promise was based on a valid consideration arising out of the compromise of a disputed question between the parties. It is conceded that if the finding shows a compromise of a disputed question, which arose in good faith between the parties, there was a valid consideration. Does the finding show that there was a compromise of a disputed question actually and in good faith existing between the parties? The language of the finding will not warrant any such conclusion. There is nothing in the finding from which a conclusion that there was a dispute between the parties can be drawn. That there must be a bona fide dispute as to some question before the principles of law pertaining to compromises become applicable is well settled. McGlynn v. Scott, 4 N. D. 18, 58 N. W. 460; Fryer v. Cetnor, 6 N. D. 518, 72 N. W. 909; Greenlee v. Mosnat, 116 Iowa, 535, 90 N. W. 338; Hansen v. Gaar Scott Co. (Minn.) 65 N. W. 254; Dolcher v. Fry, 37 Barb. (N. Y.) 158; Moon v. Martin (Ind. Sup.) 23 N. E. 669; Gray v. U. S. Savings & Loan Co. (Ky.) 77 S. W. 200. A compromise can be made as a matter of law only when the parties disagree among themselves as to their respective rights. A promise to pay a certain sum as a release of a contract is not necessarily a compromise of a disputed right or question. It does not signify that the promise was made after the parties had yielded a part of their claims and mutually agreed that payment of that sum was agreed upon as a settlement of the dispute. There is nothing in the language of the finding that is inconsistent with the fact that each one of the parties agreed that $75 actually represented defendant's damage in surrendering the contract, and plaintiff's benefit from such surrender. The finding does not show that the parties

considered that there was any dispute or doubt as to their respective rights under the contract. It shows a promise to pay $75 in consideration of a release of a contract, and shows nothing more as to the reasons existing for these promises. To compromise a dispute is to adjust it by mutual concessions. Each party to the dispute must yield something. 2 Words & Phrases, p. 1374, and cases cited. The $75 item which was included in the note was not based upon any consideration, upon the theory that there was a compromise of a disputed claim so far as the finding shows. The plaintiff agreed to sell the homestead of himself and wife. The wife did not join in the written contract for sale. The fact that she did not execute the contract rendered the contract of no validity so far as a conveyance of the homestead is concerned. Section 3608, Rev. Codes 1899 (section 5052, Rev. Codes 1905); Helgebye v. Dammen, 13 N. D. 167, 100 N. W. 245.

It is conceded by counsel for both parties that such a contract is not valid for any purpose, and will not sustain an action against the husband for damages for its breach. It was a void contract and imposed no legal obligations upon the husband. Counsel for appellant does not claim that the contract had any validity for any purpose except as a basis for a binding compromise. The authorities sustain the contention that damages cannot be recovered against the husband upon his contract to convey the homestead of himself and wife. The reason is that the contract is void and if damages were recoverable upon such a contract it would indirectly tend to defeat the object of the statute requiring the signature of the wife before the homestead can be conveyed or incumbered. Waples on Homestead and Exemptions, p. 384; Weitzner v. Thingstad (Minn.) 56 N. W. 817; Hedges & White v. Farnham, 49 Kan. 777, 31 Pac. 606; Cowgell v. Warrington, 66 Iowa 666, 24 N. W. 266; Donner v. Redenbaugh, 61 Iowa 269, 16 N. W. 127. A promise to pay money to release such a contract is without any consideration whatever. The trial court also found that both parties were mistaken as to the legal effect of the contract, and did not know that the contract was void. Section 3843, Rev. Codes 1899 (section 5288, Rev. Codes 1905), provides that an apparent consent is not real or free when obtained through mistake. Section 3854 (section 5299, Rev. Codes 1905) provides that a mistake of law is a "misapprehension of the law by all parties, all supposing that they knew and understood it, and all making sub-

stantially the same mistake as to the law." The parties did not consent to the contract of release, and neither is bound by it as a matter of law. Arnett v. Smith, 11 N. D. 55, 88 N. W. 1037; Pomeroy, Eq. Juris. vol. 2, section 846; Rued v. Cooper, 119 Cal. 463, 51 Pac. 704. The trial court did not err in refusing to find that the $75 item was due from the plaintiff under the contract.

The judgment is affirmed. All concur.

(108 N. W. 544.)

JOHN MURPHY AND JAMES MURPHY v. JOHN C. FOSTER.

Opinion filed June 21, 1906.

Appeal — Review — Record.

On an appeal from a judgment, the action of the trial court in directing a verdict in favor of a party cannot be reviewed in this court, unless a statement of the case is settled, containing the evidence on which the verdict was directed.

Appeal from District Court, Steele county; *Fisk*, J.

Action by John Murphy and James Murphy against John C. Foster. Judgment for defendant, and plaintiffs appeal.

Affirmed.

W. J. Courtney, for appellants. *C. S. Shippey*, for respondent.

MORGAN, C. J. Action upon a promissory note given for the purchase price of one Monarch self-feeder. Defendant alleged that the self-feeder was purchased under a warranty, that there was a breach of such warranty, that the machine was returned to plaintiff in pursuance of the terms of the warranty, and that the contract was thereby rescinded. The trial court directed a verdict for the defendant. Judgment was rendered on the verdict, and plaintiffs have appealed from the judgment.

The errors relied on for a reversal of the judgment are that the court erred in directing a verdict for the defendant, and that it erred in refusing to strike out certain evidence duly objected to. We cannot review the action of the trial court in reference to these questions. No statement of the case was settled. The abstract does not recite that a statement of the case was settled. In this case we have examined the original record on the appeal, and find that it fails to show a settlement of a statement of the case. The

trial court made a certificate in which it is recited that certain enumerated papers constitute the judgment roll, and among such papers the statement of the case is named. But such certificate in no way takes the place of a statement of the case. The errors complained of in this case do not appear upon the face of the judgment roll, and cannot be reviewed, in the absence of a settled statement of the case. Schomberg v. Long, 15 N. D. 506, 109 N. W. 332. Whether it was error to direct a verdict in favor of the defendant involves a consideration of all the material evidence taken at the trial, but such evidence cannot be examined until it becomes identified by a settled statement of the case and becomes a part of the judgment roll. Sanford v. Duluth & Dak. El. Co. 2 N. D. 6, 48 N. W. 434. There is nothing before us, therefore, to authorize a review of the errors complained of. The pleadings and the verdict sustain the judgment.

It follows that the judgment must be affirmed. All concur.

(109 N. W. 216.)

THE P. J. BOWLIN LIQUOR COMPANY, A CORPORATION, v. OTTO BEAUDOIN AND AUGUST BEAUDOIN, CO-PARTNERS AS BEAUDOIN BROTHERS.

Opinion filed June 23, 1906.

Sale — Order to Traveling Salesman — Acceptance.

1. Where an order for goods is received and transmitted to the seller by the latter's traveling salesman, who had no actual or ostensible authority to contract for a sale, but only to receive and transmit the orders of customers, there is no sale until the order is received and accepted by the seller.

Same — Place of Contract — Delivery to Carrier.

2. Where a merchant in this state orders goods of a merchant in another state. who there accepts the order and delivers the goods ordered to a carrier for transportation to the buyer at the latter's expense and risk, the sale is deemed to have been made in the state of the seller, in the absence of any evidence showing a contrary intent.

Same — Evidence — Witness' Conclusion Has No Probative Force.

3. In a case where the place of sale is directly in issue, testimony by a witness that he bought the goods at a given place from the seller's traveling salesman, who agreed to deliver them at that place, but not showing what was said and done, is merely the opinion of the witness as to the legal effect of the transaction, and has no

probative force as against evidence which showed that the salesman had no authority to make a sale and that the transaction was in legal effect a sale in another place.

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

Action by the P. J. Bowlin Liquor Company against Otto Beaudoin and August Beaudoin, doing business as Beaudoin Bros. Judgment for defendants, and plaintiff appeals.

Reversed.

S. L. Nuchols, for appellant.

Sales of intoxicating liquor are unlawful only when sold as a beverage. Rev. Codes 1899, section 7593. There is no presumption that the possession of intoxicating liquors is unlawful. State v. McMaster, 13 N. D. 58, 99 N. W. 58.

Delivery of goods to a carrier for the purchaser is a deliverv to the latter and title immediately vests in him. 21 Am. & Eng. Enc. (1st Ed.) 497-499. The sale takes place at the ploint where shipped. 21 Am. & Eng. Enc. (1st Ed.) 511; Tegler v. Shipman, 11 Am. Rep. 118; McIntyre v. Parks, 3 Met. 207; Whitson v. Stoddard, 8 Martin 95. Inadequate damages are grounds for new trial. Wolford v. Gold Mining Co. 63 Cal. 433.

J. E. Campbell, for respondent.

Where agent knows the purchaser's intention to illegally sell the goods bought the knowledge binds his principal, and the latter cannot recover the price of the liquors. Fisher v. Bennet, 56 Conn. 40; Louisville Second National Bank v. Curren, 36 Ia. 538; Samuel Bowman Distilling Co. v. Nutt, 34 Kan. 729; 17 Am. & Eng. Enc. Law (2d Ed.) 314.

ENGERUD, J. Plaintiff is a Minnesota corporation, engaged in the sale of liquor at wholesale. Its place of business is at St. Paul, Minn. The defendants were partners engaged in business at Mandan, N. D. The nature of their business is not disclosed. The plaintiff sold and delivered to the defendants, in October and December, 1904, three consignments of whisky. The aggregate purchase price of the three consignments was $307.75, no part of which has been paid. The plaintiff sues to recover said sum, alleging that the liquor was sold and delivered at St. Paul, Minn. The defendants claimed that the sales and deliveries all took place

in Mandan, and seek to escape liability on the ground that the transactions were unlawful. The trial court denied plaintiff's motion for a directed verdict, and instructed the jury that the only question of fact for them to decide was whether the sales took place in North Dakota or Minnesota, and, if they found the sales were made in North Dakota, the plaintiffs could not recover. The jury returned a verdict in plaintiff's favor for $99.50, the price of the first consignment. Plaintiff's motion for a new trial was denied, and judgment entered on the verdict. The plaintiff appeals, assigning as error, among other things, the denial of its motion for a directed verdict.

The first consignment consisted of a half-barrel of whisky, shipped from St. Paul to Mandan, at defendants' expense, on or about October 5, 1904, in response to a letter from defendants to plaintiff, reading as follows: "Ship us at once ½ barrel of Humboldt." The other two consignments were shipped in response to verbal orders given in Mandan to plaintiff's traveling agent, or solicitor, and by the latter transmitted by mail to plaintiff. This solicitor had no authority to contract or make sales in behalf of his principal. He was employed merely to solicit and receive orders and transmit them to the plaintiff, subject to the latter's approval. On receipt of the orders in question by the company in St. Paul, the orders were approved and the liquor was delivered to the railroad company at St. Paul for transportation to the defendants, at the latter's expense. The defendants admit receiving the liquor and paying the freight on each consignment. There is no evidence whatsoever that the defendants were engaged in the unlawful sale of liquor, or that there was any intent on their part, or on the part of plaintiff, to evade the prohibition laws of North Dakota. There were no special directions given by defendants as to manner of shipment, and the liquor was sent in the customary way. The liquors ordered were in St. Paul, and were delivered to the carrier there. The only evidence on the part of the defendants with respect to the place of sale was the following testimony of one of the defendants: "I bought some whisky at Mandan, N. D., from George C. Parker. He told me that he was traveling salesman for the P. J. Bowlin Liquor Company and he agreed to deliver the whisky at Mandan, N. D." The same statement was repeated with respect to the sale in December. This testimony is plainly nothing more than an expres-

sion of the witness' alleged opinion or conclusion as to the legal effect of his transaction with the plaintiff's traveling agent. It has no evidentiary force whatever touching the question in dispute.

It is wholly undisputed that the traveling salesman had no authority to make sales or agreements to sell. The defendants did not offer any proof as to what the salesman said or did. They rested their defense wholly on the general statement above quoted from the testimony. Under these circumstances, it is byond question that the sales must be held to have been made in St. Paul, where the orders were accepted and the liquors were delivered to the carrier for transportation. It is simply the ordinary case of an order for goods transmitted by the buyer to the seller through the latter's traveling solicitor. In such a case it is clear that there can be no sale until the order has been received and accepted by the seller. Up to that time it is a mere offer. Tegler & Co. v. Shipman, 33 Iowa 194, 11 Am. Rep. 118. The acceptance of the order took place in St. Paul, and in the absence of any competent evidence to the contrary it must be presumed that the sale contemplated delivery at the place where the goods were at the time of the sale. Rev. Codes 1899, section 3965 (section 5412, Rev. Codes 1905). Delivery to the carrier for transportation to the buyer presumptively passed the title to the latter, and the transportation was at the risk and expense of the buyer. Rev. Codes 1899, section 3968 (section 5415, Rev. Codes 1905); Benjamin on Sales (6th Ed.) section 362; Meechem on Sales, sections 736, 1175-1181.

The plaintiff was entitled to a verdict for the full amount of its claim. Its motion to that effect at the close of the evidence ought to have been granted, and tne refusal to do so was an error, which entitled it to a new trial.

Judgment reversed, and new trial ordered. All concur.

(108 N. W. 545.)

FRED GESSNER AND AMELIA GESSNER v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY.

Opinion filed June 23, 1906. Rehearing denied July 30, 1906.

Acknowledgment by Corporation — Form of Certificate.

1. Under the statutes of this state it is essential to an acknowledgment by a corporation that the acknowledgment shall show that the officer assuming to act for it in executing the instrument acknowledged that the corporation executed it.

Entry of Judgment Upon Arbitration and Award — Agreement for Submission — Acknowledgment.

2. To authorize the entry of judgment upon motion, as upon a statutory award under sections 7692 to 7712, inclusive, Rev. Codes 1905, the agreement for submission must be acknowledged by the parties thereto in the same manner as a conveyance of real property.

Same — Common Law Award.

3. A judgment entered upon motion upon an award which is invalid as a statutory award, cannot be sustained upon the ground that it is sufficient as a common-law award. Such awards are not enforceable by judgments entered upon motion, but by actions in which jurisdiction is acquired by the service of process.

Appeal from District Court, Bottineau county; *Goss*, J.

Action by Fred Gessner and another against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. From a judgment in favor of defendant, plaintiffs appeal.

Reversed.

Noble, Blood & Adamson, for appellants.

The statutory provision that the submission must be acknowledged in the same manner as a conveyance of real property is mandatory, and failure to observe it is fatal, and deprives the court of jurisdiction to affirm the award.

Berkland v. Johnson, 70 N. W. 388; Fink v. Fink, 8 Iowa, 313; Moody v. Nelson, 60 Ill. 229; Abbott v. Dexter, 6 Cushing, 108; Barney v. Flower, 7 N. W. 823; Gibson v. Burrows, 3 N. W. 200; Holdridge v. Stowell, 40 N. W. 259; Heath v. Tenney, 3 Gray, 380; Burghart v. Owen, 13 Gray, 300; Frankern Milling Co. v. Pratt, 101 Mass. 359; Darling v. Darling, 16 Wis. 675; Steel v. Steel, 1 Nev. 27.

L. W. Gammons, for respondent.

While the acknowledgment may be defective, yet appellant having alleged the submission to arbitration and the making and filing of an award, they are estopped to deny the submission. Sadler v. Olmstead, 44 N. W. 292.

It is the policy of the law to favor arbitration and every reasonable intendment will be indulged to give effect to proceedings. 3 Cyc. 586, and cases cited; Caldwell v. Brooks Elevator Co., 10 N. D. 575, 88 N. W. 700.

The proceedings amount to a good common law arbitration. Sawyer v. M'Adie, 38 N. W. 292; Sadler v. Olmstead, 44 N. W. 292; Thornton v. McCormick, 39 N. W. 502; Vincent v. Insurance Co. 94 N. W. 458.

YOUNG, J. The plaintiffs have appealed from a judgment entered upon defendant's motion upon an alleged statutory award of arbitrators. The matter in controversy is the amount of damages the plaintiff will sustain by reason of the construction by the defendant railway company of its road across the plaintiffs' land. The proceedings which resulted in the judgment were had under chapter 39 of the Code of Civil Procedure, being sections 7692 to 7712, inclusive, Rev. Codes 1905. Section 7692 authorizes all persons capable of contracting to submit to the decision of arbitrators any controversy which might be the subject of a civil action except the question of title of real property in fee or for life. Section 7693 reads as follows: "The submission to arbitration must be in writing and acknowledged by the parties thereto in the same manner as a conveyance of real property and may fix the time on or before which the award shall be made, and provide that judgment may be entered upon the award by the district court in and for a specified county." Other sections provide for the taking of an oath by the arbitrators before acting give them authority to fix a time and place for hearing, authority to secure the attendance of witnesses, to administer oaths, to adjourn, and to make an award and provide the manner in which it shall be executed and for its filing with the clerk of the district court. Section 7698 provides that: "Any party to the submission at any time within one year after the award is filed, and upon eight days' notice to the adverse party may move the court designated in the submission to affirm the award. * * *" Sections 7702 and 7703 provide for the entry of judgment when the award is affirmed. The arbitrators awarded the plaintiff damages in the sum of $1,060. The plaintiffs contested the affirmance of the award and the entry of judgment upon several grounds, chief of which, and the only one we will consider, is the alleged want of legal authority to make it. This is based upon the alleged legal insufficiency of the written agreement, under which the abitrators assume to act. It is as follows:

"Know all men by these presents, that this agreement made and entered into this 29th day of May, A. D. 1905, by and between

Fred Gessner and Amelia Gessner, his wife, party of the first part, and the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, party of the second part: Witnesseth that the said party of the first part hereby agrees with the party of the second part to submit the matter of the damages and the value of the land necessarily caused by the construction and building of the party of the second part's railway over and across the land owned by the party of the first part, being described as the southeast quarter of the southeast quarter of section fifteen (15) and the southwest quarter of the southwest quarter of section fourteen (14) all in township one hundred sixty (160), range seventy-nine (79). That the strip or parcel of land required by said second party shall be one hundred feet wide, running from the east side to the west side of said described land. And shall be submitted to a board of arbitration composed of the following named persons: R. H. Rafter, J. G. Kane, and Fred Wentlandt. That said arbitration shall be awarded by said board on the 29th day of May, 1905, and that the award made by said board of arbitrators may be entered as a judgment in the district court of Bottineau county, North Dakota, of the Eighth judicial district, and that said parties shall abide by the decision of said board of arbitration. Fred Gessner. Amelia Gessner. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., by Guy L. Scott, Agent. [Witness:] A. C. Russell. Adolph Buckholz.

"State of North Dakota, County of Bottineau—ss: On this 29th day of May, A. D. 1905, before me personally appeared Fred Gessner and Amelia Gessner, his wife, and Minneapolis, St. Paul & Sault Ste. Marie Railway by their agent, Guy L. Scott, known to me to be the persons who are described in and who executed the within instrument and acknowledged to me that they executed the same. Witness my hand and my official seal the day and year above written. A. C. Russell, Notary Public. [Seal]."

The award, which was signed, witnessed, acknowledged and filed, was as follows: "We, the undersigned board of arbitrators, being chosen according to law to award the damages caused by the construction of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company's railroad over and across the SE¼ of SE¼ of section fifteen (15) and the SW¼ of SW¼ of section fourteen (14) in township one hundred and sixty (160) of range seventy-

nine (79), said described land being owned by Fred Gessner, hereby award that the damages of said land in favor of Fred Gessner shall be ten hundred sixty and no-100 dollars; that the said amount shall be in full for all damages and the value of the land required by said railroad company for a strip of land 100 feet wide, extending across from the east side to the west side of said land as said railroad is now located and established."

Plaintiffs' counsel contend that the written agreement for submission was void and furnished no authority for an award under the statute for two reasons: (1) That it has not acknowledged by the defendant railway company; and (2) it did not definitely describe the land which the defendant proposed to take. We will consider only the first ground, the alleged absence of an acknowledgment by the defendant corporation. It will be seen by referring to the agreement that it was signed and acknowledged by the plaintiffs; also that one Guy L. Scott, who described himself as defendant's agent, signed it and acknowledged that he executed it. This is not an acknowledgment that the corporation executed it. Acknowledgments by corporations are governed by section 3584, Rev. Codes 1899 (section 5022, Rev. Codes 1905). This section provides that the officer executing an instrument for a corporation must acknowledge "that such corporation executed the same." A substantial compliance with this section is essential to the validity of the acknowledgment. The acknowledgment by Scott that he executed the instrument cannot take the place of an acknowledgment that the defendant corporation executed it. It is not necessary to consider the further contention presented by plaintiffs' counsel that there is no proof of Scott's authority to make the agreement to submit the question of damages to arbitration, for it is clear, conceding his authority, that this could be done only in the manner provided by statute; that is, through an instrument acknowledged by the corporation. An agreement executed and acknowledged in the manner provided by the statute is essential to the validity of a statutory award. Without it the provisions referring to the power of arbitrators and authorizing the court, without action and upon a mere motion to enter judgment upon the award, have no application. So far as the proceedings are statutory, the provisions of the statute must be complied with. Otherwise the arbitrators have no authority to act and the court is without jurisdiction to enter judgment. An award of arbitrators

cannot be enforced by the entry of judgment thereon summarily, unless it in all respects conforms to the statutory provisions authorizing it. Where it does not, it can be enforced, if at all, only by action. A want of acknowledgment such as exists in this case is a fatal jurisdictional defect, and will not sustain a judgment. And so the courts hold. Gibson v. Burrows (Mich.) 3 N. W. 200; Gallagher v. Kern, 31 Mich. 138; McGunn v. Hanlin, 29 Mich. 476; Barney v. Flower (Minn.) 7 N. W. 823; Fink v. Fink, 8 Iowa, 313; Abbott v. Dexter, 60 Mass. 108; Heath v. Tenney, 69 Mass. 380; Burghardt v. Owen, 79 Mass, 300; Burkland v. Johnson (Neb.) 70 N. W. 388. See, also, Darling v. Darling, 16 Wis. 644; Steel v. Steel, 1 Nev. 27; Low v. Nolte, 15 Ill. 368; Moody v. Nelson, 60 Ill. 229; Holdridge v. Stowell (Minn.) 40 N. W. 259. The judgment is this case is based wholly upon the alleged award. The plaintiff challenged its legality and opposed its affirmance and the right of court to enter judgment upon it. The contention that the trial court erred in holding that the written agreement was sufficient to give it jurisdiction to proceed as upon a statutory award must for the reason above stated be sustained and the judgment be set aside.

Counsel for defendant contends that, although the return of the arbitrators cannot be sustained as a statutory award, it can and should be sustained as a common-law award. Upon this we express no opinion. The question is not involved. The judgment appealed from rests upon an alleged statutory award entered upon motion. It is void because of the absence of jurisdiction. Jurisdiction to enter the judgment would not attach by showing that the award was good at common law. Such awards constitute causes of action enforceable by action in which jurisdiction is acquired by the service of process. There is no warrant of law for the entry of judgment on such awards by motion as in the case of awards made in pursuance of and under the authority of the statute.

Judgment reversed. All concur.

(108 N. W. 986.)

MARY J. NASH v. NORTHWEST LAND COMPANY, ET AL., PETER EHR AND DENNIS M. BROGAN AND MARGARET BROGAN, WILLIAM FLUMMERFELT AND MARY FLUMMERFELT, APPELLANTS.

Opinion filed June 25, 1906. Rehearing denied July 25, 1906.

Mortgage — Bidder at a Void Sale Equitable Assignee.

1. A sale under a void foreclosure of a real estate mortgage, where the premises have been bid in for the full amount of the debt, operates as an equitable assignment of the mortgage.

Same — Subsequent Conveyance by Purchaser at Void Sale.

2. All subsequent deeds by such purchaser or his grantees, purporting to convey the supposed title derived from such sale, have the same effect.

Same — Subsequent Purchase of Note and Mortgage.

3. One who purchases the note and mortgage after maturity from the original mortgagee after a void foreclosure acquires no right thereto as against one in possession of the premises, who by virtue of conveyances from the purchaser at the sale is an equitable assignee of such mortgage.

Same — Mortgagee in Possession.

4. Where such equitable assignee takes possession of the mortgaged premises with the express or implied consent of the mortgagor, he is to be deemed a mortgagee in possession.

Same — Adverse Possession.

5. A mortgagee in possession may hold adversely to the mortgagor.

Same.

6. When one who in good faith claims title under a void foreclosure sale takes possession of the mortgaged premises under such claim, but with the consent of the mortgagor, although he is deemed to be a mortgagee in possession, his possession is adverse to the mortgagor from its inception.

Same — Statute of Limitations.

7. Such adverse possession puts the statute of limitations in motion against the remedies of the mortgagor.

Adverse Possession — Acquisition of Title.

8. When an adverse possession of real property has continued for a sufficient length of time, so that all remedies of the owner to recover the land or enforce his rights are barred by the statute of limitations, such adverse possession operates to divest the former owner's title and vest it in the adverse occupant.

Same — Computation of Time — Successive Occupants.

9. Where the successive adverse occupants hold in privity with each other under the same claim of title, the time limited for maintaining an action may be computed by the last occupant from the date when the cause of action accrued against the first adverse possessor.

Remedy of Mortgagor.

10. The only remedy of the mortgagor against the mortgagee in possession while that relation continues is a suit in equity.

Statute of Limitations — Suit by Mortgagor.

11. The twenty-year limitation fixed by sections 5188, 5189, Rev. Codes 1899 (sections 6774, 6775, Rev. Codes 1905), does not apply to such suits.

Same.

12. The right to maintain such an equitable action by the mortgagor is limited by section 5207, Rev. Codes 1899, (section 6793 Rev. Codes 1905), to ten years from the time the cause of action accrued.

Adverse Possession — Title Acquired.

13. A title acquired, as in this case, by operation of the statute of limitations, is not a mere equitable right, but is a perfect legal title, which may be proved under a complaint alleging a fee-simple title in the form prescribed by the statute relating to actions to quiet title.

Appeal from District Court, Ward county; *Palda, jr.*, J.

Action by Mary J. Nash against the Northwest Land Company and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

McClory & Barnett, for appellants Brogan and Flummerfelt.

An equitable title cannot be proven under a pleading alleging an ownership in fee without setting up the facts constituting the equitable title. McClory v. Ricks, 11 N. D. 38, 88 N. W. 1042; Dever v. Cornwell, 10 N. D. 123, 86 N. W. 227; Finlayson v. Peterson, 11 N. D. 45, 89 N. W. 855; Hersey et al. v. Lambert, 52 N. W. 963; Stuart v. Lowry, 51 N. W. 662.

There can be no mortgagee in possession without the consent of the mortgagor. Rogers v. Benton, 38 N. W. 765; McClory v. Ricks, supra; Finlayson v. Peterson, supra; 1 Am. & Eng. Enc. Law (2nd Ed.) 817.

John E. Greene, for respondent.

Where a mortgagee is in possession of the mortgaged premises, with the consent, expressed or implied, of the mortgagor, until the mortgagor's right of redemption has been cut off by the statute against an action for an accounting and to redeem, such mortgagee becomes the owner of the legal title. Rogers v. Benton, 38 N. W. 765; Backus v. Burke, 65 N. W. 459; Houts v. Hoyne, 84 N. W. 773; Hubbell v. Sibley, 50 N. Y. 468; Russell v. Lumber Co. 48 N. W. 3. Mesne conveyances transfer the mortgage. Johnson v. Sandhoff, 14 N. W. 889; Cook v. Cooper, 7 L. R. A. 273; Russell v. Lumber Co. supra.

Where the mortgagor wholly abandons the premises, his consent to the mortgagee's possession is implied. Russell v. Lumber Co. supra; Cook v. Cooper, supra; Rogers v. Benton, supra.

ENGERUD, J. Plaintiff, claiming to be the owner in fee of the real property in controversy, which consists of two lots and buildings thereon in the city of Minot, brought this action to quiet her alleged title. The action was commenced in February, 1904. The complaint is in the form prescribed by chapter 5, p. 9, Laws of 1901 (section 7522, Rev. Codes 1905). The defendants Brogan and Flummerfelt answered, denying plaintiff's title to one of the lots (lot 10 of block 3 of the original townsite of Minot), and alleging title in themselves. The defendant Peter Ehr in his answer alleges that he is the assignee and holder of a mortgage upon said lot 10 executed by defendants Brogan and Flummerfelt, who, he alleges, were at the time of executing the mortgage, and still are, the owners of the said lot 10, and he prays foreclosure of the mortgage. No other defendants appeared. There was a trial to the court without a jury, resulting in a judgment quieting the title in plaintiff as prayed for in the complaint. The defendants Brogan and Flummerfelt and Peter Ehr appeal from the judgment and demand a retrial of all the issues; a statement of the case having been duly settled for that purpose.

The facts developed by the evidence are as follows: On April 1, 1889, defendants Dennis M. Brogan and William Flummerfelt were the owners of said lot 10 of block 3 of the original townsite of Minot. They held the fee-simple title as tenants in common. On that day they executed and delivered to the Bank of Minot, a banking corporation, a mortgage of said property to secure the

payment of a promissory note made by them that day to the said Bank of Minot, for the sum of $2,100 and interest from its date at 8 per centum per annum, payable semi-annually. The interest payments were evidenced by coupons attached to the principal note. The principal note was due April 1, 1894. In May, 1890, said Bank of Minot, claiming that there was a default by the mortgagor authorizing a foreclosure, instituted proceedings to foreclose the mortgage by advertisement under the power of sale therein contained. The sale under these proceedings was made by the sheriff of Ward county on May 31, 1890, the Bank of Minot being the purchaser for the full amount of the debt. A certificate of sale was executed to said bank and recorded. After the year for redemption had expired, a sheriff's deed in proper form was executed to said bank and was recorded. It is conceded that this attempt at foreclosure was void because the notice of sale was not published a sufficient length of time before the sale. After receiving the sheriff's deed, the Bank of Minot conveyed the premises to the Merchants National Bank of Devils Lake by warranty deed dated March 15, 1892, and recorded March 21, 1892, reciting a consideration of $3,000. The Merchants National Bank of Devils Lake conveyed the premises to the First National Bank of Minot by a warranty deed, dated August 31, 1892, and recorded. This deed also recites a consideration of $3,000. On October 7, 1892, said First National Bank of Minot sold the premises to Strain Bros., a copartnership composed of Herbert Strain and Joseph Strain, and placed them in possession; at the same time executing to them a warranty deed reciting a consideration of $2,500. This deed was dated October 7, 1892, and recorded December 5, 1892. Strain Bros. took actual possession of the property in November, 1892, and held possession of it continuously from that time until the conveyance to plaintiff. In the meantime Herbert Strain had conveyed his interest in the property to his copartner, Joseph Strain, by a deed duly recorded. On May 2, 1900, Joseph Strain sold the premises to the plaintiff, Mary J. Nash, for the sum of $1,750, and executed to her a warranty deed dated May 22, 1900, and duly recorded. Mrs. Nash took immediate possession and has since occupied the premises. It is undisputed that the consideration recited in the respective deeds above mentioned was actually paid by the respective grantees. Although the attempted foreclosure was void and its invalidity appeared on the face of the

recorded proceedings, it is wholly undisputed that Strain Bros. and Mrs. Nash had no actual knowledge of such invalidity when they received their respective deeds. They bought, paid for, and occupied the premises in good faith, in the belief that they had acquired the fee title. The Bank of Minot became insolvent in 1893 and was placed in the hands of a receiver. The Brogan and Flummerfelt note and mortgage were found among the papers and assets of the Bank of Minot. On February 14, 1898, the receiver sold and assigned to B. S. Brynjolfson all the assets of the Bank of Minot, and the note and mortgage in question were included in the assignment and delivered to the assignee. Brynjolfson subsequently sold a large number of the notes and mortgages so acquired including the note and mortgage in question, to the defendant Peter Ehr; who paid $1,000 for the entire lot. On these facts, it is plain that Ehr acquired no right to the mortgage. The foreclosure being void, and having been made for the entire debt secured by the mortgage, the deed of the Bank of Minot operated as an equitable assignment of the mortgage. Brynjolfson v. Osthus, 12 N. D. 42, 96 N. W. 261. Each of the subsequent deeds must necessarily have the same effect. Cooke v. Cooper, 18 Or. 142, 22 Pac. 945, 7 L .R. A. 273, 17 Am. St. Rep. 709; Johnson v. Sandhoff, 30 Minn. 197, 14 N. W. 889. The note and mortgage were purchased from the receiver after maturity, and hence the purchaser acquired no better right than that of the Bank of Minot. Moreover the possession of Strain Bros. who claimed title through recorded mesne conveyances from the purchaser at the void foreclosure sale was notice of their rights. The sufficiency and admissibility of the evidence to establish the foregoing facts are challenged by Ehr, but we do not think any of the objections are well founded. The objections urged by him are the same as those urged by his co-appellants and will appear in the discussion of the points urged by the other appellants, to defeat the plaintiff's claim of title. Ehr's claims being thus disposed of the action may be dealt with as one between Mrs. Nash and Brogan and Flummerfelt.

As is apparent from the foregoing statement of the facts, the plaintiff asserts that she and her grantors were mortgagees in possession, and she claims to have acquired an indefeasible title by the operation of the statute of limitations. It is a well-settled rule of law that when an adverse possession of real property has continued for a sufficient length of time, so that all the remedies

of the owner to recover the land have become barred by the statute of limitation, the title of the former owner is divested and becomes vested in the adverse occupant. Sprecker v. Wakeley, 11 Wis. 432; Rogers v. Benton, 39 Minn. 39, 38 N. W. 765, 12 Am. St. Rep. 613; Brown on Lim. and Adv. Pos., sections 1, 4, and cases cited in notes to section 4. See, especially, Campbell v. Holt, 115 U. S. 620, 6 Sup. Ct. 209, 29 L. Ed. 483, and Chapin v. Freeland, 142 Mass. 383, 8 N. E. 128, 56 Am. Rep. 701. The contest as to ownership hinges upon the answers to the following questions: (1) Was the possession of Mrs. Nash and her grantors that of mortgagees in possession? (2) Was such possession adverse? (3) What remedies accrued to Brogan and Flummerfelt to enforce or protect their rights in the land? (4) Have all those remedies been barred by the statute of limitations?

In this state by the express provision of our Civil Code, a mortgage is a mere lien, and of itself does not transfer the title or right of possession to the mortgagee or his assignees before or after default in the conditions of the mortgage. Rev. Codes 1899, sections 4699, 4700 (Rev. Codes 1905, sections 6149, 6150); Finlayson v. Peterson, 11 N. D. 45, 89 N. W. 855; McClory v. Ricks, 11 N. D. 38, 88 N. W. 1042. The mortgagee, however, may lawfully acquire the possession, but the consent of the mortgagor or his successors in interest is essential to such possession by the mortgagee. Rev. Codes 1899, section 4714 (Rev. Codes 1905, section 6164); Finlayson v. Peterson and McClory v. Ricks, supra. The mortgage in question contains a stipulation to the effect that in case the mortgagors should fail to pay the taxes on the mortgaged property when due, or should fail to keep the same insured for the benefit of the mortgagee, or should make default in the payment of interest on the debt, the mortgagee might declare the whole debt due and take possession of the premises and foreclose the mortgage. It is admitted that the mortgagors never paid any part of the debt, principal or interest, and have never paid any taxes on the property since the mortgage was given. At the time the mortgage was given, the property was occupied by the mortgagors' tenants. The appellants allege that, at the time the mortgage was given, they entered into an agreement with the Bank of Minot to the effect that the bank was to look after the mortgaged premises and collect the rent for the mortgagors and apply same to the payment of taxes, insurance, interest and repairs. They allege that the

rents collected were more than sufficient to pay these items, and eventually pay the entire debt. Hence they assert that there was no default authorizing the mortgagee to take possession or foreclose. The competency and sufficiency of the proof offered to support this claim on the part of the defendants is very doubtful. It is unnecessary to discuss it, because we are clearly of the opinion that whatever the facts may be in that regard they are immaterial to the decision of this case.

The defendants have slept too long on their rights to be permitted to advance such a claim against innocent third persons at this late day. More than ten years before the commencement of this action, Strain Bros. in good faith entered into the open and exclusive possession of the premises, claiming title adversely under a recorded deed which they supposed conveyed to them a good title. For over three years before that time, Brogan and Flummerfelt had not paid the slightest attention to the mortgage debt or premises. They had apparently abandoned all claims to the property and permitted the Bank of Minot to take possession and sell and convey the same as an owner. Assuming that the circumstances were such that the mortgagors were not chargeable with notice of the adverse claims of those who preceded Strain Bros. in the claim of title, and hence cannot be deemed to have consented to an act of which they had no notice, there is no room for question as to the effect of Strain Bros.' possession. It cannot be imagined how the mortgagors could have remained for any length of time in ignorance of the possession by Strain Bros., unless they had deliberately abandoned the premises and intended to surrender them to the mortgagee. The open and notorious possession of Strain Bros. under their recorded deed, was, in law, notice to all the world of the nature of their claim to the land. After Strain Bros. took possession, claiming as owners, the mortgagors remained silent and inactive as before. They never paid any taxes, insurance or repairs on the premises, or paid or offered to pay any part of the mortgage debt, or in any other manner evidence the slightest interest in the property until the commencement of this action. They had apparently wholly abandoned the premises to the mortgagees. If they ever had objections to the acts of the mortgagee or its successors, they never made them known. Thus, those who were occupying the premises in the belief that they owned them, were lulled into security and paid all the expenses and assumed all the risks incident

to ownership, and have expended large sums of money in valuable improvements on the buildings. Common honesty and fair dealing as well as the instinct of self-protection, required that the mortgagors should make their rights known under such circumstances. They cannot be permitted to say that they willfully concealed their claim. Their silence is explainable, consistently with honest and intelligent conduct on their part, only on the theory that they consented to and acquiesced in the possession on the part of the mortgagee and its successors. The authorities therefore hold that consent will be implied under such circmustances. Rogers v. Benton, 39 Minn. 39, 38 N. W. 765, 12 Am. St. Rep. 613; Russell v. Lumber Co. 45 Minn. 376, 48 N. W. 3. It is undisputed that when Strain Bros. took possession, the mortgage debt had not been paid, even if the rents collected had been applied thereon. The deeds from the Bank of Minot to the Devils Lake Bank and the deeds from the latter to the First National Bank of Minot, as well as the deed from this bank to Strain Bros., were not properly acknowledged. The forms of acknowledgment prescribed for an individual grantor were used instead of the form required where an officer of a corporation makes acknowledgment as such officer. The originals of two of these deeds could not be produced and secondary evidence of them was resorted to. The competency of this secondary evidence is challenged. The deeds, although not originally entitled to record by reason of the defective acknowledgments, were actually recorded. These defective acknowledgments were cured by chapter 1, p. 1, Laws of 1895, and the record of the instruments by that act, became admissible in evidence with the same force and effect as if originally valid. By what we have said with respect to the evidence of consent, we do not wish to imply that one who has peaceably and in good faith acquired possession of land claiming title under a void foreclosure cannot be deemed to be a mortgagee in possession unless the express or implied consent of the mortgagor is shown. The facts of this case do not require any expression of opinion on that point. The evidence in this case clearly shows implied consent. We hold, therefore, that Strain Bros. became mortgagees in possession, and the plaintiff has succeeded to their rights.

Was their possession adverse? It is contended by appellants that a mortgagee in possession cannot be in law an adverse claimant. It is true that loose expressions to that effect may be found in

the books, but such an unqualified statement is very far from the truth. A mortgagee in possession may or may not be holding adversely. The only necessary essentials to give rise to that relation are the existence of a mortgage, and the consent by the mortgagor that the mortgagee take or hold possession of the property by reason of the mortgage and as security for the debt. The acknowledgment or recognition of the mortgagor's right, on the part of the mortgagee, when the possession is taken or while it is held, is not essential. So long as the relation continues, the rights and liabilities arising out of it are the same, whether the mortgagee acknowledges the relation or not. This is illustrated by the case of Finlayson v. Peterson, above cited. The defendant in that case was held to be a mortgagee in possession, although her possession was unquestionably adverse from its inception. The following cases illustrate and support the same proposition: Robinson v. Fife, 3 Ohio St. 551; Rogers v. Benton (Minn.) 38 N. W. 765, 12 Am. St. Rep. 613; Hubbell v. Sibley, 50 N. Y. 468; Miner v. Beekman, 50 N. Y. 337; Wood on Lim. section 225. So long as the mortgagee acknowledges or recognizes the mortgagor's right to the land, the statute of limitations does not run against the latter's remedies. McPherson v. Hayward, 81 Me. 329, 17 Atl. 164; Waldo v. Rice, 14 Wis. 286. And conversely, when the mortgagee in possession denies the mortgagor's rights, the statute is put in motion. Of course, where the mortgagee is permitted to take possession under an agreement on his part to hold in subjection to the mortgagor's rights, such possession is not deemed adverse so as to set the statute of limitations in motion against the mortgagor until the mortgagee distinctly disavows his obligations as such, and notice thereof is brought home to the mortgagor. This is so because until the mortgagor has notice of the repudiation of the agreement, he has the right to presume that the original arrangement continues. Where, however, the mortgagee's possession is adverse from the beginning and he has never acknowledged any obligation to the mortgagor, there is no ground for the presumption above mentioned and the act of taking possession not only gives rise to a cause of action in favor of the mortgagor, but also starts the statute of limitations running against such cause of action. It is therefore clear that the statute commenced running against the mortgagor when Strain Bros took possession in November, 1892,

even if it be assumed that it had not been put in motion before. It has been running uninterruptedly since, because Joseph Strain who had acquired his brother's rights, relinquished the possession to Mrs. Nash, who was his grantee and who has ever since held the possession so acquired. The transfer of the possession did not give rise to a new cause of action. The cause of action accrued to the mortgagor when the adverse possession commenced, and that cause of action remained the same even though other parties have succeeded to the rights of the adverse claimant. Paine v. Doods (N. D.) 103 N. W. 931.

The plaintiff being a mortgagee in possession claiming adversely, and such adverse possession having continued for more than 10 years before this action was commenced, it is apparent that the mortgagors' rights are barred unless there is some remedy available to them, which is not barred in 10 years. The only actions against which there is a limitation of more than 10 years, are those mentioned in sections 5188 and 5189, Rev. Codes 1899 (sections 6774, 6775, Rev. Codes 1905). Section 5188 relates to "actions for the recovery of real property or for the recovery of the possession thereof" and section 5189 relates to a "cause of action, or defense or counterclaim to an action founded upon the title to real property or to rents or services out of the same." If any action coming within the meaning of these sections is available to the mortgagors, then clearly their title is not barred. These provisions are verbatim copies of those found in the Code of Civil Procedure of New York. It is a well-known fact that our Code of Civil Procedure as it appears in the Revised Codes of 1877, was copied from the New York Code. See page v of preface to second edition of Revised Codes of Dakota of 1877. These provisions appear in that code as sections 41 and 42 of the Code of Civil Procedure. These provisions were construed in 1872 by the Court of Appeals of New York in Miner v. Beekman, 50 N. Y. 337, and in Hubbell v. Sibley, 50 N. Y. 468. It was held by that court that a suit by a mortgagor to enforce his right of redemption against the mortgagee in possession did not belong to that class of actions referred to by these provisions. The construction placed upon these provisions in New York, from which state we adopted them, ought to prevail here. The same view also prevails in South Dakota. Houts v. Hoyne, 14 S. D. 176, 84 N. W. 773. The mortgagors' remedies against a mortgagee in

possession, so long as that relation continues, are exclusively of equitable cognizance. This is so because the adjustment of their rights necessarily involves the imposition of equitable terms as a condition precedent to the granting of any relief. Backus v. Burke, 63 Minn. 272, 65 N. W. 459; Jones on Mtges. (6th Ed.) sections 715, 716, and cases cited in notes. That equitable cause of action, as already shown, is not the kind of action which sections 5188 and 5189 refer to. In jurisdictions where there is no statutory limitation on the right to maintain a suit to redeem, the courts of equity acting on the analogy of the statute of limitations, have held the right barred after the expiration of the time limited for maintaining an action at law to recover the land. Robinson v. Fife, 3 Ohio St. 551; Wood on Lim. (3d Ed.) section 225. In this state the statute of limitations does not specifically mention actions to enforce the mortgagor's right to redeem, but section 5207, Rev. Codes 1899 (section 6793, Rev. Codes 1905) provides that "an action for relief not hereinbefore provided for must be commenced within 10 years after the cause of action shall have accrued." Inasmuch as no other section of the statute applies, it is plain that the mortgagors' cause of action against the mortgagee in possession is limited by this section. Houts v. Hoyne, 14 S. D. 176, 84 N. W. 773. As already stated, that cause of action accrued and the statute commenced to run against it not later than November, 1892, when Strain Bros. took possession, and the bar was complete before this action was commenced. The only remedy by which to enforce their rights being barred, it follows that the plaintiff has acquired the title by reason of the mortgagors' neglect to assert their rights in season.

The appellants contend that proof of a title so acquired was variant from the allegations of the complaint and constituted a failure of proof. The complaint is in the form prescribed by the statute and alleges that the plaintiff is the owner of the land in fee simple. Appellants assert that if the facts show any title in plaintiff it is merely an equitable one. This contention is unsound. The plaintiff's title is not merely an equitable right. It is a perfect legal title acquired by operation of law through the mortgagors' neglect to assert their rights within the time limited by the statute. The nature of the title so acquired is in no manner different from that which would have been acquired by a deed or

by inheritance. It is not necessary to plead the evidentiary facts by which the title was obtained.

We think the judgment is right and it is accordingly affirmed. All concur.

(108 N. W. 792.)

B. H. ANNIS v. F. H. BURNHAM.

Opinion filed June 27, 1906.

Vendor and Purchaser — Delay After Knowledge of Grounds of Rescission — Fraud.

1. After a delay of six months, during which a contract for the sale of land is recognized as valid by the vendee, after notice that the contract was voidable on the ground of misrepresentations as to the vendor's title, the vendee cannot rescind the contract on the ground of such misrepresentation.

Same.

2. A party desiring to rescind a contract for the sale of land must act promptly after notice of the grounds entitling him to rescind.

Same — Waiver.

3. By not rescinding promptly after such notice, the right to do so is waived, although no prejudice or injury to the vendor is shown.

Same.

4. A contract for the sale of land cannot be avoided by the vendee, in the absence of fraud or mistake, unless the vendor abandons the contract or fails to comply with its terms.

Oral Modification of Written Contract.

5. An oral alteration of a written contract that is definite in all its terms is not binding, unless the contract as changed has been executed.

Appeal from District Court, Foster county; *Burke*, J.

Action by B. H. Annis against F. H. Burnham. Judgment for plaintiff, and defendant appeals.

Affirmed.

Craven & Maxfield, for appellant.

No one can acquiesce in a wrong if ignorant of its existence. 29 Am. & Eng. Enc. (2nd Ed.) 1093; Henry v. Cootsworth Co.,

Bond, et al. 55 N. W. 643; Portland F. & R. Co. v. Spillman, 32 Pac. 688; Pence v. Langdon, 99 U. S. 578, 25 L. Ed. 421. The validity of a waiver requires that it shall be made with knowledge of the right, intentionally and voluntarily, upon a valuable consideration, and shall involve some element of estoppel. Hammon on Cont. 175; Marston v. Simpson, 54 Cal. 189; Hochkiss v. Middlekauff, 43 L. R. A. 806; Wilson v. Carpenter, 91 Va. 192; 29 Am. & Eng. Enc. (2nd Ed.) 1095; San Bernadino Investment Co. v. Merrill, 41 Pac. 487; Henry v. Bond, 55 N. W. 643; Portland R. Co. v. Spillman, 32 Pac. 688; Bennecke v. Ins. Co. 105 U. S. 355, 26 L. Ed. 290; 29 Am. & Eng. Enc. (2nd Ed.) 1097. Delay alone cannot work loss of right to rescind, some element of estoppel must be invoked. Royal v. Aultman Taylor Co. 2 L. R. A. 526; Marston v. Simpson, supra. Necessary elements of estoppel present 16 Cyc. 726.

The party sought to be estopped must be aware of the effect of his acts. 16 Cyc. 744; Conway v. Supreme Council etc. 70 Pac. 223; Goodale v. Middaugh, 46 Pac. 11; Winegardner v. Equitable Loan Co. 94 N. W. 1110; Gjertsadengen v. Hartzell, 9 N. D. 268, 83 N. W. 230, 81 Am. St. Rep. 575.

There being no estoppel, the acts to constitute a waiver, must have been done with knowledge of their consequences. Hammon on Cont. 175; Wilson v. Carpenter, 91 Va. 192; Hotchkiss v. Middlekauf, supra. And with intention to have them constitute a waiver. 26 Am. & Eng. Enc. (2nd Ed.) 1095; San Bernadino Inv. Co. v. Merrill, supra.; Henry v. Bond, supra. A waiver must be founded upon consideration, or estoppel. 29 Am. & Eng. Enc. (2nd Ed.) 1097. Formal rescission not required, any direct or positive rescission is sufficient. Hammon on Cont. 178; Pollock on Cont. 539; Hammon v. Pennock, 61 N. Y. 145; Potter v. Taggert, 11 N. W. 678; 24 Am. & Eng. Enc. (2nd Ed.) 645. And evidence may be used, not to vary or modify a contract, but to show how it was to be carried out. 17 Cyc. 638; Willis v. Fernald, 33 N. J. L. 206; Steinfield v. Wilcox, 56 N. Y. S. 217; Tennelly v. Ross, 14 Ky. L. Rep. 48; Jones on Evidence, section 450; 17 Cyc. 737; Cummings v. Arnold, 37 Am. Dec. 155; Marsh v. Bellew, 45 Wis. 36.

S. E. Ellsworth, for respondent.

In the absence of fraud parol evidence is inadmissible to vary terms of contract in the absence of fraud, mistake or ambiguity of

expression. Apking v. Hoffer, 104 N. W. 177; Rev. Codes 1899, section 3936; Foster v. Furlong, 8 N. D. 282, 78 N. W. 986; Houghton Imp. Co. v. Doughty, 14 N. D. 331, 104 N. W. 516; Dowagiac Mfg. Co. v. Mahon, 13 N. D. 516; 101 N. W. 903; Western Electric Co. v. Baerthel, 103 N. W. 475.

Conveyance is presumed to be made, when no time is fixed by the contract, when the same is fully performed. Sennet v. Shehan, 7 N. W. 266. To make a tender of performance effective it must be made while performance was due from vendor. Way v. Johnson, 58 N. W. 552; Arnett v. Smith, 11 N. D. 55, 88 N. W. 1037; Sennet v. Shehan, supra. One in default himself in the terms of a contract is without standing in court, when he asks for a recovery of payments under its provisions. Way v. Johnson, supra; Apking v. Hoffer, supra; Sonnesyn v. Akin, 14 N. D. 248, 104 N. W. 1026. Fraud does not render a contract void, but voidable. 14 Am. & Eng. Enc. (2nd Ed.) 156; Sonnesyn v. Akin, supra. To render it voidable, the misrepresentation must be believed and been the inducement to its making, and such belief resulted in loss, injury, damage and detriment. Sonnesyn v. Akin, supra. To entitle one to rescind for fraud, he must refuse further performance, otherwise he waives the right to rescind the contract and it becomes binding upon him. Ross v. Page, 11 N. D. 458, 92 N. W. 822; Bennett v. Glaspell, 107 N. W. 45; Sonnesyn v. Akin, supra; McWhirter v. Crawford, 72 N. W. 505.

MORGAN, C. J. This action was brought to recover the sum of $1,000 paid by the plaintiff upon a contract for the sale of 960 acres of real estate, which the plaintiff claims was subsequently rescinded by him on the ground that the defendant procured the contract to be entered into by the plaintiff through fraudulent representations as to defendant's title to part of the land involved in the contract. The material parts of the contract are as follows: That the said Frank H. Burnham, * * * being the owner in fee simple of the following-described property, * * * does hereby agree, bargain, and sell the said Benjamin H. Annis the above-described property on the following conditions, viz: The said Frank H. Burnham to receive for said lands above described, including improvements, the price of eighteen ($18.00) dollars per acre, in other words, 960 acres at the net figure of seventeen thousand two hundred eighty ($17,280.00) dollars to be paid by the said Benjamin H. Annis to the said Frank H. Burnham in amounts

agreed as follows: One thousand ($1,000.00) in hand paid; receipt of which is hereby acknowledged, and four thousand ($4,000.00) dollars to be paid when said Benjamin H. Annis takes possession of said farm, but in no case later than March 1st, 1902, and the balance of twelve thousand two hundred eighty ($12,280.00) dollars to be paid in five equal annual payments at seven (7) per cent, rate of interest. It is further agreed that the said Frank H. Burnham agrees to accept from the said Benjamin H. Annis all or any part of the said principal at any time the said Benjamin H. Annis may elect. Witness our hands and seals this day and year above written: F. H. Burnham. B. H. Annis." The representations relied upon by plaintiff as grounds for avoiding the contract are that the defendant represented himself to be the owner in fee simple of all the land, whereas in truth 320 acres were then held by defendant under contract for the sale of the land to him by the Casey Land Company. The complaint further alleges that the written contract above set forth was altered by an oral contract agreed upon by the parties, subsequently entered into by them. This oral contract, it is alleged, was to the effect that defendant was to give possession of the land to the plaintiff within a reasonable time after the making of the oral contract, and, in no event, was possession to be given later than March 1, 1903; (2) that at the time possession was to be given to plaintiff, defendant was to make and deliver to plaintiff a warranty deed of said lands, and plaintiff was thereupon to pay to defendant the sum of $4,000 and make and deliver to defendant five promissory notes for $2,456 each, respectively payable one, two, three, four, and five years from the date thereof, with interest at 7 per centum per annum; (3) that plaintiff was to make and deliver to the defendant his mortgage upon all the lands conveyed by said deed to the plaintiff to secure the payment of said five promissory notes. The trial court directed a verdict in defendant's favor at the close of the trial. Plaintiff has appealed from the judgment.

The specifications of error relate to (1) rulings refusing an offer of testimony to prove that the written contract was changed by the subsequent oral contract pleaded in the complaint; (2) the refusal of the trial court to instruct the jury that the plaintiff had a right to rescind the contract as a matter of law, on March 1, 1903; (3) in refusing to instruct the jury as a matter of law that the plaintiff had not waived the right to rescind the contract.

Whether the court erred in refusing to admit the testimony offered to show that the written contract was subsequently modified, depends upon the construction to be placed upon section 3936, Rev. Codes 1899 (section 5382, Rev. Codes 1905), which is as follows: "A contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise." It is not claimed that the alleged oral agreement was ever executed. A reading of the contract shows that it is not indefinite in any of its terms. It does not particularly specify at what time a deed is to be executed and delivered, but from the terms of the contract it is clear that a deed cannot be demanded until the payments have been fully made. After the payments have been fully made, a deed is immediately demandable, and, if refused within a reasonable time, its delivery could be enforced in a proper action. The date of taking possession by the defendant is not expressly stated, but it is clear that possession could be demanded and taken at any time upon payment of the sum of $4,000, required to be paid not later than March 1, 1903. It is therefore clear that the contract was definite and unambiguous as originally entered into, and does not require extrinsic evidence to make certain what were intended to be its terms by the parties. Section 3936, supra, is a definite enactment concerning the alteration of written contracts. Its terms clearly repel the idea that such contracts can be orally modified so far as its executory provisions are concerned. We have recently considered this question in Cugham v. Larson, 13 N. D. 373, 100 N. W. 1088, and it was there decided that said section applies to all contracts in writing whether the alteration attempted by parol agreement pertain to the performance or to other terms of the contract. There was no error in excluding the testimony that was offered to show a parol modification of the contract. Foster v. Furlong, 8 N. D. 282, 78 N. W. 986; Dowagiac Mfg. Co.. v. Mahon, 13 N. D. 516, 101 N. W. 903; Houghton Imp. Co. v. Doughty, 14 N. D. 331, 104 N. W. 516; Western El. Co. v. Baerthel (Iowa) 103 N. W. 475; Apking v. Hoffer (Neb.) 104 N. W. 177.

It is claimed that the contract was entered into by plaintiff through fraudulent representations on the part of the defendant which rendered the contract void. It is true that the defendant was not the owner of all the land represented in the contract to be owned by him. It is also true that the plaintiff did not know

that defendant held some of the land under a contract for its conveyance to him on performance of certain conditions. These conditions pertained solely to payments. Upon paying the agreed price, the vendor would convey the land to this defendant by warranty deed forthwith. It is also true that the plaintiff was notified within a few hours after the signing of the contract that 320 acres of this land were held by defendant under contract. The $1,000 payment was made by check and payment of said check could have been stopped after plaintiff was notified as to the true facts in reference to the defendant's title. For nearly six months after the making of the contract, plaintiff was making preparations to carry out the provisions of the contract as to payments and repeatedly wrote the defendant to that effect. The plaintiff wrote defendant during this time to the effect that he was making preparations to meet his payments and offered to sell the land or to rent it. After acquiescing in the contract for that length of time, plaintiff will not be upheld in his attempt to rescind the contract on the alleged ground that it was entered into through fraudulent representations. The plaintiff's contention that such a misrepresentation rendered the contract void, cannot be sustained. It rendered the contract voidable at his election, but he must act promptly in making his election whether he would acquiesce in or repudiate the contract. Sonnesyn v. Akin, 14 N. D. 248, 104 N. W. 1026. Section 3934, Rev. Codes 1899 (section 5380, Rev. Codes 1905), provides that rescission, when not effected by consent, can be accomplished only by the use on the part of the party rescinding of reasonable diligence to comply with the following rules: (1) "He must rescind promptly upon discovering the facts which entitle him to rescind if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind." Plaintiff became cognizant of the misrepresentation on the same day that the contract was signed. He was therefore aware of his right to rescind on that day. He did nothing toward rescinding for six months thereafter. No fixed rule can be laid down as to the time within which a person must rescind. What may be a prompt rescission in one case would not be so under the facts of another case. Under the facts of this case, we think that the plaintiff did not act promptly. Having waived the right to rescind, plaintiff must be held bound by the contract to the same extent as though the contract was binding in its inception.

It was therefore in full force and effect when this action was commenced. Plaintiff contends that delays in effecting a rescission will not defeat that right unless the party rescinding is estopped from so doing by having caused the other party to become damaged or prejudiced in some way. The statute cannot be so construed. Promptness is made an imperative condition without regarding the consequences upon the other party. He cannot wait six months until conditions may change and then attempt to avoid the contract because he is dissatisfied with it, and then urge as ground for rescission a fact which he had notice of six months before, and which he acquiesced in and waived. Under these circumstances, it would seem impossible to believe that plaintiff entered into the contract relying upon the fact that defendant was then actually the owner of the land and that this fact was such an inducement to entering into the contract that it would not have been entered into in the absence of such fact. If he was relying upon the fact of title in the vendor, he had ample time to repudiate the contract before the payment of the $1,000 was beyond recall. By his delay in attempting to rescind the contract, and by expressly recognizing the contract as valid, he has waived the right to repudiate it. 14 Am. & Eng. Enc. pp. 156-161, and cases cited; 2 Current Law, p. 1992. The fact that there was a misrepresentation in the contract was waived. Plaintiff cannot now take advantage of the misstatement, even if fraudulently made, and there is no evidence of that. As a matter of fact, the evidence would not sustain a verdict that plaintiff relied on such misstatement. It is clear that he attempted to repudiate the contract for other reasons than that alleged.

It is finally insisted that defendant was in default under the contract on March 1, 1903, and that plaintiff then demanded a deed and demanded payment to him of the $1,000 previously paid on the contract, and that he is therefore entitled to recover the $1,000. The basis of this contention is that plaintiff claims that he tendered $4,000 at that time, and that defendant refused to deliver a deed, and thereby became in default. There are two conclusive answers to this contention: (1) The plaintiff did not tender the $4,000. (2) The contract does not provide for the delivery of the deed upon payment of the $4,000. Upon the subject of the alleged tender of the $4,000, it need only be said that the evidence does not even show a readiness or willingness

to pay that sum. The negotiations of March 1, 1903, were made by plaintiff's agent who came from Iowa to Carrington, N. D., at plaintiff's request "to make demand on him (Burnham) for deeds to said land, and to tender to him money in payment therefor." This agent had no money with which to make any tender or payment and was not authorized by plaintiff to pay or tender any money. The plaintiff did not have $4,000 to his credit in the Iowa bank. If defendant was under obligation to deliver a deed upon payment or tender of the $4,000, plaintiff has not placed defendant in default in that respect. A willingness or readiness to pay would not be sufficient in this case. There must be an actual tender. The defendant would not be in default until he had an opportunity of receiving the money, providing he was ready and willing to deliver the deed. There was no payment or a willingness to pay shown, nor was a tender shown. There is nothing in the contract providing for delivering a deed upon payment of $4,000 on or before March 1, 1903. The written contract governs the rights of the parties and that cannot be construed to show that a deed was demandable upon payment of the $4,000.

Upon a careful review of the evidence we are satisfied that no error is shown by the record. It follows that the judgment must be affirmed. All concur.

(108 N. W. 549.)

OLE HANSON, A. A. NEWGAARD AND C. A. HANSON, CO-PARTNERS AS HANSON, NEWGAARD & HANSON, v. LOUIS LINDSTROM.

Opinion filed June 29, 1906.

Pleading — Bill of Particulars Can Be Compelled Only When First Ordered by the Court — Penalty for Failure to Furnish.

1. A party is not bound to furnish the bill of particulars provided for by section 5282, Rev. Codes 1899, on a mere demand; but, before delivery thereof can be compelled or penalties for the failure to do so can be inflicted, the court or judge must order that a bill of particulars be furnished.

Same — Copy of an Order for Machinery Not a Copy of an Account.

2. A copy of an order for the delivery of a threshing machine outfit, accepted by the seller for a fixed price, on which certain payments have been made, is not a copy of an account, within the meaning of section 5282, Rev. Codes 1899.

Direction of a Verdict — Specification of Grounds.

3. A motion to direct a verdict should specify the grounds relied on.

Sales — Breach of Warranty — Failure to Give Notice Required by Contract.

4. A failure to comply with a stipulation providing for giving written notice of the failure of a machine to work as warranted defeats the right of the purchaser to defend an action for the purchase price, on the ground that there was a breach of the warranty where such stipulation was a condition precedent to any liability on the warranty.

Foreign Corporations — Failure to Comply With Statute — Pleading.

5. The fact that a foreign corporation is not authorized to do business in this state is a matter to be raised by answer, and need not be proven by the corporation plaintiff as part of its cause of action, although complaint alleges that plaintiff has complied with the laws of the state in respect to doing business therein.

Evidence — Notice to Produce Original as Foundation for Secondary Evidence.

6. Unless the pleadings show the possession of writings or documents by a party, and unless it further appears from the pleadings that such documents will be necessarily used on the trial, a demand for the production of such writings must be made before the trial before secondary evidence of their contents can be received.

Appeal from District Court, Ransom county; *Allen*, J.

Action by Ole Hanson and others against Louis Lindstrom. Judgment in favor of plaintiffs. From an order denying a new trial, defendant appeals.

Affirmed.

T. A. Curtis, for appellant.

The office of a bill of particulars is to amplify a pleading and more particularly specify the claim or defense set up. Landon v. Sage, 11 Conn. 302; Blount v. Rick, 107 Ind. 238; Davis v. Freeman, 10 Mich. 188; Carter v. Tuck, 3 Gill (Md.) 248; Mathews v. Hubbard, 47 N. Y. 28; Garfield v. Parris, 96 U. S. 557, 24 L. Ed. 821; U. S. Land Investment Co. v. Mercantile Trust Co. 54 Hun. (N. Y.) 417.

To admit secondary evidence it must appear that the party on whom service was made had control of the instrument in question. Norton v. Heywood, 20 Me. 359; Brickbeck v. Tucker, 2 Hall (N. Y.) 121; Lovejoy v. Howe, 57 N. W. 57.

Purcell, Bradley & Divet, for respondents.

Where the party demanding the itemized account, wishes to exclude evidence of the items he must procure an order of exclusion before trial. Kellogg v. Paine, 8 How. Pr. 329; Gebhardt v. Parker, 120 N. Y. 33; Barton v. Sidway 25 N. Y. Sup. 179.

Motion for a directed verdict must be specific. Howie v. Bratwell, 14 S. D. 649, 86 N. W. 747, and cases cited. Where a contract of purchase requires notice of defects, such notice is a condition precedent to an action for damages for breach of warranty. Minn. Thresher Co. v. Lincoln, 4 N. D. 419; Mand Co. v. Hanson, 3 N. D. 81; James v. Beckadahl, 10 N. D. 120. A foreign corporation will be presumed to have complied with the law, until the presumption is overcome by proof. Acme v. Rockford, 72 N. W. 466.

MORGAN, C. J. This is an action to recover a balance due on the purchase price of a threshing machine outfit. The contract is embodied in a written order for the threshing machine and attachments, upon the Advance Thresher Company, of Minneapolis, a foreign corporation. The machinery was delivered pursuant to the order and accepted by the defendant. In the order it was agreed by the defendant that he would make and deliver his promissory notes for the purchase price and secure the same by a mortgage on the machinery. The notes and mortgage were never delivered. After a trial before a jury, the trial court directed a verdict for the plaintiffs for the full amount due, being $1,244.63, after deducting $2,200 in payments from the purchase price, $3,320. Judgment was rendered on the verdict. Defendant made a motion for a new trial, which was denied, and he appeals.

It is defendant's first contention that the court erred in not sustaining his objection to the introduction of any evidence under the complaint. The ground of this objection is that the defendant demanded of plaintiffs' attorneys a copy of the order or contract mentioned in a general way in the complaint, in order that it might be used by defendant in the preparation of his answer. The defendant now claims that, a copy of the contract not having been furnished, the plaintiffs were not entitled to use the same as evidence on the trial. A decision of this question depends upon the construction to be given to section 5282, Rev. Codes 1899 (section 6868, Rev. Codes 1905), which reads as follows:

"* * * It shall not be necessary for a party to set forth in a pleading the items of an account therein alleged; but he shall deliver to the adverse party, within ten days after the demand thereof in writing, a copy of the account, which, if the pleading is verified, must be verified by his own oath, or that of his agent or attorney, if within the personal knowledge of such agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. The court, or a judge thereof, may order a further account, when the one delivered is defective; and the court may in all cases order a bill of particulars of the claim of either party to be furnished." It will be seen that said section applies to furnishing copies of accounts and bills of particulars. A copy of an account and a bill of particulars do not necessarily mean the same thing. A bill of particulars may be demended on a claim which has no reference whatever to an accounting. The claim mentioned in the section on which a bill of particulars may be called for has a very broad application, and its meaning is almost as general as the words "cause of action" or "defense." A bill of particulars may be demanded when the pleading is definite and certain as to the nature of the cause of action or defense, but further facts are required before the party can intelligently prepare his pleading or prepare for trial. Johnson v. G. N. Ry. Co. 12 N. D. 420, 97 N. W. 546.

In the case at bar, a copy of the contract was desired in order to prepare an answer. The contract called for was not a copy of an account within the meaning of section 5282, supra. Under said section a copy of an account may be procured on mere notice or demand, and, if not furnished, the party is precluded from giving evidence of the account. When a bill of particulars is demanded, and the application is in form, and the court deems it a proper case for the furnishing of a bill of particulars, the court orders that the same be furnished. In this case no application was made to the court to order a bill of particulars. Conceding, for the purposes of this case, that section 5282, Rep. 554; J. I. Case T. M. Co. v. Ebbighausen, 11 N. D. 446, 92 N. W. 826; J. I. Case T. M. Co. v. Balke, 15 N. D. 206, 107 N. W. 57. In attempting to establish the fact that such a notice had been sent to the company, the defendant proved that one Heckle wrote such a letter at the defendant's request but defendant utterly failed to show that such a letter was mailed to the com-

pany at Minneapolis, or that the letter was mailed at all. Heckle testifies that he could not say whether the letter was "mailed there in the office by some of the boys, or whether I gave it to Mr. Lindstrom." This is far short of explicit proof that the contract was complied with by notifying the company at Minneapolis that the machine would not work.

The offer to prove the contents of the letter by secondary evidence was properly rejected for another reason. There was no attempt to show diligence in procuring the notice from the company, to whom it was claimed to have been sent. The letter or notice is not shown to have ever been in plaintiffs' possession. Hence the rule laid down in Nichols et al. v. Charlebois et al. 10 N. D. 446, 88 N. W. 80, has no application here. In that case it was held that, when the pleadings show that a document in the possession of a party will necessarily become material evidence on the trial, the party must produce such document at the trial without demand to do so, or secondary proof of its contents will be received. There is no reason or justice in extending the rule to apply to cases where a party has not and never had the possession of such document.

It is contended that the contract under which the machinery was furnished was a contract made with the plaintiffs' and not with the Advance Thresher Company, as alleged in the complaint. The objection cannot be sustained. A reading of the contract shows that it was entered into with the Advance Thresher Company, through the plaintiffs as agents. On the trial the answer was amended to show that the contract was entered into with the Advance Thresher Company. The record shows that the Advance Company assigned the contract to the plaintiffs in writing. The contract was properly received in evidence.

A motion for a new trial was made, in which it is claimed that the evidence will not sustain the verdict, and that it was not shown by the evidence that the Advance Thresher Company was authorized to do business in the state of North Dakota. There is no merit in the contention. It is presumed that all persons comply with all the laws. Until non-compliance is alleged and shown, the presumption prevails. This question was recently decided by this court, and defendant's contention denied. State v. Robb-Lawrence Co., 15 N. D. 55, 106 N. W. 406. The fact that the complaint alleged that the Advance Company is a foreign cor-

poration does not change the rule. The allegation is treated as surplusage. Kinney v. Yeoman (N. D.) 106 N. W. 44.

This disposes of all the assignments, and the order appealed from is affirmed. All concur.

(108 N. W. 798.)

STATE OF NORTH DAKOTA v. WALTER FISK.

Opinion filed June 29, 1906.

Capacity of Infant to Commit Crime — Evidence — Presumption.

1. Under the statutes of this state (section 8544, Rev. Codes 1905; section 6814, Rev. Codes 1899), a child under seven years of age is legally incompetent to commit crime. Between the ages of seven and fourteen they are presumed to be incompetent, but the presumption is not conclusive. To overcome the presumption of incompetency, the burden is upon the state to show by clear proof that the defendant knew the wrongfulness of the act when he committed it.

Same — Rape.

2. There is a presumption that a child under fourteen is not physically capable of consummating the crime of rape, and by statute, a person of that age cannot be convicted of the offense "unless his physical ability to accomplish penetration is proved as an independent fact, and beyond a reasonable doubt." Section 8891, Rev. Codes 1905; section 7157, Rev. Codes 1899.

Same — Burden of Proof — Mental and Physical Capacity.

3. In prosecution of persons between the ages of seven and fourteen, for rape or an attempt to commit rape, the burden is upon the state to show the mental and physical competency of the defendant. In the absence of such proof, the presumption of incompetency must prevail.

Same — Legal Incapacity Extends Both to the Act and Attempt.

4. When the record fails to show that a child under fourteen years of age, who is charged with assault with intent to commit rape had the physical capacity to consummate the offense, a conviction for the attempt cannot be had. The legal incompetency in such a case extends both to the act and the attempt.

Appeal from District Court, Ransom county; *Allen*, J.

Walter Fisk was indicted for assault. Verdict of not guilty, and the state appeals. Affirmed.

C. N. Frich, Attorney General, and *Alfred M. Kvello,* for appellant.

Injury to the feelings of a woman may be outraged by one who is incompetent as by one not. Territory v. Keyes, 5 Dak. 244, 38 N. W. 440.

Being under 14 years of age is not a defense to the charge of assault with intent to commit rape. Commonwealth v. Green, 2 Pick. 380. Impotency is a defense to the charge of rape, but not to an assault with intent to commit that crime. Whart. Crim. Law (8th Ed.) section 552; 1 Bish. Crim. Law, sections 737-738; Barb. Crim. Law, 114.

T. A. Curtis and *F. S. Thomas,* for respondent.

Where no conviction can be had for the crime none can be had for the attempt. Queen v. Williams, 1 Q. B. 320; McKinney v. State, 29 Fla. 565.

YOUNG, J. An information was filed by the state's attorney of Ransom county, charging the defendant with the crime of assault with intent to commit rape. The testimony disclosed that the prosecutrix was a married woman 20 years of age, who had been married at the age of 16 and was the mother of two children, and that the defendant at the date of the alleged attempt was under 14 years of age. The court instructed the jury that under the evidence the defendant could not be found guilty of assault with intent to commit rape, and that the only offense for which he could be convicted was a simple assault, and then only upon finding that he knew its wrongfulness. The jury returned a verdict of not guilty, and the state has appealed and assigns error upon the instructions.

The case presents the question of the criminal responsibility of children under 14 years of age. The trial court gave the following instruction, which is assigned as error: "The only felony which the testimony shows the defendant could have intended to commit in this case would be an attempt to commit the crime of rape and under the view the court takes, you are instructed as a matter of law, you can, under no circumstances, find this defendant guilty of this crime, as the law presumes a boy of his age to be incapable of committing the crime of rape and no evidence has been offered to overcome this presumption." Error is also assigned upon the

court's refusal to give the following instruction requested by the state: "I charge you as a matter of law that impotency in a case of this kind, that is assault with intent to commit rape, is no defense. The essence of the crime of assault with intent to commit rape, is the outrage to the person and feelings of the female. The feelings of a woman may be outraged by the force and brutality of a man who is impotent as well as of a man who is not."

In our opinion neither assignment can be sustained. The confusion which existed at common law as to the capacity of children to commit crime, has been removed in this state by express statute. Section 8544, Rev. Codes 1905 (section 6814, Rev. Codes 1899) so far as material, reads as follows: "All persons are capable of committing crime except those belonging to the following classes: (1) Children under the age of seven years; (2) children over the age of seven years, but under the age of fourteen years, in the absence of clear proof that at the time of commiting the act or neglect charged against them they knew its wrongfulness." Under the above section, a child under the age of 7 years is conclusively presumed to be incapable of committing a crime. In this respect it is the same as the common law, both of England and this country. Between 7 and 14, called the dubious age of discretion, the child is still presumed to be incapable, but the presumption is not conclusive. The state may overcome the presumption, but to do so, it must show by clear proof that the accused knew the wrongfulness of the act when he committed it. In the absence of such proof the presumption of incapacity must prevail. The burden is upon the state in such cases to prove knowledge of the wrongfulness of the act as an independent fact. In this respect the rule is the same as at common law. Angelo v. People, 96 Ill. 209, 36 Am. Rep. 132; State v. Adams, 76 Mo. 355; Stone v. R. R. Co., 115 N. Y. 109, 21 N. E. 712; Godfrey v. State, 31 Ala. 323, 70 Am. Dec. 494, and cases cited in note.

The foregoing may be said to refer to mental capacity. But the crime of rape, as well as the crime of assault with intent to commit rape, involves a further element, and that is the physical capacity to commit the offense. In England it was accepted as a fact that a child under 14 had not the physical capacity to commit the offense, and it was, therefore, held from an early day that the presumption of incapacity was conclusive. Evidence to show capacity

was not admissible. Rex v. Eldershaw, 3 Car. & Payne, 396; Rex v. Groombridge, 7 Car. & Payne, 583; Reg. v. Philips, 8 Car. & Payne, 736; Reg. v. Jordan, 9 C. & P. 118. In this country several states followed the English common law rule. Williams v. State, 20 Fla. 777. McKinny v. State, 29 Fla. 565, 10 South. 732, 30 Am. St. Rep. 140; State v. Sam Wrist, 60 N. C. 294; State v. Pugh, 52 N. C. 61; Foster v. Com. (Va.) 31 S. E. 503, 42 L. R. A 589, 70 Am. St. Rep. 846; State v. Handy, 4 Har. (Del.) 566. See, also, Com. v. Green, 2 Pick. (Mass.) 380. The courts of other states, and with considerable unanimity, were of opinion that the English rule was not suited to this country on account of the difference in condition, the age of puberty apparently coming earlier, and held that the presumption of physical incapacity was not conclusive, but that it may be overcome by proof that the defendant has reached the age of puberty and was capable of consummating the crime. People v. Randolph (N. Y.) 2 Parker Cr. R. 174; Williams v. State, 14 Ohio, 222, 45 Am. Dec. 536; Hiltabiddle v. State, 35 Ohio St. 52, 35 Am. Rep. 592; Gordon v. State, 93 Ga. 531, 21 S. E. 54, 44 Am. St. Rep. 189; Wagoner v. State, 5 Lea (Tenn.) 352, 40 Am. Rep. 36; Heilman v. Com., 84 Ky. 457, 1 S. W. 731, 4 Am. St. Rep. 207; State v. Jones, 39 La. Ann. 935, 3 South. 57. The law in this state is settled by statute in favor of the rule laid down in the cases just cited. Section 8891, Rev. Codes 1905 (section 7157, Rev. Codes 1899), reads as follows: "No conviction for rape can be had against any one who was under the age of fourteen years at the time of the act alleged, unless his physical ability to accomplish penetration is proved as an independent fact and beyond a reasonable doubt."

The record in this case shows that the state offered no evidence to show (1) a knowledge on the part of the defendant of the wrongfulness of the act with which he is charged; or (2) that he had arrived at the age of puberty and was physically able to accomplish penetration. In the absence of proof of mental and physical capacity, the presumption of incompetency must prevail. The court was right, therefore, in instructing the jury that under the evidence they could not find the defendant guilty of an assault with intent to commit rape. There was no proof of physical ability to consummate the offense of rape. The presumption is controlling, therefore, that he had not reached the age of puberty. Not having the capacity to commit the crime of rape, he could not be

guilty of the crime of assault with intent to commit rape. As applied to such assaults by children between 7 and 14 years of age, the rule is that where physical capacity to consummate the offense is not shown, there can be no conviction for an assault with intent to commit it. There being no ability to commit the rape, "the intent is merely a thought or desire, which could not in the nature of things produce any result, the highest offense of which the party was capable being a mere assault and battery. People v. Randolph, 2 Parker C. R. 174, 213; also Rex v. Eldershaw; Reg. v. Phillips, supra; Williams v. State, supra; State v. Sam, supra; McKinny v. State, supra; also, Reg. v. Waite, 2 Q. B. 600, and Reg. v. Williams, 1 Q. B. 320. The only case holding a contrary view which has come to our notice is Com. v. Green, 2 Pick. (Mass.) 380, in which it is held that the want of physical ability to consummate the offense will not defeat a conviction for an assault with intent to commit it. The general rule, however, is as stated in 1 Wharton, Crim. Law (9th Ed.) section 184, that "If there be judicial incapacity for the consummated offense (e. g. infancy) there can be no conviction for the attempt." In this case upon the evidence, the defendant was legally incompetent to commit the crime of assault with intent to commit rape. There is neither logic nor reason in the view that a child is legally competent and responsible for an attempt where he is confessed legally incompetent to consummate the offense which he is charged with attempting, and so with the single exception above noted, the courts have held.

No error was committed in refusing the instruction requested by the state as to the defense of impotency. Whether the request states the law correctly as to an attempted rape by an adult, we need not determine. In such cases, impotency is a defense against the consummated offense. But the courts differ when the charge is an attempt. See Territory v. Keyes, 5 Dak. 244, 38 N. W. 440. In that case it was held that the impotency of a grown man is no defense in a prosecution for assault with intent to commit rape, in the absence of proof that the defendant knew that he was impotent. In such cases there is a presumption of legal incompetency. In the present case there is legal incompetency. The question of impotency is not involved. The question was as to the mental and physical capacity of the defendant. The burden was upon the state to show a legal capacity to commit the crime charged, by proof

of both facts. These facts were a part of the state's case. They were not defensive facts. The instruction requested related to the effect of the impotency of an adult, and was foreign to the issues, and was properly refused.

Judgment affirmed. All concur.

(108 N. W. 485.)

THE FIRST NATIONAL BANK OF PORTAGE, WISCONSIN, v. THE STATE BANK OF NORTHWOOD, A CORPORATION, SAMUEL LOE, AS RECEIVER OF THE STATE BANK OF NORTHWOOD, APPELLANTS. THE BEIDLER & ROBINSON LUMBER COMPANY, A CORPORATION, NICK HALVORSON, M. V. LINWELL, SYDNEY C. LOUGH AND KATE LOUGH, DEFENDANTS.

Opinion filed February 14, 1906.

Banks and Banking — Excessive Loans.

1. Where, in evidence of a loan actually made to a bank, the lending bank accepts from the borrowing bank a note signed by the latter's cashier, personally, and indorsed by the borrowing bank, this being done to avoid disclosing on the face of the transaction an excessive loan to the borrowing bank, the borrowing bank is not thereby relieved of its obligation as a debtor.

Same — Loan by Officer — Ratification.

2. Where an officer of a bank, without authority to do so, borrowed money in the name of his bank and pledged certain of the bank's assets as security for the loan, and the borrowed money was received and used by the bank, and the transaction was such that the directors had, or ought to have had, knowledge of it, the corporation is estopped to deny the authority of its officer to make the contract in its behalf by which the money was procured.

Mortgage — What Constitutes — Conveyances in Trust — Vendor and Purchaser.

3. The defendant bank had sold certain of its lands under executory contracts, which provided that the title should be conveyed to the vendees on payment of the purchase price, which was to be paid by installments, the vendees, meantime, being given possession. Each future installment of the purchase price was represented by the vendees' note. The defendant bank assigned these contracts with accompanying notes to the plaintiff as collateral security for the former's debt to the latter. In connection with this assignment, and as part of the same transaction, the defendant bank conveyed the legal title of the lands described in said contracts to the plaintiff. *Held,* that the conveyances of the land cannot, so long as the

vendees' contracts are in force, be considered as mortgages securing the debt of the defendant bank and be foreclosed as such, but that the conveyances transferred to the plaintiff the legal title of the lands to be held by it in trust as security for the purchase price of the lands by the vendees, such title to be conveyed to the purchasers when the latter had performed the conditions of the contracts.

Banks and Banking — Certificate of Deposit.

4. Although a certificate of deposit payable on demand after a stated period contains a stipulation that it shall not bear interest after maturity, the holder thereof is entitled to legal interest thereon from the date when the bank fails or refuses to meet a demand for payment when payment is due.

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

Action by the First National Bank of Portage against the State Bank of Northwood and another. Judgment for plaintiff and defendants appeal.

Remanded with instructions to modify the judgment.

Charles F. Templeton, for appellants.

President or cashier of a state bank cannot bind it for a loan unless authorized thereto by its directors. First National Bank of Corunna v. Michigan City Bank, 8 N. D. 608, 80 N. W. 776; Florida Cent. R. R. Co. v. Schutte, 103 U. S. 118, 26 L. Ed. 327; Brown v. Chicago & N. W. Ry. Co., 78 N. W. 771; Eau Claire National Bank v. Benson, 82 N. W. 604.

Such president or cashier of a state bank cannot pledge its paper without like authority. Hoyt v. Thompson, 5 N. Y. 320; State v. Davis, 50 How. Pr. 447; First National Bank v. Ocean Nat. Bank, 60 N. Y. 278; Schneitman v. Noble, 39 N. W. 224; Kohler v. Hubby, 2 Black. 715, 17 L. Ed. 339; Asher v. Sutton, 1 Pac. 535; Greenawalt v. Wilson, 34 Pac. 403.

Nor to execute the deeds sought to be foreclosed. Thompson on Corporations, section 4761; Zane on Banking, sections 98, 100; Legett v. New Jersey Banking Co., 23 Am. Dec. 728; Winsor v. Lafayette Co. Bank, 18 Mo. App. 655.

Such authority can only be conferred by a formal act of the board of directors. Baldwin v. Canfield, 26 Minn. 43, 1 N. W. 261; First Nat. Bank v. Drake, 11 Pac. 445; Gashweiler v. Willis, 33 Cal. 9; De La Vergne Refrigerating Machine Co. v. German Savings Institution, 175 U. S. 40, 44 L. Ed. 65; Alta Silver Mining

Co. v. Alter Placer Min. Co., 78 Cal. 629; Hay Press Co. v. Devol, 72 Fed. 717; Edwards v. Water Co., 34 Pac. 381; Peoples Bank of New York v. St. Anthony Roman Catholic Church, 109 N. Y. 512, 17 N. E. 408.

Where a loan is to its cashier the bank's indorsement creates no liability on its part. Park Hotel Co. v. Fourth National Bank, 86 Fed. 742; Commercial National Bank v. Pirie, 82 Fed. 799.

A contract in violation of statute is void. Miller v. Ammon, 145 U. S. 421, 36 L. Ed. 759.

The loaner cannot hold bank's paper as security for its cashier's debt. Security Bank of Minn. v. Kingsland, 5 N. D. 263, 65 N. W. 697; McLellan v. Detroit File Works, 23 N. W. 321; Rhodes v. Webb, 24 Minn. 292; Dobson v. Moore, 45 N. E. 243; Lee v. Smith, 84 Mo. 304; Farmers Loan & Trust Co. v. Fidelity Trust Co., 86 Fed. 541.

Guy C. H. Corliss, for respondent.

A bank may borrow money. Auten v. U. S. Nat. Bank, 174 U. S. 125; Aldrich v. Chemical Nat. Bank, 175 U. S. 618; Barnes v. Ontario Bank, 19 N. Y. 152; Merchants Bank v. State Bank, 10 Wall. 604, 19 L. Ed. 1008; Donnell v. Bank, 80 Mo. 165; Sturgis v. Bank, 11 O. St. 153; Rockwell v. Bank, 13 Wis. 653; Ballston Spa Bank v. Marine Bank, 16 Wis. 120; Hanover Natl. Bank v. Natl. Bank, 109 Fed. 421; First Natl. Bank v. Arnold, 60 N. E. 134; Sloane v. Kansas City Bank, 7 S. W. 1056; Armstrong v. Chemical Nat. Bank, 83 Fed. 556; First Nat. Bank v. Michigan City Bank, 8 N. D. 608, 80 N. W. 1135.

A bank cannot deny its power to secure its loans, the proceeds of which it has received, so long as it retains such proceeds. Wright v. Hughes, 21 N. E. 909; Tourtelot v. Whithed, 9 N. D. 407, 84 N. W. 8.

A bank cashier has all the powers of a board of directors and could do whatever they could do, or authorize to be done; and had the full power of a banking corporation with respect to the conduct of business. Armstrong v. Chemical Nat. Bank, 83 Fed. 556; Tourtelot v. Whithed, supra; Davenport v. Stone, 62 N. W. 722; Wing v. Bank, 61 N. W. 1009; Bank v. Perkins, 4 Bosw. 420.

It is the duty of the directors to know of the transactions of its cashier, and they are chargeable with knowledge thereof. Martin v. Webb, 110 U. S. 7, 28 L. Ed. 49; Hahoney Mining Co. v. Anglo-

Cal. Bank, 104 U. S. 192, 26 L. Ed. 707; Sun Printing and Pub. Ass'n v. Moore, 183 U. S. 642; Ditty v. Dominion Nat. Bank, 75 Fed. 769; Aldrich v. Chemical Nat. Bank, 176 U. S. 618; New Hope and Delaware Bridge Co. v. Phoenix Board, 3 Comst. 156, 4 Thomp. Corp., section 5224; Sun Printing and Pub. Ass'n. v. Moore, supra.

The usages of business, in the particular institution, or the locality, may be considered in determining a cashier's power. Auten v. U. S. Bank, 174 U. S. 125.

ENGERUD, J. This action is before us for trial anew of all the issues. Defendants, the State Bank of Northwood and Samuel Loe, receiver of said bank, are the appellants. The State Bank of Northwood, which we shall hereafter refer to as the "Northwood Bank," is a banking corporation organized under the laws of this state. It became insolvent, and Mr. Loe is the receiver placed in charge of its affairs. The bank's doors were closed, and the receiver placed in charge thereof, in July, 1901. The plaintiff, which we shall refer to as the "Portage Bank," is a national bank at Portage, Wis. It alleges that on the 26th day of January, 1901, the Northwood bank was indebted to it in the sum of $7,500 for borrowed money, in evidence of which indebtedness the Northwood bank had, on December 1, 1900, executed and delivered to the Portage bank a certificate of deposit for said sum, dated December 1, 1900; that on January 26, 1901, for the purpose of securing the payment of said debt, the Northwood bank executed and delivered to the Portage bank certain quitclaim deeds, purporting to convey to the latter bank the former bank's title to several tracts of real property owned by the bank, it being agreed that the deeds, though purporting to be unconditional conveyances, were given only as security for said debt and were mere mortgages. The title to some of these tracts appeared of record in the name of Sydney C. Lough, who, at the time of the conveyances, was president of the bank and held the title in trust for the corporation. The deeds of these tracts were therefore executed by said Lough personally as grantor, but in doing so he was acting for and in behalf of the bank. No point is made as to the sufficiency of these conveyances in form to convey the bank's title, and in speaking of them hereafter we shall treat them as conveyances by the corporation itself. The prayer for relief, in substance, is that these deeds be declared to be mortgages and for

a decree of foreclosure in the usual form. The answer of the Northwood bank and its receiver denies that it ever became indebted to the Portage bank by reason of the transactions set forth in the complaint. These defendants aver that the acts referred to in the complaint, although done in the name of the bank by the president and cashier, were not done in the ordinary course of business of banking in this state, and were wholly unauthorized by the directors of the Northwood bank. The answer further alleges as a counterclaim that, at the time of the execution of the certificate of deposit described in the complaint and as part of that transaction, Sydney C. Lough, the then president of the Northwood bank, unlawfully and without authority from the board of directors of said corporation, delivered to the plaintiff a large number of promissory notes executed by various persons to the bank and owned by it. The notes so delivered are specifically described and are alleged to be worth the aggregate sum of $11,000. It is alleged that the receiver of the Northwood bank demanded the surrender of said notes to him by the Portage bank, but the latter refused and still refuses to comply with the demand, and thereby converted said notes to its own use to the damage of said Northwood bank in the sum of $11,000. Said defendants demand judgment that the plaintiff take nothing by the action, that the deeds described in the complaint be declared void, and that the defendants have and recover from plaintiff damages in the sum of $11,000. Such in brief are the issues which we deem material to the decision of the case. The plaintff claims to have a mortgage on the several tracts of land involved to secure its claim against the Northwood bank and demands a foreclosure thereof. The defendants deny the indebtedness; assert that the transactions referred to in the complaint were void as against the Northwood bank, and that the Portage bank has unlawfully converted to its own use part of the Northwood bank's assets to the damage of the latter in the sum of $11,000, for which amount they demand judgment against plaintiff.

We shall take up the counterclaim first because the decision of the questions presented thereby necessarily discloses and determines the nature and validity of all the transactions upon which plaintiff relies for relief. The record is a very voluminous one. As to what was said and done, however, by the various persons concerned in the numerous transcations involved, there is little or no room for dispute in the evidence. The dispute is principally

as to the inferences to be drawn from the facts and circumstances, and as to the legal effect of the acts of the parties. It would require too much space, and would serve no useful purpose, to set forth in this opinion a detailed analysis of the evidence in support of our views as to the ultimate facts proved. We shall simply state the facts which we think the evidence establishes. For several years before the failure of the Northwood bank its business had been conducted by Sydney C. Lough, who, from the time of its organization until November, 1900, had been cashier. At that time Lough was made president, and one H. Rostad succeeded him as cashier; but Lough continued his management of the bank as before. The directors paid little or on attention to their duties. They met from time to time as a board, but the only business apparently transacted at such meetings was of a formal nature, to vote or resolve as Lough dictated. Lough was virtually the sole manager of the bank. The bank had been in bad condition for some years before the failure and had continued to tide over its difficulties and conceal its true conditions by borrowing from other banks. When one bank declined to extend further credit, its claim would be met by borrowing from some other bank. On January 9, 1900, Lough, in behalf of the Northwood bank, borrowed from the Portage bank $5,000. In order to obtain this loan and as collateral security therefor, Lough was required to pledge to the Portage bank sundry promissory notes owned by the Northwood bank. The terms upon which these collateral securities were deposited were stated in the note executed in the name of the Northwood bank by Lough, as cashier, to evidence the debt. That note is in the following form: "$5,000. Northwood, N. Dak., Jan. 9th, 1900. November 1st, 1900, after date, (without grace), for value received, we promise to pay to the order of the First National bank of Portage, five thousand and no-100 dollars, at its office in the city of Portage and state of Wisconsin, with interest at the rate of 8 per cent per annum after date until paid, having deposited with said bank as collateral security sundry notes and first mortgage farm loans, all assigned and deposited with C. C. Gowran & Co., of Grand Forks, N. Dak., amounting to $6,250.00. All or any part of which hereby give the said bank or its president or cashier, or its assign or assigns, authority to sell on maturity of this note, or any time thereafter, (or before, in the event of such securities depreciating in value), at public or private sale, with-

out advertising the same or demanding payment, or giving notice of such sale, and it may become the purchaser on said sale, and to apply the net proceeds to the payment of this note, including interest and in case of deficiency promise to pay the amount thereof, forthwith after such sale. And it is hereby agreed and understood that if recourse is had to the collaterals, any excess of collaterals upon this note shall be applicable to any other note or claim held by said bank or its assigns against ———; and in case of exchange of, or addition to the collaterals above named, the provisions of this note shall extend to such new or additional collaterals. P. O. Northwood, N. D. The State Bank of Northwood, Sydney C. Lough, Cashier."

A stipulation was at the same time made to the effect that the Northwood bank should have the privilege of withdrawing from time to time any of the collaterals so deposited by substituting other acceptable collaterals in their place. On August 25, 1900, another loan of $3,000 was made by the Portage bank to the Northwood bank on the same terms and conditions as to collateral security. With respect to this loan, the appellants earnestly contend that the loan was not in fact one to the Northwood bank, but was a loan to Lough personally. The facts in regard to the transaction are as follows: Lough applied for the loan in behalf of his bank, and his application was accepted. The capital of the Portage bank, however, was only $75,000, and the officers of that bank wished to evade the statutory prohibition against loans to one borrower of more than 10 per cent of its capital. In order to do so, it was arranged that Lough should sign the note personally as maker and attach the name of the bank as indorser. This was done and the $3,000 so obtained was sent by Lough to a bank in Minneapolis with which the Northwood bank kept an open account. The money was credited by that bank to the Northwood bank as directed by Lough, and it was subsequently used in honoring the drafts of the Northwood bank issued in the regular course of business, so that the defendant bank received the benefit of the loan. There is not the slightest doubt that the parties to the transaction intended it to be, and thought it was, a loan to the Northwood bank, and not to Lough. It is true that Lough, apparently to temporarily cover up the bad state of his own personal account in the Northwood bank, entered it on the books of that bank as a credit to himself, but on October 19, 1900, this trick in book-

keeping was rectified by a cross-entry showing the transaction as it actually occurred. We do not consider it material that the Northwood Bank was in form merely an indorser or guarantor of Lough's note, instead of appearing as the real primary debtor. It employed this device to get the money and has reaped the fruits of the transaction. It assumed the obligation to pay the debt, and it is not material to this controversy in what form its obligation was assumed. The fact that the loan was $500 in excess of that limited by law does not relieve the debtor of its obligation whether we consider the bank as the real maker or as a mere indorser or guarantor. Hanover Nat. Bank v. Bank, 109 Fed. 21, 48 C. C. A. 482; Bank v. Arnold (Ind. Sup.) 60 N. E. 134. In the fall of 1900 the Northwood bank paid the interest on both these notes to maturity and paid $500 on the principal, leaving a balance of $7,500 due to the Portage bank on December 1, 1900. In the meantime, some of the collaterals pledged to the Portage bank had been withdrawn and other substituted in accordance with the terms of the agreement hereinbefore referred to. About the 24th of November, 1900, an arrangement was effected for the renewal of this $7,500 debt to the Portage bank. The two notes were to be surrendered and the Portage bank agreed to accept in lieu thereof a certificate of deposit for $7,500 dated December 1, 1900, payable one year from its date and bearing interest at the rate of 8 per centum per annum from its date to its maturity, but no interest after maturity. The same arrangement as to collateral securities was to continue, new collaterals, however, to be substituted for those already pledged. The certificate of deposit described in the complaint was accordingly executed and delivered, and subsequently, on or about January 21, 1901, the required collateral securities were delivered in exchange for those formerly pledged. The collateral securities so delivered are those described in the counterclaim. In connection with the same transaction, the deeds described in the complaint were executed and delivered. The lands conveyed by these deeds were owned by the Northwood bank. As to each tract it had entered into contracts with a purchaser to sell the same to him on the installment plan, the purchaser in each instance being given possession. Each purchaser had made a cash payment of part of the purchase price and had executed notes to the vendor for the amount of each future payment required by the contract. The notes and contract in

each instance referred to each other and together constituted virtually a single contract. Each contract bound the vendor to convey the title to the vendee on payment of the price agreed. These notes were amongst the collaterals delivered in January, 1901, to the Portage bank. The contracts in connection with which the notes were made were also formally assigned to the Portage bank. At the request of the Portage bank the deeds were also executed.

It is very clear from the evidence that the deeds were executed in order to completely clothe the Portage bank with the rights and remedies of the vendor, in these several contracts. All these executory contracts are still outstanding in full force and effect. The vendees were given possession of the lands affected and in equity are regarded as the owners of the land, the legal title being held by the Portage bank in trust as security for the payment of the purchase price; and the vendees are entitled to a conveyance of that legal title upon payment of the purchase price of the land. In other words the relative positions of these several vendees and the Portage bank is, in equity, that of mortgagor and mortgagee. Such, also, was the position of these vendees and the Northwood bank before the transfer of the contracts as collateral security. The Northwood bank assigned the vendees' contract obligations to the Portage bank and also conveyed to the latter the legal title which was held as security for those obligations. In equity the transaction was precisely the same and gave rise to the same rights and obligations, as between the parties affected thereby, as would have existed if the Northwood bank had assigned to the Portage bank the vendees' notes secured by real estate mortgages. On payment of the purchase price, the Portage bank was empowered to convey the legal title to the vendee, just as it would be authorized to satisfy the mortgage if the vendee's obligations had been so secured. Now, the Northwood Bank, through its legal representative, the receiver, alleges that the Portage bank, by refusing to surrender the notes on demand, is guilty of converting them and seeks to recover the full value of the security. It is self-evident that, if the Northwood bank recover the full value of the contract notes from the Portage bank, then the latter becomes the owner of those contract obligations, and, if the ownership of the obligations passes to the Portage bank, it is also entitled to deeds to be mortgages directly hypothecating the respective tracts as security for the $7,500 certificate of deposit, and decrees fore-

closure, the judgment is erroneous. The plaintiff was properly awarded judgment for the recovery of its claim against the Portage bank. The amount, however, was erroneously computed at too large a sum, but the error in this respect was rectified by an offer to remit the excess. The plaintiff concedes that interest should be computed from the date of the certificate to the failure of the bank (July 23, 1901) at 8 per cent, and thereafter at 7 per cent. The certificate in terms bears interest from its date to maturity at 8 per cent and no interest after maturity. The bank, in legal effect, as well as in fact, refused payment of the obligation. In such a case it is obvious that the stipulation providing that no interest should be allowed after maturity does not take effect. That stipulation merely protected the bank from any liability for interest after the maturity of the certificate if the holder failed to present it for payment at that time. The bank having defaulted its obligation, the law allows legal interest from the date of the default as compensation to the party injured by the breach of the contract.

The parties have filed a stipulation in the cause that, if the final judgment herein is for plaintiff, it shall contain a provision to the effect that such judgment shall be without prejudice to the right of the parties in this action to have an accounting with respect to the collateral delivered to plaintiff as security for the certificate of deposit. A provision to that effect will accordingly be inserted in the judgment. The cause will be remanded, with directions to modify the judgment appealed from to conform to this opinion. The respondent will recover taxable costs. All concur.

ON REHEARING.

The appellant urges in a petition for rehearing that the costs should be taxed against respondent and not against appellant. It is true that the plaintiff and respondent has been denied the affirmative equitable relief which it sought. But it is also true that the defendant and appellant has been defeated on every point which it urged either against the plaintiff's right or as ground for affirmative relief.

The pivotal question in controversy in this law suit was as to the validity of the transaction involved. The defendant's denial of its validity is the cause of this law suit, and it was in the

trial of that question that practically all the expenses of this litigation were incurred. In view of that fact it is no more than just that the defeated party should pay the taxable costs. Although the plaintiff misconceived its remedy, the defendant did not question the propriety of the remedy; and with respect to the question of substantial right actually litigated, the defendant and respondent is the defeated party.

In such a case as this the awarding of costs is left to the discretion of the court. Rev. Codes 1899, sections 5580, 5581; Rev. Codes 1905, sections 7179, 7180. If any item of costs provided for by Rev. Codes 1905, section 7176, is included in the costs as taxed in the court below, such item should be stricken out.

The petition for rehearing is denied.

(109 N. W. 61.)

EMMA A. CRANMER v. HENRY F. DINSMORE AND PARTHENA W. DINSMORE.

Opinion filed July 3, 1906. Rehearing denied October 4, 1906.

Costs — Non-Resident Plaintiff — Dismissal.

1. Where a plaintiff is in court when a motion is made by a defendant to compel the plaintiff, a nonresident, to furnish a surety for costs and a time is fixed by the court within which surety shall be furnished, and at the expiration of the time fixed for furnishing it defendant shows that the order has not been complied with, it is not error to dismiss the action without further notice.

Same — Discretion as to Time for Securing Costs.

2. Whether the time fixed within which surety may be furnished is reasonable is largely within the discretion of the court, and the action of the court will not be interfered with unless the discretion be abused.

Appeal from District Court, Dickey county; *Allen,* J.

Action by Emma A. Cranmer against Henry F. Dinsmore and Parthena W. Dinsmore. From a judgment of dismissal, plaintiff appeals.

Affirmed.

MORGAN, C. J. This is an action to determine adverse claims to real estate and was pending in Dickey county on June 29, 1904. On that day plaintiff moved that the cause be placed on

the trial calendar. Defendant moved that plaintiff, a nonresident, be required to give security for costs. Both motions were made in open court and granted. The written order requiring that security for costs be given by plaintiff did not fix any time within which such security must be given. On July 1st defendant moved for a dismissal of the action, upon the ground that no security for costs had been given pursuant to the stipulation of the parties and the order of court of June 29th. The court dismissed the action on July 1st, upon the ground that no security for costs had been furnished. The formal written order of dismissal upon such motion was not signed until July 5th. This order, after reciting the demand for security made on June 29th and the appearance of the attorneys on that day, is as follows: "And both parties by their attorneys having agreed in open court that plaintiff was a nonresident of the state, and that demand for security for costs had been made by defendants, and it was further agreed by said attorneys for plaintiff and defendants that plaintiff would give security for costs on or before June 30, 1904, and by consent of parties, the court ordered that plaintiff give and furnish security for costs on or before June 30, 1904, and, it further appearing to the court on showing made in open court on the 1st day of July, 1904, that plaintiff had wholly failed to give or furnish security for costs as required by the order of the court and the agreement of the parties * * *." Then follows the order of dismissal. On July 27, 1905, the plaintiff upon due notice to the defendants submitted a motion to set aside the order of July 5, 1904. This motion was based upon affidavits of the plaintiff's attorney.

Defendant's attorney filed his affidavit, also, and a sharp conflict took place as to what transpired when the motions of June 29, 1904, were before the court. The conflict between the attorneys is resolved in favor of the defendants by the recitals of the order of July 5, 1904. Plaintiff contends that the order dismissing the action was erroneous, for the reason that no notice was given of the motion to dismiss the action after the failure of the plaintiff to file security for costs. The order of July 5th was made according to its recitals in pursuance of a stipulation between the attorneys that security would be furnished on or before June 30th, and, unless so furnished, it necessarily followed that a dismissal of the action was to follow. This being the fact, section 5599, Rev. Codes 1899, prescribing that dismissal of the action must be

on notice, has no application. The statute provides that nonresidents must furnish surety for costs before commencing an action. In case surety is not furnished before the action is commenced, the action may be dismissed on motion and notice by the defendant, unless the court grant a reasonable time for furnishing security. The parties being in court, the court ordered that security be furnished within a certain time. Not having complied with that order, a dismissal was proper without further notice. It was within the discretion of the trial court whether the order of July 5, 1904, should be set aside or not. In view of the conflict between the attorneys and the fact that over a year had elapsed since the making of the order objected to, we do not think the court abused its discretion in refusing to set aside that order.

The defendant furnished a surety on July 2, 1904, who was approved by the clerk. It is claimed that this fact rendered the refusal of the court to set aside the dismissal of the action an abuse of discretion. Had it been promptly brought to the court's attention, that might be true, but in view of the unreasonable delay from November, when notice of the dismissal was received, until July, we see no ground for holding that there has been an abuse of discretion. It is claimed that the time fixed within which a surety was to be furnished was unreasonably short. There was no objection to the time fixed by the order and no application to have the time extended after plaintiff ascertained that surety could not be furnished by June 30th. The reasonable time to be allowed within which surety shall be furnished is largely discretionary. No abuse of that discretion is shown in this case.

The order is affirmed. All concur.

(109 N. W. 317.)

EMERSON-NEWTON IMPLEMENT CO., A CORPORATION, v. GEORGE CUPPS.

Opinion filed July 9, 1906.

Guaranty — Giving New Security With Knowledge of Fraud Waives It and Affirms the Transaction.

1. One who guarantees a contract, relying upon fraudulent representations as to facts concerning the same, and, after knowledge that such representations are false and fraudulent, voluntarily gives a note and mortgage to secure his liability, cannot thereafter allege fraud in the transaction as to the guaranty, as a defense to the note

and mortgage. The giving of the note and mortgage was an affirmance of the guaranty and a waiver of any fraud that might have inhered therein.

Fraud — Execution of Mortgage — Evidence.

2. Evidence examined, and *held* not to show fraud in the giving of the note and mortgage.

Appeal from District Court, Foster county; *Burke,* J.

Action by the Emerson-Newton Implement Company against George Cupps. Judgment for defendant, and plaintiff appeals.

Reversed, and judgment ordered for plaintiff.

T. F. McCue, for appellant.

The statement that the signing of a contract is a mere matter of form, and will entail no bother, is a mere expression of opinion and does not amount to fraud. Heyrick v. Surerns, 9 N. D. 28, 81 N. W. 36. Merritt v. Dufur et al. 68 N. W. 553; Rendell v Scott, 11 Pac. 779; Scrogin v. Wood, 54 N. W. 437; Nat'l Bank of Claybourne v. Carper, 67 S. W. 188; First Nat'l Bank v. Foot, 42 Pac. 205; Dearbourne Nat'l Bank v. Seymour, 73 N. W. 724; Mead v. Pettigrew, 78 N. W. 945; Kennedy v. Bank, 7 Neb. 59 Failure of consideration is waived by giving new note to settle pending litigation on original claim. Keys v. Man, 19 N. W. 666; Keefe v. Vogle, 36 Iowa 87. Giving a new note with full knowledge of all facts affecting an original transaction, and claimed to be fraudulent, waives the fraud. Wylie v. Gamble, 55 N. W. 377; Western Electric Co. v. Hart, 61 N. W. 867.

Hooker & White, for respondent.

An agent soliciting one to become a surety for the benefit of his principal, should advise such surety fully, fairly and honestly as to the liability that he is assuming, and act in the utmost good faith. Page v. Krekey, 137 N. Y. 307, 21 L. R. A. 409; Franklin Bank v. Cooper, 36 Me. 179, 39 Me. 542; Harrison v. Lumber & M. Ins. Co. 8 Mo. App. 37; Sooy v. State, 39 N. J. L. 135. Failure to do so excuses surety from liability. Remington Sewing Machine Co. v. Kejerte, 49 Wis. 409, 5 N. W. 809; Frisch v. Miller, 5 Pa. St. 310; Warren v. Branch, 15 W. Va. 21; Smith v. Josselyn, 40 Ohio St. 409; Smith v. Bank of Scotland, 1 Dow. 272; Guardman F. & L. Co. v. Thompson, 9 Pac. 1.

Weakness, illiteracy and the fact that the contract was one of suretyship will be considered on the issue of fraud. Causey v. Wiley, 27 Ga. 444.

MORGAN, C. J. This is an action to foreclose a chattel mortgage upon personal property. The answer alleges that the mortgage and the note secured by it were signed and delivered in reliance upon representations made by the plaintiff through its agent, which proved to be fraudulent. There was a trial to the court under section 5630, Rev. Codes 1899. Findings of fact and conclusions of law were made in defendant's favor upon the issue of fraud, and the note and mortgage were adjudged null and void. Plaintiff has appealed from the judgment, and requests a review of the entire case, under said section 5630.

The facts in regard to the execution of the note and mortgage are as follows: In the spring of 1902, the firm of Brown & Jennings made a contract with the plaintiff, whereby said firm was to become the plaintiff's local agents for the sale of its machinery at McHenry, N. D. It was necessary for Brown & Jennings to secure a guarantor for the faithful performance of the contract before the plaintiff would finally consummate the contract. The plaintiff's agent, Redmon, and Brown, one of the agents, called upon the defendant to secure his guaranty. The defendant was asked to become a guarantor for these agents. The defendant signed the contract of guaranty. The contract is not in evidence, nor are its terms given with any definiteness. About March, 1903, the plaintiff was attempting without success to make the defendant pay the liabilities of Brown & Jennings to the plaintiff. About the same time the defendant was negotiating for a loan upon his land, when an attachment was levied upon defendant's property by one of plaintiff's collecting agents on behalf of the company, and a notice of lis pendens was also filed in the office of the register of deeds of the county. The effect of filing the attachment and lis pendens was that the loan company would not make the loan until the lis pendens was released. Further negotiations with Redmon and the collecting agent with defendant resulted in the discharge of the lis pendens and the giving of the note and chattel mortgage in suit, for the sum of $817.20. Whether false and fraudulent representations were made by plaintiff's agents to induce defendant to sign the note and mortgage is the material question of fact to be determined on this appeal. There

is much evidence in the record as to what transpired before the guaranty was given by defendant, for the faithful performance of the contract by Brown & Jennings. We do not consider this evidence of sufficient materiality on the present issue to warrant any consideration of it. The guaranty was superseded by the note and mortgage, and is now of no importance unless something transpired before or at the time it was given that has a bearing upon the giving of the note and mortgage. Whether there was fraud in the original transaction, we do not pass upon, as the fact is of no materiality in view of the fact that defendant after discovery of what he claims to have been fraudulent representations did not promptly repudiate the guaranty contract. In place of doing this he confirmed its validity by adjusting the amount of his liability under said contract and giving security for the payment of the amount agreed on as due upon the guaranty. He did this without complaint or objection or duress, and did not make any contention at the time of giving the note and mortgage that he had been induced to sign the contract under misrepresentation of material facts. By freely giving the mortgage in suit it is clear to us that he waived the fraud, if any, that entered into the original transaction. He had the same knowledge of the facts that preceded the giving of the guaranty when he gave the note and mortgage as he had when this suit was commenced. As bearing upon the question of the waiver of a contract claimed to be fraudulent, by acquiescing in the same and entering upon a new contract based upon the former consideration, see Story on Eq. Juris. section 203a; Wylie v. Gamble (Mich.) 55 N. W. 377; Kingman v. Stoddard, 85 Fed. 740, 29 C. C. A. 413; Fitzpatrick v. Flannagan, 106 U. S. 648, 1 Sup. Ct. 369, 27 L. Ed. 211; Cornell v. Crane (Mich.) 71 N. W. 878; Western El. Co. v. Hart (Mich.) 61 N. W. 867; Morgan v. Nowlin (Mich.) 85 N. W. 468.

It is urged that the defendant did not waive any fraud that might have entered into the giving of the guaranty contract, for the reason that the note and mortgage were given under duress. The duress alleged consists in defendant's strained financial circumstances, under which it was necessary for him to raise money by a loan and that plaintiff's act in filing a lis pendens against his land would prevent making the loan, and that this fact constituted duress. There must be something more than financial

distress coupled with legal proceedings by a creditor to collect his debt before a case of duress is made out. The record does not disclose anything unlawful in the proceedings by the plaintiff to collect its debt from the defendant. There was no unlawful detention of plaintiff's property so far as the record shows. If there was any fraud in the transaction, defendant should have defended the proceedings to collect the debt by attachment and not having done so, cannot urge the defense now.

It is, however, urged that the plaintiff induced the defendant to give the note and mortgage on which this suit is based through fraudulent misrepresentations of material facts, just before they were given. It is claimed that plaintiff represented that it had in its possession over $2,000 worth of notes which it held as security for the payment of defendant's debt, for which the note and mortgage were given, and that defendant would be perfectly safe in signing the note and mortgage as he would lose nothing thereby, and that such papers would be turned over to defendant if he signed the note and mortgage. The defendant testified that he signed the note after the positive statement had been made by plaintiff that the indebtedness of Brown & Jennings was secured by notes in its hand, and that the sum total of such notes amounted to about $2,500. Conceding that such statements were made, there is no proof whatever that they were false or fraudulent. It is not shown that collaterals of that amount were not held by plaintiff when the note and mortgage were given. The defendant's attorney demanded that such notes be turned over to him for collection soon after the note and mortgage in suit were given. Notes to the amount of $200 were turned over pursuant to the request. The matter was dropped then without further demand for other notes. The attorney's request to turn over the notes did not specify any particular notes to be turned over, nor did it specify that notes of any particular aggregate amount were to be turned over. The letter of the plaintiff transmitting the notes to the attorney did not state that those sent were all the notes that it held as collateral to the indebtedness of Brown & Jennings. The result is that there is no proof that plaintiff made any false statements before the note and mortgage were signed. Hence no fraud or concealment or the making of fraudulent representations is proven. The note and mortgage were not therefore void at their inception. The only issue raised by the answer is that plaintiff's

fraudulent representations rendered the note and mortgage void. Neither pleadings nor proof will sustain a judgment for damages on account of a breach of contract.

The judgment is reversed, and the district court directed to enter judgment in favor of the plaintiff for the amount claimed. All concur.

(108 N. W. 796.)

JOHN CUMMING v. GREAT NORTHERN RAILWAY COMPANY, A CORPORATION.

Opinion filed July 9, 1906.

Railroads — Injury to Cattle.

1. Where the owner of cattle negligently permits them to stray upon a railroad track, the railroad company is not liable for injury to the cattle by trains, unless it failed to use ordinary care to avoid the accident after discovering the animals on the track.

Same.

2. Evidence examined, and *held*, that it conclusively disproves any negligence on the part of the defendant.

Appeal from District Court, Ramsey county; *Cowan*, J.

Action by John Cumming against the Great Northern Railway Company. Judgment for plaintiff, and defendant appeals.

Reversed.

Murphy & Duggan, for appellant.

It is negligence to turn cattle loose in defiance of the herd law, and this alone will preclude a recovery, in the absence of a requirement of a railroad to fence its track. Hannah v. Terre Haute Ry. Co. 21 N. E. 903; Schneckloth v. C. & N. W. Ry. Co. 65 N. W. 663; Moser v. St. P. & D. Ry. Co. 44 N. W. 530; Denver & R. G. Ry. Co. v. Stewart, 28 Pac. 658; Robinson v. Flint & P. M. Ry. Co. 44 N. W. 779; 19 Am. St. Rep. 174; McCann v. Chicago, St. P. M. & O. Ry. Co. 71 N. W. 1054.

Plaintiff must prove negligence, when the presumption afforded by a prima facie statute is overcome. Heuber v. Chicago, M. & St. P. Ry. Co. 6 Dak. 392; Smith v. N. P. Ry. Co. 3 N. D. 17, 53 N. W. 175; Harrison v. Chicago, M. & St. P. Ry. Co. 60 N. W. 405; Lewis v. Fremont Ry. Co. 63 N. W. 781; Kielbach v. Chi-

cago, M. & St. P. Ry. Co. 78 N. W. 951; Hodgins v. Minneapolis, etc., Ry. Co. 3 N. D. 382, 56 N. W. 239; Wright v. Minneapolis, St. P. & S. Ste. M. Ry. Co. 12 N. D. 159, 96 N. W. 324.

W. M. Anderson and *Fred J. Trainor,* for respondent.

Case should have gone to the jury. If different minds may honestly draw different conclusions it is properly left to the jury. Williams v. N. P. Ry. Co. 14 N. W. 97; Bates v. Fremont, E. & M. V. Ry. Co. 57 N. W. 72; Bishop v. Chicago, M. & St. P. Ry. Co. 62 N. W. 605; Huber v. Chicago, M. & St. P. Ry. Co. 43 N. W. 819.

ENGERUD, J. This is an appeal from a judgment awarding plaintiff damages for the alleged negligent killing of a cow by defendant. It is admitted that the animal was injured by being struck by a passenger train. The cow was trespassing on the defendant's right of way on the 18th of May, and had been permitted by plaintiff to run at large, contrary to law, and graze along the railroad track, which was unfenced; the company being under no obligation to fence. Under such circumstances, the company is not liable, unless its servants failed to use ordinary care to avoid the accident after discovering the animal on the track. Wright v. Railway Co. 12 N. D. 159, 96 N. W. 324. The only person who saw the accident was the engineer in charge of the train. His testimony as to the circumstances of the accident is wholly undisputed. He saw several cattle grazing along the track a considerable distance ahead. The train was a regular passenger train, consisting of an engine and six coaches, and was running about 35 miles an hour. As the train approached the cattle, one cow started to go upon the track. She was about 300 feet ahead. The engineer immediately shot off the steam and applied the air brakes, but could not stop the train before he struck the cow. The brakes were in perfect condition and worked properly. It was doubtful if the train could have been stopped in that distance, even by application of the emergency brake; but the use of that appliance is attended with great danger to the train and passengers. It cannot be pretended that ordinary care required, or even justified, resort to that appliance to avoid injury to an animal at the peril of injury to the train and passengers. The engineer admitted on cross-examination that the engine might have got past the point of collision before the cow reached it, if he had not reduced the

speed. If the engineer had had time to make this calculation when the cow started towards the track, there is no doubt that a man of his experience would have put on more steam instead of applying the brakes. He was an engineer with more than 20 years' experience, and he did what in his judgment ought to have been done to avoid the collision. He had no time to calculate the speed of the cow or the distance she would traverse to reach the track. He would reasonably expect that even a cow would be frightened and turned from her fatal course by the sound of the whistle and the sight of the approaching train.

Considerable stress is laid on the testimony of witness McVey, and it is claimed that it discredits the engineer's testimony. This witness' testimony is so confused, and in some respects inconsistent, that it is of little or no value; but giving it full credit and the most favorable construtions, there is nothing in it which throws and discredit on the engineer's statement of how the accident occurred. As we view the evidence, it shows conclusively that there was no negligence on plaintiff's part. Defendant's motion for a directed verdict ought to have been granted, and that having been erroneously denied, the error should have been corrected by granting the motion for judgment notwithstanding the verdict.

The judgment is reversed, with directions to enter judgment dismissing the action on the merits notwithstanding the verdict. All concur.

(108 N. W. 798.)

C. P. FRANKLIN v. DELLA P. JAMIESON-WOHLER, FRANK WOHLER, GUNDER NELSON AND GEORGE DIEBEL.

Opinion filed July 13, 1906. Rehearing denied October 4, 1906.

Mortgage Foreclosure — Redemption Operates as a Transfer of Purchasers' Rights — Extinction of Junior Liens Thereby.

1. A redemption from an execution or mortgage sale by a junior incumbrancer operates as an assignment or transfer of the rights of the purchaser at the sale, and, if there is no subsequent redemption within the time limited by law, the lien under which the redemption was effected is extinguished, and the redemptioner acquires the title.

Same — Mortgagor's Redemption Cancels Sale.

2. A redemption by the debtor or mortgagor who owns the land sold cancels the sale.

Same — Sheriff's Deed on a Redemption, Ostensibly by Another, But Actually by Mortgagor, Passes No Title, In Absence of Equitable Rights In Mortgagor.

3. Where a redemption from a mortgage sale was ostensibly made by and in the name of an incumbrancer, but was in fact made by and for the mortgagor himself, who owned the land sold, and the certificate of redemption issued to the ostensible redemptioner who assigned it to the mortgagor, by whom it was again assigned to a third person, a sheriff's deed to such subsequent assignee passes no title, in the absence of any showing entitling such assignee to a decree adjudging him to be the owner on equitable grounds.

Same — Cancellation of Debt — Possession of Certificate of Redemption by Mortgagor.

4. Where both the redemptioner and the debtor, through mutual ignorance of their legal rights, regarded the certificate of redemption merely as an evidence of debt in addition to the debt secured by the mortgage, the possession of such certificate by the debtor is prima facie evidence that the same had been discharged and canceled.

Same.

5. The evidence is insufficient to overcome such prima facie evidence of cancellation.

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

Action by C. F. Franklin against Della P. Jameson-Wohler and others. Judgment for defendants, and plaintiff appeals.

Modified and affirmed.

J. H. Frame and *Tracy R. Bangs*, for appellant.

When a witness willfully swears falsely as to a material fact, his entire testimony may be disregarded, unless corroborated by other credible evidence in this case. Blotcky v. Caplan, 59 N. W. 204; Mantonya v. Reilly, 56 N. E. 425; Hill v. Montgomery, 56 N. E. 320; Freeman v. Easly, 7 N. E. 656; White v. N. Y. Cent. Ry. 42 N. E. 456; Dohman v. Niagara, 71 N. W. 69; Allen v. Murray, 57 N. W. 979; Patnode v. Westhaver, 90 N. W. 467. Where a second mortgagee redeems his title to the property is complete, unless inferior lienors redeem from him. Rev. Codes 1899, 5540; Page v. Rogers, 31 Cal. 301; Leonard v. Tegner, 26 Pac. 1099.

One who acquires title to real estate by fraud holds it in trust for the party defrauded. Prondzinski v. Garbut, 8 N. D. 191,

77 N. W. 1012; Huxley v. Rice, 40 Mich, 73; Combs v. Little, 40 Am. Dec. 207; Jasper v. Hazen, 1 N. D. 75; Lakin v. Sierra Butte Mining Co. 25 Fed. 341; Nat'l Bank of St. Paul v. Stillwater Gas Co. 30 N. W. 440; 2 Pom. Eq. Juris. Vol. II, 1053; Moore v. Crawford, 130 U. S. 122, 9 Sup. 61 Rep. 447; Christy v. Sill, 95 Pa. St. 380; Dray v. Dray, 27 Pac. 223; Hollinshead v. Simms, 51 Cal. 158; Salmon v. Symonds, 30 Ca: 301; De Penier v. De Contillon, 4 John. Ch. 90; Perry on Trusts, 186; Brown v. Lamphear, 35 Vt. 252; Cole v. Ficket et al., 49 Atl. 1066; Nester v. Gross, 69 N. W. 39; Milner v. Rucker, 20 So. 510; Davis v. Settle, 26 S. E. 557; Rollins v. Mitchell, 53 N. W. 1020.

Where a husband is prohibited from acquiring title to real estate the wife is also prohibited and vice versa. Hardeman v. Cowen, 19 Smedes and M. 486; Taylor v. Eckford, 10 Smedes and M. 21; Robinson v. Lewis, 10 L. R. A. 101; Hamblet v. Harrison, 31 So. 580; McLean v. Letchford, 60 Miss. 169.

A bona fide purchaser for value without notice from a grantor in forged conveyance, obtains no title that a court of equity protects. Bernardo Sempeyreal v. U. S., 7 Peter, 222, 8 L. Ed. 665; Gray et. al. v. Jones, 14 Fed. 83; Van Amring v. Morton, 34 Am. Dec. 517; Scoles v. Wilsey et al., 11 Iowa, 261.

Guy C. H. Corliss, for respondent.

The transfer of real estate in the adverse possession of another under color of title is void. Schneller v. Plankinton, 12 N. D. 561, 98 N. W. 77; Galbraith v. Payne, 12 N. D. 164, 96 N. W. 841.

Fraudulent alteration of an instrument renders it void. 2 Cyc. L. & Proc. 183, 185.

ENGERUD, J. Plaintiff brought this action to foreclose a real estate mortgage given by defendant Mrs. Jameson-Wohler to one Dr. Reilly, by whom it was assigned to plaintiff. The mortgage purports to secure the mortgagor's promissory note for $750 and interest at 12 per cent per annum from its date, October 24, 1896. The note was due November 1, 1897. It is alleged in the complaint that a prior mortgage on the premises, given to Janney, Semple & Co., had been foreclosed on January 8, 1898, and the property sold to said Janney, Semple & Co. for $455.95. That said Dr. Reilly, as second mortgagee, redeemed from said sale in January, 1899, and received a sheriff's certificate of redemption, paying for that purpose the sum of $510.65. That thereafter the defendant

Mrs. Jameson-Wohler, by fraud and stealth, and without consideration, obtained possession of an instrument which had been executed by Reilly purporting to assign to her said certificate of redemption, and that she thereafter executed to defendant Frank Wohler an assignment thereof—all of which instruments were recorded. That said Frank Wohler thereafter, pretending to be the owner and assignee of said certificate of redemption, presented the same to the sheriff and procured from that officer a sheriff's deed of said premises, which deed was also recorded. The only relief prayed for is the foreclosure of the mortgage in the usual form for the amount due on the mortgage, including therein the sum paid for redemption from the first mortgage. Plaintiff's theory apparently is that the redemption had no other effect than the payment of a prior lien, entitled him only to add the sum so paid to his own lien. The plaintiff has misconceived his rights as well as his remedy. If the facts were as alleged in the complaint, the redemption by Reilly as second mortgagee had the effect to transfer to him all the rights of the purchaser at the sale; the certificate of redemption operating as an assignment of the certificate of sale. After the year for redemption expired he was entitled to a sheriff's deed, which would vest the title in him. Rev. Codes 1899, section 5544 (Rev. Codes 1905, section 7143); Sprague v. Martin (Minn.) 13 N. W. 34. His mortgage lien would thereby be extinguished. If the assignment of the redemption certificate was wrongfully obtained from Reilly, the remedy is a suit in equity to establish that fact and enforce Reilly's or the plaintiff's right to the land as a real owner thereof. The complaint clearly states no cause of action for the foreclosure of the second mortgage. This objection to the complaint, however, was apparently lost sight of in the court below.

The defendants Mrs. Jameson-Wohler and Mr. Wohler answered jointly, and allege that the note and mortgage described in the complaint were given for only $350, but that Dr. Reilly, the mortgagee, fraudulently altered the same so as to make the same appear as a note and mortgage for $750. They further allege that the redemption, although made in the name of Dr. Reilly as a mortgagee, was in fact made by and for Mrs. Jameson-Wohler, the mortgagor and then owner of the land; and that the amount paid for the redemption was the money of said Mrs. Jameson-Wohler, and not the money of Reilly. They further aver that the

entire mortgage debt was paid to Dr. Reilly. They pray for a judgment canceling the mortgage as a cloud on the title and adjudging Frank Wohler to be the owner of the land by virtue of the sheriff's deed. The trial court found for defendants, and judgment was entered for the relief prayed for by them. This appeal is from the judgment, and appellant demands a retrial of all the issues.

It is quite apparent that Dr. Reilly and Mrs. Jameson-Wohler are the real opposing parties in this action. Aside from the documentary evidence, the testimony of these two persons is virtually the only evidence in the case. It is painfully evident that each of these two witnesses are alike unworthy of credit. As to Dr. Reilly, the record clearly discloses that he knowingly testified falsely at the trial touching material facts in the case; and, as to the opposing witness, it is very apparent that she had little respect for the obligations imposed by her oath. It is undisputed that Mrs. Jameson-Wohler has had possession of the note and mortgage and sheriff's certificate of redemption since long prior to the commencement of this action. It is also evident from the allegations of the complaint and answer, as well as from the testimony of both parties, that both of them assumed and acted on the assumption that the redemption certificate was merely an evidence of a debt or obligation in addition to that evidenced by the note and mortgage. That being so, the possession of the certificate of redemption by the supposed debtor should be given the same evidentiary force as the possession of the note and mortgage by the obligor. Rev. Codes 1899, section 5713c, subds. 1, 9 (Rev. Codes 1905, section 7317). It is prima facie proof that the obligations have been discharged and canceled. The allegation that the possession of the papers was surreptitiously obtained by Mrs. Jameson-Wohler is supported by no other testimony than that of Dr. Reilly, who, as we have already stated, is utterly unworthy of credit. It follows that the prima facie proof of discharge or cancellation, afforded by the fact that the papers are in Mrs. Jameson-Wohler's possession, must prevail. The testimony of Mr. Prom is too vague and indefinite to be of any value as corroborative of that of Dr. Reilly. It tends to discredit Mrs. Jameson-Wohler's testimony; but, as above indicated, that was unnecsesary, because we disregard her testimony for the same reason that we decline to believe Dr. Reilly's.

There was no evidence that Frank Wohler is the owner of the land in question. He claims title by virtue of the sheriff's deed, which he obtained as an alleged assignee of the certificate of redemption. But if that redemption was in fact made, as he claims, by Mrs. Jameson-Wohler, the mortgagor and then owner of the land, then such a redemption is a cancellation of the foreclosure or execution sale. Rev. Codes 1899, section 5545 (Rev. Codes 1905, section 7144); Sprague v. Martin, supra. This result would in no way be avoided by the device of redeeming in Reilly's name and causing his certificate of redemption to be assigned to the mortgagor and owner of the land. There is no showing upon which to base a finding that Mr. Wohler is equitably entitled to the ownership of the land. It follows that the assignment from Mrs. Jameson-Wohler to Frank Wohler passed nothing.

The judgment should be modified so as to adjudge the ownership of the land to Mrs. Jameson-Wohler, instead of to Frank Wohler. As thus modified the judgment is affirmed, respondents to recover the taxable costs. All concur.

(109 N. W. 56.)

T. O. BAIRD, MARY BAIRD AND H. J. BAIRD, CO-PARTNERS AS BAIRD BROTHERS, v. H. C. CHAMBERS.

Opinion filed July 27, 1906.

Negligence — Prairie Fires.

After discovering a fire in progress on his premises for the kindling of which he is not responsible, the owner is not bound to exercise more than ordinary care and diligence to prevent it from spreading.

Appeal from District Court, Kidder county; *Winchester*, J.

Action by W. O. Baird and others against H. C. Chambers. Judgment for plaintiffs, and defendant appeals.

Reversed.

J. W. Walker and *S. E. Ellsworth*, for appellant.

Negligence or misconduct is the gist of liability and the burden of proving it is on the plaintiff. Shearman & Redfield on negligence (5th Ed.) section 668; Mattoon v. Fremont, Etc., Ry. Co., 60 N. W. 69; Sweeny v. Merrill, 16 Pac. 454; Nass v. Schulz, 81 N. W. 133.

The defendant cannot be held answerable in damages, for the reasonable and proper exercise of a lawful right, attended by a cautious regard for the rights of others, when there is no negligence, unskillfulness or malice in the act done. Fahn v. Reichart, 8 Wis. 255; Case v. Hobart, 25 Wis. 654; Garnier v. Porter, 27 Pac. 55; Sweeny v. Merrill, 16 Pac. 454; Hitchcock v. Riley, 89 N. Y. Supp. 260; Bolton v. Calkins, 60 N. W. 297; Ellsworth v. Ellingson, 64 N. W. 774; Kenney v. Hannibal, Etc., Ry. Co., 70 Mo. 252.

The mere fact that a fire originated on defendant's land does not render him liable for damages after it spread to other lands. Moe v. Job, 1 N. D. 140, 45 N. W. 700.

Defendant not liable for failure to make diligent use of means and appliance reasonably within reach, if the fire could not have been extinguished no matter what equipment or means were used. Baldwin v. Andrews, 96 N. W. 305, 12 N. D. 267.

T. R. Mockler and *Maddux & Rinker,* for respondents.

If a fire is kindled upon one's premises by himself, or he finds one there kindled by another and does not attempt to control it, and if it is likely to spread to his neighbor's farm to the latter's injury, and does so spread and injure, he is liable. Ball v. Grand Trunk R. Co., 16 U. C. C. P. 252; St. Louis Southwestern R. Co. v. Ford, 45 S. W. 55; Louisville, etc., R. R. Co. v. Vitsche, 126 Ind. 229.

ENGERUD, J. This is an action to recover compensation for the destruction of plaintiff's property by a prairie fire. It is alleged that the defendant negligently kindled the fire on his premises, and negligently permitted it to spread so as to cause the damage complained of. It is undisputed that the fire in question was started on defendant's premises and spread from there to plaintiff's ranch about seven or eight miles distant, and destroyed plaintiff's property. The defendant, however, did not kindle the fire and was in no manner responsible for the kindling thereof. He discovered the fire, however, a few minutes after it started. It is conceded that the defendant is not liable for the damages caused by the fire unless his failure to extinguish it after discovering it was due to some omission of duty on his part. The charge to the jury on this question was as follows: "In determining the question of negligence, if you find from the evidence that

at the time the defendant discovered the fire in question, it would have been possible for him to prevent the spread of the same with the help and means within his reasonable reach, then under the law he would be held responsible for negligently or carelessly allowing the fire to spread." There was much else said on the same subject but it was merely a repetition of the same idea in different language. The instructions on this point were duly excepted to and form the basis for the main assignment of error. It was not claimed that the defendant failed to make use of the means available to him for extinguishing the fire, but plaintiff contended that defendant had not used those means with proper promptness and diligence. What degree of promptness and diligence was the defendant under obligations to exert? As will be seen from the instruction above quoted, the jury were told in effect that defendant was liable if the fire could possibly have been extinguished by him. The jury were left to infer that if by the utmost promptness and extremest diligence of effort on defendant's part the fire might have been extinguished then the defendant was liable. That is clearly not the law. Even if the defendant had himself set the fire he was bound to exercise only ordinary care and diligence to prevent it from spreading. Thompson, Com. on Law of Negligence, vol, 1, section 729. Surely, no greater degree of care is required of one who is not responsible for starting the fire. After he discovered the fire on his premises he was bound to exercise reasonable care and diligence to prevent it from spreading so as to endanger his neighbor's property. His duty in this respect after discovering the fire would be the same as that resting upon a person who, without negligence, starts a fire on his own premises. He was bound to put forth such reasonable effort to prevent the fire endangering his neighbors as a man of ordinary prudence would put forth, who was actuated by a proper regard for his neighbors' rights and safety. McCully v. Clark, 40 Pa. St. 399, 80 Am. Dec. 584.

This error in the instructions requires a reversal and a new trial.

All concur.

(109 N. W. 61.)

ALEX. CURRIE AND A. H. RIGGS, CO-PARTNERS AS CURRIE & RIGGS, v. GAAR, SCOTT & CO.

Opinion filed July 30, 1906. Rehearing denied January 7, 1907.

Appeal — Review — Affirmance.

An order restraining the issuance of a sheriff's deed upon a sale pursuant to a default foreclosure judgment, which is issued in an action by a subsequent lienholder to determine the validity of such judgment and sale, will be affirmed upon appeal without a re-examination of the merits, where it appears that the judgment and sale have already been set aside upon the application of the mortgagor and the appellant was a party to the proceedings.

Appeal from District Court, Rolette county; *Cowan*, J.

Action by Alex. Currie and A. H. Riggs against Gaar, Scott & Co. and others. Judgment for plaintiffs, and Gaar, Scott & Co. appeal.

Affirmed.

Turner & Wright, for appellants.

Davis & Sennett, for respondents Currie & Riggs.

Wm. Bateson, for respondents.

PER CURIAM. This is an action to determine the validity of a default real estate foreclosure judgment, and of the sale of the premises which was made pursuant thereto. The property was bid in at the sale by the mortgagee, Gaar, Scott & Co. The plaintiffs claim to have a mortgage upon the premises, also an attachment lien, both of which are subsequent in point of time to the Gaar-Scott mortgage involved in the foreclosure action. Service in that action was made upon the mortgagor by publication. These plaintiffs claim that there were defects in the proceedings so that the court did not acquire jurisdiction to enter judgment, and further, that the mortgage itself was void because it was upon the homestead and was not signed by the mortgagor's wife. Upon plaintiff's application a temporary restraining order was issued in this action, directed to the sheriff, enjoining him from issuing a deed pendng the determination of the action. Gaar, Scott & Co. made an application to vacate the above order, which was denied, and it has appealed from the order.

The order must be affirmed. An examination of the grounds urged by appellant for reversal is not necessary. The records of

this court show that the judgment in question was vacated by the trial court upon the application of the mortgagor and his wife, in the action in which it was rendered and the sale was set aside, and the order vacating the judgment and sale was affirmed by this court upon appeal. See opinion just handed down in Gaar, Scott & Co. v. Collin et al. (N. D.; submitted with this appeal) 110 N. W. 81. Gaar, Scott & Co., the present appellant, was the plaintiff and appellant in the other action and is bound by the adjudication. The judgment and sale having been set aside, it follows that no right to issue a deed remains, and this is the alleged right which the appellant seeks to vindicate by this appeal. Order affirmed. All concur.

(110 N. W. 83.)

GAAR, SCOTT AND COMPANY, A CORPORATION, v. ARTHEME COLLIN, JULIE COLLIN AND ALEX CURRIE AND A. H. RIGGS, CO-PARTNERS AS CURRIE & RIGGS, DEFENDANTS, ARTHEME COLLIN AND JULIE COLLIN, RESPONDENTS.

Opinion filed July 30, 1906. Rehearing denied January 7, 1907.

Opening Default Judgment — Application — Decision After Time.

1. An order granting an application to open a default judgment under section 6846, Rev. Codes 1905, the application being seasonably made and submitted, is not void because the court's decision was made after the time limited by the statute.

Same — Stipulation as to Time of Hearing — Waiver.

2. Where an application for relief from a default judgment is made within time and the hearing is continued by stipulation until after the statutory period has expired, a party to the stipulation cannot urge that fact to defeat the applicant's right to relief.

Constitutional Law — Conveyance of Homestead — Both Spouses Must Join.

3. Section 5052, Rev. Codes 1905, which requires the signature of both husband and wife to all conveyances and incumbrances of the homestead, is a proper means for protecting and perpetuating the homestead, and is not open to the objection that, by legislative action alone, it impairs or defeats the husband's right of individual conveyance.

Same.

4. The right of individual conveyance can be waived, and, when the owner of land acquiesces in its dedication as a homestead, it becomes subject to existing laws regulating its conveyance.

Appeal from District Court, Rolette county; *Cowan*, J.

Action by Gaar, Scott & Co. against Artheme Collin and Julie Collin. From an order vacating a default judgment plaintiff appeals.

Affirmed.

Turner & Wright, for appellant.

Application to vacate judgment must be made and decided within one year after notice. Sargent v. Kindred, 5 N. D. 472, 67 N. W. 826.

Knowledge of entry must be shown by applicant. Judd v. Patton, 84 N. W. 199.

Right to convey or incumber homestead without joinder of wife is a vested one, that cannot be destroyed by legislation. Gladney v. Sydnor, 60 L. R. A. 880; Gilmore v. Bright, 7 S. E. 751; New Jersey v. Yard, 95 U. S. 114, 24 L. Ed. 352.

Under present homestead law conveyance by husband alone transfers title upon abandonment, subject to intervening equities. Stewart v. Mackey, 16 Tex. 56; McQuade v. Whaley, 31 Cal. 526; Himmelman v. Schmidt, 23 Cal. 117; Bowman v. Norton, 16 Cal. 214; Lee v. Kingsbury, 13 Tex. 68, 62 Am. Dec. 546; McDonald v. Crandall, 43 Ill. 231, 92 Am. Dec. 112; Hewitt v. Templeton, 48 Ill. 367; Vasey v. Trustees, 59 Ill. 188; Cobb v. Smith, 88 Ill. 199.

William Bateson and *Davis & Sennet* (*Burke & Middaugh*, of counsel), for respondents.

Plaintiffs having stipulated that a hearing might be had, at a particular time, cannot object, that such hearing was after the period limited by law for the hearing.

A conveyance of a homestead is absolutely void, unless the instrument transferring it is signed and acknowledged by both spouses. Aultman & Taylor Co. v. Jenkins, 27 N. W. 117; Swift v. Dewey, 29 N. W. 254; Larson v. Buttz, 35 N. W. 190; Betts v. Sims, 41 N. W. 117; McCreery v. Schaffer, 41 N. W. 996; Heron v. Knapp, 40 N. W. 149; Alexander v. Benham, 6 N. W. 80.

Neither spouse is estopped to claim the invalidity of the transfer. Barton v. Drake, 21 Minn. 299; Haight v. Houle, 19 Wis. 472; Bruner v. Bateman, 24 N. W. 9; Sears v. Dixon, 33 Cal. 326;

Thompson, Homestead and Exemption, 472; Williams v. Stark, 5 Wis. 534; Revalk v. Kraemer, 8 Cal. 66; Barber v. Babel, 36 Cal. 11.

YOUNG, J. The plaintiff has appealed from an order vacating a default judgment in an action to foreclose a real estate mortgage, and permitting the defendants, Artheme Collin and Julie Collin, his wife, to answer and defend in the action. The mortgage was signed by Artheme Collin and covers 160 acres of land situated in Rolette county, the title to which he acquired from the United States under the homestead law. The mortgage was given on September 9, 1899, to secure an indebtedness aggregating $2,691. It was not signed by Julie Collin, the mortgagor's wife. The action was commenced on August 15, 1903. Alex Currie and A. H. Riggs, copartners as Currie & Riggs, were made defendants as the holders of a subsequent lien. They were served personally. Service upon the mortgagor, Artheme Collin, and upon his wife, was by publication. Judgment by default was entered as prayed for in the complaint, on December 17, 1903. Execution was issued and the premises were sold to the plaintiff and the sale was confirmed on February 25, 1904. The order appealed from, which vacates the judgment and sale and permits the defendants to answer, was signed November 15, 1905, and contains the direction "that this order be and is hereby made and entered nunc pro tunc, as of the time this application was submitted to the court, to wit, the 22d day of March, A. D. 1905."

Counsel for appellant contend that the order should be reversed and urge two grounds: (1) That it was not made within one year after defendants had notice of the judgment; and (2) that the defedants' proposed answer does not state a defense. The application was made under section 5260, Rev. Codes 1899, as amended by chapter 67, p. 78, Laws 1901 (now section 6846, Rev. Codes 1905), which so far as material, reads as follows: "The defendant upon whom service by publication is made, or his representatives, on application and sufficient cause shown at any time before judgment, must be allowed to defend the action, and except in an action for divorce, the defendant upon whom service by publication is made or his representatives, upon making it appear to the satisfaction of the court by affidavit [stating the facts] that he has a good and meritorious defense to the action, and that he had no notice or knowledge of the pendency of the action so as

to enable him to make application to defend before the entry of judgment therein, and upon filing an affidavit of merits, may, in like manner be allowed to defend after judgment, or at any time within one year after notice or knowledge thereof, and within three years after its entry, and on such terms as may be just. * * *" The order was made within three years after the judgment was entered. Counsel's contention is that is was made more than one year after the defendant had notice or knowledge of the judgment, and is void for want of jurisdiction. The record, in our opinion, does not sustain this contention. The mortgagor and his wife resided in the state of New Hampshire when the action was instituted. In their affidavits to open the default, they state that they first learned that an action had been commenced by plaintiff to foreclose the mortgage, and that judgment had been taken, through a letter from J. A. Collin, the mortgagor's brother, who resided near the land, which letter was received "between the 15th day of March, 1904, and the 1st day of April, 1904." The notice of motion to vacate and the moving of affidavits were apparently prepared and served in the latter part of February or first of March, 1905, the date not being given, and this concededly was within one year after the defendants had notice of the judgment. The plaintiff's counter affidavits bear date March 10, 1905. The hearing was noticed for the opening day of the adjourned February term. The record shows that the motion was heard by stipulation on March 22, 1905, both parties being represented by counsel, and no further hearing was had. Leave was then granted to defendants to subsequently prepare and serve affidavits of merits, and this was done. The court's order was not made until November 15, 1905. No objection to the jurisdiction of the court to hear the motion appears to have been made in the trial court, and no objection to the order granting leave to subsequently file the affidavit of merits. The objection is urged for the first time in this court. Upon this state of facts we are agreed that the objection to the jurisdiction cannot be sustained. Confessedly the order was actually made more than a year after the defendants had notice of the judgment. The order recites, however, that the application was submitted on March 22, 1905, and was ordered nunc pro tunc as of that date. This course, we think, was entirely proper. The statement in the record that the application was actually submitted on March 22d must be accepted as true. The parties

evidently so understood it and the filing of affidavits of merits after that date was at most a compliance with a formal requirement as to which there was no objection. The rule is that, where an application to open a default is seasonably made and submitted, the decision of the court thereon is not void because made after the expiration of the time limited by the statute. 7 Enc. Pl. & Pr. 108; Wolff v. Railway Co., 89 Cal. 339, 26 Pac. 825; Conklin v. Johnson, 34 Iowa, 266; Albright v. Warkentin, 31 Kan. 442, 2 Pac. 614. Contra McKnight v. Livingston, 46 Wis. 356, 1 N. W. 14. The order was made as of the date the application was submitted. This court has approved of this course as a proper means of protecting suitors against the court's delay in making its decisions. Sargent v. Kindred, 5 N. D. 472, 67 N. W. 826.

We are also of opinion that the record does not sustain plaintiff's contention that the court had no jurisdiction to hear the application on March 22d. True, the defendants' statements as to when they first learned of the judgment are not definite. They fix the date between the 15th day of March and the 1st day of April. If they learned of it after March 22d, the hearing was in time. If they learned of it before that time the hearing was after time. But, in our view, the question is not material. Concededly, the application was made in time and the plaintiff, having joined in a stipulation fixing the date of hearing on March 22d, could not urge at that time, and according to the record it did not, that the court had no jurisdiction to hear the application. The better rule is that even the court cannot deprive an applicant for relief from a default of his right by continuing the hearing until the statutory period has passed. Albright v. Warkentin, 31 Kan. 442, 2 Pac. 614; Sperring v. Hudson, 37 Kan. 104, 14 Pac. 489. Much less can it be said that a party to the action can, by stipulation for a subsequent hearing, deprive his adversary of his right by urging the very act to which he has consented.

It is also contended that the proposed answer in which the defendants allege the invalidity of plaintiff's mortgage because it was not signed by the mortgagor's wife does not state a defense and that the judgment should therefore not have been set aside. This contention is based upon the fact that the mortgagor obtained title to the land while section 2451, Dak. Comp. Laws 1887, was in force. This section provided that "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." It is claimed that the answer shows that the mortgagor's wife resided out of the state when the mortgage was executed, and that the terms of the above section govern, and that the mortgage was therefore valid. It is claimed that section 3608, Rev. Codes 1899 (section 5052, Rev. Codes 1905, which was adopted as chapter 67, p. 185, Laws 1891, and was in force when the mortgage was executed, is not applicable for constitutional reasons. That section provides that "the homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." This section, it will be seen, unlike the previous statute, makes no exception as to the requirement for the wife's signature, because of nonresidence. The appellant's contention is that the husband's right of conveyance as it existed under the previous law was a vested right which the legislature could not defeat or destroy by imposing the further restriction, requiring the wife's signature, whether she was a resident or not. We cannot agree to this contention. The constitution of this state (section 208) charged the legislature with the duty of protecting the homstead by suitable laws. One of the means adopted by the legislature for accomplishing this end, and it is common to many states, is the requirement that a conveyance thereof shall not be effective unless signed by both husband and wife. There is no constitutional restriction in this state inhibiting this legislation. It, on the contrary, merely carries into effect the mandate of the constitution. That it is competent for the legislature, in the absence of constitutional restriction, to prohibit the alienation of the homestead without the wife's signaure is well settled. Barton v. Drake, 21 Minn. 299; Barker v. Dayton, 28 Wis. 367. But it is said that the right of individual conveyance is a vested right, and that the legislature cannot take it away. In support of this view, counsel for appellant rely upon Gilmore v. Bright, 101 N. C. 382, 7 S. E. 751 and the case of Gladney v. Sydnor (Mo. Sup.) 72 S. W. 554, 60 L. R. A. 882, 95 Am. St. Rep. 517. These cases hold that the legislature alone cannot take away the right of individual conveyance. That, we think, is the full extent to which they go. They do not sustain the view that the right is one which cannot be waived.

In the Missouri case it was conceded that the right of individual conveyance would be defeated by the filing of a homestead claim by the wife. The court said: "No one under the law had the right to impair or interfere with his right of alienation except his wife, and the legislature cannot step in and exercise that privilege for her. She and she alone could exercise it." The North Carolina case is not different. In that case there was no allotment of the homestead, nor any act indicating a purpose to dedicate it to the purposes of a homestead. The court held that the husband's right of individual conveyance could not, under such circumstances, be defeated, but held expressly that the right of individual alienation may be waived. "He may surrender this right by having the land allotted and set apart as a homestead, upon his own petition, or by acquiescing in such an allotment." And the holding has been uniform in that state that, when the owner, having the right of separate conveyance, voluntarily acquiesces in the appropriation of his property as a homestead, he surrenders his absolute right of alienation and it becomes subject to all restrictions relating to the conveyances of homesteads. Bruce v. Strickland, 81 N. C. 267; Castlebury v. Maynard, 95 N. C. 281.

There is some difference of opinion as to whether the right of individual conveyance by a married person is a vested right (Massey v. Womble, 69 Miss. 347, 11 South. 188), also as to whether a change in the law relating to the mode of alienation impairs any right of creditors (Kennedy v. Stacey, 60 Tenn. 220), but there is no difference as to the view that, when the property has been impressed with the homestead character by the consent of the owner, it becomes subject to existing laws regulating its alienation. By consenting to its change from individual to homestead property, the owner surrenders his right of individual alienation. In Thompson on Homesteads, section 230, it is said that "there are three ways in which land may be dedicated as a homestead by the person or persons entitled to claim this right: First, by a public notice of record in conformity with statutory direction or mandates which exist in some of the states; second, by visible occupancy and use; third, by the actual setting off of the homestead by or under the direction of a court of justice." The defendant's answer shows a dedication by occupation and use. It alleges that the mortgagor was the head of a family and resided upon the land in question as a homestead when the mortgage was given. This

shows a dedication by him, and a surrender of his right of individual alienation. Having by his own act given the land the character of a homestead, it became subject to existing laws governing the conveyance of homesteads. Section 5052, Rev. Codes 1905, in force when the mortgage in suit was given, required the wife's signature. She did not sign it. It was therefore invalid. In some states a conveyance of the homestead executed by the husband alone is not wholly void, but has the limited effect of transferring the husband's interest, but subject to the homestead estate. Gee v. Moore, 14 Cal. 472. In this state, however, a conveyance of the homestead which is not executed by both husband and wife is void. Helgebye v. Dammen, 13 N. D. 167, 100 N. W. 245; Silander v. Gronna (15 N. D. 552) 108 N. W. 554 and cases cited. It is of no validity whatever.

It follows that the answer states a defense, and that the order vacating the judgment and permitting the defendants to answer was proper, and must be affirmed. All concur.

(110 N. W. 81.)

J. K. ALSTAD, JOHN W. CECKA, JOSEPH CECKA, E. FINGARSON, MARTIN JOHNSTON, M. O. VONG, ERICK JOHNSON, TONNES EAG, HANS HALVORSON, OLE TRONSON, E. B. LILLIBERG, B. M. JOHNSON, T. L. FINNESETH, RANDI SMETTE, C. K. ALSTAD, GILBERT NELSON, IVER THOMPSON AS ADMINISTRATOR OF THE ESTATE OF MARY THOMPSON, DECEASED, EMMA THOE, IVER MOEN, E. J. TESLO, ADOLPH A. HALVORSON, B. BURRESON, THORMOD WEGGE, S. O. SALVERSON, ED OLSON AND ERICK DVERGSTEEN, O. P. PETERSON, EDWARD BRASETH, ASA SARGENT, KNUTE HALVORSON, K. O. RENSLAND, AND THE GORHAM LAND COMPANY, A CORPORATION, v. JOSEPH SIM, GEO. O. STOMNER AND MARTIN L. RUDE, MEMBERS OF THE BOARD OF COUNTY DRAIN COMMISSIONERS OF TRAILL COUNTY, N. D., AND A. O. ANDERSON, AS COUNTY TREASURER OF TRAILL COUNTY, N. D.

Opinion filed August 3, 1906.

Drains — Court Will Not Enjoin Collection of Assessment for Irregularities Where Jurisdiction Is Lawful.

1. A court of equity will not, after the drain is completed, enjoin the collection of assessments against lands benefited by a drain regularly established by legal authority, although the board proceeded irregularly in matters pertaining to the construction of the drain.

Same — Jurisdiction Acquired by Regular Petition, Notice and Hearing.

2. The jurisdiction to order the construction of a drain is acquired by filing with the board a petition of the requisite number of owners of land affected by the drain, and an order by the board establishing the drain, after a hearing on such petition has been had upon due notice to all concerned.

Same — Determination of Commissioners Conclusive.

3. The determination of the board of drain commissioners that lands are benefited by a drain is conclusive, except in case of fraud

Same — Irregularities No Ground for Injunction — Laches.

4. Irregularities of drain commissioners in letting contracts for doing the work or furnishing materials for a drain are not grounds for a permanent injunction against the collection of the assessments of benefits on account of such drain, when not applied for until the drain is entirely completed.

Same — Relief After Completion of Work — Notice of Work Being Done.

5. Persons whose lands are assessed for benefits on account of a drain will not be heard in a court of equity, when asking for a perpetual injunction against the collection of assessments against their land on account of benefits after the drain is completed; they having had notice of the fact that work was being done on the drain pursuant to proceedings authorized by the drainage board.

Same.

6. Various irregularities considered, and *held* not to show ground for an injunction after the drain is completed.

Appeal from District Court, Traill county; *Burke,* J.

Action by J. K. Alstad and others against Joseph Sim and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

John Carmody and *P. G. Swenson,* for appellants.

The Board of Drain Commissioners is an inferior tribunal of limited jurisdiction, possessing only powers conferred by statute. Witte v. Curtis, 56 N. W. 475; Kemp v. Adams, 73 N. E. 590; Rutherford v. Maynes, 97 Pa. St. 78.

An assessment pursuant to unauthorized proceedings is void. Morrie v. Merrel, 62 N. W. 865; Kemp v. Adams, supra; Kenyon v. Board of Supervisors, 101 N. W. 851; Whitney v. Village of

Hudson, 37 N. W. 184; Fairbanks, Morse & Co. v. City of North Bend, 94 N. W. 537; Ricketson v. City of Milwaukee, 81 N. W. 864; Le Tourneau v. Hugo, 97 N. W. 115.

An assessment without notice is illegal and unauthorized. Curran v. Board of Com'rs, 50 N. W. 237; Twp. of Whiteford v. Probate Judge, 18 N. W. 593; Cook v. Covert, 39 N. W. 47; Dietz v. City of Neenah, 64 N. W. 299; Beebe v. Magoun, 97 N. W. 986; Picton v. Fargo, 88 N. W. 90.

Injunction is the proper remedy where property is threatened to be sold upon a void tax or assessment. Picton v. Fargo, supra; Dietz v. Neenah, supra; Power v. Larabee, 49 N. W. 724; O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434; Blaser v. Ashland, 61 N. W. 77.

Theo. Kaldor, State's Attorney, and *J. F. Selby,* for respondents

Where there is failure to employ writ of certiorari and delay until issue of warrant in payment of work done, and expenses of construction incurred, equitable relief will be denied. Moore et al. v. McIntyre Drain, 68 N. W. 130; Wood et al. v. Bangs et al., 1 Dak. 179.

Delay in seeking relief while proceedings are being had, and expenses incurred, waives equitable relief, 92 N. W. 841; Smith v. Carlow, 72 N. W. 22; Moore et al. v. McIntyre Drain, 68 N. W. 130.

MORGAN, C. J. On the 11th day of May, 1904, a petition for a drain, regular in form, was presented to the drainage board of Traill county for the establishment of a drain in said county. Subsequently the board acted upon said petition and regularly made an order establishing the drain as petitioned for. The ditch or drain thus duly established was two and a half miles in length and ran along section lines on which was a regular highway, and the drain was designated as "Alfred Munter Drain No. 6." Everything in connection with the establishment of this drain was regular, and nothing is urged against it that is claimed as a ground for declaring the proceedings void for want of jurisdiction on the part of the board to establish it. On July 19, 1904, at a regular session of the drainage board to consider matters concerning this drain, the board concluded to extend it westward to a given point, three and a half miles from the western terminus of the drain as first established. At this time there was no petition for such extension

before said board, and its action was of no validity whatever so far as the extension of said drain was concerned. The understanding of the board and of all concerned was that the extension was to be based on a new and separate petition by interested landowners adjoining the extension. Subsequently a petition regular in form was presented to the board, asking for the extension of said drain along section lines westward from the terminus of Alfred Munter drain No. 6. The board took no action on this petition until September 3d. On that day the board ordered that a notice of hearing on the petition for the extension of said drain be published and posted as provided by law, and September 19, 1904, was fixed in said notices as the day for the hearing. On the same day, September 3d, the board made an estimate of the cost of the construction of the drain, including the proposed extension. At this meeting an assessment of the benefits to accrue from said drain as extended was made, and such assessment of benefits to the several tracts of land was ordered published, and it was also ordered that a notice of the letting of the contract for the construction of said drain on September 19 at 1 o'clock p. m., be published and posted. and that a notice of review of said assessment at the same time be published and posted. On September 19th the board met and ordered that the petition for the extension of the drain as prayed for in the petition be granted; and, further, that the extension "be and the same is hereby established, and is attached to and forms a part of Alfred Munter drain No. 6, and shall be known and designated in the records by such name." At this meeting the contract for the construction of the drain and extension was made. The assessment of benefits was reviewed upon application to do so, and changes were made in the assessments. Very soon after this meeting the work on the construction of the drain was commenced, and the same was fully completed in November. The list of assessment of benefits to the several tracts of land, as changed by the board, on the review thereof, was filed with the county auditor as a corrected list, and the sum assessed by the board as benefits to each tract of land was extended by the auditor as a tax against the tract of land, and the tax roll with such assessment thereon was placed in the hands of the treasurer for collection with the general tax for that year. More than half, to wit, the sum of $3,541.04, of said assessment was paid before this action was tried. The sum of $3,262.96 is unpaid and is involved in this suit. The

drain was wholly completed on November 15, 1904. This suit for a permanent injunction, restraining the county treasurer from collecting any of the unpaid taxes assessed on account of the construction of said drain, was commenced on February 28, 1905. The plaintiffs, 32 in number, are landowners adjoining and in the immediate vicinity of said extension, and seek to restrain the collection of the drain assessments. It is uncontradicted that a majority of these plaintiffs had actual notice of the proceedings pertaining to the drain and were fully aware that work was being done on the drain. All of them would be presumed to have had such notice and knowledge from the circumstances surrounding them while the work was in progress. The trial court found that they had notice of the proceedings and knowledge that work was being done on the drain. No fraud is alleged or proven against the drainage board in reference to any of the proceedings. The trial court found in favor of the defendants and dismissed the action. Plaintiffs appeal from the judgment and demand a trial de novo of the entire case.

The plaintiffs claim that the facts warrant the intervention of a court of equity to restrain the collection of the assessments, upon the ground that the board of drainage commissioners acted without authority in the establishment of the extension of the drain and in all subsequent proceedings. The specific grounds urged against the legality of the proceedings are: (1) That the extension of the drain was established before a petition therefor was filed; (2) that the assessment of benefits to adjoining lands on account of said extension was made without estimates of cost, survey of the route, and filing of maps and profiles by the surveyor; (3) that no notice of the review of assesments for benefits was given as provided by law; (4) that no notice of the letting of contracts for the extension was given, and that the materials for the culverts were not bought under competitive bids. These objections may be disposed of by applying two legal principles: (1) Those applicable where the board is claimed to have acted wholly without jurisdiction in the establishment of the extension to the drain; (2) those applicable where the board is alleged to have acted irregularly and without compliance with statutory provisions relating to proceedings after the drain was established.

So far as the first objection is concerned, it may be stated that, if the board acquired no jurisdiction to establish the drain or the

extension thereto, all subsequent proceedings would be void and would not sustain an assessment of benefits or a tax based thereon. A total want of jurisdiction to initiate the proceedings could not be cured or waived, or the right to object to subsequent proceedings based on such absence of jurisdiction lost. There is a wide difference between a total absence of jurisdiction to establish a drain and noncompliance with statutory requirements as to matters to be done by the board thereafter in reference to the construction of the drain and assessment of benefits and letting of contracts. If there was no petition for the establishment of the extension, or the board did not act on such petition, and thereby establish the drain, then it acted without jurisdiction, and all its proceedings would be void. It is claimed that there was no petition by landowners for the establishment of the drain when the matter was before the board on July 19th. If the board ordered the establishment of the drain on July 19th, the contention would be true. But the record will not bear out the contention that the drain was established on that day. The minutes of the proceedings of the board for that day show that it was then agreed that the proposed drain be extended, and that it be done and considered under a separate petition. Nothing further was done in reference to the extension until September 3d. On that day the petition for the extension was before the board, and a notice of hearing on September 19th on the petition for the extension was ordered to be published and posted. It was also further ordered at that time that a notice of assesments and a notice of review of assessments on September 19th be published and posted. It was further determined that day what the estimated cost of the construction of the drain would be, and a notice was ordered given by publication and posting that a contract for the construction of the drain would be let on September 19th. When all these notices were ordered published and posted, the petition for the extension of the drain had not been acted upon formally. But on September 19th the board ordered that the extension to drain No. 6 as petitioned for be established and designated as "Alfred Munter Drain No. 6." It is therefor incorrect to assert that the extension to the original drain was not based upon a petition, and it is not true that it was established without a proper and regular petition regularly acted upon. The regularity of the preliminary proceedings to the original drain is not questioned, and could

not be questioned, as the drain was established by regular action of the board based upon a regular petition. The proceedings in regard to the establishment of the extension were equally as regular as those pertaining to the original drain. It is therefore beyond question that the drain and the extension had been regularly established on September 19th. The proceedings for the construction of the drain and the extension were therefore based upon a regular petition, and a hearing was granted on these petitions, and the hearings were followed by orders regularly made that the drain and extension as petitioned for be established. The board therefore acquired jurisdiction to proceed with the construction. The filing of the petition gave the board jurisdiction. Erickson v. Cass Co. (N. D.) 92 N. W. 841. After the establishment of the drain, the proceedings were irregular in many ways, so far as the extension is concerned. There was no survey by the surveyor, and no maps or estimates were made by the surveyor. All these matters were regularly done upon the original drain. In regard to the extension the board simply directed the surveyor to set the necessary grade stakes along the route of the drain, prior to the commencement of the construction thereof, and to superintend the construction of the same. The surveyor's final report, after inspecting the drain as completed, was that the drain had been completed according to plans and specifications.

The omissions as to surveys did not render the proceedings void in this kind of an action. These plaintiffs generally had actual knowledge that the work was being done upon the drain, pursuant to proceedings before the board, and the others had knowledge of such facts from which notice would necessarily be implied. Notices were posted and published of all proceedings to be taken by the board which are now objected to and sought to be enjoined. If timely objections had been made before the board on these grounds and disregarded, equity would interfere by injunction enjoining further proceedings until all statutory requirements had been complied with. But courts will grant no relief in such actions when invoked solely to avoid payment of assessments which were levied in good faith and without objection from any source until after the work was completed. The plaintiffs seek to enjoin the collection of the assessment, knowing that their lands will always receive the benefits derived from the drain. This action is a collateral attack upon the drain proceed-

ings. The work has all been done and the assessments extended upon the tax roll. Nothing further remains to be done by the board upon or in reference to the drain. There was no fraud in the proceedings. The board had jurisdiction to initiate the proceedings and to establish the drain. It is only as to irregularities and omissions that pertain to the exercise of the jurisdiction that the board lawfully acquired by regular proceedings that it is sought to invalidate the proceedings. The grounds for relief relate to errors or omissions in the exercise of jurisdiction regularly acquired. It is too late to invoke the powers of a court of equity when asked only as based on such irregularities and omissions and by collateral attack. In a similar case (Erickson v. Cass Co. 11 N. D. 494, 92 N. W. 841) the court said: "A court of equity will not extend its extraordinary remedy of injunction to prevent the collection of assessments for benefits imposed to pay the cost of constructing drains, when the parties seeking such relief have been actively or impliedly consenting parties to its construction and to the proceedings which led to the assessments, whether such assessments are legally valid or not." In that case the authorities are collected and reviewed. It is decisive of this appeal.

Failure to comply with the statute by requiring the surveyor to make plans, specifications, profiles and estimates of cost, is not ground for enjoining the collection of assessments after all the drain has been completed. These estimates and maps were filed in reference to the original drain. The petition for the extension accurately described the route of the drain and what lands it would pass through. The drain was extended along and was a part of a section line highway, and the drain was to be constructed by a ditcher. These matters rendered the filing of plans and specifications and profiles and estimates by the surveyor of little consequence when the same had been done as to the original drain.

We have read the cases cited by the appellants to support their contentions. The cases do not apply under the facts of this case. In the cited cases, injunctions were sought while the proceedings were pending and before any work was done on the proposed improvement. In other words, the complainants in those cases were not guilty of laches. In addition to the Erickson Case cited above, see, also, Turnquist v. Cass Co. 11 N. D. 514, 92 N. W. 852, and cases cited; Moore v. McIntyre, Drain Com'r (Mich.)

68 N. W. 130; Smith v. Carlow (Mich.) 72 N. W. 22; Patterson v. Baumer, 43 Iowa, 477.

It is claimed that the board made no finding that the extension was a necessity. The petition recited that the chief purpose of said extension was the drainage of agricultural lands, and that the same was a public necessity. The board gave a hearing on said petition, and after such hearing the petition was granted and the drain established as prayed for in the petition. The statute does not require that the board make a record that a necessity existed for such drain or extension. The order establishing the extension necessarily implies that it was deemed a matter of public necessity. Oliver v. Monona Co. (Iowa) 90 N. W. 510; Simonton v. Hays, 88 Ind. 70.

Complaint is made that no proper notice was given of the time and place where a review of the assessments for benefits would be allowed. The published notice of assessment for benefits against each tract of land benefited did not state the time when or place where the assessments would be reviewed. The assessments of benefits were headed, "Notice of Assessments and Review of Assessment." If the time and place of the review had been inserted, no objection could be raised to the form of the notice. The list as published showed that lands along the extension had been assessed for benefits. The notice of the letting of contracts for the construction of the drain was drawn up, published, and posted at the same time as the notice of assessments. In the notice that contracts would be let on September 19th for the construction of Alfred Munter drain No. 6, it was stated: "At said meeting the assessment of benefits on account of said drain will be subject to review." In a notice given on September 3d, it was stated that on September 19, 1904, at 10 o'clock a. m., the board would be in session for the purpose of considering all matters connected with said drain, "and especially to hear and determine any objections you may have to the same." We are satisfied that it cannot be said, in view of the foregoing notices, that there was no notice of the time and place where a review of the assessments was to take place. In one notice it was expressly stated that the review would take place on September 19th at 1 o'clock p. m. It is true that this notice technically referred to the original drain, but it referred to a review of the assessments of the Alfred Munter drain No. 6. That was the name that the entire drain was known

by. In the other notice it was stated in a general way that all matters pertaining to the extension would come up for consideration. This is very general; but, in view of the fact that the statutes prescribe that notice of review of assessments shall be incorporated in the notice of letting of contracts, we think the two notices read together are a substantial compliance with the statute in reference to giving notice of review. Section 1828, Rev. Codes 1905.

It is claimed that assessments were made against land not benefited by the drain. The action of the commisisoners is not subject to review on the question as to what lands are benefited. On that question the action of the board is conclusive, except when acting fraudulently. Erickson v. Cass Co. supra; State ex rel. v. Fisk (N. D.) 107 N. W. 191. It is claimed that the board did not let the contract to the lowest bidder as to furnishing materials for the culverts. The objection is that the board furnished the materials by purchasing them from a local lumber company upon prices to be submitted. This was irregular, and not in compliance with the statute (section 1829, Rev. Codes 1905). It is not, however, a ground for equitable interference after the materials have been furnished and the work completed. General notice was given that contracts would be let on September 19th. The minutes show that the board decided at said time to purchase the materials themselves from a certain firm upon "prices submitted and on file." The plaintiff should have objected to that manner of supplying the materials, and not delayed until the materials were purchased, used, and paid for. There is no pretense that there was fraud or any overcharge in the purchase of the materials. There are other matters urged against the regularity of the board's proceedings after the drains were ordered established, after regular petitions had been filed. They refer entirely to irregularities, and not to anything done or omitted that pertained to the original jurisdiction of the board over the drain. They pertain to technical deviations from the provisions of the statute as to the duties of the board to file the lists of the assessment of benefits with the county auditor. It is too late to attack the proceedings for such irregularities after the work is completed. It is therefore immaterial whether the lists filed were filed at the proper time and contained the proper date or not.

It is also urged that the board did not secure a right of way over the land through which the extension ran before it was established. This is not a matter that can be raised by an attack in a collateral action (Erickson v. Cass Co. supra), and is not ground for perpetual injunction (section 1841, Rev. Codes 1905).

Our conclusion is that no grounds have been brought forward warranting the granting of a permanent injunction.

The judgment is affirmed. All concur.

YOUNG, J. (concurring). I concur in the result above announced and in the statement of the legal principles which are applied. But I do not wish to give apparent assent to the view that there is any authority of law for the establishment of an extension of a drain as such, and as a part of the original drain, by a separate petition of those interested in the extension. The only authority for extending a drain is that given by section 1447, Rev. Codes 1899, and relates entirely to the lowering of the outlet. All other additions must be treated as original drains. In my opinion the so-called extension involved in this case was a new drain. The board had authority to act, however, for a regular petition was presented, and this petition was the basis of the subsequent proceedings. The board had power to locate and construct it as a new and independent drain, but did not have the power to consolidate the new with the original drain. They should have been kept separate. The board certainly proceeded irregularly. But it is not claimed that the assessments imposed upon the plaintiffs are in excess of the amount which would have been justly charged against them, had the board in its proceedings treated the so-called extension as an independent drain. There is no ground for equitable interference.

(109 N. W. 66.)

E. P. GATES v. FRED A. KELLEY.

Opinion filed August 3, 1906. Rehearing denied February 13, 1907.

Trusts — Constructive Trusts — Evidence.

1. Evidence examined, and *held* to show that a deed from C. to K. was executed with the intent on C.'s part to cure a defective foreclosure and to perfect the title in the person claiming under the mortgage sale, and that K. induced the execution of the deed to himself by representing himself to be the agent or attorney for the person claiming title under the defective foreclosure.

Same.

2. The grantee in a deed so obtained is a trustee of the legal title for the benefit of the person in whose favor the grantor intended the deed to operate.

Appeal from District Court, Nelson county; *Fisk*, J.

Action by E. P. Gates against Fred A. Kelley. Judgment for defendant, and plaintiff appeals.

Reversed and judgment entered.

Frich & Kelly, for appellant. *Scott Rex* and *George A. Bangs*, for respondent.

ENGERUD, J. This is a suit in equity whereby the plaintiff seeks to have the defendant declared to be a trustee ex maleficio of the title of a quarter section of land in Nelson county, and to compel the defendant to convey the legal or record title to plaintiff, who claims to be equitably entitled thereto. The answer is a general denial. The issues were tried without a jury and resulted in a judgment for defendant, from which judgment the plaintiff appeals, demanding a retrial of all the issues.

On July 5, 1884, Chester Cranmer was the owner in fee of the southwest quarter of section 15, township 153, range 59, in Nelson county. On that day he borrowed from Anna Hoagland $450, secured by a first mortgage on said land. The debt was evidenced by a promissory note due November 1, 1889, with coupons attached representing the interest to be paid for the loan. By a mistake of the scrivener the mortgage described the land as being in range 58. This loan was procured through the plaintiff, E. P. Gates, who was then a banker and real estate loan broker in Grand Forks. A second mortgage was at the same time given by Cranmer to Mr. Gates to secure the latter's commissions on the loan. The commissions aggregated $96, payable in annual installments, being the equivalent of 4 per cent annual interest. The loan was evidently made at the rate of 12 per cent per annum; the broker reserving one-third of the annual interest as his commission. This second mortgage described the land correctly, and it is expressly stipulated therein that it is subject to the mortgage to Anna Hoagland. Both mortgages contained the usual power of sale in case of default. Cranmer abandoned the land in 1885, and has never since paid any taxes thereon or any of the interest or principal

of the mortgages. On July 30, 1886, the Hoagland mortgage was foreclosed by advertisement and the premises sold to Anna Hoagland for the amount of the mortgage. There was no redemption, and a sheriff's deed in due form was issued to the purchaser on August 1, 1887, and duly recorded. This deed, as well as the certificate of sale, which was also recorded, gave the correct description of the premises, but the same misdescription appeared in the notice of sale as that found in the mortgage. It is conceded that the foreclosure is wholly void. Anna Hoagland subsequently executed and delivered a deed of the land to Peter V. Hoagland, and the latter on January 4, 1900, executed a deed thereof to plaintiff, both of which deeds were recorded. There has been no possession taken of the land under any of these deeds, but the premises have been unoccupied until the defendant took possession in 1902, as will hereafter appear. In 1901 Mr. Gates discovered that the title supposed to have been acquired through the foreclosure was invalid by reason of the misdescription of the property. He decided to endeavor to acquire title by a foreclosure of his second mortgage. He was referred to the defendant, who was and is an attorney at law engaged in the practice of his profession at Lakota, in this state. The plaintiff was then a resident of Minneapolis, Minn.

On January 14, 1902, plaintiff wrote to defendant, inclosing his second mortgage against Cranmer, and also another mortgage upon another tract of land. He requested Mr. Kelley to proceed to foreclose both mortgages at once on the terms proposed in the letter, if they were acceptable. A check for $50 was inclosed to apply on the fees. He also requested Mr. Kelley to notify him by telegraph if he would do the work, as he (Gates) intended to start on a journey to California on the morning of January 16th. This letter in the usual course of mail reached Lakota on Wednesday, January 15th, the day after it was mailed, but the defendant asserts that, owing to his absence from Lakota, he did not actually receive it until the afternoon of Thursday, the 16th, too late to comply with Mr. Gates' request for a telegraphic reply. In answer to Mr. Gates' letter the defendant wrote the following letter:

Lakota, Jany. 17th, 1902.

"E. P. Gates, Esq., Los Angeles, Cal.—Dear Sir: Your favor of recent date, enclosing mortgages Cranmer to Gates and Flatin to

Gates, at hand, together with draft for $50.00 arrived during my absence, and was therefore unable to wire you as requested. I am sorry to say that I cannot represent you in the Cranmer case, as I am interested adversely, and I return herewith the papers in that case, together with chk for $25.00. I am willing to foreclose the other one, however, upon the terms named. If, however, you do not wish to separate the foreclosure, wire me upon receipt of this letter at my expenses, and I will return the papers in that case, together with the balance of the money. I regret that my absence has delayed this matter.

Very truly yours, Fred A. Kelly.

"Under a recent statute in this state no mortgages over ten years past due can be foreclosed by advertisement so that the Cranmer mortgage will have to be foreclosed by action and may be subject to the defense of the statute of limitations."

It is admited that this letter, although dated Jauary 17, 1902, was not mailed until January 18th. We shall have occasion to refer to this circumstance later. Immediately after the receipt of the Gates letter, and before the answer thereto was mailed, the defendant went by train to Willow City, in this state, near which place the mortgagor, Cranmer, lived, and obtained from him a quitclaim deed of the land in question, naming said defendant as grantee and reciting a consideration of $500. It is admitted that the actual sum paid by defendant for this deed was $75. The deed is dated and acknowledged January 18, 1902. Defendant returned to Lakota imediately after obtaining the deed and mailed the above letter to Gates, and on January 20, 1902, recorded the deed from Cranmer to himself. The following spring he took possession of the farm and has held possession since, claiming title under said deed. We will add that Gates, after receiving the answer to his letter transmitting the Cranmer papers, declined Mr. Kelley's services in the foreclosure of the other mortgage, and the papers relating thereto and the remaining $25 were returned to him by defendant. Such, in brief, are the undisputed facts out of which this controversy arises.

Plaintiff alleges and claims that the evidence proves (1) that the relation of attorney and client existed between defendant and plaintiff when the deed was obtained by Kelley, and that the transaction was a betrayal by the latter of his trust; (2) that Kelley secured the deed to himself by inducing Cranmer to believe that

it was to operate as a conveyance to plaintiff so as to cure the latter's defective title. We are convinced that the second proposition just stated is true, and that it is decisive of the case, without considering the first one. Throughout this opinion, therefore, we shall assume in favor of the defendant that the relation of attorney and client had never existed between himself and the plaintiff.

There were no witnesses present at the interview between Cranmer and Kelly at Willow City, which resulted in the execution of the deed. The decision of the case hinges altogether upon what was really said and done at this interview, and upon the circumstances which brought it about. Cranmer and Kelly, who alone know the facts, give wholly different versions of the transaction, and their testimony cannot be reconciled or the variance accounted for on the theory that one of them was mistaken. It is a question of veracity between these two men. At the time Cranmer occupied the premises in dispute Kelly was occupying a nearby farm, which he still owns, and they were then well acquainted and on friendly terms. Cranmer is single, and since leaving said farm has lived in McHenry and Bottineau counties, except about two years that he was in Montana. At one time he owned a quarter section of land in McHenry county which he sold and deeded in 1886 to one Crane, but the deed contained a defective description. In August, 1900, Kelly met Cranmer by appointment at Rugby and procured from him a quitclaim deed to Crane to correct the defect in the old deed, paying him therefor $25. We mention these facts because they play an important part in the consideration of what actually transpired at the subsequent transaction now in question.

Cranmer's testimony was taken by deposition. He testified that Kelley came to Willow City in January, 1902, where the witness met him at the depot as he was getting off the train; that he had no recollection of any previous appointment to meet Kelley, but was hauling wood to town at that time, and happened to be in town with a load when Kelley arrived. What then transpired is narrated by the witness as follows: "He [Kelley] said that, when he came to me, he was like a little fairy—he always brought good tidings —that there was an error in my name, and the man that owned the land had employed him to straighten it up, and he would give me $50 to sign a quitclaim deed. It would cost that to put it through the courts. He didn't need none of my help; that he [his

client] was wealthy and could put it through the courts; but that the man who owned the land would give me $50 instead of putting it through the courts if I would take it. I hesitated about taking it, and he told me he would give me $75, and if the man he was doing business for wouldn't stand it I would have to give him back $25, and I agreed to it and signed the quitclaim deed." The witness could not recall whether the grantee's name was mentioned or not, but he was given to understand that the deed was to run to the man who had loaned the money and that Kelley represented him. He says Mr. Kelley produced the deed written out ready for signature, and witness signed it in the room of the hotel where the transaction took place. They then went before the notary, who executed the certificate of acknowledgment, and then to the bank, where Mr. Kelley drew a check for $75, which the banker cashed and the same was paid to the witness. He and Kelley then parted; the transaction having occupied only 30 or 40 minutes. He did not know when Kelley left town. He denies positively that he had ever had any previous talk or understanding with Kelley about the title to this land, or that he had ever requested him to look up the title. He knew the land had increased in value since he left it, and supposed the mortgagee had obtained title thereto. He asserts that this deed, like the one Kelley procured for Crane, was asked for and given solely to remedy the defective title, caused by an error in his name, and for no other purpose; and he did not notice who was named therein as grantee. The testimony of this witness bears every indication of candor and truthfulness.

Mr. Kelley testified at the trial, and his version of the transaction is as follows: At the time of the Crane transaction at Rugby in August, 1900, Cranmer inquired of Kelley what had become of the Nelson county land and requested Kelley to look it up, suggesting that there might be some chance of getting something out of it. Kelley agreed to do so, but neglected it for some time. He finally examined the records and discovered that by reason of the misdescription in the mortgage Cranmer's title had not been divested by the foreclosure. There was also a tax deed to plaintiff which witness says he found to be wholly void. Just when this examination of the record was made does not appear. He says he did not at once communicate the results of his examination to Cranmer, because Cranmer was of a roving disposition, and it was uncertain where he could be found; that Cranmer was an ignorant

man, and the situation could not be explained to him in a letter so he would understand it. For these reasons he let the matter rest for some time, intending to hunt him up and have a personal interview with him some time when he might be in the vicinity where Cranmer usually stayed. The letter from Mr. Gates called the matter to his attention, and on the next day, January 17th, he went directly to Willow City in search of Cranmer for the purpose of coming to an understanding with him, arriving at Willow City between 3 and 4 o'clock p. m. of that day. He asserts that he wrote the answer to Mr. Gates letter before he left Lakota on January 17th, but did not mail it until his return the next day. He says he was not certain of Cranmer's whereabout; but in explanation of his trip direct to Willow City without making inquiry he says: "I thought if I couldn't find Cranmer out there —as I say, he was a nomadic sort of chap—I was coming back next day. I didn't see that Mr. Gates' interests could be prejudiced in any way, and if I couldn't find Mr. Cranmer out there, I wasn't going to hang around there to find him. I would feel that I had done my duty so far as he was concerned, and I would come back and foreclose the mortgage for Mr. Gates." In the face of this explanation we are unable to account for the writing of the letter to Gates before Kelley's departure, and especially the statement therein that he could not foreclose the Cranmer mortgage because the writer was interested adversely. We think the letter must have been written and mailed after Kelly's return from Willow City, and for some reason dated back.

But to return to defendant's testimony. On his arrival at Willow City he was informed that Cranmer lived a few miles from town, and he hired a team and driver from a livery barn and directed the driver to find Mr. Cranmer and bring him to town. Next morning, January 18th, Kelley found Cranmer at the hotel and obtained the deed under the following circumstances: He explained fully and in detail the condition in which he found the title; that the foreclosure was void; that the tax deed was not "worth the paper it was written on;" that the mortgages were outlawed, and the land worth from $2,500 to $3,000. He urged Cranmer to institute proceedings to recover the land; and, when the latter said he had no money to litigate with, Kelley stated that it would not require much money, and offered "to take it up with him and speculate," as the land was valuable and he thought the title was good. Cran-

mer, however, was disinclined to litigate, and requested Kelley to make an offer for the land. The latter first offered $50 and finally raised the offer to $75, and Cranmer promptly accepted it. Kelley then went out for a blank deed, filled it out in the hotel, and Cranmer then and there signed it. After it had been acknowledged they went to the bank, where the check was cashed and paid to Cranmer. The check was drawn to Cranmer at the hotel while the transaction was in progress. It is a noticeable fact that the check bears date January 17, 1902, and we firmly believe that is the true date of the transaction, notwithstanding the deed is dated January 18th, and purports to have been acknowledged that day. If the two instruments had been written at the same time and place, it is not likely that they would bear different dates. It is very apparent on inspection that Cranmer's signature on the deed was written with a different ink than was used for the body of the instrument; while the ink used in writing the body of the deed appears to be the same as that used in Kelley's letter to Gates. It is evident that the deed had been prepared for signature, as Cranmer says, before the interview took place, and was dated ahead for some reason. The body of the certificate of acknowledgment seems to be in the same handwriting as the body of the deed, and it is easy to conceive how the notary may have attached his signature and seal without noticing or correcting the erroneous date. There could be no reason for dating the check back, and, as it was to be cashed at the bank at once, it could not well be dated ahead.

For the purpose of corroborating Kelley and discrediting Cranmer, one Lee Keller was produced as a witness. He was working in the livery stable at Willow City in January, 1902, and swears that he was the driver of the team which Kelley says he dispatched in search of Cranmer. He testifies that Kelley handed him a letter to Cranmer, and told him to drive until he found him and to bring him to Willow City. Keller swears that he did not find Cranmer at home, but finally found him after midnight some distance away; that he gave Cranmer Kelley's message and induced him to dress and accompany the witness to town, where they arrived about 3 o'clock in the morning of January 18th; that Cranmer went to bed in the hotel. In corroboration of this story, the book kept at the livery stable was produced, and he identified a certain entry therein, which he asserts refers to the trip made for Kelley. The book was one ruled and spaced especially for the

use of livery stables. The original leaf containing the entry is in the record. It shows a trip made by Lee Keller for a stranger at 4:15 p. m. on January 16, 1902, for which $3.50 was collected. The witness testified that the entries refer to trips made on the 16th and 17th, and that this particular trip was probably on the 17th. The entry in question is the fifth of eight entries; all appearing under the same date. The date is written out at the top of the column and ditto marks appear beneath it opposite each entry. The date at the top was originally "Thursday, January 16th," but there has been inserted with an entirely different ink in the same column with "16" and above it the figures "& 17." Below these eight entries are two entries showing the "Amount of drives for the day," and "Feed and collections," and two heavy lines are drawn across the page to separate these entries from the entries for the next day. The entries on the leaf in the record cover the priod from January 16th to 26th, inclusive, and in every instance the date of each entry is shown either by figures or ditto marks; and, where there are more than one entry in a single day, they are separated from the next entry in the manner above indicated The books seem to have been kept in a very orderly manner. It appears to us that the entry pointed out by Keller was originally made under date of January 16th, and the figures "& 17" were subsequently inserted in a clumsy attempt to give color to the claim that the entry referred to a drive on January 17th. The circumstance that no business was done on January 18th is not remarkable at such a season of the year, when storms and bad roads are common. The absence of any record of a drive on January 17th convinces us that Keller's midnight drive is a fiction. Hence, to our minds, the testimony of Lee Keller has the opposite effect to that intended. If Cranmer had been sent for and brought to town in the manner claimed by defendant, he could hardly fail to remember it, and it is inconceivable that he would willfully swear falsely as to that fact, as to which there could be no possible reason to falsify, even though he had some motive for falsifying as to the bargain with Kelley. But Cranmer had apparently no motive to tell anything but the truth as to the transaction. He had nothing to gain or lose from the result of this action. There was testimony showing that his reputation for truth and veracity was bad; but even an untruthful man will not usually lie without a motive. We cannot escape the conviction that the

interview took place on the 17th, and that the deed had been prepared at Lakota beforehand. This being so, the conclusion follows that Kelley left Lakota after receiving Gates' letter with the fixed determination to get the deed from Cranmer, if he could, and when he succeeded he wrote the letter, dated January 17th, to the effect that he was interested adversely. The reason for dating the letter back and dating the deed ahead thus becomes obvious. It would aid to give color to his claim that he had been previously engaged by Cranmer and had promptly declined Gates' retainer for that reason, and that the deed to himself was an afterthought. Had the facts been as Kelley claims, it is extremely improbable that he would make use of the expressions or give such meager information as appear in the letter to Gates, and it is still more improbable that he would have written the letter before he left Lakota in search of Cranmer. Kelley's explanations of his neglect to write to Cranmer, or even make inquiries to locate him after he discovered the defective title, are very unsatisfactory, and it is remarkable, to say the least, that immediately upon receipt of Gates' letter Kelley, although professing such uncertainty as to Cranmer's whereabouts, proceeded without delay or inquiry to the very place where Cranmer was found. It is still harder to believe that Cranmer for the paltry sum of $75 would deed to Kelley land worth $2,500, which the latter had assured him he could and would recover for the former on a contingent fee without the outlay of much money.

We shall not further prolong this analysis of the evidence. Suffice it to say that Cranmer has apparently no motive to falsify, and his testimony is probable and consisitent and bears the impress of truth. We regret to say that the contrary is true of the defendant's evidence. We find that Kelley induced Cranmer to execute the deed by representing himself to be acting in behalf of the claimant under the mortgage, and that Cranmer made the conveyance with the intent that it should operate to remedy a defect in the title claimed under the foreclosure. The grantee of a title so acquired will not be permitted to reap the fruits of his wrongdoing; but will be deemed in equity a trustee of the legal title for the benefit of the person in whose favor it was intended by the grantor that the deed should operate. It is not essential to the application of this rule that the grantee should have violated any trust or confidence reposed in him by the person for whom the deed was in-

tended or that such third person should have any legal or equitable claim to the land against the grantor. As said by Judge Mitchell in Rollins v. Mitchell, 52 Minn. 41, 49, 53 N. W. 1020, 38 Am. St. Rep. 519: "The rights of the third person in such cases depend, not upon the fact that he had some legal or equitable claim to the property before the constructive trust was created, but upon the fact that he acquired such right by the trust as being the party for whose benefit it was intended by the owner." See, also, 1 Perry on Trusts, section 181.

The plaintiff has tendered and still offers to pay the money expended by defendant in obtaining the deed and also compensation for his services in doing so. The defendant has not chosen to show what his expenses were or the value of his services, and it may be questionable if he is entitled to such compensation under the circumstances of this case.

The judgment is reversed, and a judgment will be entered to the effect that the legal title acquired through the deed in question is held in trust by defendant for the use of plaintiff, and that the latter is, and since the delivery of said deed has been, the owner of the land in fee simple, and entitled to the possession, rents and profits thereof, and entitled to a conveyance of the legal title from the defendant, the judgment to have the effect of such conveyance. As the costs taxable in plaintiff's favor will necessarily exceed the sum of $75, the amount paid by Kelley for the deed, that sum may be deducted from plaintiff's costs and disbursements to be included in the judgment. All concur.

(110 N. W. 770.)

RALPH D. WARD AND MILAN G. WARD v. OLE GRADIN.

Opinion filed August 4, 1906.

County Organization — District and Collateral Attack Thereon.

1. The right of McLean county to exercise its corporate powers over the territory added thereto by chapter 50, page 129, Laws 1891, cannot be assailed, even by a direct attack, either at the suit of a private person or by the state. State v. McLean Co., 92 N. W. 385, 11 N. D. 356, followed and approved.

Same.

2. The existence and authority of a municipal corporation acting under color of law cannot be questioned collaterally by private suitors.

Sheriffs — Conversion — Evidence — Impeachment of Witness.

3. The sheriff was sued in conversion for seizing and selling property pursuant to a proceeding to collect personal property taxes from a delinquent taxpayer. One of the contested issues was whether the property belonged to the taxpayer or to plaintiffs, and the taxpayer was the principal witness for plaintiffs. The defendant was permitted to prove that the taxpayer, whom the defendant claimed owned the property seized, had never voluntarily paid the taxes imposed on him. *Held* prejudicial error.

Trivial Defects in Pleading.

4. Trivial defects in a pleading, which could not mislead, should be disregarded, where no objection is made before trial.

Appeal from District Court, McLean county; *Winchester,* J.

Action by Ralph D. Ward and others against Ole Gradin. Judgment for defendant, and plaintiffs appeal.

Reversed.

Newton & Dullam, for appellants.

Plaintiff's in conversion must allege their ownership and right to possession at the time of the taking. Parker v. Bank, 3 N. D. 87, 54 N. W. 313; Clendenning v. Hawk, 8 N. D. 419, 79 N. W. 878.

Act organizing McLean county was unconstitutional. Richards v. Stark County, 8 N. D. 392, 79 N. W. 863; Schaffner v. Young, 10 N. D. 245, 86 N. W. 733; State ex rel. Walker v. McLean County, 11 N. D. 356, 92 N. W. 385.

Sheriff's authority to levy for delinquent taxes is confined to his county. Chapter 134, Laws 1903; Schaffner v. Young, supra.

An unconstitutional act affords no justification for any act done under it. Norton v. Shelby County, 118 U. S. 425, 30 L. Ed. 178.

The defendant was a trespasser. State v. McLean County, supra.

One sued for an official act cannot justify as a *de facto* officer. 5 Am. & Eng. Enc. Law, 96; State v. Carroll, 38 Conn. 449; Norton v. Shelby County, supra; Blake v. Sturtevant, 12 N. H. 567; Conover v. Devlin, 15 How. Pr. 477; Cummins v. Clark, 15 Vt. 653; Courser v. Powers, 34 Vt. 517; Outhouse v. Allen, 72 Ill. 529; Meagher v. Story Co., 5 Nev. 244; In re Hinkle, 31 Kan. 712.

Plaintiff was entitled to judgment notwithstanding the verdict for the value of his cattle. Laws 1901, page 74, chapter 63; Rich-

mire v. Andrews, 11 N. D. 451, 92 N. W. 819; Johns v. Ruff, 12 N. D. 714, 95 N. W. 440; Nelson v. Grondahl, 12 N. D. 130, 96 N. W. 299.

W. L. Nuessle and *Guy C. H. Corliss,* for respondent.

It is settled law in Wisconsin, from which our law was copied, that a special verdict need not cover all the issues, but is sufficient, if when taken in connection with the undisputed facts, or facts with respect to which the proofs are all one way, it sustains the case of the party in whose favor it is rendered. Stringham v. Cook, 44 N. W. 777; Cooper v. Ins. Co. of Pennsylvania, 71 N. W. 606; Murphy v. Weil, 61 N. W. 315.

The right of a municipal corporation to exercise jurisdiction can be attacked only by the sovereign, not collaterally. People v. Oakland, 28 Pac. 807; State v. Westport, 22 S. W. 888; State v. McMillan, 18 S. W. 784; East Dalla v. State, 11 S. W. 1030; People v. Peoria, 46 N. E. 1075; State v. Cram, 16 Wis. 343; People v. Maynard, 15 Mich. 463; State v. McLean County, 11 N. D. 356-360, 92 N. W. 385.

ENGERUD, J. The plaintiffs are suing to recover damages for the alleged conversion of 38 head of cattle, which they claimed to own as partners when the cattle were seized by the defendant, who at the time of the seizure was the sheriff of McLean county. The defendant admits the seizure and sale of the cattle, but denies that they were the sole property of Ralph D. Ward, one of the plaintiffs. Defendant justifies the seizure and sale by virtue of proceedings to collect certain delinquent personal property taxes assessed against Ralph D. Ward in McLean county. There was a trial to a jury, which found in favor of defendant, and judgment was entered accordingly. Plaintiffs moved in the alternative for judgment notwithstanding the verdict or for a new trial, which motion was heard and denied before the entry of judgment. This appeal is from the judgment.

One of the main questions in controversy at the trial was as to the ownership of the cattle. The defendant claimed that Ralph D. Ward was the sole owner thereof, and denied that the other two plaintiffs had any interest therein. In relation to this issue the defendant's counsel propounded to the county treasurer, who was a witness, the following question: "State whether or not Ralph

D. Ward has paid any personal property taxes since 1899 voluntarily." The question was objected to on the ground that it was incompetent, irrelevant and immaterial. Plaintiff's counsel thereupon stated that the object of the question was to show a persistent and determined purpose to avoid the payment of taxes, and the court overruled the objection. The witness answered that said Ward had not voluntarily paid such taxes since 1899. The evidence was clearly irrelevant to the issue being tried. That it was prejudicial is equally plain, especially in view of the avowed object of the question. It could hardly fail to create a prejudice in the minds of the jury against the plaintiffs, and especially against Ralph D. Ward, who was their main witness. This error requires a reversal and new trial.

There was no error in denying plaintiffs' motion for a directed verdict, and hence the motion for judgment notwithstanding the verdict was also properly denied. On this point plaintiffs contend: (1) That there was no issue made by the answer as to plaintiffs' alleged joint ownership of the cattle on the date of the conversion; (2) that the place where the seizure by the sheriff was made was outside the boundaries of McLean county. We think the criticism of the answer is hypercritical. The complaint alleged the conversion on October 3, 1903. The denial of plaintiffs' alleged ownership found in the answer is in the present tense, and, strictly construed, simply denies that the plaintiffs were the owners on the day the answer was dated or verified; but it is perfectly plain that it is merely a grammatical error, which could mislead no one, and which would have been speedily corrected, if attention had been called to it before the trial. We think it is one of those trivial defects which the court is directed to disregard by section 5300, Rev. Codes 1899 (Rev. Codes 1905, section 6886). The answer also contains a general denial, and in the part of the answer pleading the justification it is stated in express terms that the levy was made upon cattle then belonging to Ralph D. Ward.

The plaintiffs contend that the cattle in question were seized outside of McLean county, where the defendant and the taxing officers of that county had no authority to act. The defendant contends, on the other hand, that the place of seizure lies within McLean county, and that the seizure and sale were therefore made with legal authority. The pleadings fix the place of seizure upon section 22, township 148, range 86. This is within the boundaries of Mc-

Lean county as fixed by chapter 50, p. 129, Laws 1891; the same being an act to increase the boundaries of McLean and certain other counties. Counsel for plaintiffs contend that this act is void for the reason that the subject of the act is not expressed in the title, and to sustain this contention rely upon the decision of this court in Richard v. Stark County, 8 N. D. 392, 79 N. W. 863. We are agreed that the right of McLean county to exercise its corporate authority over the territory added by chapter 50, p. 129, Laws 1891, is not now open to question. This court held in State v. McLean County, 11 N. W. 356, 92 N. W. 385, in a direct attack by quo warranto upon the corporate authority being exercised by McLean county over the territory in question under the act of 1891, that because of the long-continued and general acquiescence in the validity of that act, and for the reason stated in the opinion, it could not be questioned. whether upon the application of a private relator, or even upon application of the state. We are entirely satisfied with the conclusion announced in that case. But, regardless of our conclusion in the above case, in no event can the present attack be sustained. The former was a direct attack. The present attack is entirely collateral. McLean county has been exercising jurisdiction over the territory in question under the assumed authority of the act above referred to for 15 years. It is settled law that "where a municipal corporation is acting under color of law, and its existence is not questioned by the state, it cannot be collaterally drawn in question by private persons; and the rule is not different, although the constitution may prescribe the manner of incorporation. * * * In such cases evidence that the corporation is acting as such is all that is required." 1 Dillon on Munic. Corp. (4th Ed.) sections 43a, 418; Cooley, Const. Lim. (5th Ed.) 311; 1 Smith on Munic. Corp., section 59, and cases cited; also Coler & Co. v. Dwight School District, 3 N. D. 249, 55 N. W. 587, 28 L. R. A. 649, and cases cited. It is manifest, therefore, that, to the extent that the plaintiffs' right of recovery rests upon an alleged want of authority in the officers of McLean county to impose and collect taxes in the territory in question, it is not well founded.

For the reason first above stated, the judgment will be reversed, and a new trial granted. It is not necessary to express any opinion as to whether the special verdict in this case is sufficient, or as to whether the insufficiency of the verdict would be ground for

reversal, if the facts not found appeared from the statement of the case to have been admitted or conclusively established.

YOUNG, J. (concurring). I concur in the result, but place my concurrence in the reversal upon the insufficiency of the special verdict. At the close of the testimony the court, against the objection and exception of plaintiffs' counsel, submitted the case to the jury for a special verdict upon six questions. No general verdict was returned. The special verdict, consisting of the questions and the jury's answers thereto, is as follows: "Verdict: (1) What was the value of the property in question at the time of the alleged sale thereof by the defendant? Five hundred and eighty-five dollars ($585.00). (2) Who was the owner of the cattle in question at the time of the alleged sale thereof by the defendant? Ralph D. Ward. (3) Was the plaintiff Ralph D. Ward the sole owner of the cattle in question at the time of the alleged sale thereof by the defendant? Yes. (4) What, if any, interest did the plaintiff Ralph D. Ward have in the cattle in question at the time of the alleged sale thereof by the defendant, and what was the value of such interest? Sole owner. Value, $585.00. (5) What, if any, interest did the plaintiff Milan G. Ward have in the cattle in question at the time of the alleged sale thereof by the defendant, and what was the value of such interest? He had no interest. (6) What, if any, interest did the plaintiff William O. Ward have in the cattle in question at the time of the alleged sale thereof by the defendant, and what was the value of such interest? He had no interest. J. R. Howell, Foreman." Upon motion of defendant's counsel, judgment was entered upon the special verdict dismissing plaintiffs' action and for costs.

In my opinion it was error to submit the case to the jury upon the six questions embraced in the special verdict and to subsequently enter judgment thereon. The so-called special verdict covers only a part of the ultimate facts in issue, and there was no general verdict. The plaintiff did not waive a trial by jury, and they were entitled either to a general verdict or to a special verdict covering all of the ultimate facts in issue. Where a case is submitted to a jury for a special verdict, the facts must be submitted and found, so "that nothing shall remain to the court but to draw from them conclusions of law." Section 5444, Rev. Codes 1899 (section 7033, Rev. Codes 1905), reads as follows: "* * * The verdict of a jury is either general or special: (1) A general

verdict is that by which they pronounce generally up all or any of the issues either in favor of the plaintiff or defendant; and (2) a special verdict is that by which the jury find the facts only, leaving the judgment to the court. The special verdict must present the conclusions of fact as established by the evidence and not the evidence to prove them; and these conclusions of fact must be so presented that nothing shall remain to the court but to draw from them conclusions of law." The special verdict in this case finds in effect but two facts: (1) That Ralph D. Ward was the sole owner of the property; (2) that it was of the value of $585. It is patent that these facts alone do not furnish a sufficient basis for any legal conclusions as to which party is entitled to judgment. They do not embrace all of the facts essential either to make out or defeat the plaintiffs' alleged cause of action. The special verdict is entirely silent upon the questions of the alleged wrongful taking and conversion by the defendant and also upon the defendant's alleged justification. True, the taking was admitted by the defendant in his answer, and was therefore not in issue. Still that did not dispense with the necessity for a finding upon the vital question as to whether the taking was wrongful, or upon the ultimate facts alleged by the defendant in his plea of justification. There is no fact found which the court could hold as matter of law that the taking was rightful, and consequently there is no basis for the judgment of dismissal.

Counsel for respondent concede the insufficiency of the special verdict, but contend that, when taken in connection with the evidence in the case, it supports the judgment. They contend that an examination of the evidence will show that the material allegations of the defendant's answer, alleged by way of justification, are sustained by undisputed evidence, and that for the purposes of the judgment this is equivalent to a finding that the property was not wrongfully taken but that it was rightfully seized and sold. This presents the question whether a judgment will be sustained where it rests in part upon a defective special verdict and in part upon the evidence as to a material fact in issue as to which there is no finding. In my opinion there is no authority of law for the entry of judgment in such cases. The requisites of a special verdict under our statute (section 7033, supra) do not differ from those of a special verdict at common law. The rule is universal that the special verdict must find every material fact in issue, and the find-

ings should be of such a nature that nothing remains for the court but to draw from such facts the proper conclusions of law. It is generally held that facts admitted by the pleadings need not be found. There is reason in this for such facts being admitted are not in issue. See 22 Enc. Pl. & Pr. 981, 986, 987, and cases cited. It has been held in Wisconsin, under a statute differing somewhat from our section 7033, supra, that, while the questions embraced in a special verdict must cover all the controverted issues of fact, "a judgment on a special verdict will not be reversed for its failure to determine one or more of the issues, if the uncontradicted evidence proves that issue in favor of the prevailing party." Williams v. Porter, 41 Wis. 422; Hutchinson v. Ry. Co., 41 Wis. 541; McNarra v. C. & N. W. Ry. Co., 41 Wis. 69; Munkwitz v. Uhlig, 64 Wis. 380, 25 N. W. 424; Weisel v. Spence, 59 Wis. 301, 18 N. W. 165. Wisconsin is alone in holding that a judgment in a jury case, where a jury has not been waived and no general verdict has been returned, may stand in part upon the facts found in a special verdict, and in part upon facts not found and in issue, but established by the evidence. The prevailing rule is that the court cannot examine the evidence to determine what judgment should be given, and that it is of no avail that evidence was adduced which would have warranted a finding of a material fact which it omitted from the special verdict. And this is true, even where the evidence as to material facts in issue is undisputed. The court in entering judgment can look only to the special verdict for the determination of the facts in issue. The evidence cannot take the place of findings. It is true the court may in a proper case direct what answer shall be given to a particular question, and it seems that in some cases, where a material fact as to which there is no dispute has been omitted from the special verdict through inadvertence, the verdict may be amended upon motion. But in all cases the findings in the special verdict must cover the material facts in issue in the pleadings, and the evidence cannot be resorted to to supply them. Wallingford v. Dunlap, 14 Pa. 31; Jenks v. Hallet, 1 Caines (N. Y.) 60; Seward v. Jackson, 8 Cow. (N. Y.) 406; Kuhlman v. Medlinka, 29 Tex. 385; Maxwell v. Bank (Tex. Civ. App.) 23 S. W. 342; Ry. Co. v. Richardson, 13 Tex. Civ. App. 555, 36 S. W. 290; Cole v. Crawford, 69 Tex. 126, 5 S. W. 646; Newbolt v. Lancaster, 83 Tex. 271, 18 S. W. 740; Walker v. Dewing, 8 Pick. (Mass.) 520; Phoenix Water Co. v. Fletcher, 23 Cal.

482; Kiel v. Reay, 50 Cal. 61; Chesapeake Ins. Co. v. Stark, 6 Cranch (U. S.) 268, 3 L. Ed. 220; M'Arthur v. Porter's Lessee, 1 Pet. (U. S.) 626, 7 L. Ed. 290; Barnes v. Williams, 11 Wheat. (U. S.) 415, 6 L. Ed. 508; Prentice v. Zane's Adm'r, 8 How. (U. S.) 470, 12 L. Ed. 1160; Daube v. P. & R. C. & I. Co., 77 Fed. 713, 23 C. C. A. 420; also 22 Enc. Pl. & Pr. 998, and Clementson on Special Verdicts, 224.

The Wisconsin rule that the evidence may be referred to to supply facts omitted in the special verdict has not been accepted even in that state without dissent. See dissenting views of Chief Justice Ryan in Ward v. Busack, 46 Wis. 407, 1 N. W. 107. The Supreme Court of the United States in Hodges v. Easton, 106 U. S. 408, 1 Sup. Ct. 307, 27 L. Ed. 169, a case arising in Wisconsin, declined to follow the rule of that state. In that case the special verdict did not cover all of the material facts in issue. The trial court ordered judgment upon the special verdict and upon the "facts conceded or not disputed upon the trial." The judgment was reversed and a new trial ordered upon the ground that the issues of fact triable by jury were not submitted to the jury in the mode required by law. Mr. Justice Harlan speaking for the court, said: "* * * The record discloses that the defendants had a determination by the jury of a part of the facts, while other facts, upon which the final judgment was rested, were found by the court to have been conceded or not disputed. If we should presume that there were no mtaerial facts considered by the court beyond those found in the answers to special questions, then, as we have seen, the facts found do not authorize the judgment. If, on the other hand, we should adjudge it to have been defendants' duty to preserve the evidence in a bill of exceptions, and that, in deference to the decisions of the state court, it should be presumed that the 'facts conceded or not disputed at the trial' were, in connection with the facts ascertained by the jury, ample to support the judgment, we then have a case at law, which the jury was sworn to try, determined as to certain material facts by the court alone, without a waiver of a jury trial as to such facts. It was the province of the jury to pass upon the issues of fact, and it was the right of the defendants, secured by the Constitution of the United States, to have them do so. That right could have been waived, but it could not be taken from them by the court. If, upon the trial, all the facts essential to recovery had been undis-

puted, or so conclusively established the cause of action as to have authorized the withdrawal of the case altogether from the jury, by a pre-emptory instruction to find for plaintiff, it would still have been necessary that the jury make its verdict, albeit in conformity with the order of the court. The court could not, consistently with the constitutional right of trial by jury, submit a part of the facts to the jury, and itself determine the remainder, without a waiver by the defendant of a verdict by the jury. * * * It has often been said by this court that the trial by jury is a fundamental guaranty of the rights and liberties of the people. Consequently, every reasonable presumption should be indulged against its waiver. For these reasons, the judgment below must be reversed."

The rule laid down in the cases above cited was followed by this court in the recent case of Sonnesyn v. Akin, 14 N. D. 248, 104 N. W. 1026. It is a mistrial where, as in this case, there is no general verdict, and the jury's answers to specific questions do not cover all of the facts in issue. Manning v. Monaghan, 23 N. Y. 539. The insufficiency of the special verdict requires a reversal of the judgment.

I concur in what is said as to the present status of McLean county and its freedom from collateral attack.

(109 N. W. 57.)

THE MOLINE PLOW COMPANY v. SYLVESTER D. BOSTWICK AND JENNIE H. BOSTWICK.

Opinion filed October 30, 1906. Rehearing denied December 4, 1906.

Rescission of Sale Contract — Return of Rents.

1. Rescission of a sale contract, where a party takes possession of land thereunder, cannot be effectually made without returning or offering to return the rents received under the contract.

Appeal — Presumptions.

2. This court cannot presume the existence of facts not contained in the record of the case.

Appeal from District Court, Walsh county; *Kneeshaw*, J.

Action by the Moline Plow Company against Sylvester D. Bostwick and Jennie H. Abbott. Judgment for defendants, and plaintiff appeals.

W. J. Burke and *Spalding & Stambaugh,* for appellant.

Appellant is only required to make a good title, at the time when, under the term of his agreement, or the equities of the case, he is to make the conveyance, to entitle him to the consideration. Andrews v. Babcock, 26 Atl. 715; Arnett v. Smith, 11 N. D. 63, 88 N. W. 1037.

A wrongdoer cannot make extreme vigilance and promptitude conditions of the rescission of a contract. Pence v. Langdon, 99 U. S. 578, 25 L. Ed. 420.

Myers & Myers, for respondent.

A party to rescind must act promptly. Rev. Codes 1899, section 3934, par. 1.

Accounting for rents by vendee seeking rescission, both in law and equity, is essential as establishing the original status quo between the parties. 29 Am. & Eng. Enc. Law, 652; Warvelle on Vendors, vol. II, page 885; Thompson v. Lee, 31 Ala. 292; Bryant v. Boothe, 30 Ala. 311; Walker v. Sedgwick, 8 Cal. 398; Gates v. McLean, 11 Pac. 489; Worley v. Nethercott, 25 Am. Rep. 209, 27 Pac. 767; Florence Oil Co. v. McCandless, 28 Pac. 1084; Martin v. Atkinson, 50 Am. Dec. 403; LaCoure v. Dupre, 55 N. W. 129; Wood v. Wheeler (N. C.) 11 S. E. 590; McIndoe v. Norman, 26 Wis. 288, 7 Am. Rep. 96; Burwell v. Sollock (Tex.) 32 S. W. Rep. 844.

KNAUF, J. This action was brought to quiet title to the lands hereinafter described, and is of the statutory form. The defendant Sylvester D. Bostwick and the defendant Jennie H. Abbott, having each answered therein, a statement of the facts was agreed upon by counsel for the respective parties, and is fully set out in the abstract, and, so far as necessary to the decision of this action, shows the following facts: On February 1, 1900, said Bostwick and one Reynolds, the then owners, respectively, of the fee simple title to the lots and lands hereinafter described, entered into an agreement under which said Bostwick agrees to deed to said Reynolds lots 9, 10 and 11, in block 27, in Bathgate, N. D., and to reduce a $1,000 mortgage against lots 11 and 12 in said block, and theretofore executed by said Bostwick to one Sands, to the sum of $500, and leave the same as a mortgage lien against said lot 11 only, which mortgage said Reynolds agreed to assume.

As a consideration of the foregoing agreement and transfer, said Reynolds agrees to deed to said Bostwick the E. ½ of section 28, in township 131, in range 63, Dickey county, N. D., theretofore incumbered by a mortgage of $500 to one Jennie H. Abbott, which mortgage said Bostwick agreed to assume. Said Reynolds was to perfect title to said lot 10, for which Bostwick was to pay $10. Said Bostwick and Reynolds each agreed to furnish the other with a complete abstract of title to said premises, showing clear title, within one year, except the $500 mortgage aforesaid, each to pay all taxes on his property up to and including the 1899 tax. Under the agreemnt said Bostwick and said Reynolds were to, and did, execute deeds to each other as agreed for their respective properties, which, together with the memoranda of agreement as above set forth, were placed with I. J. Foster, to be held by him in escrow until the full performance of their respective agreements, when each deed was to be delivered to the grantee therein named. Time is not made the essence of the contract, and no method of cancellation is provided therein. Each of said parties immediately entered upon and took possession of the properties by each to be deeded to the other, which possession was openly held and continued until November 25, 1902, at which time the said Reynolds vacated the said Bathgate lots and premises. By mortgage and deed said Moline Plow Company acquired and holds the right, title and interest which the said Reynolds held in said Dickey county lands on November 29, 1902. The said Moline Plow Company was not an innocent purchaser or holder of said Dickey county lands, but had notice of the rights of said Bostwick. On or about the 25th day of November, 1902, the said F. W. Reynolds discovered that the said Sylvester D. Bostwick had executed a mortgage on the Dickey county lands to one Jennie H. Abbott for $500, and also ascertained that the said Sylvester D. Bostwick did not pay the delinquent taxes against the Bathgate property hereinbefore described, and did not, prior to November 1, 1902, reduce the mortgage, so as to leave only $500 against lot 11, and thereupon tendered to the said Sylvester D. Bostwick the key to the said buildings so occupied by the said F. W. Reynolds, and offered to return said property and everything of value which he had received from him under the contract hereinbefore mentioned, and notified the said Sylvester D. Bostwick that he rescinded said agreement and vacated the prop-

erty, all of which the said Bostwick refused to accept. Reynolds did not on November 25, 1902, and did not at any other time, pay or account, or offer to account, to said Bostwick for the rent received on the said Bathgate premises. At the time Reynolds took possession of the Bathgate property, it had thereon a building, of which, during his possession, the lower part was used as a storeroom wherein said Reynolds conducted the sale of machinery, and the upper portion of which, fitted for office and living rooms, was rented to tenants who attorned to Reynolds therefor. Said Reynolds held possession of said Bathgate lots from February 1, 1900, till November 25, 1902, and said Bostwick held possession of said Dickey county lands during the same period, on which lands there existed a tract of 50 acres tilled and some hay meadow.

On the trial of this action on the facts as stipulated and agreed, the learned court below caused judgment to be entered in favor of the defendants, requiring the said Reynolds deed to be delivered to said Bostwick by said Foster on or before November 21, 1905, upon the said Bostwick's furnishing a proper abstract of title to said Bathgate lots, showing clear title to said lots 9 and 11, and the tax title to said lot 10, free and clear of all incumbrances except a $500 mortgage lien and taxes accruing thereon since January 1, 1900, and upon the performance of those conditions by the said Bostwick the said Foster was required to deliver to said Bostwick the deed to the said Dickey county lands, and the title to the said Dickey county lands be thereupon quieted in the said Bostwick, his heirs and assigns, as against the Moline Plow Company, the plaintiff, and its successors and assigns, and that, upon such compliance by the said Bostwick, the said deed by the said Reynolds to one Tibbits and a mortgage by the said Reynolds to the said Moline Plow Company be declared null and void and without further effect, and thereupon the Moline Plow Company be foreclosed, debarred, and enjoined from asserting any interest, claim or demand to the said Dickey county lands, and that the pre-existing mortgage against said lands in favor of said Abbott be adjudged a valid, subsisting and paramount lien against said Dickey county lands, and, in the event of a failure on the part of said Bostwick to comply with the terms of said judgment as therein required, that the said contract entered into by said Reynolds and Bostwick should be thereafter null and void and abrogated, and the title thereto be then quieted in the said

Moline Plow Company. From this judgment the plaintiff appealed, and this action is brought before this court on a trial de novo, under section 7229, Rev. Codes 1905.

On the question, did Reynolds, under the facts stipulated and set forth in this case, on November 25, 1902, rescind the contract then existing between him and Bostwick? We are of the opinion, and hold, that he did not. He tendered to Bostwick the "key to the building occupied by him, and offered to return everything of value he had received under the contract therein mentioned," except that he did not account for, and has not accounted for, or offered to account for, the money collected from tenants for the use thereof, and for which said tenants had attorned to Reynolds. Counsel for appellants contend that the rents of the Dickey county lands should be held to offset the rents and occupation of the Bathgate property, and cite Kicks v. Bank, 12 N. D. 576, 98 N. W. 408, as authority. In the action at bar there is no showing that there were any rents received, and no showing that there was any rental value, to the Dickey county lands, while the facts do show that there was some rental value, and some rent received, of and for the Bathgate property. The facts in Kicks v. Bank are not analogous to the facts in this case, and that decision does not apply here. In that case there was a sufficient showing that the interest or use of the actual money paid on the land contract was the equivalent of the use of the lands in that particular case. This court will not presume the existence of facts not in the record of the case, and therefore cannot hold that said Dickey county lands produced any rent, or had a rental value equal to the rent received from the Bathgate property. To so hold would be to read something into the agreed facts and record not placed therein by the parties. The facts in this case show that Reynolds did receive from the premises rent, under the contract in question, which he did not account for, offer to account for, or offer or pretend to offer to Bostwick when the attempted rescission of said contract was made. To rescind a contract, one must, under our statute, account for everything of value received by him, or restore or offer to restore the same, under the contract. Section 5380, Rev. Codes 1905. And this value may be rents. Am. & Eng. Enc. Law, vol. 29, p. 652 (e) (and numerous authorities cited in note 1.)

Other questions were presented, but the decision on the question of rescission is decisive of this action, and therefore the other matters are immaterial. The decision of the court below is affirmed, and the respective parties are granted a period of thirty days, after the filing of the remittitur herein with the clerk of the district court of Walsh county, within which to comply with the conditions set forth in the judgment appealed from.

With the above directions as to performance, the judgment of the district court is affirmed.

MORGAN, C. J., concurs. ENGERUD, J., absent and not participating.

(109 N. W. 923.)

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2. An averment that plaintiff was deceived by defendant's alleged misrepresentation, is of no avail, unless they were such as to justify the belief upon which the plaintiff acted. Marshall-McCartney Co. v. Halloran, 71.

3. In order to disclose a cause of action for deceit, the complaint must show that the loss or damage was the proximate effect caused by the alleged misrepresentations. Marshall-McCartney Co. v. Halloran, 71.

4. Upon a trial de novo of an action to cancel a conveyance which is in form a warranty deed, upon the ground that the plaintiff's signature thereto was obtained by fraud, it is held that the finding of the trial court against the allegations of fraud is sustained by the evidence. Patnode v. Deschenes et al., 100.

5. The district court has inherent power to vacate a judgment procured by means of proceedings which are in effect fraudulent. Gilbreath v. Teufel, 152.

6. An action to annul a marriage, which is void because the defendant had contracted a prior marriage which was still in force, is not an action to annul a marriage for fraud within the meaning of the statutes relating to that subject, even though it is alleged and found that the plaintiff was the innocent victim of defendant's fraudulent representation that her former husband had died. Mickels v. Fennell, 188.

7. Section 2734, Rev. Codes 1899, relating to the custody of the children of an annulled marriage in which the fraud or force are essential facts to be proved in order to establish the cause of action. Mickels v. Fennell, 188.

8. Evidence examined, and held insufficient to establish the defense that the contract sued upon was void for fraud. Raymond v. Edelbrock, 231.

9. Fraud inducing the execution of a contract, and by reason of which consent is not free renders it voidable, and, unless the contract has been affirmed, is available as a ground for rescission or as a defense against its enforcement. Bennett v. Glaspell, 239.

10. When fraud in the inception of a negotiable instrument is alleged and proved, the burden is upon the indorsee to prove that he is a purchaser for value, before maturity, without notice, and in good faith. Tamlyn v. Peterson et al., 488.

11. A party desiring to rescind a contract for the sale of land must act promptly after notice of the grounds entitling him to rescind. Annis v. Burnham, 577.

12. A contract for the sale of land cannot be avoided by the vendee, in the absence of fraud or mistake, unless the vendor abandons the contract or fails to comply with its terms. Annis v. Burnham, 577.

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5. Illegality of a contract with a foreign corporation by reason of non-compliance with the statute relating to such corporations doing business within this state must, unless shown on the face of the complaint, be pleaded as a defense and proved by the defendant. Hart-Parr Co. v. Robb-Lawrence Co., 55.
6. The hearing and determination of the issue of law raised by a demurrer to the complaint in justice court is a "trial," within the meaning of section 6652, Rev. Codes 1899. Walker v. Maronda, 63.
7. In an action to recover damages for deceit, the misrepresentations relied upon must be specifically alleged. Marshall-McCartney Co. v. Halloran, 71.
8. An averment that plaintiff was deceived by defendant's alleged misrepresentations, is of no avail, unless they were such as to justify the belief upon which the plaintiff acted. Marshall-McCartney Co. v. Halloran, 71.
9. In order to disclose a cause of action for deceit, the complainant must show that the loss or damage was the proximate effect caused by the alleged misrepresentations. Marshall-McCartney Co. v. Halloran, 71.
10. A surety who would absolve himself from liability as such because of an extension granted to his principal, must allege and prove that such extension was given without his consent. Patnode v. Deschenes, 100.
11. Upon setting aside a default judgment and granting leave to serve an answer, upon grounds within the provisions of section 5298, Rev. Codes 1899, the trial court is vested with wide discretion, which will not be disturbed except in the clear case of abuse thereof. Olson v. County of Sargent, 146.
12. One who consents to an irregular method of amending a pleading cannot afterward urge the irregularity as error. Pyke v. City of Jamestown, 157.
13. An amendment of a complaint after the cause has been set for trial may be permitted, although the cause of action be technically changed in reference to the plaintiff's claim. Kerr v. Grand Forks, 294.
14. In considering the granting or refusing of such amendments, the test is, not whether the cause of action is changed in a technical sense, but whether the amendment should be allowed in furtherance of justice. Kerr v. Grand Forks, 294.
15. An answer states no defense when no facts are set forth as a basis for the conclusions pleaded. Houghton Implement Co. v. Vavrosky, 308.
16. An amendment of a complaint after notice and about sixty days before the trial, which does not substantially state different facts, is permissible, although the prayer of the original complaint is one

PRACTICE—Continued.

RESCISSION. See SALES, 308.

1. Under a written executory contract for the sale of land, the vendee derives in law no interest in the land or in the title and may rescind the contract in a proper case without a reconveyance. Miller v. Shelburn, 182.
2. The principle that the vendor in such contracts holds the title as trustee for the vendee and the vendee holds the purchase price as trustee for the vendor applies only in equity, under the equitable doctrine that what ought to be done has been done. Miller v. Shelburn, 182.
3. A recission of a contract for the sale of land may be effected by act of a party thereto, when the consideration for the contract has wholly or partially failed through the fault of the other party; and in such case a notice that the vendee rescinds and disaffirms the contract is sufficient, where there is nothing to be returned under the same. Miller v. Shelburn, 182.
4. The consideration for a contract for the sale of land in vendee's favor is the title to be conveyed after performance; and, in case the vendor refuses to convey after full performance or offer to perform the consideration for the contract wholly fails, and is ground for rescission by the vendee. Miller v. Shelburn, 182.
5. Where the vendor refuses to perform his contract to convey the land after full performance or offer to perform by the vendee and the contract has been duly rescinded by the latter, the money paid by him to the vendor under the contract may be recovered back in an action at law for money had and received. Miller v. Shelburn, 182.
6. Evidence considered, and held to show compliance by the vendee with the conditions of a contract of warranty required to effect a rescission thereof. Case Machine Co. v. Balke, 206.
7. Fraud inducing the execution of a contract, and by reason of which consent is not free, renders it voidable, and, unless the contract has been affirmed is available as a ground for rescission or as a defense against its enforcement. Bennett v. Glaspell, 239.
8. A rescission of a contract of sale on an engine cannot be consummated by a mere disaffirmance thereof, but such disaffirmance must be followed by a return of the engine unless a return be waived by the seller or the contract otherwise provides. Houghton Implement Co. v. Vavrosky, 308.
9. After a delay of six months, during which a contract for the sale of land is recognized as valid by the vendee, after notice that the contract was voidable on the ground of misrepresentations as to the vendor's title, the vendee cannot rescind the contract on the ground of such misrepresentation. Annis v. Burnham, 577.
10. A party desiring to rescind a contract for the sale of land must act promptly after notice of the grounds entitling him to rescind. Annis v. Burnham, 577.

SALES—Continued.

SALES—Continued.

STATUTES—Continued.

2. Executors are the "assigns" of their testator, within the meaning of section 110, c. 100, p. 271, Laws 1891, which authorizes the issuance of a tax deed to "the purchaser, his heirs or assigns." Blakemore v. Cooper, 5.
3. The right to redeem from a tax sale under chapter 132, p. 376, Laws 1890, was a "right accrued," and was perpetuated as it existed under that act, including the provisions for terminating and exercising the right by the saving provisions contained in section 2686, Rev. Codes 1895, notwithstanding the repeal of the 1890 revenue laws by the revised codes of 1895. Blakemore v. Cooper, 5.
4. The provisions of chapter 132, p. 376, Laws 1890, which required the service of notice in order to terminate the right of redemption is still in force as to sales made under that chapter, and deeds issued without such notice are void. Blakemore v. Cooper, 5.
5. A notice of tax sale published in a newspaper, legally designated and otherwise qualified to make such publication, is not illegal because of the failure of the owner or manager to file with the county auditor an affidavit setting forth its qualifications as required by section 2, c. 120, p. 346, Laws 1890.
6. Section 5848, Rev. Codes 1895, reducing the period of time previously required for publication of the notice of sale in foreclosure by advertisement applies to all foreclosures by advertisement made after the revision took effect, even though the mortgage being foreclosed was executed before that time. Orvik v. Casselman, 34.
7. Section 5848, Rev. Codes 1895, did not as to previously existing powers of sale, impair the obligation of any contract. Ovrik v. Casselman, 34.
8. Section 6723, Rev. Codes 1899, which authorizes a justice of the peace to issue execution within five years after the entry of the judgment, and not afterwards, is a limitation upon the remedy by justice court execution, and not upon the life of the judgment. The limitation upon the latter is fixed by section 5200, and is ten years. Holton v. Schmarback, 38.
9. Under sections 6717, 5498, Rev. Codes 1899, the filing of a transcript of a justice court judgment in district court terminates the power of the justice to issue execution, and authorizes the district court thereafter to issue its execution as upon judgments originally rendered and entered therein. Holton v. Schmarback, 38.
10. The period for issuing district court execution is limited by section 5500, Rev. Codes 1899, to ten years from the entry of judgment. As applied to a justice court judgment, this means ten years from its entry by the justice, and not ten years from the filing of the transcript in district court. Holton v. Schmarback, 38.
11. A single business transaction in this state by a corporation (not an insurance corporation) which is not engaged in doing business generally here does not constitute "doing business," or "transacting

STATUTES—Continued.

STATUTES—Continued.

STATUTES—Continued.

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74. A firm name showing the surnames only of the parties, is not a "fictitious name," nor "a designation not showing the names of the parties," within sections 4410, 4412, Rev. Codes 1899, requiring every firm doing business under such name or designation to file and publish a certificate showing the full names and residences of the members. Walker v. Stimmel, 484.

75. A statement for a thresher's lien pursuant to chapter 83 of the Rev. Civil Code of 1899, which requires the statement to show the amount and quantity of grain threshed, need not state the number of bushels of each kind of grain threshed, when the total amount appears from the statement. Mitchell v. Elevator Co., 495.

76. Chapter 83, Rev. Civil Code of 1899, gives to threshers of grain an enforcable lien thereon upon filing a statement therefor within thirty days from the threshing and such lien exists from the commencement of the threshing. Mitchell v. Elevator Co., 495.

77. Where grain upon which a thresher's lien, under chapter 83, of the Civil Code (Rev. Codes 1899, sections 4823-4825), is claimed was grown on land situated in two counties, the lien statement should be executed in duplicate and filed in both counties. Gorthy v. Jarvis, 509.

78. Both at common law and under our statute (sections 4973, 4997, Rev. Codes 1899), one who suffers an injury by the wrongful act of another may recover compensation for all detriment proximately caused thereby, and this includes compensation, not only for past detriment, but also for detriment resulting after the commencement of the action or certain to result in the future, and whether the damages alleged are general or special in character. Shoemaker v. Sonju, 518.

79. Exemplary damages may be awarded for an assault under section 4977, Rev. Codes 1899, where it is committed with malice either actual or presumed, and malice authorizing such a recovery may be presumed from the wanton and reckless manner in which the wrongful act was committed. Shoemaker v. Sonju, 518.

80. The notice of injury on a street or sidewalk of a city, provided for by section 2172, Rev. Codes 1899, presented to the proper city officials in this case, is not insufficient or fatally misleading when it describes the place of injury as about thirty feet from a fixed point, when it is only twenty-four feet therefrom. Johnson v. Fargo, 525.

81. Section 5467, Rev. Codes 1899 (section 7058, Rev. Codes 1905), makes it essential to a review of errors of law occurring at the trial of a law action that they shall be specified in the statement of case. Jackson v. Ellerson, 533.

82. A judgment rendered in an action to quiet title under chapter 5, page 9, laws 1901, is void as to those who are not named in the published summons, and who are not personally served and who do not appear in the action. Following Fenton v. Insurance Co., 15 N. D. 365, 109 N. W. 363. Skjelbred v. Shafer, 539.

STATUTES—Continued.

STATUTES—Continued.

92. The right of McLean county to exercise its corporate powers over the territory added thereto by chapter 50, page 129, Laws 1891, cannot be assailed, even by a direct attack, either at the suit of a private person or by the state. State v. McLean Co., 11 N. D. 356, 92 N. W. 385, followed and approved. Ward v. Gradin, 649.

STATUTES CITED AND CONSTRUED.

REVISED CODES 1895.

REVISED CODES 1899.

STATUTES CITED AND CONSTRUED—Continued.

REVISED CODES 1905.

STATUTES CITED AND CONSTRUED—Continued.

COMPILED LAWS.

SESSION LAWS.

SUPREME COURT—Continued.

5. Under the rule that a party urging error must present a record of the facts upon which the error is predicated, this court will not review the trial court's action in excusing a juror when the record contains merely the exception, and wholly omits the examination and challenge. Aultman-Miller Co. v. Jones, 130.
6. On an appeal to this court from a judgment dismissing an appeal from a judgment of justice of the peace, this court cannot review the judgment dismissing the appeal unless the motion to dismiss, or the grounds on which it is based, appear on the face of the record. Edwards v. Eagles, 150.
7. A judgment will not be reversed on appeal for an information which ought to be remedied by motion in the court below. Rapp v. Hansen, 151.
8. The supreme court will not reverse an order denying a motion for a new trial for the alleged insufficiency of the evidence to justify the verdict, when the verdict is supported by evidence of a substantial nature. Libby v. Barry, 186.
9. Where an action is properly triable to a jury, but a jury is expressly waived, and it is tried under section 5630, Rev. Codes 1899, and all the evidence that is offered is received, although some of it is objected to, the supreme court will not remand the cause for another trial under said section, which authorizes such court to grant another trial where necessary to the accomplishment of justice. More v. Burger, 345.
10. The reception of such evidence under such circumstances, although it may be error, does not authorize a new trial under said section, but is an error of law occurring at the trial, which must be objected to, excepted to, specified as error in the statement of the case, and assigned as error before the same will be reviewed in this court. More v. Burger, 345.
11. The supreme court cannot presume the existence of facts not contained in the record of the case. Moline Plow Co. v. Bostwick, 658.

TAXATION.

1. Executors are the "assigns" of their testator within the meaning of section 110, c. 100, p. 271, Laws 1891, which authorizes the issuance of a tax deed to "the purchaser, his heirs or assigns." Blakemore v. Cooper, 5.
2. The assurance held out by the state to purchasers at tax sales by the revenue laws of 1890, as amended in 1891, that the tax sale certificates and tax deeds issued to them would be prima facie evidence of the regularity of the tax proceedings, although relating to the remedy, constituted a substantial inducement to the purchase, entering into the contract with the state, and so materially affecting its value that it cannot be taken away by subsequent legislation without impairing its obligation. Fisher v. Betts, 12 N. D. 197, 96 N. W. 132, followed and approved. Blakemore v. Cooper, 5

TAXATION—Continued.

TAXATION—Continued.

15. Even if the judgment was void the sale becomes valid if not attacked within three years, unless a jurisdictional defect in the antecedent proceedings can be shown. Nind v. Myers, 109 N. W. 335, 15 N. D. 400, followed. Finance Co. v. Beck, 374.
16. The fact that instead of furnishing the sheriff with a certified copy of the judgment upon which to make the sale, the original judgment was used for that purpose, is not a jurisdictional defect in the proceedings. Finance Co. v. Beck, 374.
17. Service of the notice of expiration of time to redeem from such a sale, upon the grantees named in certain recorded tax deeds which were void on their face is not a service upon the owner required by section 1344, Rev. Codes 1899. Finance Co. v. Beck, 374.
18. A tax deed void on its face is not evidence of a tax sale or of the existence of a tax. Finance Co. v. Beck, 374.
19. Where the defect in the deed was properly pointed out by an objection at the trial, but the party offering it neglected to offer other evidence of his alleged right as a tax-sale purchaser he cannot have a new trial to supply the absence of proof. Beggs v. Paine, 15 N. D. 400, 109 N. W. 322, distinguished. Finance Co. v. Beck, 374.
20. In case of such failure of proof the alleged tax title purchaser must be held to have no claim either on the land or for reimbursement from the county as on a void sale. Finance Co. v. Beck, 374.
21. In an action to determine adverse claims the plaintiff will not be relieved from an alleged invalid tax sale unless he pays the face amount of all just taxes with interest from the day of sale. Previous cases on this point overruled. Finance Co. v. Beck, 374.
22. A notice of the expiration of the time to redeem from a tax sale under the revenue law of 1897 is fatally defective if it incorrectly states the time when the redemption right will expire. Finance Co. v. Beck, 374.
23. A sufficient description of the property intended to be assessed and taxed is inherently essential to a valid tax. Finance Co. v. Mather, 386.
24. The term "east middle" of a given town lot is unintelligible. Finance Co. v. Mather, 386.
25. Chapter 165, page 220, Laws 1901, amending section 1269, Rev. Codes 1899, is constitutional. It is a valid limitation act, and its title is sufficient. Finance Co. v. Mather, 386.
26. The failure to attach to the assessment roll the prescribed assessor's affidavit does not invalidate a tax sale of real property under the revenue law of 1897. Finance Co. v. Mather, 386.
27. The verification of the assessment roll by the assessor is merely a legislative requirement which is neither inherently or constitutionally essential to an assessment; and objection to a tax sale under the tax law of 1897 for such irregularity is barred by section 1263, Rev. Codes of 1899. Eaton v. Bennet, 10 N. D. 346, 87 N. W. 188, disapproved. Finance Co. v. Mather, 386.

TAXATION—Continued.

TAXATION—Continued.

VERDICT—Continued.

4. This court will not reverse an order denying a motion for new trial for the alleged insufficiency of the evidence to justify the verdict, when the verdict is supported by evidence of a substantial nature. Libby v. Barry, 286.
5. A motion for judgment notwithstanding the verdict should not be granted unless the record shows not only that the verdict is not sustained by the evidence, but also that there is no reasonable probability that defects in proof or pleadings can be remedied on a new trial. Houghton Implement Co. v. Vavrosky, 308.
6. A specification that the evidence is insufficient to justify the verdict or other decision, must point out the particulars in which it is insufficient. Jackson v. Ellerson, 533.
7. Error in denying a motion to direct a verdict is waived, unless the motion is renewed after the taking of evidence is closed. Garland v. Keeler, 548.
8. On an appeal from a judgment, the action of the trial court in directing a verdict in favor of a party cannot be reviewed in this court, unless a statement of the case is settled, containing the evidence on which the verdict was directed. Murphy v. Foster, 556.
9. A motion to direct a verdict should specify the grounds relied on. Hanson v. Lindstrom, 584.

WAIVER. See CONTRACTS, 239; PLEADING, 360.

1. A written contract for the sale of land may be waived or abandoned by the vendee by parol. Wisner v. Field, 43.
2. The rule that "acquiescence in error takes away the right of objecting to it" is applicable to errors in procedure. One who consents to an irregular method of amending a pleading cannot afterwards urge the irregularity as error. Pyke v. Jamestown, 157.
3. Error in denying a motion to direct a verdict is waived, unless the motion is renewed after the taking of evidence is closed. Garland v. Keeler, 548.
4. By not rescinding promptly after such notice, the right to do so is waived, although no prejudice or injury to the vendor is shown. Annis v. Burnham, 577.
5. One who guarantees a contract, relying upon fraudulent representations as to facts concerning the same, and after knowledge that such representations are false and fraudulent, voluntarily gives a note and mortgage to secure his liability, cannot thereafter allege fraud in the transaction as to the guaranty, as a defense to the note and mortgage. The giving of the note and mortgage was an affirmance of the guaranty and a waiver of any fraud that might have inhered therein. Implement Co. v. Cupps, 606.

WORDS AND PHRASES.

1. Executors are "assigns," within the meaning of the statute authorizing the issuance of tax deeds to the "purchaser, his heirs and assigns." Blakemore v. Cooper, 5.

2. The right to redeem from a tax sale under chapter 132, p. 376, Laws 1890, was a "right accrued," and was perpetuated as it existed under that act, including the provisions, for terminating and exercising the right by the saving provisions contained in section 2686, Rev. Codes 1895, notwithstanding the repeal of the 1890 revenue laws by the Rev. Codes of 1895. Blakemore v. Cooper, 5.

3. It is a fact of which the court takes notice that "standard" or "railroad" time is the system for designating time which has been in general use in this jurisdiction since territorial days. Orvik v. Casselman, 34.

4. "Two o'clock P. M.," in a notice of foreclosure sale in 1896, must be taken to mean 2 o'clock in the afternoon, standard time. Orvik v. Casselman, 34.

5. A single business transaction in this state by a corporation (not an insurance corporation) which is not engaged in doing business generally here does not constitute "doing business," or "transacting business" within the meaning of section 3261, Rev. Codes 1899. Hart-Parr Co. v. Robb-Lawrence Co., 55.

6. The word "may" in section 6652, Rev. Codes 1899, relating to change of venue in justice court, should be construed to mean "must." Walker v. Maronda, 63.

7. The hearing and determination of the issue of law raised by a demurrer to the complaint in justice court is a "trial," within the meaning of section 6652, Rev. Codes 1899. Walker v. Maronda, 63.

8. Section 3605, Rev. Codes 1899, is not to be construed as a definition of the term "homestead," but as a definition and limitation of the homestead exemption. Calmer v. Calmer, 120.

9. The term "mortgagor," as used in section 5845, Rev. Codes 1899, includes within its meaning any person claiming title to the mortgaged premises under and in privity with the original mortgagor. Young, J., dissenting in part). Scott v. County, 259.

10. In such an action wherein the determination of the equitable counterclaim does not conclude all issues on the law side of the case, and the equitable and legal issues are tried together, the case is one "properly triable with a jury," within the meaning of the proviso added to section 5630, Rev. Codes 1899, by chapter 201, page 277, Laws of 1903, which withdraws such cases from the operation of section 5630. Laffy v. Gordon, 382.

WORDS AND PHRASES—Continued.

11. The words "place of destination," as used in a stipulation in a shipping contract, requiring the giving of notice of injuries to stock before its removal from the place of destination, refer to the town, village or city to which the shipment is made. Hatch v. Soo Ry., 490.
12. The abbreviation "N. W." in the column headed "Part of Section," was sufficient to identify the land as the northwest quarter of the section named in the assessment roll. Power v. Bowdle, 3 N. D. 107, 54 N. W. 404, and Power v. Larabee, 2 N. D. 141, 49 N. W 724, distinguished. Beggs v. Paine, 463.

WRIT OF PROHIBITION. See PROHIBITION, 219.